



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

DEC 05 2012

REPLY TO THE ATTENTION OF:
WN-16J

Kenneth G. Johnson, Administrator
Division of Water
Wisconsin Department of Natural Resources
Post Office Box 7921
Madison, Wisconsin 53707-7921

Dear Mr. Johnson:

I am writing to provide a summary of the efforts to resolve issues initially identified in the U.S. Environmental Protection Agency's letter to Secretary Stepp of July 18, 2011. Ms. Stepp's October 17, 2011 reply letter committed the State to resolving the issues through four parallel processes, including rulemaking, statutory amendments, clarification of Wisconsin's Attorney General's statement supporting the State's approved National Pollutant Discharge Elimination System Permit (NPDES) program, and potential amendments to the Wisconsin-EPA memorandum of agreement (MOA) for the NPDES program. In the past several months, EPA and the Wisconsin Department of Natural Resources (WDNR) have made significant progress toward bringing the issues to closure. A description of each issue identified in EPA's 2011 letter and the manner in which EPA and WDNR have agreed to resolve these issues is found in Enclosure 1.

Rulemaking and Statutory Changes

EPA requested that the WDNR establish a schedule to complete regulatory and statutory changes by October 2012 and October 2013, respectively. In Secretary Stepp's May 18, 2012 letter to EPA, WDNR provided the estimated timeframe for eight proposed rulemaking packages and explained that, while it would not be possible to meet EPA's dates under the State's rulemaking process, WDNR is committed to moving these rulemaking packages as quickly as possible. EPA understands that the eight rule packages need to go through each step in the State's rulemaking process.

Attorney General Statement

During the last several months, WDNR, EPA, and the Wisconsin Department of Justice have exchanged information on each issue identified for further clarification in WDNR's October 14, 2011 letter to Attorney General Van Hollen. A review of the information, including that provided in the Attorney General's January 19, 2012 reply letter to WDNR, leads EPA to conclude that issues 5, 7, 10, 12, 19, 44, 51, 58, 59, 63, 64, and 75 in EPA's 2011 letter are resolved. Resolution notwithstanding, EPA appreciates and supports the commitment WDNR

made in its May 2012 letter to amend rules pertaining to issues 7, 10, and 51. All of the issues assigned for resolution by the Attorney General's office are further described in Enclosure 2.

Amending the Wisconsin-EPA NPDES MOA

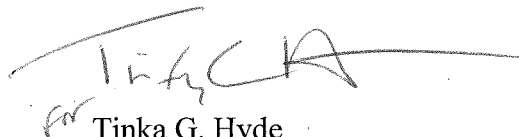
Attachment A to Secretary Stepp's letter of October 14, 2011 included a list of issues proposed for resolution through an amendment of the Wisconsin-EPA NPDES MOA. Following subsequent discussions between our respective staffs, EPA agrees that issues 18, 21, 22, 38, 39, and 66 are amendable to resolution through an addendum to this MOA. These issues are noted in Enclosure 1. We anticipate providing a draft MOA Addendum to WDNR for review in the near future.

Additional Issues

As noted in Enclosure 1, EPA now considers issues 54, 68, and 72 closed. EPA understands that Wisconsin will revise the rule that gives rise to issue 55. EPA erroneously omitted a comment on Wis. Admin. Code NR § 216.21(4) in our July 2011 letter. Resolution for this issue, as well as issues 24, 25, and 69, await further discussion between EPA and WDNR.

We appreciate the dedicated efforts of WDNR to cooperate with EPA to accomplish the work described in this letter and to resolve the remaining issues.

Sincerely,

A handwritten signature in black ink, appearing to read "Tinka G. Hyde", with a long horizontal line extending to the right.

for Tinka G. Hyde
Director, Water Division

Enclosures

Enclosure 1

Overview of Issues to be resolved through rulemaking, statutory amendment, an MOA Addendum, or Attorney General clarifications relating to the State's Approved NPDES Program

Issue as identified in EPA's July 18, 2011 letter to WDNR	Rulemaking Package Assigned (Based on Milestones identified in letter of May 18, 2012)	Statutory Changes Projected	Other Resolution Mechanism	Clarified through Attorney General Statement	MOA Change Projected
1	#1				
2	#4, 5				
3	#6				
4	#5				
5				yes	
6		Yes - Other statutory NPDES program changes			
7	#5			yes	

Issue as identified in EPA's July 18, 2011 letter to WDNR	Rulemaking Package Assigned (Based on Milestones identified in letter of May 18, 2012)	Statutory Changes Projected	Other Resolution Mechanism	Clarified through Attorney General Statement	MOA Change Projected
8	#3				
9	#7				
10	#3, #4			yes	
11	#5				
12				yes	
13	#5				
14	#5				
15	#5				
16	#2				

Issue as identified in EPA's July 18, 2011 letter to WDNR	Rulemaking Package Assigned (Based on Milestones identified in letter of May 18, 2012)	Statutory Changes Projected	Other Resolution Mechanism	Clarified through Attorney General Statement	MOA Change Projected
17	#3				
18	#6				yes
19				yes	
20	#5				
21	#6				yes
22					yes
23	#8	Yes - Statutory changes relating to storm water			
24	#8 ¹	Yes - Statutory changes relating to storm water			
25	#8 ²				

¹ Wisconsin proposed a “manual code change” to resolve the issue with Wis. Admin. Code NR § 216.42(6). This proposal requires further discussion.

² Wisconsin proposed a “manual code change” to resolve the issue with Wis. Admin. Code NR § 216.415(4). This proposal requires further discussion.

Issue as identified in EPA's July 18, 2011 letter to WDNR	Rulemaking Package Assigned (Based on Milestones identified in letter of May 18, 2012)	Statutory Changes Projected	Other Resolution Mechanism	Clarified through Attorney General Statement	MOA Change Projected
26	#8	Yes - Statutory changes relating to storm water			
27		Yes - Other statutory NPDES program changes			
28	#4				
29	#5				
30	#4				
31	#4				
32	#4				
33			Resolved by Attachment C – letter of 10/17/2011		
34	#4				

Issue as identified in EPA's July 18, 2011 letter to WDNR	Rulemaking Package Assigned (Based on Milestones identified in letter of May 18, 2012)	Statutory Changes Projected	Other Resolution Mechanism	Clarified through Attorney General Statement	MOA Change Projected
35	#4				
36	#4				
37	#4				
38	#4				yes
39	#4				yes
40	#4				
41	#4				
42	#4				
43	#4				
44				yes	
45	#6				
46	#5				

Issue as identified in EPA's July 18, 2011 letter to WDNR	Rulemaking Package Assigned (Based on Milestones identified in letter of May 18, 2012)	Statutory Changes Projected	Other Resolution Mechanism	Clarified through Attorney General Statement	MOA Change Projected
47	#6				
48	#6	Yes - Other statutory NPDES program changes			
49	#6				
50	#6	Yes - WDNR reported that the State has enacted an amendment to address this issue, in part.			
51	#6			yes	
52	#8				
53	#8				
54	Resolved via review of s. NR 216.002(2) and recognition				

Issue as identified in EPA's July 18, 2011 letter to WDNR	Rulemaking Package Assigned (Based on Milestones identified in letter of May 18, 2012)	Statutory Changes Projected	Other Resolution Mechanism	Clarified through Attorney General Statement	MOA Change Projected
	by EPA that the quarter mile separation provided in s. NR 216.42(11) mirrors Part III of the fact sheet for EPA's 2003 construction general permit.				
55	EPA understands that Wisconsin will revise the rule that gives rise to this issue.				
56			Wisconsin will revise the required content of annual		

Issue as identified in EPA's July 18, 2011 letter to WDNR	Rulemaking Package Assigned (Based on Milestones identified in letter of May 18, 2012)	Statutory Changes Projected	Other Resolution Mechanism	Clarified through Attorney General Statement	MOA Change Projected
			reports		
57	#8		Wisconsin will revise the required content of annual reports		
58				yes	
59				yes	
60				yes	
61	#5				
62	#6				
63				yes	
64				yes	
65	#6				
66	#6				yes

Issue as identified in EPA's July 18, 2011 letter to WDNR	Rulemaking Package Assigned (Based on Milestones identified in letter of May 18, 2012)	Statutory Changes Projected	Other Resolution Mechanism	Clarified through Attorney General Statement	MOA Change Projected
67	#8				
68	EPA's re-evaluation of the issue indicates that the issue is closed.				
69	Awaiting further discussion				
70	#4				
71	#3				
72			Resolved by Attachment C – letter of 10/17/2011.		

Issue as identified in EPA's July 18, 2011 letter to WDNR	Rulemaking Package Assigned (Based on Milestones identified in letter of May 18, 2012)	Statutory Changes Projected	Other Resolution Mechanism	Clarified through Attorney General Statement	MOA Change Projected
73			Resolved by Attachment C to WDNR's letter of 10/17/2011.		
74	#4				
75				yes	

Issues to be resolved through clarification of the Wisconsin Attorney General’s Statement for the State’s Approved NPDES Program

Issue as identified in EPA’s July 18, 2011 letter to WDNR	Status of Issue	Discussion
5 Right to Judicial Review	Resolved	<p>The letter from J.B. Van Hollen, Attorney General, to Matt Moroney, Deputy Secretary, Wisconsin Department of Natural Resources, January 19, 2012 [hereafter AG Letter] explains that standing for purposes of judicial review under Wis. Stat. § 227.52-58 [judicial review] includes (1) whether a decision of an agency directly causes injury to interest of petitioner, and (2) whether the interest asserted is recognized by law. The AG Letter states that this meets applicable case law requiring a causal link between a petitioner and the action challenged. The AG Letter notes that state law provides 30 days to seek judicial review (AG Letter at 2).</p> <p>The AG Letter explains that the State provides for individual petitions for judicial review pursuant to Wis. Stat. §§ 227.52-227.58 (AG Letter at 3). <i>Pulera v. WDNR</i>, No. 2011AP001894 (Wis. Ct. App. Oct. 17, 2011), voluntary dismissal (unpublished decision), is a recent example of an individual petition for judicial review of a WPDES permit.</p>
7 New Source Performance Standards, Effluent Limitation Guidelines	Resolved	<p>The AG Letter explains that pursuant to <i>Andersen v. Department of Natural Resources</i>, 2011 WI 19, 332 Wis. 2d 41, 796 N.W.2d 1., Wis. Stat. § 283.31(3)(d)(2) is read to allow WDNR to apply new or revised federal standards or limitations that are “promulgated over a state rule” that already exists and is included in those categories of rules enumerated in 283.31(3)(a)-(c), which include new source performance standards, effluent limitations, effluent standards. (AG Letter at 6-7).</p> <p>A May 24, 2012 email from Robin Nyffeler to Barbara Wester, explains WDNR’s authority, post <i>Andersen</i>, rests on Wis. Stat. § 283.31(3)(d)(2) which allows WDNR to</p>

Issue as identified in EPA's July 18, 2011 letter to WDNR	Status of Issue	Discussion
		include more stringent federal provisions in permits where (1) EPA has overpromulgated a limitation or requirement that is more stringent than that found in the State's rules and (2) where EPA has promulgated a limitation or requirement not already found in the State's rules. Additionally, the email explains that WDNR has interpreted Wis. Stat. § 283.31(2)(c), (3) and (4) as providing authority to include more stringent limitations where EPA has specifically objected to a permit limitation (or absence of one). The email also explains that the State has other authorities to include more stringent federal requirements in permits, including effluent limitations guidelines and sludge management standards.
10 GLI Procedures	Resolved	The AG Letter explains that WDNR does have authority to administer the more stringent limitations in 40 C.F.R. § 132.6 (discharges of toxic substance to the Great Lakes basin) because § 132.6 limitations were promulgated "over a state rule."
12 Downstream waters	Resolved	The AG Letter states that the use of term 'downstream waters' is not limited to intra-state waters, and includes downstream federally approved state and tribal standards (AG Letter at 8). The AG Letter states that WDNR has authority to issue WPDES permits necessary to meet downstream water quality standards (AG letter at 8).
19 Point source/Fish hatcheries,	Resolved	The AG Letter states that DNR has sufficient authority because the hatcheries use conveyances regulated by Wis. Stat. § 283.01(12) and the wastes from the hatcheries fall under Wis. Stat. § 283.01(13) as a pollutant. Therefore, the AG Letter concludes that fish hatcheries are included in Wis. Admin. Code NR § 220.02(20) (AG Letter at 8-9).
44 Point source/landfill leachate collection	Resolved	The AG Letter states that landfill leachate would contain substances deemed pollutants under Wis. Stat. § 283.01(13), and if leachate is discharging to waters of the state, it is subject to permitting (AG Letter at 9).

Issue as identified in EPA's July 18, 2011 letter to WDNR	Status of Issue	Discussion
Point source/Filter Backwash	Resolved	The AG Letter states that filter backwash includes pollutants and as such is subject to permitting (AG letter at 10).
51 Request for informational hearing	Resolved	The AG Letter states that the interest necessary to demonstrate to the state that an individual has met the standard to request a hearing; and/or that WDNR has correctly assessed that there is sufficient public interest to hold a hearing, are the same as the standard in 40 CFR § 124.11 that 'any interested person' can requested a hearing and that the Director should schedule a hearing where there is a "significant degree of public interest" (AG Letter at 10).
58 Waters of the State	Resolved	The AG Letter states that the definition of waters of the state, specifically the inclusion of wetlands and places where water is near the surface, together with the phrase "other surface water or groundwater" in Wis. Stat. § 283.01(2) is enough to include mudflats, sandflats, sloughs, prairie potholes, etc. (AG Letter at 10-11).
59 Exemption for solid waste disposal to landfill	Resolved	The AG Letter states that if a solid waste landfill discharges solid waste into ground or surface waters of the state, then it would need WPDES permit because it would be a point source (AG Letter at 11).
60 Exemption for discharges from private alcohol fuel production systems	Resolved	The AG Letter states that if wastes are spread on land and there is a resulting discharge to surface water, then a WPDES permit would be required (AG letter at 12). The AG Letter states that if the waste were to enter surface water, then it would no longer be confined to an owner's land (AG letter at 12).
63	Resolved	The AG Letter states that WDNR has the authority to collect fines for multiple instances of violation and that this has been WDNR's and the State's general practice (AG Letter

Issue as identified in EPA's July 18, 2011 letter to WDNR	Status of Issue	Discussion
False statements		at 12-13).
64 Public Participation in Enforcement Process	Resolved	<p>The AG Letter explains that the public participation requirement is provided by a process for intervention, as contemplated in 40 C.F.R. § 123.27(d). However, Wisconsin generally enters an order for judgment simultaneously with a complaint, which results in the right of intervention being exercised only after entry of the final judgment. (AG letter at 13-14).</p> <p>In response to EPA's request for clarification regarding the burden on plaintiffs to intervene, in a supplemental letter from Thomas Dawson, Assistant Attorney General, to Robin Nyffeler, July 2, 2012, the WI Department of Justice stated that while the burden on plaintiffs to intervene post-judgment may be higher than such intervention pre-judgment, this higher threshold (1) has generally not penalized plaintiffs with regard to timeliness where processes outside their control are at issue; and (2) any dissimilarity between the federal requirement and the State's provision is within the latitude allowed to the states in interpreting the regulatory provision, as set forth in <i>NRDC v. EPA</i>, 859 F.2d 156 (DC Cir. 1988), in which state regulations for public participation in the enforcement process need only be "similar," and may be more stringent (the latter, under <i>Allied-Industrial, Chemical and Energy Workers Int'l union v. Continental Carbon Co.</i>, 428 F.3d 1285 (10th Cir. 2005).</p>
75 Wis. Stat 227.10(2m)	Resolved	The AG Letter states that the enactment of Wis. Stat. § 227.10(2m) has not altered WDNR's authority to issue permits pursuant to the authority stated in Wis. Stat. 283.31(1), which allows WDNR to issue permits "based on whether the discharge will meet certain limitations and standards, including any more stringent limitation 'necessary to comply with any applicable federal law or regulation.'" (AG Letter at 14).