



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 45

FROM: Kevin Pierard, Chief 
NPDES Permits Branch

TO: File

Issue 45 (Permits not Property Interest)

In EPA's July 11, 2011 letter to the Wisconsin Department of Natural Resources (WDNR), Issue 45 stated the following:

The federal regulation at 40 C.F.R. § 122.5 explains the effect of a permit. It includes permit as a shield, use of a permit as an affirmative defense, prohibition of the use of a permit as a property interest, and prohibition of the use of a permit as an authorization to injure persons or property. This provision appears to have no equivalent in Wisconsin's rules. In its response to this letter, Wisconsin must explain how it will address the deficiency noted in this comment, either through corrective rulemaking or by citing existing, specific authority in a written explanation from the State's Attorney General.

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

The federal regulations at 40 C.F.R. § 122.5, effect of a permit [applicable to state programs, see 40 C.F.R. § 122.5], includes four main topics: (1) the permit as an enforcement shield; (2) the permit as an affirmative defense; (3) the prohibition on conveying property rights through permit; and (4) the prohibition on authorization of injury, invasion, etc. through permit. These federal permit provisions and Wisconsin's rule changes that match them are set forth in Table 1 below:

Table 1: Comparison Between Federal and Wisconsin Rules that Describe the Effect of a Permit

Federal Rules Describing the Effects of a Permit	Wisconsin's Comparable Revised Rules
<p>(1) 40 C.F.R. § 122.5(a)(1) provides:</p> <p>Except for any toxic effluent standards and prohibitions imposed under section 307 of the CWA and "standards for sewage sludge use or disposal" under 405(d) of the CWA, compliance with a permit during its term constitutes compliance, for purposes of enforcement, with sections 301, 302, 306, 307, 318, 403, and 405(a)-(b) of CWA. However, a permit may be modified, revoked and reissued, or terminated during its term for cause as set forth in §§ 122.62 and 122.64.</p>	<p>Wis. Admin. Code NR § 205.07(1)(x) provides:</p> <p><i>Permit as enforcement shield.</i> Compliance with a permit during its term constitutes compliance for purposes of enforcement with 33 USC [§§] 1311, 1312, 1316, 1317, 1328, and 1345 (a) and (b), except for any toxic effluent standard or prohibition, and standards for sewage sludge use or disposal. If a new or revised toxic effluent standard or toxic prohibition becomes effective during the term of the permit, the permittee may be subject to enforcement action if the discharge exceeds the new or revised effluent standard for the toxic pollutant even though the discharge is in compliance with the existing permit. The permittee may also be subject to enforcement action standards for sewage sludge use or disposal. However, a permit may be modified, revoked and reissued, or terminated during its term for cause as set forth in ch. 283, Stats., and ch. NR 203.</p>
<p>(2) 40 C.F.R. § 122.5(a)(2) provides:</p> <p>Compliance with a permit condition which implements a particular "standard for sewage sludge use or disposal" shall be an affirmative defense in any enforcement action brought for a violation of that "standard for sewage sludge use or disposal" pursuant to sections 405(e) and 309 of the CWA.</p>	<p>Wis. Admin. Code NR 205.07(1)(y) provides:</p> <p><i>Affirmative defense.</i> Compliance with a permit condition which implements a particular standard for sewage sludge use or disposal shall be an affirmative defense in any enforcement action brought for a violation of that standard for sewage sludge use or disposal.</p>
<p>(3) 40 C.F.R. § 122.5(b) provides:</p> <p>The issuance of a permit does not convey any property rights of any sort, or any exclusive privilege.</p> <p>(4) Additionally, 40 C.F.R. § 122.5(c) provides:</p> <p>The issuance of a permit does not authorize any injury to persons or property or invasion of other private rights, or any infringement of State or local law or regulations.</p>	<p>Wis. Admin. Code NR § 205.07(1)(c) addresses both 40 C.F.R. §§ 122.5(b)-(c), as follows:</p> <p>(c) <i>Property rights.</i> The permit does not convey any property rights of any sort, or any exclusive privilege. The permit does not authorize any injury or damage to private property or any invasion of personal rights, or any infringement of federal, state or local laws or regulations.</p>

As demonstrated in Table 1, Wisconsin's revised rules that specify some of the effects of a permit are consistent with their federal counterparts.

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 above review of the Wisconsin's corrections to its regulations, EPA concludes that Issue 45 is resolved.