



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5
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CHICAGO, IL 60604-3590

SEP 11 2018

REPLY TO THE ATTENTION OF

WN-15J

MEMORANDUM

SUBJECT: Wisconsin Legal Authority Review - Review and Recommendation of Resolution for Issue 23

FROM: Candice Bauer, Chief
NPDES Permits Branch Section 2

A handwritten signature in black ink, appearing to read "C Bauer".

TO: File

Issue 23 (Wisconsin Department of Transportation Storm Water Permitting)

In EPA's July 11, 2011 letter to the Wisconsin Department of Natural Resources (WDNR), Issue 23 stated the following:

Wisconsin law at Wis. Stat. 30.2022(1) provides that "activities affecting waters of the state, as defined in § 281.01(18), that are carried out under the direction of the department of transportation in connection with highway, bridge, or other transportation project design, location, construction, reconstruction, maintenance, and repair are not subject to the prohibitions or permit or approval requirements specified under ... chs. 281 to 285 or 289 to 299." The provision does not conform to 40 C.F.R. §§ 123.1(g)(1) (requiring approved states to prohibit point source discharges including, but not limited to, storm water discharges as provided in 40 C.F.R. § 122.26, unless such discharges are in compliance with a permit issued under the federally approved state program) and 123.25(a)(4) (providing that approved states shall require any person who discharges or proposes to discharge to apply for a permit.)

Wis. Admin. Code NR § 216.42(5) (which appears to implement Wis. Stat. 30.2022(1) and (2) with respect to storm water discharges from Department of Transportation (DOT) construction sites) exempts DOT project from [National Pollutant Discharge Elimination System or] NPDES permit coverage by providing that such discharges "shall be deemed to be in compliance with s. 283.33, Stats., and the requirements of ch. NR 216, Subchapter III, if the project from which the discharges originate is in compliance with Trans 401 Wis. Admin. Code and the liaison cooperative agreement between WDNR and DOT. Unless EPA approves the division of the NPDES permitting responsibility between WDNR and DOT (or any other state agency), and DOT prohibits discharges without a permit, Wisconsin cannot

simply exempt DOT projects from NPDES permitting requirements. If the State has divided permitting authority for various categories of projects, the State's response to this letter must describe the division of permitting authority. EPA must review and approve any agreement to divide permitting authority before any permits issued by DOT or any other agency of the State will be considered equivalent to NPDES permits. Such a review, if it occurs, is intended to ensure that the implementing agencies have legal authority and are acting consistent with federal program requirements including permit issuance; sufficiency of public notice, hearing, and judicial review requirements; compliance evaluation; and enforcement authority. If the State has divided permitting authority, then Wisconsin must include the State's plan, with a schedule and milestones, for correcting the deficiency with Wis. Admin. Code NR § 216.42(5).

EPA has additional concerns if Wisconsin purports that Wis. Admin Code NR § 216.42(5) establishes an NPDES "permit-by-rule". For example, the authorities cited in that administrative code provision (Wis. Admin Code § Trans 401 and the "liaison cooperative agreement"): (1) are not subject to EPA review and potential objection under 40 C.F.R. 123.44, (2) are likely not subject to reissuance proceedings (including notice and the opportunity for the public to comment) once every five years, (3) likely do not require terms and conditions that are standard to all NPDES permits, and (4) may not be subject to judicial review as required for NPDES permits by 40 C.F.R. § 123.30. Furthermore, the text of the rule is not written to provide, consistent with Wis. Admin Code § NR 205.08(5), that WDNR may require any point source covered by a general permit to obtain an individual permit, and that any person may petition WDNR to require an individual permit for a source covered by a general permit.

Wisconsin's response to this letter must provide a plan with appropriate milestones for amending Wis. Stat. 30.2022(1) and Wis. Admin. Code § NR 216.42(5) to conform to federal NPDES requirements.

Letter from Susan Hedman, Regional Administrator, U.S. EPA, to Cathy Stepp, Secretary, WDNR (July 11, 2011) (on file with U.S. EPA).

Analysis

To resolve Issue 23, the State of Wisconsin amended Wis. Stat. § 30.2022, and created Wis. Stat. § 283.33(4m). 2015 Wisconsin Act 307, 2015 Assembly Bill 755, published March 31, 2016.¹

First, Wisconsin amended Wis. Stat. § 30.2022 to remove the DOT construction stormwater NPDES exemption, as shown below:

¹ EPA previously approved Wisconsin's statutory changes to Wis. Stat. § 30.2022 and Wis. Stat. § 283.33 in 2016. Letter from Robert A. Kaplan, Acting Regional Administrator, U.S. EPA, to Cathy Stepp, Secretary, WDNR (December 29, 2016) (on file with U.S. EPA).

(1m) Transportation activities affecting waters of the state, as defined in s. 281.01 (18), are not subject to the . . . permit or approval requirements specified under . . . chs. 281 to 285.² . . . However, at the earliest practical time prior to the commencement of these transportation activities, the department of transportation shall notify the department of the location, nature, and extent of the proposed work that may affect the waters of the state. **This subsection does not apply beginning on the date on which the department of natural resources issues a general permit under s. 283.33 (4m) (b) 1.** [Emphasis added.]

Wis. Stat. § 30.2022(1m). The language added— in bold above—nullifies the statute’s DOT NPDES exemption once WDNR issues a general permit covering DOT stormwater discharges, under Wis. Stat. § 283.33(4m)(b)1.

Subsequently, WDNR issued Wisconsin Pollutant Discharge Elimination System General Permit WI-S066796-1 on April 2, 2018, which formally terminates the statute’s exemption.

Additionally, the Wisconsin legislature provided the basis for WDNR’s permitting of DOT stormwater discharges at Wis. Stat. § 30.2022(1p):

Transportation activities affecting waters of the state, as defined in s. 281.01 (18), are not subject to the prohibitions or permit or approval requirements specified under . . . under chs. 281 and 283, **except s. 283.33.** . . . At the earliest practical time prior to the commencement of these transportation activities, the department of transportation shall notify the department of the location, nature, and extent of the proposed work that may affect the waters of the state. This subsection applies beginning on the date on which the department of natural resources issues a general permit under s. 283.33 (4m) (b) 1. [Emphasis added.]

As seen above, the statute makes transportation activities subject to the requirements at Wis. Stat. § 283.33, which is the statutory source for WDNR’s NPDES stormwater permitting authority.

Lastly, the Wisconsin legislature created Wis. Stat. § 283.33(4m) to specifically address stormwater discharges from transportation activities as follows:

(a) In this subsection, “transportation activity” has the meaning given in s. 30.2022 (1g).³

(b) 1. The department of natural resources shall issue a general permit under this section on or before June 30, 2018, that authorizes the department of transportation to discharge

² Wis. Stat. 283 is the chapter specific to pollutant discharge elimination.

³ Wis Stat. § 30.2022(1g) provides, “In this section, ‘transportation activity’ means an activity carried out under the direction and supervision of the department of transportation in connection with highway, bridge, or other transportation project design, location, construction, reconstruction, maintenance, or repair.”

storm water from the site of a transportation activity. A general permit issued under this paragraph is subject to the requirements for general permits issued under s. 283.35.

...

(c) Beginning on the date on which the department of natural resources issues a general permit under par. (b) 1., the department of transportation may not discharge storm water from the site of a transportation activity unless it obtains an individual permit under sub. (1) or it is covered by a general permit issued under par. (b) 1.

(d) A general permit issued under this section shall incorporate the interdepartmental liaison procedures established under s. 30.2022 (2) and the requirements specified in rules promulgated under ss. 30.2022, 283.33, and 283.35.

Wis. Stat. § 283.33(4m)(c) requires DOT to have a WDNR individual NPDES permit or coverage under a WDNR general NPDES permit to discharge stormwater from its transportation activities. Overall, Wisconsin's legislative actions, and WDNR's issuance of a general permit ensure that NPDES permitting of DOT's stormwater discharges will be through WDNR's approved NPDES program.

In addition to ensuring WDNR's authority over DOT NPDES stormwater permitting, Wisconsin has committed to repealing Wis. Admin. Code NR § 216.42(5) through rulemaking. EPA and WDNR Water Directors teleconference (June 18, 2018). Wis. Admin. Code NR § 216.42(5) was part of the previous permitting regime and is now obsolete given Wisconsin's statutory changes.

Conclusion

Based on EPA's review of Wisconsin's provisions, general permit, and its rulemaking commitment, EPA concludes that Issue 23 is resolved.