



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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

SEP 11 2018

REPLY TO THE ATTENTION OF

WN-15J

MEMORANDUM

**SUBJECT:** Wisconsin Legal Authority Review - Review and Recommendation of Resolution for Issue 26

**FROM:** Candice Bauer, Chief  
NPDES Permits Branch Section 2 

**TO:** File

**Issue 26 (MS4, MOU Compliance)**

In EPA's July 11, 2011 letter to the Wisconsin Department of Natural Resources (WDNR), Issue 26 stated the following:

The State's regulations at Wis. Admin. Code s. NR § 216.022 appear to create an exclusion for those Municipal Separate Storm Sewer System (MS4) dischargers which are in compliance with an Memorandum of Understanding with another agency of the State. Unless EPA formally approves the bifurcation of NPDES permitting responsibilities between WDNR and other State agencies, and the other State agencies prohibit discharges without a permit, WDNR cannot exclude these MS4s from NPDES permitting requirements. As stated in comment [for Issue 23] ..., EPA must review and approve any such arrangements regarding the divisibility of permitting authority to ensure that federal program requirements are met. The State's response to this letter must identify any MS4s that are the subject of such an arrangement, including a description of the authorities and responsibilities covered. It must also include the State's plan, with a schedule and milestones, for correcting the problem with Wis. Admin. Code § NR 216.022.

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

**Analysis**

Wis. Admin. Code NR § 216.022 sets forth an exemption from NPDES permitting requirements for those MS4 dischargers that are in compliance with a Memorandum of Understanding with another state agency.

Wis. Admin. Code NR § 216.022 provides:

The department may determine that a municipal separate storm sewer system is in compliance with permit coverage required under s. 283.33, Stats., and will not be required to hold a permit under s. 283.33, Stats., where the storm water discharge is in compliance with a memorandum of understanding with **another agency of the state that implements rules that are equivalent to this subchapter** and that include storm water control requirements that are at least as stringent as this subchapter requires. [Emphasis added.]

To address Issue 26, the State of Wisconsin amended Wis. Stat. § 30.2022 and created Wis. Stat. § 283.33(4m). 2015 Wisconsin Act 307, 2015 Assembly Bill 755, published March 31, 2016.<sup>1</sup>

Wis. Stat. § 30.2022(1) now provides:

(g) In this section, "transportation activity" means an activity carried out under the direction and supervision of the department of transportation in connection with highway, bridge, or other transportation project design, location, construction, reconstruction, maintenance, or repair.

(m) Transportation activities affecting waters of the state, as defined in s. 281.01 (18), are not subject to the ... permit or approval requirements specified under ... chs. 281 to 285.... However, at the earliest practical time prior to the commencement of these transportation activities, the department of transportation [DOT] shall notify the department of the location, nature, and extent of the proposed work that may affect the waters of the state. **This subsection does not apply beginning on the date on which the department of natural resources issues a general permit under s. 283.33 (4m) (b) 1.**

(p) Transportation activities affecting waters of the state, as defined in s. 281.01 (18), are not subject to the prohibitions or permit or approval requirements specified under ... under chs. 281 and 283, except s. 283.33.... At the earliest practical time prior to the commencement of these transportation activities, the department of transportation [DOT] shall notify the department of the location, nature, and extent of the proposed work that may affect the waters of the state. **This subsection applies beginning on the date on which the department of natural resources issues a general permit under s. 283.33 (4m) (b) 1.** [Emphasis added.]

In keeping with Wis. Stat. § 30.2022(1), WDNR issued Wisconsin Pollutant Discharge Elimination System General Permit WI-S066796-1 pursuant to Wis. Stat. § 283.33(4m)(b)(1) on April 2, 2018. EPA did not object to issuance of this permit.

---

<sup>1</sup> EPA previously approved Wisconsin's statutory changes to Wis. Stat. § 30.2022 and Wis. Stat. § 283.33 in 2016. Letter from Robert A. Kaplan, Acting Regional Administrator, U.S. EPA, to Cathy Stepp, Secretary, WDNR (December 29, 2016) (on file with U.S. EPA).

By amending Wis. Stat. § 30.2022(1) and issuing a general NPDES permit under Wis. Stat. § 283.33(4m)(b)(1), the state legislature has removed stormwater permitting authority from DOT and placed it appropriately with WDNR. Therefore, DOT can no longer implements rules that are the equivalent of Subchapter I of Wis. Admin. Code Chapter NR 216. See bolded language in quoted regulation above. EPA is unaware of any Wisconsin agency that could serve as “another agency” for the purposes of Wis. Admin. Code NR § 216.022, rendering Wis. Admin. Code NR § 216.022 inoperable.

Additionally, WDNR has committed to repealing Wis. Admin. Code NR § 216.022 and has kept EPA apprised of rulemaking progress.

## Conclusion

Based on EPA’s review of Wisconsin’s statutory provisions, general permit, and its rulemaking commitment, EPA concludes that Issue 26 is resolved.