



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

DEC 21 2017

REPLY TO THE ATTENTION OF:

WN-15J

MEMORANDUM

SUBJECT: Wisconsin Legal Authority Review - Review and Recommendation of Resolution for Issue 50

FROM: Candice Bauer, Chief 
NPDES Permits Branch Section 2

TO: File

Issue 50 (Termination of Permits, Notice of Intent)

In EPA's July 11, 2011 letter to the Wisconsin Department of Natural Resources (WDNR), Issue 50 stated the following:

Federal regulations at 40 C.F.R. § 124.5 (a) – (d) provide for termination of permits. Wisconsin regulations do not appear to provide for permit termination. Specifically, the Wisconsin regulations lack an equivalent provision for "notice of intent to terminate," as specified in 40 C.F.R. § 124.5(d). The State must explain how its regulations are consistent with the federal requirement. If corrective rulemaking is required to address this deficiency, the State must explain in its response to this letter what timetable the State will follow.

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 EPA's concern and resolve Issue 50, the State added the authority to terminate permits to its statutory and regulatory framework. Statutory revisions were made by amending Wis. Stat. § 283 (Pollution Discharge Elimination System). 2011 Wis. Act 167, Section 100, and 2015 Wis. Act 307, Section 18.

In EPA's December 29, 2016 letter to the WDNR Secretary, we stated that "EPA has determined that the modifications made to Wisconsin's regulations . . . related to Issues 3 (and others) conform to applicable federal NPDES program regulations." Letter from Robert Kaplan, Acting Regional Administrator, U.S. EPA, to Cathy Stepp, Secretary, WDNR (December 29, 2016) (on file with U.S. EPA). This letter further stated that "EPA has determined that to fully resolve Issues 3 and 50, which cover provisions for the

modification, revocation and reissuance, and termination of permits, and which both rely on the review procedures specified in Wis. Statute § 283.63, Wisconsin must amend Wis. Stat. § 283.63 to allow “any person” to seek review by the department for these actions.” Id.

In response to this request for clarification, WDNR provided an extensive comparison of the Wisconsin regulations that are analogous to the provisions at 40 C.F.R. § 124.5(a), (c), and (d) and further clarified that the judicial review provisions (that the State is separately seeking to address through legislative change (Issue 5)) are separate from the provisions underlying requests for seeking public hearings. Email from Robin Nyffeler, WDNR, to Barbara Wester, U.S. EPA (September 6, 2017) with attachment (on file with U.S. EPA). The additional information considered by EPA is included in this memorandum. See Appendix 1. Table 1 compares the Federal and State regulations.

Table 1: Comparison between Federal and Wisconsin’s Regulations

Federal Provisions	Wisconsin Provisions
<p>33 U.S.C. 1342(b) [State Permit Programs] provides in pertinent part:</p> <p>The Administrator shall approve each such submitted [State] program unless he determines that adequate authority does not exist:</p> <p>(1) To issue permits which --</p> <p>...</p> <p>(C) can be terminated or modified for cause including, but not limited to, the following:</p> <p>(i) violation of any condition of the permit;</p> <p>(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;</p> <p>(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge. . . .</p>	<p>Wis. Stat. § 283.53(2) [Permit duration, modification, revocation and reissuance] provides:</p> <p>(a) Any permit issued by the department under s. 283.31 or 283.33 may, after an opportunity for hearing, be modified, terminated, or revoked and reissued, in whole or in part, for cause, including but not limited to:</p> <ol style="list-style-type: none"> 1. Violation of any terms or conditions of the permit; 2. Obtaining a permit by misrepresentation or failure to disclose fully all relevant facts; 3. A change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge; <p>(b) Whenever, on the basis of any information available to it, the department finds that there is cause for modifying, terminating, or revoking and reissuing a permit, in whole or in part, the department shall notify the permittee by certified mail or personal service of its intention to modify, terminate, or revoke and reissue the permit, in whole or in part, except that if the department proposes to modify a permit to authorize</p>

a substantial change to a nutrient management plan of a concentrated animal feeding operation, the department may notify the permittee by electronic mail. Such notice shall specify the information upon which the department relies, and if the department intends to modify the permit, shall explain the modifications which the department intends to make in the permit.

(c) The department shall also notify the U.S. environmental protection agency, the U.S. army corps of engineers, any affected state, any interested agency of this state, and any interested members of the public of its intention to modify, terminate, or revoke and reissue a permit. Such notice shall incorporate the terms of the notice sent to the permittee and shall be provided to members of the public in accordance with s. 283.39 (1), except that if the department proposes to modify a permit to authorize a substantial change to a nutrient management plan of a concentrated animal feeding operation, the department is not required to provide notice of the substantial change under s. 283.39 (1) (a). The department shall provide a 14-day period, from the date on which notice is provided under s. 283.39 (1) (d), for written comments on a proposed modification to authorize a substantial change to a nutrient management plan.

(d) The department may hold a public hearing on a proposed permit modification, termination, or revocation and reissuance if the department determines that there is a significant public interest in holding such a hearing or upon the petition of 5 or more persons. The petition shall indicate the

	<p>interest of the petitioners and the reasons why a hearing is warranted. A petition for a hearing on a proposed permit modification to authorize a substantial change to a nutrient management plan of a concentrated animal feeding operation shall be filed within 14 days of the date notice is provided under s. 283.39 (1) (d).</p> <p>(e) Public notice of any hearing held under this section shall be provided in accordance with the requirements of pars. (b) and (c).</p> <p>(f) Hearings held under this section are not contested cases under s. 227.01 (3).</p>
<p>40 C.F.R. § 124.5 provides:</p> <p>(a) <i>(Applicable to State programs, see § 123.25 (NPDES) . . . Permits . . . may be modified, revoked and reissued, or terminated either at the request of any interested person (including the permittee) or upon the Director's initiative. However, permits may only be modified, revoked and reissued, or terminated for the reasons specified in . . . § 122.64 (NPDES). . . . All requests shall be in writing and shall contain facts or reasons supporting the request.</i></p>	<p>Wis. Admin. Code NR § 203.135 provides:</p> <p>(1) GENERAL. The department may modify, revoke and reissue, or terminate a permit upon request of any interested person, including the permittee, or upon the department's initiative. Permits may only be modified, revoked and reissued, or terminated for one of the causes listed in s. NR 203.136. If cause exists, the department may request an updated application if necessary.</p> <p>(3) REQUESTS. Permits may be modified, revoked and reissued, or terminated at the request of any interested person, including the permittee. All requests for a modification, revocation and reissuance, or termination by a permittee or interested person shall be in writing and shall contain facts or reasons supporting the request.</p>

<p>40 C.F.R. § 124.5 provides:</p> <p>(b) If the Director decides the request is not justified, he or she shall send the requester a brief written response giving a reason for the decision. Denials of requests for modification, revocation and reissuance, or termination are not subject to public notice, comment, or hearings.</p>	<p>Wis. Admin. Code NR § 203.135 provides:</p> <p>(4) DENIAL. If the department decides the request is not justified, the department shall send the requester a brief written response giving a reason for the decision. Denials of requests for modification, revocation and reissuance, or termination are not subject to public notice, comment, informational hearings or adjudicatory hearings under s. 283.63, Stats.</p>
<p>40 C.F.R. § 124.5 provides:</p> <p>(d) <i>(Applicable to State programs, see § 123.25 (NPDES) of this chapter.)</i> (1) If the Director tentatively decides to terminate: A permit under . . . § 122.64(a) (NPDES) . . . , or a permit under § 122.64(b) (NPDES) of this chapter where the permittee objects, he or she shall issue a notice of intent to terminate. A notice of intent to terminate is a type of draft permit which follows the same procedures as any draft permit prepared under § 124.6 of this chapter. . . .</p>	<p>Wis. Admin. Code NR § 203.135 provides:</p> <p>(2) NOTIFICATION. Whenever, on the basis of any information available to it, the department finds that there is cause under s. NR 203.136 for modifying, revoking and reissuing, or terminating a permit, in whole or in part, the department shall notify the permittee by certified mail or personal service of its intended permit action. However, if the department proposes to modify a permit to authorize a substantial change to a nutrient management plan of a concentrated animal feeding operation, the department may notify the permittee by email. When notifying the permittee of a proposal to modify, revoke and reissue, or terminate the department shall specify the information upon which the department relies, and if the department intends to modify the permit, shall explain the modifications which the department intends to make in the permit.</p> <p>...</p>

	<p>(6) TERMINATION.</p> <p>(a) Except as provided in paragraph (b) [discussed below], if the department tentatively decides to terminate a permit, the department shall issue a notice of intent to terminate. A notice of intent to terminate is subject to the same procedures as a draft permit prepared under s. NR 200.11.</p>
<p>40 C.F.R. 122.64(b) provides:</p> <p>... if the entire discharge is permanently terminated by elimination of the flow or by connection to a POTW. . . the Director may terminate the permit by notice to the permittee. Termination by notice shall be effective 30 days after notice is sent, unless the permittee objects within that time. If the permittee objects during that period, the Director shall follow part 124 of this chapter or applicable State procedures for termination. . . .</p>	<p>Wis. Admin. Code NR § 203.135 provides:</p> <p>(6)NR 203.135(6)(b)(b) If the department tentatively decides to terminate a permit due to permanent elimination of a discharge that is due to a facility closure, connection to a publicly owned treatment works or some other cause, the department may terminate the permit by written notice to the permittee. The termination of the permit shall be effective 30 days after the notice is sent, unless the permittee files a written objection of the termination with the department within the 30 day time period. If a notice of objection is filed by the permittee, then the department shall follow the procedures for preparation of a draft permit under s. NR 200.11.</p>
<p>40 C.F.R. 122.64(a) provides:</p> <p>The following are causes for terminating a permit during its term, or for denying a permit renewal application:</p> <p>(1) Noncompliance by the permittee with any condition of the permit;</p>	<p>Wis. Admin. Code NR § 203.136(3) provides:</p> <p>TERMINATION. The department may terminate a permit, or deny an application for reissuance, for any of the following causes:</p>

<p>(2) The permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts, or the permittee's misrepresentation of any relevant facts at any time;</p> <p>(3) (3) A determination that the permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification or termination; or</p> <p>(4) A change in any condition that requires either a temporary or permanent reduction or elimination of any discharge or sludge use or disposal practice controlled by the permit (for example, plant closure or termination of discharge by connection to a POTW).</p>	<p>(a) Substantial noncompliance by the permittee with any condition of a permit.</p> <p>(b) Failure by the permittee in the permit application or during the permit issuance process to fully disclose all relevant facts, or the permittee's misrepresentation of any relevant facts at any time.</p> <p>(c) A determination that the permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification, revocation and reissuance, or termination.</p> <p>(d) A change in any condition that requires either a temporary or permanent reduction or elimination of any discharge or sludge use or disposal practice regulated by the permit.</p>
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Analysis

As shown in the table above, the State has established permit termination procedures comparable to federal program requirements set forth at 40 C.F.R. § 124.5. Specifically, the State created Wis. Admin. Code NR § 203.135(6) that requires WDNR to issue a notice of intent to terminate, unless the reason for terminating the permit is the permanent elimination of a discharge, in which case WDNR may terminate the permit by written notice to the permittee in accordance with Wis. Admin. Code NR § 203.135(6)(b)(b). A notice of intent to terminate a permit is subject to the same procedures as a draft permit prepared under Wis. Admin. Code NR § 200.11, which is addressed in EPA's memorandum for Issue 65.

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 State's regulations and statutes, we conclude that Issue 50 has been resolved.

Appendix 1

Email from Robin Nyffeler, WDNR, to Barbara Wester, U.S. EPA (September 6, 2017) attachment:

EPA has stated that Issues 3 and 50 and Issue 5 are interrelated and therefore Issues 3 and 50 cannot be resolved until statutory changes are made for Issue 5. WDNR believes that Issues 3 and 50 are separate from Issue 5 and can be resolved independently. Issues 3 and 50 are based on the requirements in 40 CFR 124.5(a), (c), and (d). These federal requirements establish permitting procedures and requirements BEFORE a final decision is made regarding a permit modification, termination or revocation and reissuance. Issue 5, however, applies to the requirements in 40 CFR 123.30 which involve appeal rights/judicial review AFTER a permitting agency has made a final decision on a permit modification, termination, revocation and reissuance, or denial. Put another way, Issue 3 (40 CFR 124.5(a)(c) and (d)) covers the right of an interested person to request a permit modification, termination or revocation and reissuance, but it does not involve the right a person to seek "review of the permit" once a final decision is made. The federal requirements for review of the permit are found in 40 CFR 123.30 (Issue 5). For Issues 3 and 50, the WDNR believes the following rules and statutes satisfy the requirements in 40 CFR 124.5(a), (c) and (d):

- **40 CFR 124.5 (a):** Permits MAY be modified, revoked and reissued, or terminated either at the request of any interested person or upon the Director's initiative. However, permits may only be modified, revoked and reissued or terminated for the reasons specified in 40 CFR 122.62, 122.64. All requests shall be in writing and shall contain facts or reasons for supporting the request.
 - **DNR Statute and Rule:** Wis. Stat. s. 283.53(2) and Wis. Adm. Code ss. NR 203.135 and NR 203.136
- **40 CFR 124.5 (b):** If the Director decides the request is not justified, he or she shall send the requester a brief written response giving a reason for the decision. Denials of requests for modification, revocation and reissuance, or termination are not subject to public notice comment or hearings. Denial by regional administrator may be informally appealed to the Environmental Appeals Board by letter. If appeal board takes no action, then petitioner may seek judicial review. As discussed below, this federal requirement does not apply to state programs.
 - **DNR Statute and Rule:** 40 CFR 124.5(b) does involve the appeal of a permit decision – denial of a request for a permit modification, revocation and reissuance or termination of a permit, but this requirement does not apply to state programs pursuant to 40 CFR s. 123.25, and therefore this specific paragraph was not cited in Issue 3 and 50. Although this requirement does not apply to Wisconsin, the WDNR provides the following information to EPA: If WDNR's denied a request for a modification, revocation and reissuance, or termination of a permit, an interested person could appeal that decision pursuant to Wis. Stat. s. 227.42 or seek judicial review under Wis. Stat. s. 227.52. These appeal procedures do NOT require a petition of five or more persons under Wis. Stat. s. 283.63 (NOTE: See Wis. Adm. Code s. NR 203.135(4) and the specific scope of contested case hearings under Wis. Stat. 283.63). Alternatively, if the WDNR granted a request to

modify, terminate, or revoke and reissue a permit (or denied a permit to a permit applicant), then the right to appeal the decision to modify, terminate or revoke and reissue a permit would be subject to the petition requirements in Wis. Stat. 283.63. Note: 40 CFR 122.5(b) does not cover appeal rights of decisions to grant individual requests for modification, termination or revocation and reissuance.

- **40 CFR 124.5 (c)** If the Director decides to modify or revoke and reissue a permit under 40 CFR 122.62, the Director shall prepare a draft permit under 40 CFR s 124.6 incorporating the proposed changes. For decisions to modify a permit, the Director may request additional information in an updated application, or for a revocation and reissuance, the Director shall require submittal of a new application. In a permit modification, only those conditions to be modified shall be reopened when a new draft permit is prepared. All other aspects of the existing permit shall remain in effect for the duration of the unmodified permit. For a revocation and reissuance, the entire permit is reopened just as if the permit had expired and was being reissued. During any revocation and reissuance, the existing permit is in effect and the permittee shall comply with the existing permit conditions until a new permit is reissued.
 - **DNR Statute and Rule:** Wis. Adm. Code NR 203.135(5)

- **40 CFR 124.5(d)** If the Director tentatively decides to terminate a permit under 40 CFR 122.64(a), or a permit under 40 CFR 122.64(b) where the permittee objects, a notice of intent to terminate shall be issued, and the agency shall follow the same procedures it follows as any draft permit prepared under 124.6.
 - **DNR Statute and Rule:** Wis. Adm. Code NR 203. 135 and Wis. Stat. s. 283.53(2)

Regarding statutory changes, EPA specifically mentioned statutory changes may be needed for Wis. Stat. ss. 283.53(2) and 283.63 to address the requirements in 40 CFR 124.5(a), (c) and (d). As stated above, WDNR does not believe that statutory changes are needed to these sections.

WDNR agrees that Wis. Stat. s. 283.53(2) is relevant, but this subsection provides broad authority for the WDNR to consider a request by an interested person to modify, terminate, or revoke and reissue a permit. The "hearings" mentioned in Wis. Stat. s. 283.53 are informational hearings (see Wis. Stat. 283.53(2)(f)). Wis. Stat. 283.53(2) appears consistent with the federal regulations in 40 CFR 124.5(a), (c) and (d) (Issues 3 and 50), so EPA must provide a more detailed explanation regarding concerns with Wis. Stat. s. 283.53(2).

Furthermore, WDNR does not believe that Wis. Stat. s. 283.63 is relevant to the requirements in 40 CFR 124.5(a), (c) and (d) because this state statute outlines appeal rights for specific permit actions, but the federal regulations cited in Issues 3 and 50 do not contain requirements for appeal rights. EPA must provide a more detailed explanation as to how Wis. Stat. s. 283.63 is related to, and conflicts with, the requirements in 40 CFR 124.5(a), (c) and (d).

In conclusion, the WDNR believes it has made all necessary rule changes to resolve Issues 3 and 50 and no statutory changes are needed.