



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
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CHICAGO, IL 60604-3590


SEP 01 2016

REPLY TO THE ATTENTION OF

WN-16J

MEMORANDUM

SUBJECT: Wisconsin Legal Authority Review - Review and Recommendation of Resolution for Issue 1

FROM: Kevin Pierard, Chief 
NPDES Permits Branch

TO: File

Issue 1 (Sanitary Sewer Overflow and Bypassing)

In EPA's July 11, 2011 letter to the Wisconsin Department of Natural Resources (WDNR), Issue 1 stated the following:

The federal rule at 40 C.F.R. § 122.41(m) pertains to intentional diversions around a portion of a treatment facility. Wisconsin amended its analog in January 2011. The analog now appears at Wis. Admin. Code NR §§ 205.07(1)(v) and (2)(d). The Wisconsin rule appears inconsistent with the federal rule for the following reasons. First, the state regulation includes overflows from collection systems. The federal provision at 40 C.F.R. § 122.41(m)(1) limits bypass to mean the intentional diversion around any *portion of a treatment facility* (emphasis added). Second, the Wisconsin rule allows the State to authorize scheduled bypasses whereas the federal rule provides that a permittee may allow a bypass only if it is for essential maintenance and the bypass does not cause effluent limits to be exceeded. Third, the federal regulation provides that the Director may approve an anticipated bypass if the Director determines that the conditions in 40 C.F.R. §§ 122.41(m)(4)(A) (C) are met. The state regulation does not appear to include these as necessary conditions for authorizing scheduled bypasses. Fourth, some of the reporting requirements under the state regulation appear less rigorous than those in 40 C.F.R. § 122.41(m). The federal regulation requires oral reporting of bypass within 24 hours; the state regulation allows for fax or e-mail reporting. The federal regulation requires written reporting within 5 days of the time the permittee becomes aware of the bypass; the state regulation requires reporting within 5 days of the *cessation* of the bypass. The federal regulation requires reporting of the date and time of bypass; the state regulation requires only that the date be reported. Wisconsin must modify the State rule to be consistent with federal requirements, or document the specific basis of

the State's authority to implement the provisions above consistent with federal program requirements and in a manner that addresses the concerns raised above.

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

Analysis of State Provision Changes

EPA reviewed numerous iterative draft amendments to Wis. Admin. Code NR §§ 205, 207, 208, 110, and 210. These code revisions prohibit Sewage System Overflows (SSOs) and eliminate the authorization of diversions around a full secondary treatment process. The revisions also require Capacity, Maintenance, Operations, and Management (CMOM) plans for all major Publicly Owned Treatment Works (POTW) and collection systems. The rule revisions mainly modify the Wisconsin code provisions derived from 40 C.F.R. § 122.41(m) and related federal regulations. The State's regulatory provisions encompassed in EPA's review included the following:

1. Wis. Admin. Code NR § 205 (2015) – General Provisions:
 - a. More details on SSO and overflow reporting; and
 - b. Further clarification on bypassing and scheduled bypassing.
2. Wis. Admin. Code NR § 207 (2006) – Antidegradation Provisions – Only nominal changes.
3. Wis. Admin. Code NR § 208 (2013) – Compliance Maintenance and Annual Reports.
4. Wis. Admin. Code NR § 110 (2014) – Sewerage Systems:
 - a. Standards added to allow for WDNR to require the permittee to develop and implement a System Evaluation of Capacity and Assurance Plan (SECAP) when needed;
 - b. Design requirements and safety features required for any permanent constructed SSO structures; and
 - c. Sewer ban language was removed from rules; will be incorporated into actual enforcement actions.
5. Wis. Admin. Code NR § 210 (2013) – Sewage Treatment Works:
 - a. Specific authority for the issuance of General NPDES permits to satellite facilities;
 - b. Prohibition of SSOs and treatment works overflows; adding additional response and reporting requirements; case by case review of conditions which may allow for some enforcement discretion;
 - c. Provisions added for building backups (e.g., basement backups) which are in conjunction with permittee-owned surcharge in the main sewer; Required in annual CMAR report; State may take action to reduce I/I;
 - d. Requires all collection system authorities to develop a compliance, maintenance, operation and management (CMOM) plan for their sewer collection systems;
 - e. Diversions around full secondary (biological) treatment may be considered for extreme weather conditions, if requested in permit application, there are no feasible alternatives to the diversion, and the terms for this diversion have been included in the new permit; and
 - f. Conditions which may trigger the need for the WNDNR to require a SECAP.

Public Hearing and Comment

The WDNR published a public hearing notice on proposed revisions to Wis. Admin. Code §§ NR 110, 205, 208, and 210 on June 30, 2012 in the Wisconsin Administrative Register. 678 Wis. Admin. Register 29 (June 30, 2012). The public comment period was open from July 1 through July 31, 2012 and public hearings were held in Oshkosh, Wis. (July 16, 2012); Eau Claire, Wis. (July 17, 2012); and Milwaukee, Wis. (July 18, 2012). Nat. Resources Bd. Agenda Item (attachment Response Summary to Order WT-23-11), Item No. 3.A.1 at 1 (Wis. Dept. Nat. Resources Nov. 2, 2012). At the hearings, four attendees provided verbal comments. *Id.* In addition, seven entities provided written comments: City of Brookfield, City of Superior, Milwaukee Metropolitan Sewerage District, Milwaukee Riverkeeper, Municipal Environmental Group, Village of Elm Grove, Village of Thiensville, and EPA Region 5. *Id.* WDNR responded to the verbal and written comments in a written response summary, which adequately explained the reasons why certain rule changes were made in response to comments received and why other comments did not warrant changes. *Id.*

Conclusion

Based on EPA review, these rules now conform to federal requirements contained within 40 C.F.R. § 122.41(m) and related federal regulations. EPA therefore concludes that Issue 1 has been resolved as previously communicated in EPA's December 22, 2014 letter to WDNR. Letter from Susan Hedman, Regional Administrator, U.S. EPA, to Cathy Stepp, Secretary, WDNR (Dec. 22, 2014) (on file with U.S. EPA).