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EPA approves Wisconsin's innovative phosphorus variance program

On Feb. 6, 2017, the United States Environmental Protection Agency (EPA) approved, with conditions, Wisconsin's Multi-Discharger Variance (MDV) for total phosphorus in accordance with § 303(c) of the Clean Water Act. This approval will have national significance; it will be closely watched and likely followed by other states that will be seeking similar approvals based upon Wisconsin's template for this variance program under the Clean Water Act. This newsletter will provide an overview of Wisconsin's MDV program and the conditions that apply to EPA's approval.

Please note that Godfrey & Kahn will be hosting a one-half day seminar on March 9, 2017 at the University Club of Milwaukee focusing on phosphorus regulation in Wisconsin waterways. The program will feature leading municipal POTW experts on this topic, as well as in-depth presentations on the newly approved MDV program and other topics. More information about the March 9 program can be found at the following link: [Going Green and Saving Green: Strategies for Meeting Phosphorus Requirements in Wisconsin](#).

Overview of MDV

Wisconsin Act 378 requires that the Wisconsin Department of Administration (DOA), in consultation with the Wisconsin Department of Natural Resources (WDNR), make the following determination:

...whether attaining the water quality standard for phosphorus... through compliance with water quality based effluent limitations by point sources that cannot achieve compliance without major facility upgrades is not feasible because it would cause substantial and widespread adverse social and economic impacts on a statewide basis.

In effect, EPA determined that the state of Wisconsin had met this threshold requirement and that the MDV should be approved to assist the state in meeting phosphorus reduction objectives.

Background

In Wisconsin, approximately 80% of the total phosphorus load to Wisconsin surface waters comes from non-point sources such as agricultural operations, urban runoff and other unregulated sources. For non-point source dominated

surface waters, it is not possible to attain phosphorus criteria until non-point source loadings are reduced, even if all point source loadings into these waters were reduced.

Under the Clean Water Act, “water quality based effluent limitations,” or “WQBELs,” are typically restrictive limitations that require a major facility upgrade to achieve compliance. Sixty percent of Wisconsin Pollution Discharge Elimination System (WPDES) permit holders face phosphorus WQBELs that are set equal to the phosphorus criteria and another 20% face more restrictive phosphorus WQBELs than what is currently present in their WPDES permit.

Costs to comply with these restricted limitations were estimated by Wisconsin and the DOA to be approximately \$3.4 billion, statewide, over a 20-year timeframe, which surges to almost \$6 billion once interest is factored in. Generally speaking, the Clean Water Act does not give EPA or state agencies direct regulatory authority over non-point sources. They only have a direct authority to regulate point sources via the issuance of WPDES permits for the discharge of treated wastewater.

The MDV, in combination with Wisconsin’s non-point source performance standards rules, creates a mechanism to achieve more compliance in more waters at lower costs than would be possible using solely the authorities previously available under the Clean Water Act.

Under the MDV, improvement to water quality will occur as point sources reduce their phosphorus discharges incrementally. Payment by point sources under the MDV to the counties where the qualifying discharger is situated will create funding for those counties to complete water quality improvement projects (i.e. with the non-point sources) within the watershed where the sources are located.

Requirements for participation in the MDV

To be eligible under the Wisconsin program, a permittee must document that it meets the following criteria:

- It is an existing facility;
- That a major facility upgrade would be necessary to achieve compliance with the total phosphorus limit necessary to attain the water quality standards;
- It must provide facility-specific compliance cost data to document the analysis conducted by the DOA to support that the variance is appropriate for the facility;
- It must provide facility-specific effluent total phosphorus data;
- It must provide any available facility-specific influent total phosphorus data;
- It must provide an optimization analysis for any internal waste streams; and
- It must document that the substantial impact determination by DOA under Wis. Stats. § 283.16(2)(3) applies to the facility.

The DOA prepared a very extensive economic report which outlines the factors that should be considered to meet the substantial impact determination. Please use this [link](#) to access the April 24, 2015 DOA Economic Impact Analysis.

For a WPDES facility to continue to operate under the MDV, it must meet the following requirements:

- The facility must optimize its performance to control phosphorus;
- The facility must comply with progressively more stringent monthly effluent limits that would be no less stringent than 0.8 milligrams per liter by the end of the source's first permit term; 0.6 milligrams per liter by the end of the second permit term; 0.5 milligrams per liter by the end of the third permit term; and must meet the underlying WQBEL by the end of the fourth permit term;
- The facility must comply with more stringent limits in certain situations where such limitations reflect the "highest attainable condition" as determined by WDNR in accordance with Wis. Stats. § 283.16(7), as amended on March 1, 2016; and
- The facility must implement measures to reduce phosphorus loadings from other sources using one of the following three options:
 1. Enter into an agreement with WDNR to implement a plan or project designed to result in an annual reduction of phosphorus from other sources in the HUC 8 basin in an amount tied to the difference between what the facility discharges and a target value (this concept bears a relationship to "[adaptive management](#)");
 2. Enter into an agreement with a third party and approved by WDNR to implement a plan or project designed to result in an annual reduction of phosphorus from other sources in the facility's HUC 8 basin in an amount equal to the difference between what they discharge and a target value (this approach is the basis for "[trading](#)" agreements); or
 3. Make payments to counties in the same HUC 8 basin of \$50 per pound times the number of pounds of phosphorus their discharge exceeds the target value. Payments are capped for any one point source at \$640,000 per year (Wis. Stats. §283.16(b)). It is likely this third option will be most attractive to WPDES holders who operate under the MDV.

The eligibility of municipalities and industrial dischargers to participate in the MDV is highly complex, dependent on certain economic factors, the discharger's location and the discharger's historic patterns of compliance.

EPA's Approval

On Feb. 6, 2017, EPA approved Wisconsin's proposal for its MDV with certain conditions. In particular, EPA determined that the MDV is consistent with all relevant requirements of the Clean Water Act. Specifically, however, EPA identified the following provisions that establish the terms and conditions of the MDV:

- EPA specifically approved WDNR's representation of the "justification" supporting the request for approval. On this basis, the term of the MDV is 10 years following the date of EPA approval, "unless the Department submits and receives for approval for an extension."
- In addition, EPA approved certain elements of the implementation guidance for the MDV clarifying that permittees that choose to implement watershed plans either directly or in collaboration with third parties under Wis. Stats. § 283.16 will be required as a condition of their WPDES permit to achieve specified offset load reductions on an annual basis.

Concluding Observations

For any WPDES permit holder that can meet the economic test contained in DOA's report and is willing to comply with the specific conditions of the MDV, EPA's approval of Wisconsin's program provides another option for WPDES permit holders to consider and strategies for compliance with the stringent and costly phosphorus limits in their WPDES permit. Obviously, the MDV program is quite complex and needs thorough analysis on a fact specific basis for each discharger. Nonetheless, EPA's approval of the MDV is of national significance and should be considered carefully by WPDES permit holders as they develop their strategy for compliance in the future.

Godfrey & Kahn has extensive experience representing WPDES permit holders in developing legal strategies for compliance with the complex phosphorus program. Please feel free to contact any member of the Energy and Environmental Strategies team if you have any further questions regarding this complex topic.

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