




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

JAN 18 2017

REPLY TO THE ATTENTION OF:
WN-15J

MEMORANDUM

SUBJECT: Wisconsin Legal Authority Review - Review and Recommendation of Resolution for Issue 48

FROM: Kevin Pierard, Chief 
NPDES Permits Branch

TO: File

Issue 48 (Permit Termination, for Violations)

In EPA's July 11, 2011 letter to the Wisconsin Department of Natural Resources (WDNR), Issue 48 stated the following:

Wisconsin's regulations do not include permit "termination" as a consequence of violating the permit, as provided by the federal regulations at 40 C.F.R. § 122.41(a). Wisconsin should explain whether and how its rules are consistent with this federal requirement, even if the specific terminology used in the State's rule rules differ. If corrective rulemaking is required to address this deficiency, the State must explain in its response to this letter what timetable the State will follow to address this potential deficiency.

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 State and Federal Provisions

To address EPA's concerns with this issue and also Issue 50, the State added the authority to terminate permits to its statutory and regulatory framework. Statutory revisions were made by amending Wis. Stat. § 283 (Pollution Discharge Elimination System). 2011 Wis. Laws 167, §100, and 2015 Wis. Laws 307, §18. Regulatory revisions were published a public hearing notice on proposed revisions to Wis. Admin. Code chapters NR 200, 201, 203, and 205 on March 31, 2014 in the Wisconsin Administrative Register. These statutory and regulatory revisions included changes which were subsequently codified into the Wisconsin Statutes and the Wisconsin Administrative Code, resulting in the corrected provisions outlined below.

Federal Provisions	Wisconsin Provisions
<p>33 U.S.C. 1342(b) [State Permit Programs] provides in pertinent part:</p> <p>The Administrator shall approve each such submitted [State] program unless he determines that adequate authority does not exist:</p> <p>(1) To issue permits which –</p> <p>(C) can be terminated or modified for cause including, but not limited to, the following:</p> <p>(i) violation of any condition of the permit;</p> <p>(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;</p> <p>(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge. . . .</p>	<p>Wis. Stat. § 283.53(2)(a) provides:</p> <p>Any permit issued by the department under s. <u>283.31</u> or <u>283.33</u> may, after an opportunity for hearing, be modified, terminated, or revoked and reissued, in whole or in part, for cause, including but not limited to:</p> <ol style="list-style-type: none"> 1. Violation of any terms or conditions of the permit; 2. Obtaining a permit by misrepresentation or failure to disclose fully all relevant facts; 3. A change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge; <p>(b) Whenever, on the basis of any information available to it, the department finds that there is cause for modifying, terminating, or revoking and reissuing a permit, in whole or in part, the department shall notify the permittee by certified mail or personal service of its intention to modify, terminate, or revoke and reissue the permit, in whole or in part, except that if the department proposes to modify a permit to authorize a substantial change to a nutrient management plan of a concentrated animal feeding operation, the department may notify the permittee by electronic mail. Such notice shall specify the information upon which the department relies, and if the department intends to modify the permit, shall explain the modifications which the department intends to make in the permit.</p> <p>(c) The department shall also notify the U.S. environmental protection agency, the U.S. army corps of engineers, any affected state, any interested agency of this state, and any interested members of the public of its intention to modify, terminate, or revoke and reissue a permit. Such notice shall incorporate the terms of the notice sent to the permittee and shall be provided to members of the public in accordance with s. <u>283.39 (1)</u>, except that if the department</p>

	<p>proposes to modify a permit to authorize a substantial change to a nutrient management plan of a concentrated animal feeding operation, the department is not required to provide notice of the substantial change under s. <u>283.39 (1) (a)</u>. The department shall provide a 14-day period, from the date on which notice is provided under s. <u>283.39 (1) (d)</u>, for written comments on a proposed modification to authorize a substantial change to a nutrient management plan.</p> <p>(d) The department may hold a public hearing on a proposed permit modification, termination, or revocation and reissuance if the department determines that there is a significant public interest in holding such a hearing or upon the petition of 5 or more persons. The petition shall indicate the interest of the petitioners and the reasons why a hearing is warranted. A petition for a hearing on a proposed permit modification to authorize a substantial change to a nutrient management plan of a concentrated animal feeding operation shall be filed within 14 days of the date notice is provided under s. <u>283.39 (1) (d)</u>.</p> <p>(e) Public notice of any hearing held under this section shall be provided in accordance with the requirements of pars. (b) and (c).</p> <p>(f) Hearings held under this section are not contested cases under s. <u>227.01 (3)</u>.</p>
<p>40 C.F.R. 122.64(a) provides:</p> <p>The following are causes for terminating a permit during its term, or for denying a permit renewal application:</p> <ol style="list-style-type: none"> (1) Noncompliance by the permittee with any condition of the permit; (2) The permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts, or the permittee's misrepresentation of any relevant facts at any time; 	<p>Wis. Admin. Code NR § 203.136(3) provides:</p> <p>TERMINATION. The department may terminate a permit, or deny an application for reissuance, for any of the following causes:</p> <ol style="list-style-type: none"> (a) Substantial noncompliance by the permittee with any condition of a permit. (b) Failure by the permittee in the permit application or during the permit issuance process to fully

<p>(3) A determination that the permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification or termination; or</p> <p>(4) A change in any condition that requires either a temporary or permanent reduction or elimination of any discharge or sludge use or disposal practice controlled by the permit (for example, plant closure or termination of discharge by connection to a POTW).</p>	<p>disclose all relevant facts, or the permittee's misrepresentation of any relevant facts at any time.</p> <p>(c) A determination that the permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification, revocation and reissuance, or termination.</p> <p>(d) A change in any condition that requires either a temporary or permanent reduction or elimination of any discharge or sludge use or disposal practice regulated by the permit.</p>
<p>40 C.F.R. § 122.41(a) provides:</p> <p>(Applicable to State programs, see § 123.25). The following conditions apply to all NPDES permits. Additional conditions applicable to NPDES permits are in § 122.42. All conditions applicable to NPDES permits shall be incorporated into the permits either expressly or by reference. If incorporated by reference, a specific citation to these regulations (or the corresponding approved State regulations) must be given in the permit.</p> <p>(a) Duty to comply. The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Clean Water Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or denial of a permit renewal application. . . .</p>	<p>Wis. Admin. Code NR § 203.135 provides:</p> <p>(1) GENERAL. The department may modify, revoke and reissue, or terminate a permit upon request of any interested person, including the permittee, or upon the department's initiative. Permits may only be modified, revoked and reissued, or terminated for one of the causes listed in s. NR 203.136. If cause exists, the department may request an updated application if necessary.</p> <p>Wis. Admin. Code NR § 203.136 provides, in part, for "Causes for a modification, revocation and reissuance, or termination":</p> <p>(3) TERMINATION. The department may terminate a permit, or deny an application for reissuance, for any of the following causes:</p>

	(a) Substantial noncompliance by the permittee with any condition of a permit. . . .
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We note that the State’s inclusion of the qualifier “substantial” in relation to noncompliance differs from the federal regulatory provision. In response to a request for clarification, WDNR provided the following rationale:

The term “substantial” reflects the reality that the department would exercise discretion regarding when a permit violation would require permit termination or denial of a permit. The department would ordinarily not terminate a permit for a one time violation. If a permittee was late on a monthly discharge monitoring report or an interim compliance schedule, the Department would not terminate the permit for the one time noncompliance. The federal regulations do not mandate termination or refusal to reissue for a one time violation. It is discretionary and is a cause for termination. Email from Robin Nyffeler to Quintin White, September 19, 2016, enclosing “Questions/Comments for WDNR Regarding Selected WI LAR Issues 09.06.2016.”

On the basis of the above, EPA finds that the State’s resolution of this issue is adequate.

Rule Package 6, Public Notice, Hearing, and Comment

The WDNR published a public hearing notice on proposed revisions to Wis. Admin. Code chapters NR 200, 201, 203, and 205 on March 31, 2014 in the Wisconsin Administrative Register. 699 Wis. Admin. Reg. 37 (March 31, 2014). The public comment period was open from April 1 through May 12, 2014, and a public hearing was held in Madison, Wisconsin on May 1, 2014. Wis. Nat. Res. Bd., Agenda Item No. 3.A.1 at 2, Jan. 8, 2015, Correspondence/Memorandum Attachment to Order WT-13-12. At the May 1, 2014 public hearing, no one appeared in person. *Id.* Two entities, other than the Wisconsin Legislative Council Rules Clearing House, provided written comments: Stafford Rosenbaum Attorneys and Wisconsin Electric Power Company. Wis. Nat. Res. Bd., Agenda Item No. 3.A.1 at 2, Jan. 8, 2015, Response to Comments on Rule Package 6, Attachment to Order WT-13-12. WDNR responded to the written comments in a written response summary, which adequately explained the reasons for accepting all changes suggested by the written comments. *Id.*

Conclusion

Based on EPA’s review of the revised Wisconsin’s regulations, EPA concludes that Issue 48 is resolved.