



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5  
77 WEST JACKSON BOULEVARD  
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF

JUN 28 2016

WN-16J

Tressie Kamp, Staff Attorney  
Midwest Environmental Advocates, Inc.  
612 W. Main St. Suite 302  
Madison, WI 53703

Re: Final Protocol for Responding to Issues Related to Wisconsin's WPDES Permit Program presented in the Midwest Environmental Advocates, Inc. Petition for Corrective Action or Delegation of Wisconsin's Authority to Administer the NPDES Permitting Program

Dear Ms. Kamp:

Thank you for your comments on the draft Protocol for Responding to Issues Related to Wisconsin's Permit Program presented in the Midwest Environmental Advocates, Inc. Petition for Corrective Action or Delegation of Wisconsin's Authority to Administer the NPDES Permitting Program. We have considered your comments in developing the final protocol, which we have enclosed with this letter.

If you have any questions, please contact me. Legal questions should be directed to Barbara L. Wester, Associate Regional Counsel, at [wester.barbara@epa.gov](mailto:wester.barbara@epa.gov) or (312) 353-8514.

Sincerely,

A handwritten signature in blue ink, appearing to read "Kevin M. Pierard".

Kevin M. Pierard, Chief  
NPDES Programs Branch

Enclosure

cc: Sharon Gayan, WDNR

# **Final Protocol for Responding to Issues Related to the Wisconsin Pollutant Discharge Elimination System Permit Program**

## **Summary of allegations and proposal to investigate those allegations:**

### **Allegation 1: "Wisconsin's Legal Authority No Longer Meets the Requirements of the Clean Water Act (CWA)."<sup>1</sup>**

#### **1.a: "Neither the State legislature nor the Wisconsin Department of Natural Resources (WDNR) has promulgated or enacted authorities necessary for WDNR to comply with the CWA."**

##### **The petitioner alleges that:**

- WDNR "is not adequately responding to known statutory and regulatory omissions and deficiencies that Wisconsin must resolve in order to meet minimum requirements of the CWA."
- WDNR "lacks the legal authority to implement and administer the stormwater WPDES Program in compliance with federal laws."
- "Wisconsin has failed to enact new authorities to remedy antidegradation program deficiencies previously identified by EPA." Specifically that includes the following issues:
  - "Wisconsin's antidegradation implementation regulations allow a lowering of water quality without a showing that the new or increased discharge is necessary, and lack a cap on cumulative discharges exempted as 'insignificant.'"
  - The WDNR "allows permitted dischargers to increase total pollution loading to receiving waters without performing an antidegradation review."
  - The WDNR's "antidegradation evaluation procedure contains exemptions that violate federal law."
  - The WDNR "interprets its antidegradation rules as not requiring consideration of all reasonable alternatives before issuance of a WPDES permit."
  - "Wisconsin law lacks the opportunity for public input regarding whether lowering of water quality is necessary or will accommodate economic and social development."
  - EPA should promulgate federal antidegradation procedures for the State.

##### **EPA Staff will Review:**

- WDNR's progress to date in addressing the 75 program deficiencies identified in EPA's July 18, 2011 letter to WDNR. EPA will review, together with WDNR, which issues WDNR believes have been addressed and EPA will determine whether the issues have been successfully resolved.
- WDNR's anticipated schedule for submitting rule packages to resolve outstanding issues.

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<sup>1</sup> Text appearing in quotation marks quotes directly from Midwest Environmental Advocates, "Citizen Petition for Corrective Action or Withdrawal of NPDES Program Delegation from the State of Wisconsin," October 20, 2015.

- WDNR's legal authority to implement and administer the stormwater WPDES Program.
- WDNR's implementation of its antidegradation policy.

**EPA Staff will Assess:**

- Whether WDNR has adequately addressed the issues that it has already sought to correct through rule changes and the State's progress in implementing the changes. EPA will post a tracking document on its website that will identify the status of the resolution of the 75 issues and update it as EPA deems issues to have been successfully corrected.
- Whether WDNR's Rule Package schedule is likely to lead to a timely resolution of program deficiencies and what additional actions may be needed if unresolved issues remain.
- Whether WDNR has adequate authorities to implement the stormwater program and antidegradation procedures consistent with federal rules, including through reviewing selected permits.

**1.b: "Wisconsin legislative action has struck down or limited Wisconsin's authority to operate the WPDES Program in compliance with the [CWA]."**

**The petitioner alleges that:**

- "Wisconsin's statutory rulemaking process prevents WDNR from timely revising the WPDES Program to comply with federal law and regulations."

**EPA Staff will Review:**

- The extent to which WDNR's implementation of the NPDES permit program has been limited by legislative action.
- WDNR's capability to implement the NPDES program in light of alleged limiting legislation.
- WDNR capacity to timely complete rulemaking actions, including reviewing the State's procedures and providing examples to the State of other state's rulemaking and legislative processes for keeping environmental programs current with federal program requirements.

**EPA Staff will Assess:**

- The extent to which Wisconsin retains sufficient authority to implement the NPDES program if the WDNR is precluded from timely revising the WPDES Program to comply with current federal law and regulations.

**Allegation 2: The WDNR's "Operation of the WPDES Program Fails to Comply with the Requirements of the CWA."**

**2.a: The WDNR "interprets its authority to administer the WPDES Program in contradiction of the Department's commitments to the EPA, restricting the rights of Wisconsin residents."**

**The petitioner alleges that:**

- Wisconsin restricts review of WPDES permits to groups of five or more persons in violation of the CWA.

**EPA Staff will Review:**

- The 2012 Attorney General's statement and subsequent Wisconsin case law.
- The State's current interpretation of its legal authority.

**EPA Staff will Assess:**

- Whether the State provides adequate means for judicial review of permits, consistent with the CWA, and any needed corrective action.

**2.b: The WDNR "repeatedly issues WPDES permits that violate the requirements of the CWA."**

**The petitioner alleges that:**

- "Despite [WDNR]'s adoption of phosphorus criteria and the EPA's detailed approval of Wisconsin's associated implementation rules, WDNR continues to issue WPDES permits with phosphorus terms that fail to meet state and federal requirements." Specifically, that includes:
  - "WPDES permits include excessive compliance schedules that do not comport with the purpose or intent of federal law."
  - "WPDES permits allow violation of water quality standards in downstream waters."

**EPA Staff will Review:**

- For selected permits, whether WDNR is using the EPA approved implementation rules associated with WDNR's phosphorus criteria in permits.
- EPA will also look at WDNR procedures and rules for including limits to protect downstream waters where reasonable potential is found.
- For selected permits, EPA will also review WDNR's process for utilizing schedules of compliance, how such schedules are integrated into WDNR's permit process, and the degree to which such schedules of compliance have led to actual compliance.

**EPA Staff will Assess:**

- If permits have been issued according to the implementation rules and if they include phosphorus limits that are protective of downstream uses.
- Whether WDNR consistently includes in permits limits needed to protect downstream waters.
- For the permits that contain schedules of compliance, EPA will assess whether or not the schedule comports with 40 C.F.R. §§ 122.47 and/or 131.15.

**2.c: "The [WDNR's] operation of the WPDES Program violates public participation requirements of the Clean Water Act."**

**The petitioner alleges that:**

- "Wisconsin residents have inadequate opportunity to intervene in state enforcement

- actions against permittees who violate terms and conditions of a WPDES permit."
- The State fails to provide an opportunity for citizen intervention.
  - The State fails to provide 30 days for public comment on settlement of enforcement actions.

**EPA Staff will Review:**

- See "EPA Staff will Review," in response to Allegation 2a, above.
- Additionally, EPA will review a cross section of State enforcement actions to determine the adequacy of citizen participation as reflected in specific permitting records.

**EPA Staff will Assess:**

- The adequacy of public participation requirements provided by the State in the context of WDNR's enforcement program.

**2.d: The WDNR "fails to reissue expired permits in timely manner."**

**The petitioner alleges that:**

- That the State has a permit backlog and that failure to issue permits constitutes failure to exercise control over activities required to be regulated.
- Failure to timely issue permits has resulted in extreme permit backlog rates especially where a permittee challenges the terms of a permit or where new regulations require more stringent permit requirements.
- Failure to timely issue WPDES permits is primarily a result of the State's failure to provide sufficient staffing or funding resources to the WDNR.

**EPA Staff will Review:**

- WDNR's permitting records relating to the timely reissuance of selected permits. This review will consist of file reviews at State Headquarters and the State's Regional Offices as needed, interviews with state staff, and may include written information requests to the State. EPA will specifically review files for expired and/or administratively continued NPDES permits focusing on why the permits have not been reissued. Because it will be infeasible to review every permit WDNR issues, EPA will develop a list of permits to review.
- For expired permits, EPA will review whether or not the permittee submitted complete permit applications before the statutory deadline for re-applying for NPDES permits.
- How WDNR has administered permits which are expired, including to what extent administratively continued permits reflect current operating conditions; and to what extent WDNR has procedures in place to provide effective oversight of permittees operating under expired/administratively continued permits.
- The steps WDNR has taken to reissue and or modify permits and the outcome, including whether or not WDNR determined if applications for reissuance were complete and the time frame within which WDNR subsequently reissued or modified such permits.
- The extent to which permittee-instituted permit challenges are the cause for permit backlog, and whether such challenges could be instituted intentionally to delay

implementation of more stringent WPDES permit terms and conditions.

**EPA Staff will Assess:**

- The nature of the backlog of expired NPDES permits (both major and minor) and whether WDNR has the capability, including staff, technical expertise, and other resources, to effectively and timely reissue expired permits. EPA staff will consider the number of expired permits and the duration for which such permits have been expired.
- Any deficiencies that exist which require action by WDNR, a description of those actions, and if possible, the underlying cause for the permit backlog.

**2.e: The WDNR "fails to seek necessary EPA approval of WPDES Program changes."**

**The Petitioner alleges that:**

- "The EPA has not approved statutory revisions to Wis. Stat. Ch. 283 that revise the approved WPDES Program as it relates to issuance of permits that authorize adaptive management option to meet water quality based effluent limits for phosphorus or TSS."
- "Despite EPA disapproval, WPDES permits do not need to include mercury limits during the initial permit term."
- "WPDES permits did not include WQBELs for additives in noncontact cooling water in certain circumstances."

**EPA Staff will Review:**

- The extent to which Wis. Stat. § 283 is consistent with federal program requirements.
- Selected issued permits, focusing on those using the adaptive management approach for phosphorus and TSS; permits containing mercury requirements; and permits that cover non-contact cooling water discharges.
- Permits that contain mercury requirements, including the basis for those requirements, to determine if they are consistent with federally approved water quality standards.
- Selected permits that include discharge of non-contact cooling water to determine if appropriate WQBELs are included.

**EPA Staff will Assess:**

- Whether revisions to Wis. Stat. § 283 are needed to ensure consistency with federal program requirements.
- Whether WDNR is incorporating mercury requirements into permits, consistent with its federally approved criteria and the CWA.
- Whether WDNR is issuing permits with appropriate WQBELs for facilities that discharge non-contact cooling.
- Whether the WDNR consistently seeks approval of NPDES Program changes as required pursuant to 40 C.F.R. § 123.62.

**2.f.: The WDNR "does not allocate sufficient staff time toward resolution of WPDES Program deficiencies."**

**The petitioner alleges that:**

- The WDNR lacks sufficient staff to oversee NPDES permitting programs.
- The WDNR lacks sufficient resources to carry out an effective NPDES enforcement program.
- The WDNR "could address certain WPDES Program deficiencies by exercising its emergency rulemaking authority."

**EPA Staff will Review:**

- See "EPA Staff will Review" in response to Allegations 1a, 1b, 2b, and 2d above.

**EPA Staff will Assess:**

- See "EPA Staff will Assess" for Allegations 1a, 1b, 2b, and 2d above.

**Allegation 3: The WDNR "Does Not Have an Adequate Regulatory Program for Developing Water Quality-Based Effluent limits in WPDES Permits."**

**The petitioner alleges that:**

- "WPDES permits are not required to include effluent limitations to meet narrative water quality standards or prevent acute harm to fish and other aquatic life."

**EPA Staff will Review:**

- Records relating to instances where WDNR has developed water-quality based limits directed at the implementation of narrative criteria, the methods used, and the available methods that could have been used. In addition, we will specifically ask for any examples of WDNR's development of a numeric interpretation of narrative criteria for the protection of aquatic life. We will also review instances of WDNR implementing and enforcing narrative criteria in permits generally.
- EPA will also examine whether WDNR has made water quality-based limit determinations that accurately reflect anticipated discharges.
- EPA will also review the procedures WDNR follows when developing water quality-based limits. The water quality-based limit review will include a review of how WDNR calculates WQBEL's and determines appropriate monitoring requirements. Monitoring requirements include frequency, location, and determination of which parameters to include in the monitoring requirements for selected facilities.

**EPA Staff will Assess:**

- By reviewing selected permits, whether and how WDNR is implementing narrative criteria.
- Whether WDNR's current approach, if applicable, is sufficient to protect water quality and aquatic life based on the State's criteria.
- Whether and how WDNR has considered implementation of narrative criteria in the permitting process.
- If WDNR has found aquatic life impairments in water bodies where numeric water

quality standards are not being exceeded, the steps WDNR has taken to ensure a permit does not authorize a permittee to cause or contribute to such an impairment.

**Schedule:**

In FY 2016, we expect to visit the WDNR's offices in Madison and possibly other State Regional Offices as necessary. Prior to the visit, we will send a letter to WDNR explaining the purpose of and schedule for the visit, asking that the information be made available, and arranging for scanning or copying as necessary. For each visit, there will be an entrance interview with State managers and staff (participation by WDNR personnel is at the State's discretion) and an exit interview during which preliminary findings will be outlined. In addition to the file reviews, the audit team will pose questions to WDNR staff involved in responding to inquiries from potential permit applicants or reviewing permit applications and drafting permits.

**Findings and Next Steps:**

Over the course of this process, EPA will determine if any of the findings made:

- Indicate that Wisconsin's state rules are contrary to the CWA or federal implementing regulations,
- Demonstrate whether WDNR, through policy or practice, is not implementing its NPDES program consistent with federal regulations,
- Constitute criteria for program withdrawal under 40 C.F.R. §123.63

EPA anticipates that once it has completed its investigation, draft findings will be provided to the petitioner and the WDNR for comment. EPA will determine appropriate next steps.

While the protocol outlines EPA's expectations for proceeding with its informal investigation of the allegations in the petition, nothing in the protocol alters EPA's ability to make preliminary draft findings where EPA determines it has sufficient information to do so or to take any other action pursuant to its authority under 40 C.F.R. 123.63 and 123.64.