



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 56

FROM: Candice Bauer, Chief 
NPDES Permits Branch Section 2

TO: File

Issue 56 (MS4 Other Government Reliance)

In EPA's July 11, 2011 letter to the Wisconsin Department of Natural Resources (WDNR), Issue 56 stated the following:

Wis. Admin Code NR § 216.07(8) provides for an annual report. The rule does not include the requirements of 40 C.F.R. § 122.34(g)(3)(v)¹ pertaining to notice that the permittee is relying on another government entity to satisfy some of the permit obligations. In its response to this letter, Wisconsin must explain how it will address the deficiency noted in this comment, either through corrective rulemaking or 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 require that small municipal separate storm sewer systems (MS4s) provide an annual report under 40 C.F.R. § 122.34(d)(3). The annual report must include, "[n]otice that you are relying on another governmental entity to satisfy some of your permit obligations (if applicable)." 40 C.F.R. § 122.34(d)(3)(v). Notably, Wisconsin's analogue, Wis. Admin Code NR § 216.07(8), does not require permittees to provide notice of other governmental reliance in the annual report. However, under Wis. Stat. § 283.37, WDNR has broad authority to request information from permittees or applicants:

¹ 40 C.F.R. § 122.34(g) has been changed to 40 C.F.R. § 122.34(d).

(5) The department may require the applicant to submit information in addition to that supplied on the permit application.

(6) Subsection . . . (5) do[es] not apply to an owner or operator of a point source eligible for coverage under a general permit under s. 283.35 and the rules promulgated by the department under that section. The department may require the owner or operator to submit information regarding any discharge.

WDNR exercises its authority to require MS4s to provide notice of reliance on other governmental entities when submitting their annual report forms to the State—WDNR Form 3400-195 (R 12/15). Additionally, Wisconsin's MS4 General Permits No. WI-S050075-2 & WI-S050181-1 provide that permittees must include in their annual reports, "notice that the permittee is relying on another municipality to satisfy any of the permit requirements and a description of the arrangement where a permit requirement is being met in this manner." Thus, WDNR's current practice ensures that small MS4s provide notice of other governmental reliance in stormwater annual reports in keeping with the federal regulations at 40 C.F.R. § 122.34(d)(3)(v).

In addition to its federally consistent practice, Wisconsin has committed to modifying its regulations to add the federal notice of other governmental reliance requirement. Email from Christopher Korleski, EPA, to James Zellmer and Mark Aquino, WDNR (September 29, 2017) (on file with U.S. EPA). Wisconsin's rulemaking will further ensure that MS4 annual reports are consistent with the mandatory federal requirement at 40 C.F.R. § 122.34(d)(3)(v).

In the meantime, WDNR recently added the following note to its regulations at Wis. Admin. Code NR § 216.07(8)(e):

Note: As authorized under s. NR 205.07 (1) (L), the department requests other relevant information in the annual report to determine the MS4 permittee's compliance with a permit issued under this subchapter, such as any reliance on another entity to satisfy some permit requirements, proposed changes to the storm water management program, and an evaluation of the storm water management program.

Email from James Zellmer, WDNR, to Christopher Korleski, et al, EPA, December 8, 2017 (on file with U.S. EPA).

Conclusion

Based on EPA's review of Wisconsin's statutes, regulations, forms, general permits, and rulemaking commitments, EPA concludes that Issue 56 is resolved.

Additional Notes

1. As discussed above, Wisconsin has committed to modifying its rules to require small MS4s to include notice of other governmental reliance in their annual reports consistent with 40 C.F.R. § 122.34(d)(3)(v).
2. Federal regulations do not require MS4s to enter into written agreements with another governmental entity to require notice in the annual report. *Compare* 40 C.F.R. § 122.34(d)(3)(v) *with* 40 C.F.R. § 122.35(a)(3). However, Wisconsin's Form 3400-195, revised in December of 2015, requires a municipality to provide notice in accordance with 40 C.F.R. § 122.34(d)(3)(v) only if its reliance on another entity has been formalized in writing. Additionally, the MS4 General Permits No. WI-S050075-2 & WI-S050181-1 requires a written agreement or contract to be able to rely on another governmental entity to perform one or more of the conditions of these permits. EPA recommends that WDNR formalize, via rulemaking, its practice that the reliance on another entity requires a written agreement.
3. EPA recommends that WDNR revise Form 3400-195:
 - a. to include a reference to Wis. Stat. § 283.37(6), in addition to Wis. Admin. Code Chapter NR 216, so that any permittee understands the basis of WDNR's authority to request information not currently listed at Wis. Admin. Code NR § 216.07(8); and
 - b. to change its title from "Annual Report under MS4 General Permit No. WI-S050075-2" to "MS4 Annual Report" to reflect the full spectrum of permittees utilizing the form.