



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
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CHICAGO, IL 60604-3590

JAN 18 2017

REPLY TO THE ATTENTION OF:

WN-15J

MEMORANDUM

SUBJECT: Wisconsin Legal Authority Review - Review and Recommendation of Resolution for Issue 22

FROM: Kevin Pierard, Chief 
NPDES Permits Branch

TO: File

Issue 22 (Draft Permits, Notice to other Agencies)

In EPA's July 11, 2011 letter to the Wisconsin Department of Natural Resources (WDNR), Issue 22 stated the following:

The federal rule at 40 C.F.R § 124.10 requires that draft permits be sent to a variety of agencies as well as the applicant. We understand that Wisconsin provides electronic access to information regarding a permit application. Wisconsin's response to this letter must explain how its practice of providing notice is equivalent to the public notice requirement found at 124.10(c) or what steps, taken on what timetable, the State will take to cure deficiencies in the State analog.

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

Comparison between the Federal and State Provisions

To address Issue 22, WDNR modified its draft permit notice rules to add additional notice recipients that match the recipients found at 40 C.F.R § 124.10(c)(1). Table 1 compares the analogous federal and state regulations, below:

Table 1: Comparison Between Federal and Wisconsin Rules for NPDES Draft Permit Notice Recipients¹

40 C.F.R § 124.10(c)(1) Notice Recipients ²	Wis. Admin. Code NR §§ 203.02(4) and 203.03(4) Notice Recipients
(i) The applicant (except for NPDES and 404 general permits when there is no applicant);	<ul style="list-style-type: none"> • NR § 203.02(4)(b) Mailing the notice to the applicant. . .
(ii) <u>Any other agency</u> which the Director knows has issued or is required to issue NPDES, 404, or sludge management permit (including EPA when the draft permit is prepared by the State);	<ul style="list-style-type: none"> • NR § 203.03(4)(f) <u>Any other agency</u> or unit of government interested in the proposed discharge. • NR § 203.03(4)(a) US EPA.
(iii) Federal and State agencies with jurisdiction over fish, shellfish, and wildlife resources and over coastal zone management plans , the Advisory Council on Historic Preservation, State Historic Preservation Officers , including any affected States (Indian Tribes) . . .	<ul style="list-style-type: none"> • NR § 203.03(4)(g) Federal and State agencies with jurisdiction over fish, shellfish, and wildlife resources and over coastal zone management plans, the Advisory Council on Historic Preservation, State Historic Preservation Officers, including any affected States, or American Indian tribes or bands.
(iv) For NPDES and 404 permits only, <u>any State agency responsible for plan development under CWA section 208(b)(2), 208(b)(4), or 303(e)</u> and the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service and the <i>National Marine Fisheries Service</i> . ³	<ul style="list-style-type: none"> • NR § 203.03(4)(f) <u>Any other agency or unit of government interested in the proposed discharge</u>. • NR § 203.03(4)(b) U.S. army corps of engineers, and U.S. fish and wildlife service.
(v) For NPDES permits only, any user identified in the permit application of a privately owned treatment works ;	<ul style="list-style-type: none"> • NR § 203.02(4)(b) . . . any user of a privately owned treatment works that was specifically identified in the permit application. . .
(ix) Persons on a mailing list developed by: <ul style="list-style-type: none"> (A) Including those who request in writing to be on the list; (B) <i>Soliciting persons for "area lists" from participants in past permit proceedings in that area; and</i> (C) <i>Notifying the public of the opportunity to be put on the mailing list through periodic publication in the public press and in such publications</i>. . . 	<ul style="list-style-type: none"> • NR § 203.02(4)(c) Mailing the notice to individuals and groups on a department WPDES permit application mailing list. Requests to be placed on the mailing list shall be directed to the Department of Natural Resources, WPDES Permits, P.O. Box 7921, Madison, Wisconsin 53707-7921.

¹ Added emphasis guide: **Bold** = verbatim or nearly verbatim match between the federal regulations and Wisconsin's; Underlined = strong matching language between the federal regulations and Wisconsin's; *Italics* = federal rule language absent from Wisconsin's regulations.

² Note: 40 C.F.R § 124.10(c)(1)(vi-vii) and (xi) do not pertain to NPDES permits and thus are omitted from the table.

³ Note: As the state of Wisconsin does not encompass any marine environments, notification of the National Marine Fisheries Service is not a possible eventuality.

<p>(x)(A) <u>To any unit of local government having jurisdiction over the area where the facility is proposed to be located; and (B) to each State agency having any authority under State law with respect to the construction or operation of such facility. . .</u></p>	<ul style="list-style-type: none"> • <u>NR § 203.03(4)(d) The county and the city, town or village where the proposed discharge is located.</u> • <u>NR § 203.03(4)(e) The regional planning commission of the area where the proposed discharge is located.</u> • <u>NR § 203.03(4)(f) Any other agency or unit of government interested in the proposed discharge.</u>
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As can be seen in Table 1 above, nearly all of Wisconsin’s provisions regarding draft permit notice recipients either match verbatim or match strongly with their federal counterparts.

There are two federal provisions at 40 C.F.R §§ 124.10(c)(1)(ix)(B) and (C), detailing procedures to develop notice mailing lists, which are absent from Wisconsin’s regulations. See italicized federal rules in Table 1 above. Specifically, Wisconsin lacks provisions for mailing list development from “area lists” of past permit proceedings and by notifying the public of the opportunity to be included on notice mailing lists through press outlets. However, WDNR’s regulations, like the federal regulations, provide for citizens to be added to draft permit notice mailing lists by request. Additionally, in a practice not required by the federal rules, WDNR maintains an internet site where all current NPDES permits proposed for public notice and comment are available. Finally, citizens can track the progress of NPDES permits and view pertinent permit application documents on WDNR’s internet site.

Overall, given the match between WDNR’s and the EPA’s draft permit notice recipients, WDNR’s rules for generating notice lists, and WDNR’s internet notice practices that go beyond the federal requirements, Wisconsin adequately ensures that draft permits are noticed in keeping with the federal rules.

Rule Package 6, Public Notice, Hearing, and Comment

The WDNR published a public hearing notice on proposed revisions to Wis. Admin. Code chapters NR 200, 201, 203, and 205 on March 31, 2014 in the Wisconsin Administrative Register. 699 Wis. Admin. Reg. 37 (March 31, 2014). The public comment period was open from April 1 through May 12, 2014, and a public hearing was held in Madison, Wisconsin on May 1, 2014. Wis. Nat. Res. Bd., Agenda Item No. 3.A.1 at 2, Jan. 8, 2015, Correspondence/Memorandum Attachment to Order WT-13-12. At the May 1, 2014 public hearing, no one appeared in person. Id. Two entities, other than the Wisconsin Legislative Council Rules Clearing House, provided written comments: Stafford Rosenbaum Attorneys and Wisconsin Electric Power Company. Wis. Nat. Res. Bd., Agenda Item No. 3.A.1 at 2, Jan. 8, 2015, Response to Comments on Rule Package 6, Attachment to Order WT-13-12. WDNR responded to the written comments in a written response summary, which adequately explained the reasons for accepting all changes suggested by the written comments. Id.

Conclusion

Based on EPA's review of Wisconsin's corrections to its regulations, EPA concludes that Issue 22 is resolved.

Additional Comments

To better align Wisconsin's rules with the federal ones, Wisconsin should add the mailing list development methods found at 40 C.F.R § 124.10(c)(1)(B) and (C) to their draft permit notice regulations.