

CHAPTER 1.8 - Enforcement Strategy

The purpose of this chapter is to give example enforcement situations and to discuss appropriate responses to WET violations.

NOTICE: This document is intended solely as guidance, and does not contain any mandatory requirements except where requirements found in statute or administrative rule are referenced. This guidance does not establish or affect legal rights or obligations, and is not finally determinative of any of the issues addressed. This guidance does not create any rights enforceable by any party in litigation with the State of Wisconsin or the Department of Natural Resources. Any regulatory decisions made by the Department of Natural Resources in any matter addressed by this guidance will be made by applying the governing statutes and administrative rules to the relevant facts.

WET Limit Violations

Many wastewater permits contain language requiring that whole effluent toxicity (WET) monitoring be conducted. Standard WET language requires follow up actions in the event of a test failure – typically two retests are required within 90 days. Additional toxicity reduction evaluation (TRE) follow up actions are required if a retest fails (see recommended permit language in Chapter 1.14: <http://dnr.wi.gov/topic/wastewater/WETguidance.html>).

In some cases, a permittee will be required to do WET monitoring but will not have a WET limit in their permit. In these cases where there is no WET limit in the permit, the failure of a WET test is not a permit violation. In situations where a WET limit is required in the permit, a WET test failure is a violation. (See Chapter 1.3 for how to express WET limits.)

WET-related permit violations can also occur if WET Test Report Forms are not submitted on time, if permit-required monitoring or retests are not done, if TRE follow up actions are not taken, or if compliance schedule steps are missed. Listed below are examples of possible WET noncompliance events. The list provides examples of noncompliance and shows a continuum from less important to more important noncompliance events. Please note that the list is not all-inclusive and that additional types of noncompliance may exist and should not limit an enforcement response.

Noncompliance events which should trigger a Notice of Noncompliance (NON) are shown in bold text below. A Notice of Violation (NOV) should be triggered in most cases where a permittee has experienced several bolded events or when one bolded event has occurred along with several non-bolded events. The more “more important/more severe” events (towards the bottom) that occur, the more significant the enforcement follow up should be.

Less important/
Less severe

- ◆ WET monitoring only required, failure occurred (not a violation if no WET limit is present)
- ◆ WET test or retests done on time but WET Test Report Form not submitted within 45 days
- ◆ TRE information submitted, but not within the 60 days required in Standard Requirements
- ◆ WET tests not conducted by a certified lab as required by s. NR 149.20, Wis. Adm. Code.
- ◆ Failure to follow WET test methods required by WPDES permit
- ◆ WET compliance schedule date missed (late submittal)
- ◆ **Monitoring only required, WET tests not completed**
- ◆ **Monitoring only required, WET failure occurred (not a violation), retests not completed**
- ◆ **WET limit in permit, WET tests not completed**
- ◆ **WET compliance schedule date missed (no submittal)**
- ◆ **WET limit in permit, WET failure occurred (limit violation)**
- ◆ **WET limit in permit, WET failure occurred (limit violation) and retests not completed**
- ◆ **WET limit violation is an isolated incident; permittee does not have a history of WET failures**
- ◆ **WET limit violation indicates magnitude of toxicity is slight, potential is lower for environmental impact**
- ◆ **WET limit violation indicates magnitude of toxicity is severe & potential is high for adverse impact**
- ◆ **WET limit violation is not an isolated incident; there is a history of frequent or severe WET failures**

More important/
More severe

Persistence and Severity of Toxicity

WET limits, when given, will appear in the effluent limits table in the permit and be expressed in Toxic Units Acute (TU_a) or Toxic Units Chronic (TU_c). (See Chapter 1.3 for how to calculate and express WET limits.) The severity (or magnitude) of toxicity expressed in a WET test can be determined by comparing the test results to the permittee's limit. The higher the TU_a or TU_c, the more severe the toxicity.

More severe toxicity, even if it occurs only once or a few times, has the potential to cause adverse impacts to aquatic life. Repeated or constant toxicity, even if present at lower levels, also increases the potential for toxicity to cause adverse impacts to aquatic life. Therefore, more severe toxicity and repeated bouts of toxicity should be considered more seriously and given more weight than single and/or less severe events.

Response to WET Violations

It is recommended that all WET limit violations be taken seriously. WET monitoring is done infrequently, usually at most quarterly, therefore individual results should be given more weight. In addition, the test itself is intended to directly measure the potential for impairment of fish and aquatic life communities related to substances present in the effluent at toxic concentrations. Thus, all WET test failures indicate some potential for adverse impacts to the aquatic life community in the receiving water and appropriate action should be taken. As discussed above, more severe and repeated toxicity should be given more weight than single toxic events.

Follow up on violations should be in accordance with the stepped enforcement procedures outlined in the Environmental Enforcement handbook and the guidance document titled, "*Enforcement Strategy For The Wisconsin Department Of Natural Resources Water Pollution Control Program*". The continuum shown above provides guidance to staff related to when a NON or NOV action should be taken.

As noted above, retests and TRE actions are required when repeated WET failures occur. If a WET limit is present, it is critical that the permittee complete these activities to try to find and fix the source of toxicity. In general, the WDNR would not normally take serious enforcement action (e.g., referrals, fines) following WET limit violations, if staff agree that the permittee has adequately complied with its WPDES permit requirements for accelerated testing and conducting a TRE. More serious enforcement action would be appropriate if the permittee fails to aggressively conduct a TRE or is otherwise recalcitrant in addressing the toxicity. Exceptions to this general guideline include situations where the WET violations are of large magnitude or have contributed to a significant environmental impact; the permittee needs additional incentive to complete the corrective actions identified by a TRE; the permittee failed to eliminate/reduce toxicity within a reasonable time frame; or WET violation(s) were caused by circumstances within the control of the discharger and could have been reasonably avoided.

The Biomonitoring Coordinator (Kari.Fleming@wisconsin.gov; 608-267-7663) can provide assistance and should be notified when WET-related enforcement action is being considered. In cases where the situation may be controversial, repeated violations have occurred, or other non-standard conditions exist, it may be necessary to convene an interdepartmental team, including the Biomonitoring Coordinator, District staff, supervisors, legal staff, or others, to determine necessary actions. The Department's response to WET limit violations should be based on the site-specific circumstances involved. Ultimately, decisions on the appropriate enforcement steps should be made on a case-by-case basis, with input from the Biomonitoring Coordinator and compliance staff most familiar with the facility.

Inspections and Supplemental WET Monitoring

WET data and other related information should be collected and historical or existing toxicity problems should be discussed with the permittee during every compliance inspection. In situations where problems are suspected or staff feel that more WET data is needed, staff may request testing from the UW-Madison State Laboratory of Hygiene (SLH) Environmental Toxicology Section. If an enforcement case is ongoing, or there is a good chance that future enforcement actions may be necessary, DNR staff should be present during SLH WET sampling (i.e., equipment setup, sample collection and shipping, etc.). Sampling equipment should be secured, if possible, and sample integrity maintained. Chain of custody forms should accompany samples and be filled out appropriately.

WET tests may be conducted by the SLH at the request of DNR staff and used to determine whether a problem exists or to generate additional data for use in WET determinations, but cannot be used as a replacement or credit towards permit-required testing. Staff may contact the Biomonitoring Coordinator or the SLH directly (608-224-6230 or biomonitoring@mail.slh.wisc.edu) to request a toxicity test.

WET Files

The Methods Manual requires WET Test Report Forms be sent directly to the Biomonitoring Coordinator in Madison within 45 days of test end. Upon receipt at the central office, forms are date-stamped and reviewed as soon as possible. (For details regarding the review process, see Chapter 1.5.) After a complete data review, the Biomonitoring Coordinator confirms whether the test passed or failed, enters test information into the SWAMP WET database, and sends copies to the appropriate field staff for comparison to permit conditions and placement in the permit file.

Signed WET Test Report Forms and other information collected by the Biomonitoring Coordinator for each facility (TRE reports, email correspondence, etc.) are placed in the "WET file" for the facility, which is kept in the central office in Madison. In many cases, more detailed WET-related information will be included in this WET file than in other permit files. Field staff should contact the Biomonitoring Coordinator for copies or to discuss information contained in this file.