



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 60

FROM: Candice Bauer, Chief 
NPDES Permits Branch Section 2

TO: File

Issue 60 (Private Fuel Alcohol Production)

In EPA's July 11, 2011 letter to the Wisconsin Department of Natural Resources (WDNR), Issue 60 stated the following:

Wisconsin appears to exempt from NPDES permitting "discharges from private alcohol fuel production systems as exempted in s. 283.61, Stats." Wis. Admin. Code NR § 200.03(3)(f), and Wis. Stat. § 283.61 provide that the exemption applies where the waste product "discharge or disposal is confined to the property of the owner." (Wis. Stat. § 283.61(2).) Does Wisconsin allow the discharge exemption where waters of the United States are located within, or traverse through, privately-owned property? In its response to this letter, Wisconsin must explain how it will address the deficiency noted in this comment, either through statutory amendment, 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).

Wisconsin Attorney General's Written Explanation

Following EPA's 2011 letter to WDNR, through mutual agreement between EPA and WDNR, the issues in EPA's letter were prioritized for correction, with some 13 issues identified for resolution through an updated Wisconsin Attorney General's opinion. That opinion was submitted to EPA in early 2012, and in a December 5, 2012 letter, EPA concluded that issues covered by the Attorney General letter were resolved. In 2014, the views of the Attorney General's letter as to issue 5 of EPA's 2011 letter were not found persuasive by a state court of appeals in *Clean Water Action Council of N.E. Wisconsin v. Wisconsin Dep't of Nat. Res.*, 2014 Wis. App. 61 (Wis. Court of Appeals, District III, April 29, 2014). This is

the only decision of which EPA is aware where a court has formally nullified the State's position as expressed in the Attorney General letter. As a result of this decision, however, EPA requested that WDNR revisit the issues covered by the Attorney General letter. The additional information considered by EPA is included in this memorandum. As noted below, should the State take actions contrary to the positions outlined, EPA will reconsider the resolution of this issue.

Information Provided by WDNR

The statutory exemption set forth in Wis. Stat. § 283.61, is implemented through regulations found at Wis. Admin. Code NR § 200.03(3)(g). In 2012, the Wisconsin Attorney General sent a letter to WDNR clarifying the State's authorities, including those to regulate private alcohol fuel production facilities. In this letter, the Attorney General explained that pursuant to Wis. Stat. § 283.61(2):

[T]he owner of a private alcohol fuel production system is not required to obtain a WPDES permit "to discharge or dispose of any distillate waste product if the waste product is stored in an environmentally sound storage facility and disposed of using an environmentally safe land spreading technique and the discharge or disposal is confined to the property of the owner." An environmentally sound storage facility is a distillate waste facility that does not allow any waste products to "enter or leach into the waters of the state." Wis. Stat. §§ 283.61(1)(b) and 289.44(1)(b). Thus, no permit is required for a distillate waste storage facility that is stored in an environmentally sound manner because there would be no discharge. If discharges from such facilities were to occur, they would violate the prohibition of discharges from point sources without a permit. Wis. Stat. § 283.31(1).

As for discharges and disposal of distillate waste product, the statute requires that it be "disposed of using an environmentally safe land spreading technique and the discharge or disposal is confined to the property of the owner." An "environmentally safe land spreading technique" is not defined in the statutes or Department rules. However, by requiring an "environmentally safe land spreading technique," the owner must discharge the distillate waste onto land, as opposed to discharging into surface water, whether directly or indirectly. Moreover, if the discharge were to enter a surface water, then it would no longer be confined exclusively to the owner's land.

Letter from J.B. Van Hollen, Wisconsin Attorney General, to Matt Moroney, Deputy Secretary, WDNR (January 19, 2012) (on file with U.S. EPA). Following further discussions with EPA to clarify that the exemption is meant only to cover those facilities that have zero discharge to surface waters of the State, WDNR added the following note at Wis. Admin. Code NR § 200.03(3)(g) that explains the exemption does not apply to any discharge that would require a NPDES permit:

Note: This note clarifies that the statutory exemption that is referenced in s. NR 200.03(3)(g) does not apply if there is a discharge from a private alcohol fuel production system that would require NPDES permit coverage under the Clean Water Act and federal regulations. Under

federal regulations and the CWA, NPDES permit coverage is required for any point source discharge of a pollutant that reaches waters of the United States. For the private alcohol fuel production system exemption in Wis. Stat. s. 283.61(2) to apply, the discharge of pollutants or disposal must be "confined to the property of the person" and therefore there would be no discharge of pollutants to waters of the United States that would require NPDES permit coverage under federal law.

Analysis

We find that the State's explanation, as expressed in the 2012 Attorney General letter, and further clarified in the note to its regulation, is a reasonable interpretation of its authorities. Should the EPA or the State determine that there is insufficient authority to regulate the discharges at issue, EPA will revisit the resolution of this issue.

Conclusion

Based on EPA's review of Wisconsin's provisions above, EPA concludes that Issue 60 is resolved.

Additional Notes

To ensure that there is clarity for the potential regulation of private alcohol fuel production facilities, EPA recommends that Wisconsin eliminate the exemption from both its statute and regulations so as to more closely align with the federal program.