acquired corporation that accumulated before the non-inclusion exchange. * * *

* * * * *

**§ 1.367(b)–5 [Corrected]**

**Par. 7.** Section 1.367(b)–5 is amended as follows:

1. Paragraph (a)(1) is amended by revising the first sentence.

2. Paragraph (f) is revised.

3. Paragraph (g), *Example 1*(ii)(B), the second sentence is amended by removing the language ''$60 and $0'' and by adding ''$0 and $60'' in its place.

4. Revising the fourth sentence of paragraph (g), *Example 1*(ii)(C) by removing the language ''from FC''.

5. Adding two new sentences after the fourth sentence of paragraph (g), *Example 1*(ii)(C).

6. Adding a new sentence at the end of paragraph (g), *Example 2*(ii)(C).

The additions and revisions read as follows:

**§ 1.367(b)–5 Distributions of stock described in section 355.**

(a) * * * (1) *Scope.* This section provides rules relating to a distribution described in section 355 (or so much of section 356 as relates to section 355) and to which section 367(b) applies. * * *

* * * * *

(f) *Exclusion of deemed dividend from foreign personal holding company income.* In the event an amount is included in income as a deemed dividend by a foreign corporation under paragraph (c) or (d) of this section (including amounts received as an intermediate owner under the rule of § 1.367(b)–2(e)(2)), such deemed dividend shall not be included as foreign personal holding company income under section 954(c).

(g) * * *

*Example 1.* * * *

(ii) * * *

(C) * * * Under § 1.367(b)–2(e)(2), the $20 deemed dividend is considered as having been paid by FC to FD, and by FD to USS, immediately prior to the distribution. Under paragraph (f) of this section, the deemed dividend is not included by FD as foreign personal holding company income under section 954(c). * * *

*Example 2.* * * *

(ii) * * *

(C) * * * Under paragraph (f) of this section, the deemed dividend is not included by FD as foreign personal holding company income under section 954(c).

**Dale D. Goode,**

*Federal Register Liaison, Office of Special Counsel (Modernization and Strategic Planning).*

[FR Doc. 00–28433 Filed 11–3–00; 8:45 am]

**BILLING CODE 4830–01–U**

## DEPARTMENT OF COMMERCE

## United States Patent and Trademark Office

## 37 CFR Part 1

**RIN 0651–AB05**

## Changes To Implement Eighteen-Month Publication of Patent Applications; Correction

**AGENCY:** United States Patent and Trademark Office, Commerce.

**ACTION:** Final rule; correction.

**SUMMARY:** The United States Patent and Trademark Office (Office) published a final rule in the **Federal Register** of September 20, 2000, revising the rules of practice in patent cases to implement the eighteen-month publication provisions of the American Inventors Protection Act of 1999. This document corrects two errors in that final rule.

**EFFECTIVE DATE:** November 29, 2000.

**FOR FURTHER INFORMATION CONTACT:** *Concerning this rule:* Robert W. Bahr by telephone at (703) 308–6906, or by mail addressed to: Box Comments—Patents, Assistant Commissioner for Patents, Washington, D.C. 20231, or by facsimile to (703) 872–9411, marked to the attention of Robert W. Bahr.

**SUPPLEMENTARY INFORMATION:** The Office published a final rule in the **Federal Register** of September 20, 2000 (65 FR 57023), entitled ''Changes to Implement Eighteen-Month Publication of Patent Applications.'' This document corrects errors in § 1.55 and § 1.99 as discussed below.

Section 1.55(a) should refer to ''35 U.S.C. 119(a) through (d) and (f), 172, and 365(a) and (b)'' rather than ''35 U.S.C. 119(a) through (d), 172, and 365(a)'' (references to 35 U.S.C. 119(f) and 365(b) were inadvertently omitted). Section 1.55(c) should refer to ''35 U.S.C. 119(a) through (d) and (f), and 365(a)'' rather than ''35 U.S.C. 119(a) through (d) and 365(a)'' (a reference to 35 U.S.C. 119(f) was inadvertently omitted).

Section 1.99(f) should not include its last sentence (''[N]o further submission on behalf of the member of the public will be considered, unless such submission raises new issues which could not have been earlier presented.'').

In rule FR Doc. 00–23822, published on September 20, 2000 (65 FR 57023), make the following corrections:

**§ 1.55 [Corrected]**

1. On page 57053, in the third column, in § 1.55, in paragraph (a) introductory text, in lines 5 and 6, correct ''119(a) through (d), 172, and 365(a)'' to read ''119(a) through (d) and (f), 172, and 365(a) and (b);'' and on page 57054, in the first column, in § 1.55, in paragraph (c) introductory text, in each of lines 4, 9, and 19, correct ''119(a)–(d) or 365(a)'' to read ''119(a) through (d) and (f), or 365(a)''.

**§ 1.99 [Corrected]**

2. On page 57056, in the second column, in § 1.99, in paragraph (f), in lines 14 through 19, remove the sentence ''No further submission on behalf of the member of the public will be considered, unless such submission raises new issues which could not have been earlier presented.''

Dated: October 30, 2000.

**Albin F. Drost,**

*Acting General Counsel.*

[FR Doc. 00–28315 Filed 11–3–00; 8:45 am]

**BILLING CODE 3510–16–P**

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 132

**[FRL–6896–9]**

**RIN 2040–AD66**

## Identification of Approved and Disapproved Elements of the Great Lakes Guidance Submission From the State of Wisconsin, and Final Rule

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA published the final Water Quality Guidance for the Great Lakes System (the Guidance) on March 23, 1995. Section 118(c) of the Clean Water Act (CWA) requires the Great Lakes States of Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania and Wisconsin to adopt within two years of publication of the final Guidance (*i.e.*, March 23, 1997) minimum water quality standards, antidegradation policies and implementation procedures that are consistent with the Guidance, and to submit them to EPA for review and approval. Each of the Great Lakes States made those submissions.

Today, EPA is taking final action on the Guidance submission of the State of Wisconsin. EPA's final action consists of approving those elements of the State's submission that are consistent with the Guidance, disapproving those elements that are not consistent with the Guidance, and specifying in a final rule the elements of the Guidance that apply

in the portion of Wisconsin within the Great Lakes System where the State either failed to adopt required elements or adopted elements that are inconsistent with the Guidance.

**DATES:** 40 CFR 132.6(f), (h)-(j) is effective on December 6, 2000. 40 CFR 132.6(g) is effective on February 5, 2001. To the extent this action, or portion thereof, is subject to judicial review pursuant to section 509(b) of the Clean Water Act, 33 U.S.C. 1369(b), it is considered issued for purposes of judicial review as 1 p.m., Eastern Standard time on November 20, 2000, as provided in 40 CFR 23.2.

**ADDRESSES:** The public docket for EPA's final actions with respect to the Guidance submission of the State of Wisconsin is available for inspection and copying at U.S. EPA Region 5, 77 West Jackson Blvd., Chicago, IL 60604 by appointment only. Appointments may be made by calling Mery Jackson-Willis (telephone 312–886–3717).

**FOR FURTHER INFORMATION CONTACT:** Mark Morris (4301), U.S. EPA, Ariel Rios Building, 1200 Pennsylvania Avenue., NW, Washington, DC 20460 (202–260–0312); or Mery Jackson-Willis, U.S. EPA Region 5, 77 West Jackson Blvd., Chicago, IL 60604 (312–353–3717).

**SUPPLEMENTARY INFORMATION:**

## I. Discussion

### *A. Potentially Affected Entities*

Entities potentially affected by today's action are those discharging pollutants to waters of the United States in the Great Lakes System in the State of Wisconsin. Potentially affected categories and entities include:

| Category | Examples of potentially affected entities |
|---|---|
| Industry | Industries discharging to waters within the Great Lakes System as defined in 40 CFR 132.2 in Wisconsin. |
| Municipalities | Publicly-owned treatment works discharging to waters within the Great Lakes System as defined in 40 CFR 132.2 in Wisconsin. |

This table is not intended to be exhaustive, but rather provides a guide for readers regarding regulated entities likely to be affected by these final actions. This table lists the types of regulated entities that EPA believes could be affected by this action. Other types of entities not listed in the table could also be affected. To determine whether your facility may be affected by this final action, you should examine the definition of ''Great Lakes System'' in 40 CFR 132.2 and examine 40 CFR 132.2 which describes the part 132 regulations. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

### *B. Background*

On March 23, 1995, EPA published the Guidance. See 60 FR 15366; 40 CFR part 132. The Guidance establishes minimum water quality standards, antidegradation policies, and implementation procedures for the waters of the Great Lakes System in the States of Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania and Wisconsin. Specifically, the Guidance specifies numeric criteria for selected pollutants to protect aquatic life, wildlife and human health within the Great Lakes System and provides methodologies to derive numeric criteria for additional pollutants discharged to these waters. The Guidance also contains minimum implementation procedures and an antidegradation policy.

Soon after being published, the Guidance was challenged in the U.S. Court of Appeals for the District of Columbia Circuit. On June 6, 1997, the Court issued a decision upholding virtually all of the provisions contained in the 1995 Guidance. *American Iron and Steel Institute, et al.* v. *EPA* (*AISI*), 115 F.3d 979 (D.C. Cir. 1997). The Court vacated the human health criterion for polychlorinated biphenyls (PCBs) and the acute aquatic life criterion for selenium, and the provisions of the Guidance ''insofar as it would eliminate mixing zones for [bioaccumulative chemicals of concern (BCCs)] and impose [water quality-based effluent limitations (WQBELs)] upon internal facility waste streams.'' 115 F.3d at 985. On October 9, 1997, EPA published a document revoking the PCB human health criteria pursuant to the Court's decision. 62 FR 52922. On April 23, 1998, EPA published a second document amending the 1995 Guidance to remove the BCC mixing zone provisions from 40 CFR part 132 (found in procedure 3.C. of appendix F) and to remove language in the Pollutant Minimization Program provisions (procedure 8.D. of appendix F) that might imply that permitting authorities are required to impose WQBELs on internal waste streams or to specify control measures to meet WQBELs. 63 FR 20107. On June 2, 2000, EPA published a third document withdrawing the acute criteria for selenium. 65 FR 35283.

40 CFR 132.4 requires the Great Lakes States to adopt water quality standards, antidegradation policies, and implementation procedures for waters within the Great Lakes System consistent with the Guidance or be subject to EPA promulgation. 40 CFR 132.5(d) provides that, where a State makes no submission to EPA, the Guidance shall apply to discharges to waters in that State upon EPA's publication of a final rule indicating the effective date of the part 132 requirements in that jurisdiction.

On July 1, 1997, the National Wildlife Federation filed suit alleging that EPA had a non-discretionary duty to promulgate the Guidance for any State that failed to adopt standards, policies and procedures consistent with the Guidance. *National Wildlife Federation* v. *Browner,* Civ. No. 97–1504–HHK (D.D.C.). EPA negotiated a consent decree providing that the EPA Administrator must sign, by February 27, 1998, a **Federal Register** document making 40 CFR part 132 effective in any State in the Great Lakes Basin that failed to make a submission to EPA by that date under 40 CFR part 132. However, all of the Great Lakes States made complete submissions to EPA on or before the February deadline. On March 2, April 14, April 20 and April 28, 1998, EPA published in the **Federal Register** documents of its receipt of each of the States' Great Lakes Guidance submissions and a solicitation of public comment on the National Pollutant Discharge Elimination System (NPDES) portions of those submissions. 63 FR 10221; 63 FR 18195; 63 FR 19490; 63 FR 23285.

40 CFR 132.5(f) provides that, once EPA completes its review of a State's submission, it must either publish notice of approval of the State's submission in the **Federal Register** or issue a letter notifying the State that EPA has determined that all or part of its submission is inconsistent with the CWA or the Guidance, and identify any changes needed to obtain EPA approval. If EPA issues a letter to the State making findings of inconsistencies, the State then has 90 days to make the necessary

changes. If the State fails to make the necessary changes, EPA must publish a document in the **Federal Register** identifying the approved and disapproved elements of the submission and a final rule identifying the provisions of the Guidance that will apply to discharges within the State.

On November 15, 1999, the National Wildlife Federation and the Lake Michigan Federation filed suit alleging that EPA had a non-discretionary duty to take action on the Great Lakes States' Guidance submissions. *National Wildlife Federation* v. *Browner,* Civ. No. 99–3025–HHK (D.D.C.). EPA negotiated a consent decree providing that EPA must sign a **Federal Register** document by July 31, 2000, taking the action required by 40 CFR 132.5 on the Guidance submissions of the States of Illinois, Indiana, Michigan, Minnesota, Ohio and Pennsylvania; and **Federal Register** documents by September 29, and October 31, 2000, taking the action required by 40 CFR 132.5 on the Guidance submissions of the States of New York and Wisconsin, respectively. Today's **Federal Register** document fulfills EPA's obligations under that Consent Decree with respect to the State of Wisconsin. EPA has completed its final actions with respect to the States of Illinois, Indiana, Michigan, Minnesota, New York, Ohio, and Pennsylvania. EPA notes that Wisconsin's Guidance submission may contain provisions that revise its NPDES program or water quality standards in areas or with respect to regulated entities not covered by the Guidance. EPA is not taking action at this time to either approve or disapprove any such provisions.

EPA has conducted its review of the Wisconsin's submission in accordance with the requirements of section 118(c)(2) of the CWA and 40 CFR part 132. Section 118 requires that States adopt policies, standards and procedures that are ''consistent with'' the Guidance. EPA has interpreted the statutory term ''consistent with'' to mean ''as protective as'' the corresponding requirements of the Guidance. Thus, the Guidance gives States the flexibility to adopt requirements that are not the same as the Guidance, provided that the State's provisions afford at least as stringent a level of environmental protection as that provided by the corresponding provision of the Guidance. In making its evaluation, EPA has considered the language of each State's standards, policies and procedures, as well as any additional information provided by the State clarifying how it interprets or will implement its provisions.

Where EPA has promulgated a final rule that identifies a provision of the Guidance that shall apply in Wisconsin, EPA explains below its reasons for concluding that Wisconsin failed to adopt requirements that are consistent with the Guidance. Additional explanation of EPA's conclusions are contained in EPA's correspondence with Wisconsin (identified in relevant sections below) where EPA initially identified inconsistencies in the State's submission, as well in documents prepared for Wisconsin entitled, ''Wisconsin Provisions Being Approved as Being Consistent With the Guidance,'' ''Analysis of Whether Wisconsin Has Adopted Requirements Consistent With the Guidance'' and ''Analysis of Steps Taken By Wisconsin in Response to EPA's 90-Day Letter.'' Notice of the availability of EPA's correspondence with Wisconsin was published in the **Federal Register** and EPA has considered all public comments received regarding any conclusions as to whether Wisconsin had adopted provisions consistent with the Guidance.

In this proceeding, EPA has reviewed the State's submission to determine its consistency with 40 CFR part 132. EPA has not reopened part 132 in any respect, and today's action does not affect, alter or amend in any way the substantive provisions of part 132. To the extent any members of the public commented during this proceeding that any provision of part 132 is unjustified as a matter of law, science or policy, those comments are outside the scope of this proceeding.

With regard to those elements of the State submission being approved by EPA, EPA is approving those provisions as amendments to Wisconsin's NPDES permitting program under section 402 of the CWA and as revisions to Wisconsin's water quality standards under section 303 of the CWA. Today's document identifies those approved elements. Additional explanations of EPA's review of and conclusions regarding Wisconsin's submission, including the specific State provisions that EPA is approving, are contained in the administrative record for today's actions in documents prepared for Wisconsin entitled, ''Wisconsin Provisions Being Approved as Being Consistent With the Guidance,'' ''Analysis of Whether Wisconsin Has Adopted Requirements Consistent With the Guidance'' and ''Analysis of Steps Taken By Wisconsin in Response to EPA's 90-Day Letter.''

*C. Today's Final Action*

On June 13, 2000, EPA issued a letter notifying the Wisconsin Department of Natural Resources (WDNR) that, while the State of Wisconsin had generally adopted requirements consistent with the Guidance, EPA concluded that portions of the standards, policies and procedures adopted by the State were not consistent with corresponding provisions of the Guidance. On June 22, 2000, EPA published in the **Federal Register** a notice of and solicitation of public comment on its June 13, 2000 letter. 65 FR 38830. EPA has completed its review of all public comments on the June 13, 2000, letter and has determined that, with the exceptions described below, Wisconsin has adopted requirements consistent with all aspects of the Guidance. Specifically, Wisconsin has adopted requirements consistent with, and EPA is therefore approving those elements of the State's submissions which correspond to: the definitions in 40 CFR 132.2; the water quality criteria for the protection of aquatic life, human health and wildlife in Tables 1–4 of part 132, with three exceptions as described below; the methodologies for development of aquatic life criteria and values, bioaccumulation factors, human health criteria and values and wildlife criteria in appendices B—D; the antidegradation policy in appendix E; and the implementation procedures in appendix F, with three exceptions described below. As explained more fully below, Wisconsin has not adopted requirements consistent with (1) the acute and chronic aquatic life criteria in Table 1 of part 132 for copper and nickel, and the chronic aquatic life criterion in Table 2 of part 132 for endrin and selenium, (2) the provisions governing total maximum loads in procedure 3 in appendix F to 40 CFR part 132, (3) the provisions governing consideration of intake pollutants in determining reasonable potential and establishing WQBELs in paragraphs D and E of procedure 5 in appendix F to 40 CFR part 132, and (4) the provisions for determining reasonable potential for whole effluent toxicity set forth in paragraph D of procedure 6 in appendix F to 40 CFR part 132.

EPA's June 13, 2000, letter concluded that some of the provisions that EPA is now approving authorized the State to act consistent with the Guidance, but provided inadequate assurance that the State would exercise its discretion consistent with the Guidance. Subsequent to that letter, WDNR provided additional materials, including an Addendum to its Memorandum of

Agreement (MOA) with EPA regarding the State's approved NPDES program in which WDNR commits to always exercise its discretion under those provisions in a manner consistent with the Guidance. Pursuant to 40 CFR 123.44(c)(3) and 123.63(a)(4), the State is required to comply with commitments made in its MOA or risk EPA objection to permits and even program withdrawal. These materials have demonstrated to EPA that the State will implement its program (with the exceptions identified below) consistent with the Guidance. The specific provisions that EPA is approving, and EPA's full rationale for approving these provisions, are set forth in the documents entitled ''Wisconsin Provisions Approved as Being Consistent With the Guidance,'' ''Analysis of Whether Wisconsin Has Adopted Requirements Consistent With the Guidance'' and ''Analysis of Steps Taken By Wisconsin in Response to EPA's 90-Day Letter.''

EPA has determined that Wisconsin's acute and chronic aquatic life criteria for copper and nickel in Wis. Adm. Code NR 105, Tables 2 and 6 are not consistent with those in Tables 1 and 2 of part 132; and chronic aquatic life criterion for endrin in Wis. Adm. Code NR 105, Table 5 is not consistent with that in Table 2 to 40 CFR part 132. With respect to copper and nickel, Wisconsin acknowledged in an October 11, 2000, letter to EPA that it made mathematical errors which resulted in criteria that were higher than (less protective than) criteria that Wisconsin believes would have been consistent with the Guidance had the errors not been made. Wisconsin also acknowledged that it did not consider certain toxicological data incorporated into the Guidance criterion in deriving its chronic aquatic life criterion for endrin, which in turn resulted in a criterion that is less stringent than that required by the Guidance. Wisconsin intends to initiate rulemaking to correct these errors, but will be unable to complete that rulemaking before October 31, 2000, which is the date by which EPA is required under its Consent Decree with the National Wildlife Federation and the Lake Michigan Federation to take final action on Wisconsin's submission.

Based upon the above, EPA finds that Wisconsin has failed to adopt acute and chronic aquatic life criteria for copper and nickel consistent with those in Tables 1 and 2 of part 132, and has failed to adopt a chronic aquatic life criterion for endrin consistent with that in Table 2 to 40 CFR part 132, as required by 40 CFR 132.3. EPA, therefore, disapproves Wisconsin's acute and chronic aquatic life criteria for copper and nickel in Wis. Adm. Code NR 105, Tables 2 and 6, and chronic aquatic life criterion for endrin in Wis. Adm. Code NR 105, Table 5, to the extent they apply to waters of the Great Lakes System, and has determined that the acute and chronic aquatic life criteria for copper and nickel in Tables 1 and 2 of part 132 and the chronic aquatic life criterion for endrin in Table 2 to 40 CFR part 132 shall apply to the waters of the Great Lakes System in the State of Wisconsin.

As noted above, Wisconsin intends to initiate rulemaking to adopt criteria that are consistent with those in the Guidance for these three parameters. EPA will work closely with WDNR to insure that these criteria will be consistent with the Guidance. WDNR will then submit its criteria to EPA for review pursuant to section 303(c) of the CWA, and, if EPA approves those revisions, EPA will revise its regulations so that the Guidance criteria will no longer apply to the waters within the Great Lakes System in the State of Wisconsin.

EPA is also disapproving Wisconsin's failure to adopt and submit to EPA a chronic aquatic life water quality criterion for selenium. 40 CFR 132.3(b) mandates that each Great Lakes State adopt numeric water quality criteria that are consistent with the chronic water quality criteria for the protection of aquatic life contained in Table 2 of part 132 (or with site-specific modifications of those criteria adopted in accordance with the Guidance). Table 2 contains a chronic water quality criterion for selenium of 5 micrograms per liter (μg/L). Currently, Wisconsin's water quality standards do not contain a chronic aquatic life criterion for selenium. The absence of any water quality criterion in Wisconsin's standards to ensure the protection of aquatic life from chronic adverse effects due to selenium is inconsistent with the Guidance.

EPA did not identify the omission of the selenium criterion from the State's submission in its June 13, 2000, letter to the State, but subsequently became aware of this deficiency very near the close of this proceeding. Because the absence of the selenium criterion is clearly inconsistent with the Guidance, and in light of EPA's obligation under the consent decree in *National Wildlife Federation* v. *Browner,* Civ. No. 99–3025–HHK (D.D.C.), EPA has taken final action on the entirety of the State's submission, including the omission of the chronic aquatic life criterion for selenium. EPA recognizes however, that it has not previously notified the State of EPA's conclusion regarding the selenium criterion, and provided the 90-day period contemplated in EPA regulations for the State to take corrective action. To provide the State with this opportunity, EPA has established an effective date for the selenium criterion in today's rule of 90 days from today. If Wisconsin corrects this deficiency and adopts a selenium criterion consistent with the Guidance during this period, EPA will take action to withdraw the selenium criterion prior to its effective date. If the State does not take corrective action in this time frame, the selenium criterion in today's rule will go into effect 90 days from today. As with the other aspects of today's rule, if the State subsequently cures this deficiency and adopts a criterion for selenium that is approved by EPA, EPA will amend today's rule to remove the selenium criterion.

EPA also has determined that procedure 3 in appendix F to 40 CFR part 132 shall apply with regard to development of total maximum daily loads (TMDLs) for the Great Lakes System in the State of Wisconsin. EPA has made this determination because Wisconsin simply has not adopted specific requirements for developing TMDLs in the Great Lakes System that correspond to those in procedure 3 of appendix F. Wisconsin has enacted a statutory requirement at Wis. Stat. 283.83(3), and has adopted a regulatory requirement at Wis. Adm. Code NR 106.11, that generally require WDNR to develop TMDLs. Wisconsin also has adopted at Wis. Adm. Code NR 212 detailed regulatory requirements for how WDNR must develop TMDLs for a number of pollutants that are not subject to the Guidance (see Table 5 of 40 CFR part 132). However, Wisconsin has not adopted similar, detailed provisions governing development of TMDLs for pollutants that are subject to the Guidance (*i.e.,* all pollutants other than those in Table 5 of 40 CFR part 132).

Given the complete absence of any specific requirements governing development of TMDLs in the Great Lakes System in Wisconsin for pollutants subject to the Guidance, it is necessary for EPA to specify that the provisions of procedure 3 of appendix F to 40 CFR part 132 apply in the Great Lakes System in the State of Wisconsin. EPA notes that this promulgation has no effect on the chemical-specific reasonable potential procedures at Wis. Adm. Code NR 106.05 and 106.06(1) , (3)–(5), & (7)–(10) which EPA approves as being consistent with the reasonable potential procedures in paragraphs A through C and F of procedure 5 in appendix F to 40 CFR part 132. These State procedures, therefore, apply in the

Great Lakes System in the State of Wisconsin for purposes of developing wasteload allocations in the absence of a TMDL and developing preliminary effluent limitations in making chemical-specific reasonable potential determinations.

EPA also has determined that two provisions in Wisconsin's rules, Wis. Adm. Code NR 106.06(06) and Wis. Adm. Code NR 106.10(1), are inconsistent with procedure 5 in appendix F to 40 CFR part 132. Section 301(b)(1)(C) of the CWA requires all NPDES permits to include effluent limitations more stringent than technology-based limits when necessary to meet State water quality standards in the receiving waterbody. To implement this requirement, EPA has established a two-step water quality-based permitting approach. A discharge of pollutants must first be evaluated to determine whether it will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard (*i.e.,* whether the discharge poses ''reasonable potential''). 40 CFR 122.44(d)(1)(i) and (ii). If reasonable potential exists, then the discharge must be subject to water quality-based effluent limitation that will ensure ''the level of water quality to be achieved by limits on point sources * * * is derived from, and complies with all applicable water quality standards.'' 40 CFR 122.44(d)(1)(vii)(A). Procedure 5 of the Guidance implements, and elaborates on, these requirements. It requires the permitting authority to characterize pollutant levels in a discharge, and determine whether those levels, if left uncontrolled, would cause, or have the reasonable potential to cause, or contribute to a violation of water quality standards. See procedure 5.A–C. If the permitting authority makes an affirmative reasonable potential determination, it must impose water quality-based effluent limitations (''WQBELs'') to ensure compliance with water quality standards. See procedure 5.F.2.

One of the principal issues considered in the development of the Guidance was the appropriate approach for establishing wasteload allocations for point sources (upon which WQBELs are based) where the ''background'' levels of the pollutant in a waterbody exceed applicable water quality criteria for that pollutant. The proposed Guidance included a requirement to set the wasteload allocation at zero, in the absence of a multiple source TMDL, for any pollutant discharged into a waterbody already exceeding water quality criteria for that pollutant. See procedures 3A.C.4 and 3B.C.3 (58 FR 21046, April 16, 1993). This ''high background'' provision was not included in the final Guidance because the Agency concluded that a multitude of factors would need to be considered in establishing wasteload allocations and WQBELs in this situation. See Supplemental Information Document for the Water Quality Guidance for the Great Lakes System (EPA, 3/23/95) (''SID'') at 285. Possible permitting approaches discussed in the SID ranged from prohibiting the discharge of the pollutant altogether to allowing no greater than discharge at the criteria itself (*i.e.,* ''criteria end-of-pipe''). See SID at 339.

EPA also addressed ''high background'' pollutants by establishing specialized provisions for discharges of pollutants contained in a facility's intake water (''intake pollutants'') in paragraphs D and E of procedure 5. Where a facility removes water with high background pollutant levels and then subsequently discharges the same level of pollutants back into the same waterbody, the discharge does not pose environmental concerns comparable to where a facility introduces pollutants into the waterbody for the first time.

Procedure 5.D allows a finding that a water quality-based effluent limit is not needed for a particular pollutant that originates in the intake water and simply passes through the facility and is discharged without any adverse effect (that would not have occurred had the intake pollutant stayed in-stream). Among other things, eligibility for this finding under the Guidance requires a showing that:

i. The facility withdraws 100 percent of the intake water containing the pollutant from the same body of water into which the discharge is made;

ii. The facility does not contribute any additional mass of the identified intake pollutant to its wastewater;

iii. The facility does not alter the identified intake pollutant chemically or physically in a manner that would cause adverse water quality impacts to occur that would not occur if the pollutants were left in-stream;

iv. The facility does not alter the identified intake pollutant concentration, as defined by the permitting authority, at the edge of the mixing zone, or at the point of discharge if a mixing zone is not allowed, as compared to the pollutant concentration in the intake water, unless the increased concentration does not cause or contribute to an excursion above an applicable water quality standard; and

v. The timing and location of the discharge would not cause adverse water quality impacts to occur that would not occur if the identified intake pollutant were left in-stream.

If an intake pollutant does not meet the above five criteria and effluent limitations are needed, paragraph E of procedure 5 allows a facility to discharge the same mass and concentration of pollutants that are present in its intake water (*i.e.,* ''no net addition''), provided the discharge is to the same body of water and certain other conditions are met. Under the Guidance, an intake pollutant is from the same body of water if the intake pollutant ''would have reached the vicinity of the outfall point in the receiving water within a reasonable period had it not been removed by the permittee.'' Procedure 5.D.2.b. EPA determined that allowing discharge at background levels, even though above applicable criteria, would be both environmentally protective and consistent with the requirements of the CWA where a pollutant is simply being moved from one part of the waterbody to another that it would have reached in any event. However, if the pollutant is from a different body of water, ''no net addition'' limitations are not available because, in such a case, the facility is introducing a pollutant to a waterbody for the first time (*i.e.,* the pollutant would not be introduced to the waterbody but for the discharge). Because the waterbody is already exceeding applicable water quality criteria the Guidance requires a more stringent approach to ensure the discharge does not exacerbate the water quality standards violation—*i.e.,* effluent limitations based on the most stringent applicable water quality criterion for the receiving water. See procedure 5.E.4.

Wisconsin's regulations contain a provision that addresses discharges into waters where background levels exceed applicable water quality criteria. Wis. Adm. Code NR 106.06(6). If 10 percent of a pollutant to be discharged by a facility is from the same body of water as the discharge, Wisconsin's procedure requires that permit limitations for the entire discharge be set at background levels, except that more stringent limitations may be established when the existing treatment system has a demonstrated cost-effective ability to achieve regular and consistent compliance with a limitation more stringent than the representative background concentration. Wis. Adm. Code NR 106.06(6)(c). Where at least 90 percent of the wastewater is from groundwater or a drinking water supply, the permitting authority is to establish limits equal to the lowest applicable

water quality criteria, except that limitations up to background levels are allowed if reasonable, practical or otherwise required steps are taken to minimize the level of the pollutant discharged. Wis. Adm. Code NR 106.06(6)(a) and (b). In either situation, the department may allow alternative limitations, including limitations above background levels, in the form of numerical limits, monitoring requirements, or a cost-effective pollutant minimization plan. Wis. Adm. Code NR 106.06(6)(d).

Wisconsin's approach differs significantly from, and is not as protective as, procedure 5 of the Guidance. Most importantly, procedure 5 only allows effluent limitations to be set above water quality criteria at ''background'' levels (*i.e.,* ''no net addition'' limitations under procedure 5.E) for intake pollutants that are taken from, and returned to, the same body of water. Any pollutants transferred from a different body of water must meet limitations based on the most stringent applicable water quality criterion. See procedure 5.E.4. Where a facility's discharge combines pollutants from the same and different bodies of water, effluent limitations may be derived using flow-weighting to reflect the two permitting approaches. See procedure 5.E.5. Wisconsin's procedure, on the other hand, effectively allows any facility covered by its provision to discharge its entire waste stream at background levels (and potentially even higher in accordance with Wis. Adm. Code NR 106.06(d)), regardless of whether the pollutant originated from the same body of water, a different body of water, or the facility generated the pollutant itself. Indeed, Wisconsin's procedure would even allow the permit writer to not include effluent limitations at all. Because Wisconsin's procedure allows the permitting authority to adopt less stringent effluent limitations than would be allowed by the Guidance, and even allows the permitting authority to not include any effluent limitations in situations where the Guidance would require one, the State's procedure is inconsistent with the Guidance.

Wisconsin's approach is also inconsistent with the fundamental principles underlying the Guidance permitting procedures. The Guidance allows effluent limitations at ''background'' levels for intake pollutants from the same body water because, in that circumstance, ''the discharge containing the identified intake pollutant of concern effectively has no impact on the receiving water that would not otherwise occur if the pollutant were left in stream.'' See SID at 370. In contrast, Wisconsin's approach allows facilities to discharge pollutants that were not previously in the waterbody (pollutants either generated by the facility itself or intake pollutants from a different body of water), and to do so at levels greater than the applicable water quality criteria. Since the receiving waterbody is already exceeding applicable water quality criteria, such discharges have the strong potential to exacerbate the water's non-compliance with standards, and permits authorizing such discharges would not meet the underlying requirement to establish effluent limitations that ensure water quality achieved by point sources derives from and complies with water quality standards. 40 CFR 122.44(d)(1)(vii)(A).

This conclusion is not changed by the fact that Wisconsin's procedures provide for limitations to be set at levels below background based on practicability considerations, as provided in Wis. Adm. Code NR 106.06(6)(b) and (c)2. The CWA does not contain an exception to the requirement to meet water quality standards based on considerations of technical feasibility. To the contrary, the Act requires discharges to meet technology-based requirements and ''*any more stringent* limitations, including those necessary to meet water quality standards.'' CWA section 301(b)(1)(C) (emphasis added). When EPA developed the Guidance, EPA expressly evaluated and rejected Wisconsin's approach on the grounds that it would ''substitute the feasibility of pollution control for consideration of water quality standards as the basis for deriving WQBELs.'' See SID at 352. Procedure 5 of the Guidance does not permit loosening of water quality-based effluent limitations based on consideration of feasibility. Therefore, Wisconsin's procedure is not as protective as the Guidance.

Finally, the Wisconsin approach is not as protective as the Guidance because it fails to include the important restrictions contained in the Guidance to ensure that all possible adverse impacts that could result from the discharge of intake pollutants are considered in determining whether limits are needed. The Guidance prohibits ''no net addition'' limitations where the facility alters the intake pollutant chemically or physically in a manner that would cause adverse water quality impacts to occur that would not occur if the pollutant were left in-stream, or the timing and location of the discharge would increase the adverse effects of the pollutants. Procedures 5.D.3.b.iii and v; 5.E.3.a. The absence of these restrictions in the Wisconsin submission is inconsistent with the Guidance.

For the reasons described above, EPA finds that Wis. Adm. Code NR 106.06(6) is inconsistent with procedure 5 of appendix F of 40 CFR part 132.

EPA also finds Wisconsin's cooling-water exemption at Wis. Adm. Code NR 106.10(1) to be inconsistent with the intake pollutant procedures of the Guidance. That provision prohibits the NPDES permitting authority from imposing WQBELs on discharges of non-contact cooling waters, which do not contain additives. Even when additives are used, Wis. Adm. Code NR 106.10(1) categorically prohibits the permitting authority from imposing WQBELs for ''compounds at a rate and quantity necessary to provide a safe drinking water supply, or the addition of substances in similar type and amount to those substances typically added to a public drinking water supply.'' Wisconsin's rules do not contain any of the limitations set forth in the Guidance at paragraph 5.3.b of appendix F discussed above, which ensure that all potential environmental effects are considered in regulating the discharge of intake pollutants.

Nothing in the Guidance allows for a categorical exclusion for non-contact cooling water discharges (with or without additives) from the need for evaluating whether WQBELs are needed to ensure compliance with water quality standards. A major premise of the provisions in the Guidance pertaining to determining reasonable potential in paragraphs A–C of procedure 5, as well as the intake pollutants addressed by paragraphs D and E, is that decisions on the need for, and calculation of, WQBELs must occur on a case-by-case basis because there is no way to categorically determine that a particular group of discharges will have the same impact on any particular body of water. Without such an evaluation, it is not possible to make a reliable determination that limitations are being imposed that are needed to meet water quality standards, as required by section 301(b)(1)(C) of the CWA. EPA recognizes that it is possible to develop a framework for considering classes of discharges based upon their common characteristics (e.g., certain categories of non-contact cooling water) that accounts for the factors identified in the Guidance to determine whether their discharge will cause or has the reasonable potential to cause or contribute to an exceedance of water quality standards. This is evidenced by EPA's approval of once-through non-contact cooling water provisions in

other Great Lakes States. Wisconsin, however, has not tailored its procedure in this manner or supplied any analysis why the exempt category of discharges never require the imposition of WQBELs. Instead, the State has provided a broad, blanket exemptions from water quality-based permitting requirements for non-contact cooling water discharges regardless of the impacts on the receiving water of those discharges. EPA clearly stated that it would not consider such exemptions consistent with the Guidance. See SID at 384–85. EPA, therefore, finds that Wisconsin's non-contact cooling water provisions at Wis. Adm. Code NR 106.06(10)(1) are not consistent with the Guidance.

Based upon the above, EPA disapproves the provisions at Wis. Adm. Code NR 106.06(6) and Wis. Adm. Code NR 106.06(10)(1) to the extent they apply to waters of the Great Lakes System as inconsistent with procedure 5 in appendix F of 40 CFR part 132 and has determined that paragraphs D and E of procedure 5 in appendix F to 40 CFR part 132 shall apply to the waters of the Great Lakes System in the State of Wisconsin. As described in the record for today's action, EPA has approved Wisconsin's basic procedure at Wis. Adm. Code NR 106.05 for determining reasonable potential for specific chemicals as consistent with the Guidance, and that procedure will continue to govern reasonable potential determinations by the State within the Great Lakes System. In light of EPA's disapproval of Wis. Adm. Code NR 106.06(6) and Wis. Adm. Code NR 106.06(10)(1), those provisions are not an effective component of the State's NPDES program within the Great Lakes System and cannot serve as the basis for making reasonable potential determinations and establishing effluent limitations in issuing NPDES permits. See 40 CFR 123.63(b)(4) (NPDES program revisions are effective upon approval by EPA). Therefore, discharges of pollutants will be governed by the State's reasonable potential procedures in Wis. Adm. Code NR 106.05, subject to the flexibility available under the intake pollutant procedures contained in today's rule.

EPA also has determined that Wisconsin's provisions at Wis. Adm. Code NR 106.08(5) for determining reasonable potential for a discharge to cause or contribute to an exceedance of Wisconsin's narrative criteria at Wis. Adm. Code NR 102.04(1) prohibiting the discharge of toxic substances in toxic amounts are inconsistent with paragraph D of procedure 6 in appendix F to 40 CFR part 132. The Guidance procedure for evaluating reasonable potential for whole effluent toxicity (WET) is based on comparing a projected 95th percentile WET value at a 95 percent confidence level with the acute and chronic WET criteria after accounting for any available dilution. In most cases where there is quantifiable effluent data, EPA's procedure will project an effluent value greater than the maximum observed value (using factors to account for effluent variability and size of the data set) to characterize the reasonable worst case effluent. This conservative approach is designed to ensure that WQBELs are imposed when there is a reasonable potential for toxicity, taking into account the effluent variability and the size of the data set, even if no toxicity has actually been observed.

In evaluating State reasonable potential procedures for WET, EPA looked for an equivalent level of protection to that provided by the Guidance procedure. In the case of a procedure to determine when a WQBEL is needed, one important consideration is whether the alternative procedure would indicate the need for a WQBEL in similar situations to those that would trigger a WQBEL under paragraph D of procedure 6.

Wisconsin's procedures at Wis. Adm. Code NR 106.08(5) rely on the comparison of the geometric mean toxicity multiplied by the fraction of the available toxicity values that fail WET requirements to derive a WET reasonable potential factor (RPF). If the calculated RPF is greater than 0.3, a limit is required. Because effluent monitoring results are averaged under the Wisconsin approach, the importance of individual sample showing high levels of toxicity is diminished in determining the need for a limit. Indeed, Wisconsin's procedure would allow the State to not impose a limit even where actual toxicity has been observed in WET tests on the effluent, a result clearly inconsistent with the Guidance. Wisconsin's regulation also allows the permit writer not to even undertake a reasonable potential analysis if there are fewer than five data points to calculate the RPF, while the Guidance requires a reasonable potential analysis where even where there is only one data point. Each of these characteristics of the Wisconsin procedure means that it is possible to reach a determination that a limit is not necessary even when an actual observed value would violate potential permit limits. This is clearly inconsistent with paragraph D of procedure 6.

Based upon the above, EPA finds that Wisconsin has failed to adopt procedures governing WET reasonable potential consistent with those in paragraph D of procedure 6 in appendix F to 40 CFR part 132. EPA, therefore, disapproves Wisconsin's provisions at Wis. Adm. Code NR 160.08(5) to the extent they apply to waters of the Great Lakes System, and has determined that the provisions in paragraph D of procedure 6 in appendix F to 40 CFR part 132 shall apply for discharges into the Great Lakes System in the State of Wisconsin.

As noted above, EPA, in this document, is not taking action to approve or disapprove portions of Wisconsin's Guidance submission pertaining to NPDES permitting and water quality standards issues that are not addressed by the Guidance. Therefore, EPA is not taking action under section 118 with regard to the following issue. However, EPA wishes to describe its understanding with regard to one aspect of Wisconsin's submission that is not addressed by the Guidance. Specifically, Wis. Adm. Code NR 106.07(6)(c) provides that effluent levels that are below the level of quantification (LOQ) are generally deemed to be in compliance with WQBELs that are below the LOQ. EPA expressed concern in its June 13, 2000, letter to Wisconsin that, to the extent this provision suggested that effluent levels that exceeded the WQBEL but that were below the LOQ would be deemed to be in compliance with the WQBEL, this provision would be inconsistent with the requirement in paragraph A of procedure 8 in appendix F to 40 CFR part 132 that such WQBELs must be specified in the NPDES permit as the enforceable effluent limit.

WDNR has clarified that, consistent with the Guidance, it is required to specify the WQBEL in the permit as the enforceable limit in these situations and that Wis. Adm. Code NR 106.07(6)(c) only relates to the exercise by WDNR of its enforcement discretion, not the authority of the federal government or third parties in a citizen suit to enforce the WQBEL as calculated. Moreover, WDNR has agreed in an addendum to its MOA with EPA that it will not include the language of Wis. Adm. Code NR 106.07(6)(c) in NPDES permits. Given WDNR's clarification regarding the meaning of Wis. Adm. Code NR 106.07(6)(c), EPA no longer believes that Wis. Adm. Code NR 106.07(6)(c) is relevant to the question of whether WDNR has adopted requirements consistent with the Guidance, and so EPA is not taking action at this time to either approve or disapprove that provision. EPA notes that revisions to State NPDES programs do not become

effective until approved by EPA (40 CFR 123.62(b)(4)), that EPA has concerns regarding the appropriateness of the State's limitation on its own enforcement authority, and that WDNR intends to review and potentially revise its rules to address EPA's concerns.

*D. Public Comments*

EPA received public comments from two commenters in response to its **Federal Register** notice of the availability of its June 13, 2000 letter to the State of Wisconsin. EPA has responded to those comments in a document entitled ''EPA's Response to Comments Regarding the Great Lakes Guidance Submission of the State of Wisconsin'' that has been included as part of the record in this matter. The following is a summary of EPA's responses to the significant points of these comments.

*Comment:* One commenter asserted that EPA should have provided the public with 90 days, rather than 45, to comment on EPA's June 13, 2000, letter to the State of Wisconsin setting forth EPA's initial views regarding whether Wisconsin had adopted requirements consistent with the Guidance.

*Response:* The final rule being promulgated by EPA makes certain provisions of 40 CFR part 132 applicable to the Great Lakes System in Wisconsin. Those provisions were adopted after publication of a proposed rule for public comment. See 58 FR 20802 (April 16, 1993). EPA is not modifying those provisions, but merely making them effective in accordance with 40 CFR 132.5(f)(2). Therefore, the public had a full opportunity to comment on the contents of today's rule. Moreover, EPA provided public notice of the availability of, and solicited comment on, the NPDES portions of Wisconsin's Guidance submission in a **Federal Register** document (63 FR 10221) dated March 2, 1998. In a **Federal Register** document (65 FR 38830 ) dated June 22, 2000, EPA subsequently provided notice of the availability of its June 13, 2000, letter to Wisconsin in which EPA provided (a) detailed explanations of the bases for its findings that the State had not adopted provisions consistent with certain provisions of the Great Lakes Guidance and (b) its preliminary conclusions that, with the exception of those findings, the State had adopted provisions consistent with the Guidance. EPA also solicited comment on all aspects of this letter, and has considered and responded to all comments received before taking today's final action. EPA has complied with all applicable public participation requirements, and believes that the 45 day period for commenting on its June 13, 2000, letter to Wisconsin was adequate.

*Comment:* One commenter asserts that EPA's treatment of intake pollutants in the Guidance is technically flawed and economically unachievable because they could require the treatment of up to one billion gallons per day of non-contact cooling water at a power plant. According to the commenter, the power plant in such a scenario would have to either install wastewater treatment equipment at a cost of tens or hundreds of millions of dollars or to shut down. The commenter asserts that a better approach would be to determine the sources of the background pollutants of concern and to determine if there are other technically and economically feasible options for improving water quality.

*Response:* To the extent this commenter is asserting that the Guidance itself improperly addresses intake pollutants, EPA reiterates that it has not reopened the Guidance for revisions and therefore such comments are not within the scope of EPA's current action, which is to determine whether Wisconsin has submitted provisions consistent with the Guidance.

EPA is disapproving the Wisconsin provision that prohibits WQBELs for non-contact cooling water as being inconsistent with the Guidance for the reasons stated above. EPA believes the commenter's conclusion that power plants will have to treat billions of gallons of water or shut down is speculative and overstated. EPA expects that in many cases, especially where no additives are used, once-through non-contact cooling water will qualify for intake pollutant relief under the Guidance provisions being promulgated for application to discharges to the Great Lakes Basin in Wisconsin. In any case, the application of the intake pollutant procedures of the Guidance to a particular discharger is fundamentally a site-specific evaluation. The particular characteristics of a facility's intake water and effluent, the manner in which the intake pollutants are handled by the facility and the resulting effect of that handling on the potential adverse effects of such pollutants in the receiving water, as well as the nature of the receiving water itself, all must be considered to determine what regulatory controls, if any, are needed under the Guidance. Thus, without a full record, it is not possible for us to address fully the concerns raised by this commenter, or predict how the rule being promulgated today will apply to any particular facility.

In addition, there are two other mechanisms set forth in the Guidance for addressing the commenter's concern. First, as EPA explained in several places in the SID, the best means for States and Tribes to address comprehensively the root causes of non-attainment of water quality standards is the TMDL development process. See, e.g., SID at 347. (The SID has been included in the record for EPA's determination with respect to Wisconsin's Guidance submission.) The TMDL procedures for the Great Lakes System are set forth in procedure 3 of appendix F to 40 CFR part 132. Second, any existing discharger into the Great Lakes System can apply for a variance from water quality standards where the discharger believes that requiring compliance with necessary water quality based effluent limitations ''would result in substantial and widespread economic and social impact.'' See 40 CFR 131.10(g)(6). EPA adopted the intake pollutant procedures in the Guidance as an additional, permit-based mechanism for dealing with simple removal and transfer of pollutants from one part of a waterbody to another, but availability of this mechanism does not preclude use of other means of adjusting water quality standards or a particular discharger's load reduction responsibilities.

*Comment:* One commenter asserts that Wisconsin's approach to addressing WET, which the commenter describes as being one that relies upon permittees unilaterally (or in a cooperative fashion with the WDNR) taking voluntary measures to reduce toxicity rather than upon imposition of effluent limitations to control WET, is consistent with or superior to that in the Guidance. According to the commenter, Wisconsin's voluntary approach to addressing WET is superior to an approach that requires imposition of effluent limitations because effluent limitations can actually hinder a permittee's ability to address toxicity problems. The commenter asserts that this is because exceedances of permit limits can have serious legal consequences that can often divert the technical staff of both the regulatory agency and the permittee away from doing the technical work necessary to identify and address the causes of toxicity in the permittee's effluent.

*Response:* Paragraph C of procedure 6 in appendix F to 40 CFR part 132 requires imposition of WQBELs for WET whenever an effluent is or may be discharged at a level that will cause, have the reasonable potential to cause, or contribute to an excursion above any numeric WET criterion or narrative criterion within a State's water quality

standards (*i.e.*, whenever there is ''reasonable potential''). Paragraph D of procedure 6 sets forth procedures for determining reasonable potential for WET.

Wisconsin's rules at Wis. Adm. Code NR 106.08(1), consistent with paragraph C of procedure 6, requires that WDNR ''shall establish [WET] testing requirements and limitations whenever necessary to meet applicable water quality standards as specified in [Wis. Adm. Code] chs. NR 102 to 105 as measured by exposure of aquatic organisms to an effluent and specified effluent dilutions.'' For the reasons explained above, Wisconsin's procedures for determining reasonable potential (*i.e.*, for determining whether WET limitations are ''necessary to meet applicable water quality standards'') are clearly not consistent with paragraph D of procedure 6 because, among other things, it is possible under Wisconsin's procedures to reach a determination that a WQBEL is not necessary even when an actual observed value would violate potential permit limits.

The commenter's premise is that imposition of WQBELs is actually harmful to the environment because the commenter believes that imposition of WQBELs results in an expenditure of resources that could otherwise be used addressing toxicity problems. The commenter, therefore, concludes that Wisconsin's inadequate WET reasonable potential should be approved precisely because it does not result in imposition of WQBELs.

EPA does not agree with the commenter's premise that imposition of WQBELs is somehow harmful to the environment, and the commenter has provided nothing other than vague, conclusory assertions to support the premise. Instead, EPA believes that the procedure that determines whether or not a permit includes a WQBEL for a particular pollutant or parameter (the reasonable potential procedure) is a critical element for determining the level of protection that will be achieved when implementing a water quality standard. Where a reasonable potential procedure is not as protective as the Guidance, a State's WET program cannot be considered to achieve the same level of protection as the Guidance.

EPA also notes that in addition to the requirements of procedure 6 of the Guidance itself, section 301(b)(1)(C) of the CWA requires ''limitation[s] * * * necessary to meet any applicable water quality standard.'' Moreover, EPA's regulations implementing section 301(b)(1)(C) at 40 CFR 122.44(d)(1)(iv) and (v) require that NPDES permits contain ''effluent limits for whole effluent toxicity'' or chemical-specific limits in lieu of WET limits, whenever there is reasonable potential that a discharge will cause or contribute to an in-stream excursion above a numeric criterion for WET or a narrative criterion of no toxics in toxic amounts. Therefore, the CWA and EPA's implementing regulations require permitting authorities to impose WQBELs for WET when there has been a reasonable potential finding, and EPA does not believe it would be consistent with the CWA and EPA regulations to approve an alternative approach that omits this fundamental requirement. EPA notes that, in appropriate cases, a permitting authority can include a compliance schedule for the WQBEL that would allow for additional monitoring and identification and reduction of toxicants, followed by a reassessment of the need for a limit or the identification of a specific toxicant rather than WET that could be subject to a WQBEL.

*Comment:* One commenter asserts that EPA has failed to present technical evidence that the Guidance WET reasonable potential statistical procedure is technically valid. Specifically, the commenter asserts that EPA has not presented any information to prove that WET data follow a log-normal distribution.

*Response:* The CWA requires the States to adopt policies, standards and procedures that are consistent with the Guidance promulgated by EPA. 33 U.S.C. 118(c)(2)(C). EPA has reviewed Wisconsin's submission to determine its consistency with the Guidance but has not reopened any provision of the Guidance in our review. The public had a full opportunity to provide its views on the statistical procedure for determining WET reasonable potential in paragraph D of procedure 6 during the rulemaking establishing the Guidance, and the time period for challenging the Guidance has passed. See 33 U.S.C. 509(b). Therefore, this comment does not provide a basis for allowing Wisconsin to adopt WET reasonable potential procedures that are inconsistent with those in the Guidance.

EPA further notes, in response to the comment regarding whether it is appropriate to assume that WET data follow a log-normal distribution, that although the States have flexibility to adopt approaches that make different assumptions about the distribution of WET data than is assumed in procedure 6, no one has presented EPA with an analysis identifying a different distribution or statistical method that fits WET data better, either in general or in a particular case. More fundamentally, however, for the reasons explained above, the procedure submitted by Wisconsin does not address in any manner the underlying premise of procedure 6: that effluent quality is variable and, therefore, a method for assessing WET data must account for the likelihood that the maximum value in a particular data set is less than the true maximum that is likely to be experienced by the environment as a result of the discharge. EPA, therefore, concludes that Wisconsin's approach is inconsistent with the Guidance.

*Comment:* One commenter asserts that EPA is asking Wisconsin to adopt TMDL rules that did not exist when the Wisconsin rules were being revised.

*Response:* EPA promulgated the Guidance at 40 CFR part 132 on March 23, 1995. Wisconsin subsequently engaged in a proceeding to adopt requirements consistent with the Guidance, and Wisconsin did indeed revise its rules in that time period in an effort to be consistent with the Guidance. EPA, therefore, does not agree that the Guidance required Wisconsin to adopt rules that did not exist when the Wisconsin rules were being revised.

*E. Consequences of Today's Action*

As a result of today's action, the Guidance provisions specified in today's rule apply in the Great Lakes System in Wisconsin until such time as the State adopts requirements consistent with the specific Guidance provisions at issue, and EPA approves those State requirements and revises the rule so that the provisions no longer apply in Wisconsin.

## II. ''Good Cause'' Under the Administrative Procedure Act

Section 553 of the Administrative Procedure Act, 5 U.S.C. 553 (b)(3)(B), provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. EPA has determined that there is good cause for making today's rule final without prior proposal and opportunity for comment because EPA finds it unnecessary and contrary to the public interest. Today's rule does not promulgate any new regulatory provisions. Rather, in accordance with the procedures in 40 CFR 132.5(f), today's rule identifies the provisions of 40 CFR part 132 promulgated previously by EPA that shall apply to discharges in Wisconsin within the Great Lakes

System. Those provisions have already been subject to a notice of proposed rulemaking, and publication of a new proposed rule is therefore unnecessary. See 58 FR 20802 (April 16, 1993). In addition, while EPA's approval/disapproval decisions described in this document do not constitute rulemaking, EPA has nonetheless received substantial public comment on these decisions. See 63 FR 10221 (March 2, 1998) (notice of receipt of State Guidance submission and request for comment); 65 FR 38830 (June 22, 2000) (notice of letter identifying inconsistencies and request for comment). EPA also believes the public interest is best served by fulfilling the CWA's requirements without further delay and publication of a notice of proposed rulemaking therefore would be contrary to the public interest. Thus, notice and public procedure are unnecessary. EPA finds that this constitutes good cause under 5 U.S.C. 553(b)(B).

### III. Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and is therefore not subject to review by the Office of Management and Budget. Because the agency has made a ''good cause'' finding that this action is not subject to notice-and-comment requirements under the Administrative Procedure Act or any other statute, as described in Section II, above, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), or to sections 202 and 205 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4). In addition, because this action does not promulgate any new requirements, but only makes certain existing provisions of 40 CFR part 132 effective in Wisconsin, it does not impose any new costs. The costs of 40 CFR part 132 were considered by EPA when it promulgated that regulation. Therefore, today's rule does not significantly or uniquely affect small governments or impose a significant intergovernmental mandate, as described in sections 203 and 204 of UMRA, or significantly or uniquely affect the communities of Tribal governments, as specified by Executive Order 13084 (63 FR 27655, May 10, 1998). This rule will not have substantial direct effects on the State, on the relationship between the national government and the State, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant.

This action does not involve technical standards; thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. The rule also does not involve special consideration of environmental justice related issues as required by Executive Order 12898 (59 FR 7629, February 16, 1994). In issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct, as required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996). This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the Agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This rule is not a major rule as defined by 5 U.S.C. 804(2). 40 CFR 132.6(f), (h)–(j) is effective on December 6, 2000. 40 CFR 132.6(g) is effective on February 5, 2001.

### List of Subjects in 40 CFR Part 132

Environmental protection, Administrative practice and procedure, Great Lakes, Indian-lands, Intergovernmental relations, Reporting and recordkeeping requirements, Water pollution control.

Dated: October 31, 2000.

**Carol M. Browner,**

*Administrator.*

For the reasons set forth above, EPA amends 40 CFR part 132 as follows:

## PART 132—WATER QUALITY GUIDANCE FOR THE GREAT LAKES SYSTEM

1. The authority citation for part 132 continues to read as follows:

**Authority:** 33 U.S.C. 1251 *et seq.*

2. Section 132.6 is amended by adding paragraphs (f) through (i) to read as follows:

**§ 132.6 Application of part 132 requirements in Great Lakes States and Tribes.**

* * * * *

(f) Effective December 6, 2000, the acute and chronic aquatic life criteria for copper and nickel in Tables 1 and 2 of this part and the chronic aquatic life criterion for endrin in Table 2 of this part shall apply to the waters of the Great Lakes System in the State of Wisconsin.

(g) Effective February 5, 2001, the chronic aquatic life criterion for selenium in Table 2 of this part shall apply to the waters of the Great Lakes System in the State of Wisconsin.

(h) Effective December 6, 2000, the requirements of procedure 3 in appendix F of this part shall apply for purposes of developing total maximum daily loads in the Great Lakes System in the State of Wisconsin.

(i) Effective December 6, 2000, the requirements of paragraphs D and E of procedure 5 in appendix F of this part shall apply to discharges within the Great Lakes System in the State of Wisconsin.

(j) Effective December 6, 2000, the requirements of paragraph D of procedure 6 in appendix F of this part shall apply to discharges within the Great Lakes System in the State of Wisconsin.

Dated: October 31, 2000.

**Carol M. Browner,**

*Administrator.*

[FR Doc. 00–28419 Filed 11–3–00; 8:45 am]

BILLING CODE 6560–50–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### 42 CFR Part 63

**RIN 0925–AA11**

### Traineeships

**AGENCY:** National Institutes of Health, HHS.

**ACTION:** Final rule.

**SUMMARY:** The National Institutes of Health (NIH) is amending the regulations governing traineeships to add conditions under which NIH may terminate traineeship awards and revise the authorities for the awards.

**EFFECTIVE DATE:** This final rule is effective on December 6, 2000.

**FOR FURTHER INFORMATION CONTACT:** Jerry Moore, NIH Regulations Officer,