



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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

AUG 29 2018

REPLY TO THE ATTENTION OF

WN-15J

MEMORANDUM

SUBJECT: Wisconsin Legal Authority Review - Review and Recommendation of Resolution for Issue 44

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

TO: File

Issue 44 (Point Source Definition)

In EPA's July 11, 2011 letter to the Wisconsin Department of Natural Resources (WDNR), Issue 44 stated the following:

- (a) Wisconsin's definition of "point source" in Wis. Admin. Code NR § 205.03(27) does not specify landfill leachate collection systems even though such systems are expressly included in the federal definition in 40 C.F.R. § 122.2 [and applicable to state programs, see 40 C.F.R. § 123.21]. During discussions, WDNR explained that the agency has issued WPDES permits for discharges from landfill leachate collection systems. In response to this letter, please provide an explanation of Wisconsin's authority to issue WPDES permits for landfill leachate collection systems and provide the permit numbers for such permits and the names of the permittees.
- (b) Wisconsin's definition of "pollutant" in Wis. Admin. Code NR § 205.03(28) does not specify filter backwash as a pollutant even though filter backwash is expressly enumerated as a pollutant in 40 C.F.R. § 122.2 [and applicable to state programs, see 40 C.F.R. § 123.2]. 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

Below is a comparison of the federal provisions for the definitions of "Point Source" and "Pollutant" and the revisions codified into the Wisconsin Administrative Code.

Table 1: Comparison of Federal and State Regulatory Definitions

Federal Provisions	Wisconsin Provisions
<p>40 C.F.R. § 122.2 for Point Source provides:</p> <p><i>Point source</i> means any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural storm water runoff. (See §122.3).</p>	<p>Wis. Admin. Code NR § 205.03(27) provides:</p> <p>NR 205.03 (27) "Point source" as defined in s. 283.01 (12), Stats., means any discernible, confined and discrete conveyance including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, landfill leachate collection system, concentrated animal feeding operation or vessel or other floating craft from which pollutants may be discharged either into the waters of this state or into a publicly owned treatment works. Point source does not include diffused surface drainage or any ditch or channel which serves only to intermittently drain excess surface water from rain or melting snow and is not used as a means of conveying pollutants into waters of the state. <i>Point source does not include uncontrolled discharges composed entirely of storm runoff when these discharges are uncontaminated by any industrial or commercial activity, unless the particular storm runoff discharge has been identified by the department as a significant contributor of pollution.</i> [Emphasis added, see Notes section below.]</p>
<p>40 C.F.R. § 122.2 for Pollutant provides:</p> <p><i>Pollutant</i> means dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 <i>et seq.</i>)), heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. It does not mean:</p> <p>(a) Sewage from vessels; or</p>	<p>Wis. Admin. Code NR § 205.03(28) provides:</p> <p>(28) "Pollutant" as defined in s. 283.01 (13), Stats., means any dredged spoil, solid waste, incinerator residue, sewage, garbage, refuse, oil, sewage sludge, munitions, chemical wastes, biological materials, radioactive substance, heat, filter backwash, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water.</p>

Federal Provisions	Wisconsin Provisions
(b) Water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil and gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if the State determines that the injection or disposal will not result in the degradation of ground or surface water resources.	

As demonstrated in the table above, Wisconsin’s revised rules are consistent with their federal counterparts, including defining “point source” to encompass landfill leachate collection systems and defining “pollutant” to encompass filter backwash. See Additional Comment below.

Rule Package 5, Public Hearing and Comment

WDNR published a public hearing notice on proposed revisions to Wis. Admin. Code chapters NR 106, 200, 205, 207, 210, 220, 221, 225, 228, 231, 236, 239, 240, 245, 247, 250, 258, 261, 268, 269, 275, 276, 277, 280, 281, 284, 286, 290, 294, 295, and 296 on January 9, 2017 in the Wisconsin Administrative Register. 733A2 Wis. Admin. Reg. CR 17-002 (January 9, 2017). The public comment period was open through March 1, 2017, and public hearings were held in Green Bay, Wisconsin on February 6, 2017 and Madison, Wisconsin on February 7, 2017. Wis. Nat. Res. Bd., Agenda Item No. 2.A.1, July 10, 2017, Correspondence/Memorandum Attachment to Order WT-12-12. At the Green Bay hearing no one appeared in person. *Id.* Two members of the public attended the Madison hearing without providing oral comments. *Id.* Four entities, other than the Wisconsin Legislative Council Rules Clearing House, provided written comments: US EPA, Wisconsin Manufacturers & Commerce, WE Energies, and Midwest Environmental Advocates. Wis. Nat. Res. Bd., Agenda Item No. 2.A.1, July 10, 2017, Response to Comments on Rule Package 5, Attachment to Order WT-12-12. WDNR responded to the written comments in a written response summary, which adequately explained why certain rule changes were made in response to the comments received, and why other comments did not warrant changes. *Id.* After Wisconsin completed rulemaking, the revised regulations were published in the Wisconsin Administrative Register on April 30, 2018. 748B Wis. Admin. Reg. CR 17-002 (April 30, 2018).

Conclusion

Based on EPA’s review of the Wisconsin’s revised regulations at Wis. Admin. Code NR § 205.03, EPA concludes that Issue 44 is resolved.

Additional Comment

The last sentence of Wis. Admin. Code NR § 205.03(27), italicized above in Table 1, appears to exclude certain stormwater discharges from the definition of “point source,” although the State’s rules for Stormwater Discharge permits (Wisconsin Admin. Code NR § 283.33) further clarify the types of stormwater discharges subject to permit coverage. We recommend that the State update the last sentence in Wis. Admin. Code NR § 205.03(27) to better reflect the scope of the State’s stormwater permit coverage. In the interim, a clarifying note could be added to Wis. Admin. Code NR § 205.03(27) to cross reference the rules for stormwater discharge permits.