

Summary of comments received during the public review of the PAH guidance

Comment 1: The limit is unattainable for runoff discharged from a bituminous surface lot, larger TEF (toxicity equivalent factor) values may be appropriate when considering site specific data, and the limit should be increased from 0.1 µg/L to 20 µg/L.

Response to comment: The PAH limits are applicable to discharges from oil and water separators, or other treatment system intended to remove contaminants related to petroleum based products or combustion by-products. The comment relates to the applicability of the limit to storm water runoff discharges from bituminous parking lots. Storm water is regulated with best management practices to prevent the discharge of pollutants, and storm water is typically not subject to numerical effluent limits for specific substances like PAH's. The TEF values are scientifically based on toxicology studies and are unrelated to any site specific conditions. The PAH limits are based on treatment technology, and are not intended to reflect what the discharge quality is without treatment, as suggested to rationalize setting a higher limit.

Comment 2: Both the PAH limits themselves and the methodology for determining compliance with the PAH group of 10 concentration limit contained in this guidance must be promulgated by administrative rule.

Response to comment: First, the PAH limits are already authorized by statute and administrative rule and have the effect of law. Under s. 283.13(2) (b) and (c), Wis. Stats., discharges of certain toxic pollutants (including PAHs, see ch. NR 215, Wis. Adm. Code) from point sources require the application of "best available technology economically achievable." This technology-based effluent limit (TBEL) is determined using best professional judgment (BPJ), and equates to the numerical limits expressed for benzo(a)pyrene, naphthalene, and the PAH group of 10. This guidance simply incorporates the TBEL as authorized under existing law. In lieu of such a TBEL, the Department has authority to establish water quality-based effluent limitations (WQBELs) for toxic pollutants, but is not doing so in this guidance. Second, the methodology for determining compliance with the concentration limit for the PAH group of 10 is not a rule (thus no administrative rulemaking is required) because it does not have the effect of law. As previously discussed, the effluent limits are the law, and nothing in this guidance makes changes to those limits. The methodology proposed for determining compliance is simply that. It in no way affects the legal rights or interests of a regulated party; the legal obligation to comply with the limits exists (and does not change) no matter what methodology for measuring compliance is chosen.

No changes were made to the draft guidance in response to the comments received. Only some minor corrections for typos and references were made to the final guidance document. The Department's Legal Services was consulted with for their legal opinion in responding to comment 2.

Luebke, Paul W - DNR

From: Morgan, Lynn <lmorgan@wm.com>
Sent: Friday, June 26, 2015 3:22 PM
To: Luebke, Paul W - DNR
Cc: Bob Fassbender (fassbender@greatlakeslegalfoundation.org)
Subject: Proposed PAH Guidance

Thank you for accepting these comments regarding the proposed PAH guidance. While the modified methodology using the Toxicity Effluent Factors (TEF) provides some relief on the attaining the 0.1 ug/l limit, bituminous surface lots will still be unlikely to meet the standards. The

TEF method in the technical guidance references EPA TEF values and states these values are subject to change in the future if better information is available. Until technically developed limits are determined, a larger multiplier of EPA's TEFs may be appropriate when considering site specific data. An unattainable limit is effectively no limit. It is our understanding that the proposed limit of 0.1 ug/l is an unachievable discharge limit off bituminous surface lots. Reference: DNR pilot project study at a Northern WI post office parking lot.

Using BPJ (best professional judgment) technology and site historical data, an achievable discharge limit could be set. WM proposes setting a limit of 20 ug/l replacing the current 0.1 ug/l PAH discharge limit considering our site specific historical data, technological based levels, and historical data from all sites within the State.

Thank you for considering our comments.

Lynn

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June 26, 2015

Via Email: paul.luebke@wisconsin.gov

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RE: Proposed "guidance" establishing compliance limits for polycyclic aromatic hydrocarbons (PAH) for any WPDES permits requiring PAH limits.

Mr. Lubke,

Thank you for this opportunity to comment on the proposed guidance document recently proposed by the Wisconsin Department of Natural Resources (DNR) entitled *PAH Group of 10 Calculation of Concentration Using Toxicity Equivalent Factors* (Proposed Guidance).

The Great Lakes Legal Foundation (the Foundation) is a public interest law firm with a mission to provide legal and policy expertise to advance economic growth and increase job opportunities in the upper Midwest. Relevant here, the Foundation has made it a priority to monitor agency policies relating to guidance and permit requirements.

In that regard, Wisconsin law requires that a state agency promulgate as a rule "each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute."¹ And any such policy not promulgated as a rule is invalid.² In addition, "no agency may implement or enforce any standard, requirement, or threshold, including a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with [Chapter 227]."³

Summary

We believe portions of the guidance are invalid because they are inconsistent with Chapter 227. For example, the methodology to demonstrate compliance (calculation method) with the 0.1 µg/L limit for the PAH group of 10 is a policy of general application with the effect of law.

¹ Wis. Stat. § 227.10(1).

² Wis. Stat. 227.40(4)(a)

³ Wis. Stat. § 227.10 (2m), created by 2011 Wis. Act 21

As such, the calculation method meets the definition of a rule and should be promulgated as such under Chapter 227.⁴

More troubling, it appears the three limits that are the subject of this guidance are established by regulatory fiat, not by rule as required by law. DNR states “at one time ch. NR 105, Wis. Adm. Code had a water quality criterion for benzo(a)pyrene, and a group criterion for the 10...PAH compounds..” but, “[i]n the most recent version of ch. NR 105, the...PAH criteria were removed.”⁵

These limits, therefore, suffer two flaws, they are policies of general application having legal effect (i.e., rules) and they are permit conditions not explicitly authorized by statute or rule. They would appear, therefore, to be invalid under Wis. Stat. § 227.40(4)(a) as un-promulgated rules and otherwise unenforceable permit conditions under Wis. Stat. § 227.10(2m).

Background: Guidance is a Poor Substitute for Rulemaking

State agencies have momentous power over Wisconsin citizens, landowners, and businesses.⁶ Surveys of businesses consistently cite regulatory burdens as one of the main limitations on job growth.⁷ Recognizing the sometimes severe impacts of regulatory programs on the business community and individual liberties, Wisconsin’s legislature and governors went to great lengths to assure agencies follow a well-defined process to preclude regulation by agency fiat.

This process is set forth in Wisconsin statutes in Subchapter II of Chapter 227, Administrative Rules. Many of the procedures, the bulk added by 2003 Wis. Act 118 and 2011 Wis. Act 21, mirror the federal Administrative Procedure Act and related court decisions. These statutory procedures are extensive, and include requirements relating to:

- Preparation and Approval of Scope Statement
- Rule Drafting Protocols
- Preparation of Economic Impact Analysis
- Review by Legislative Council Rules Clearinghouse
- Agency Public Hearing
- Initial Regulatory Flexibility Analysis
- Submission of Final Draft Rule to Governor
- Submittal of Rule to Legislature
 - Standing Committee Review

⁴ In the guidance document, DNR notes the proposed methodology to demonstrate compliance is similar to the TEF approach used to evaluate compliance with dioxin limits. The fundamental difference, however, is that the dioxin methodology is promulgated as a rule at NR 106.115, Wis. Adm. Code (Activity of dioxin and furans).

⁵ Proposed Guidance, 1.

⁶ If an administrative rule is properly adopted and is within the power of the legislature to delegate, there is no material difference between it and a law. 63 Atty. Gen. 159.

⁷ Public Notice, National Poll on Government Regulations, <http://thepublicnotice.org/2011/09/11/memo-national-poll-on-government-regulations/>.

- o Joint Committee for Review of Administrative Rules (JCRAR).

It would be more than a little tedious to review the details of these requirements, but suffice it to say they were thoroughly debated and enacted by Wisconsin elected officials.⁸ They are the law and any agency policies that have the “effect of law” which are not duly promulgated in accordance with these procedures are invalid and unenforceable.⁹

Having General Application and Effect of Law, the Methodology to Demonstrate Compliance Must Be Promulgated as a Rule

The Proposed Guidance changes criteria for both current and aspirant WPDES permittees which may affect permittees’ ability to comply with their permits. If DNR intends to change the way it calculates the concentration of polycyclic aromatic hydrocarbons (PAH) from a point source wastewater discharge, then they need to go through the proper rule promulgation process, not use a guidance document.

“Under Wis. Stat. §227.10[1], any statement of general policy or interpretation of a statute adopted to govern enforcement or administration of that statute must be promulgated as a rule.”¹⁰ Wis. Stat. §227.01(13) defines a rule as, “a regulation, standard, statement of policy, or general order of general application which has the effect of law and which is issued by an agency to implement, interpret, or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency.” The *Cholvin* Court helpfully broke down Wis. Stat. §227.01(13) into five criteria:

1. A regulation, standard, statement of policy or general order;
2. Of general application;
3. Having the effect of law;
4. Issued by an agency;
5. To implement, interpret or make specific legislation enforced or administered by such agency.¹¹

There can be no real dispute the calculation method is a statement of policy of general application and thus satisfies elements one and two of the *Cholvin* test. DNR’s calculation method is a statement of policy because it changes the calculation for determining how PAH compounds are measured for all, applicable, existing and new permits. This is similar to *Cholvin* where a new set of data entry instructions were considered a statement of policy.¹² The statement

⁸ For a detail discussion on the rulemaking process, see, Wisconsin Legislator Briefing Book 2013-14; Chapter 5 – Administrative Rulemaking, http://legis.wisconsin.gov/lc/publications/briefingbook/ch05_admrules.pdf.

⁹ See Wis. Stat. § 227.40(4)(a) providing that “the court shall declare the rule invalid if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was promulgated without compliance with statutory rule-making procedures.” (Emphasis ours)

¹⁰ *Cholvin v. DHFS*, 2008 WI App 127, ¶21, 313 Wis. 2d 749, 758 N.W.2d 118.

¹¹ *Cholvin*, 313 Wis. 2d 749, ¶22 (quoting *Citizens for Sensible Zoning, Inc. v. DNR*, 90 Wis. 2d 804, 814, 280 N.W.2d 702 (1979)).

¹² *Id.*

of policy is one of general application because it specifies a class of permit holders which it would uniformly apply to. The calculation method would apply to all “groundwater remediation general permit[s], petroleum contaminated water general permit[s], and other site specific individual WPDES permit[s] when there’s a need for a PAH limit.”¹³ Even though the class may be relatively small, the calculation method is of general application because the class is described in general terms and new members can be added to the class by applying for a permit.¹⁴ Therefore elements one and two are satisfied.

The calculation method has the effect of law because it may affect the legal rights of permittees. Like in *Cholvin*, where instructions to department personnel explaining how to enter data into a computer program were held to be rules, this new instruction to DNR staff on how to calculate the concentration of PAHs may affect whether a permittee is found to be in compliance with the standard. DNR admits as much when they state, “permittees that were in apparent violation may now be found in compliance due to the more precise method of calculating the concentration [of PAH].”¹⁵ Coming to a different determination on whether a permittee is or is not in compliance with PAH discharge standards, and thus whether the permittee is or is not in compliance with their permit, means the calculation method has the effect of law. Therefore element three is satisfied.

Element four is satisfied on its face because the calculation method in the Proposed Guidance is issued by DNR. And finally, element five is satisfied because the calculation method was created to help implement ch. 283, stats., the WPDES permit program.¹⁶

As all five elements are satisfied the calculation method is really a rule unless it meets an exception. The only applicable exception would be under Wis. Stat. 227.01(13)(r), “is a pamphlet or other explanatory material that is not intended or designed as interpretation of legislation enforced or administered by an agency, but which is merely informational in nature.” As the Proposed Guidance directs DNR staff to implement these calculations in existing WPDES permits and dictates additional language to be included in future permits, which stems from legislation enforced and administered by the agency, the exception does not apply. Furthermore the Proposed Guidance is not explanatory material, it changes the calculation method used to determine if a permittee is complying with a term of their permit. The calculation method in the Proposed Guidance is a rule under Wis. Stat. 227.01(13) and no exception applies.

Furthermore DNR has promulgated similar calculation methods in rules. In the Proposed Guidance DNR notes it promulgated a toxicity equivalent factor (TEF) approach to measuring the concentration of dioxin related equivalent compounds in Wis. Adm. Code NR 106.115 (attached).¹⁷ DNR had to promulgate the TEF measurement approach for dioxin related equivalent compounds for a reason, because they would not have had authority to implement the approach on permit holders unless it was promulgated under ch. 227 as a rule. DNR is required

¹³ Proposed Guidance, 1.

¹⁴ See *Cholvin*, 313 Wis. 2d 749, ¶23.

¹⁵ Proposed Guidance, 2.

¹⁶ Proposed Guidance, Summary.

¹⁷ Proposed Guidance, 2.

to take the same approach here because the standard cannot be valid unless properly promulgated in compliance with the statutory rule-making process. Wis. Stat. § 227.40(4)(a).

Proposed Guidance Document Unlawfully Creates Effluent Limits

While DNR purports that this Proposed Guidance simply modifies the methodology used to calculate the three limits listed in the guidance, the Guidance Documents actually create the limits. These limits meet the definition of a rule and must be promulgated as such.

In addition, the limits must be in a statute or administrative rule for DNR to place them in a WPDES permit.¹⁸ Nowhere in statute or rule are the limits articulated, and they have not been so for eighteen years.¹⁹ This means the limits on benzo(a)pyrene and the other group of 10 PAH compounds in point source wastewater discharges is not “explicitly required or explicitly permitted by statute or rule.”²⁰ Therefore DNR does not have authority to use this calculation on current permits or include sections 1.1.1.1 – 1.1.1.3 in future permits unless/until DNR properly promulgates a rule that creates water quality criterion for benzo(a)pyrene and for the other group of 10 PAH compounds.

DNR should reevaluate using the Proposed Guidance because (1) the methodology to demonstrate compliance with the 0.1 µg/L limit for the PAH group of 10 is a policy of general application with the effect of law and (2) because none of the three limits that are the subject of this guidance are established in any duly promulgated rule. Thus key components of the guidance document are rule which has not gone through the ch. 227 promulgation process and are invalid.

Sincerely,

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¹⁸ Wis. Stat. § 227.10(2m).

¹⁹ Proposed Guidance, 1.

²⁰ Wis. Stat. § 227.10(2m).