



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:

WN-15J

JAN 18 2017

MEMORANDUM

SUBJECT: Wisconsin Legal Authority Review - Review and Recommendation of Resolution for Issue 49

FROM: Kevin Pierard, Chief
NPDES Permits Branch

TO: File

Issue 49 (Permit Change/Notifications)

In EPA's July 11, 2011 letter to the Wisconsin Department of Natural Resources (WDNR), Issue 49 stated the following:

The federal regulations at 40 C.F.R. § 122.41(I)(1)(i) require that a permitted facility must provide notice where, because of an alteration or addition to a permitted facility, the facility may meet one of the criteria for defining a new source (40 C.F.R. § 122.29(b)). Wisconsin should explain how its provision at Wis. Admin. Code NR § 205.07(1)(q)(1) is equivalent to this federal requirement. If corrective rulemaking is required to address this potential deficiency, the State must explain in its response to this letter what timetable the State will follow.

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 Revised State and Federal Provisions

As discussed in the Issue Resolution Review Memorandum for Issue 27, Wisconsin modified its definition of "new source" in a statutory change adopted in 2015. Wis. Stat. 283.01(8)(a)-(b). Issue 49 addresses the requirements surrounding when a facility must provide notification to the permitting agency because of alterations or additions the facility may meet the definition of "new source." To address EPA's concern, Wisconsin modified Wis. Admin. Code NR § 205.07 to add the notification requirement for "new sources," as required by the federal analogue. The federal and Wisconsin regulations that determine when a permittee must notify the permitting authority of changes or additions which potentially trigger new source requirements are, respectively, found at 40 C.F.R. § 122.41(I)(1)(i) and Wis. Admin. Code NR § 205.07(1)(q)(1). These rules are compared in Table 1 below.

Table 1: Comparison of Federal and Wisconsin Regulations Governing “New Source” Notifications

40 C.F.R. § 122.41(l)(1)(i)	Wis. Admin. Code NR § 205.07(1)(q)(1)
<p>(l) Reporting requirements – (1) Planned changes. The permittee shall give notice to the Director as soon as possible of any planned physical alterations or additions to the permitted facility. Notice is required only when:</p> <p>(i) The alteration or addition to a permitted facility may meet one of the criteria for determining whether a facility is a new source in § 122.29(b); or . . .</p>	<p>(q) Reporting requirements. The permittee shall give notice to the department as soon as possible of any planned physical alterations or additions to the permitted facility. Notice is required only when:</p> <ol style="list-style-type: none"> 1. The alteration or addition to a permitted facility may meet one of the criteria for determining whether a facility is a new source. 2. The alteration or addition could significantly change the nature or increase the quantity of pollutants discharged. This notification requirement applies to pollutants which are not subject to effluent limitations in the existing permit.
40 C.F.R § 122.29(b)	Equivalent Wisconsin Provision
<p>(b) Criteria for new source determination.</p> <p>(1) Except as otherwise provided in an applicable new source performance standard, a source is a “new source” if it meets the definition of “new source” in § 122.2, and</p> <p>(i) It is constructed at a site at which no other source is located; or</p> <p>(ii) It totally replaces the process or production equipment that causes the discharge of pollutants at an existing source; or</p> <p>(iii) Its processes are substantially independent of an existing source at the same site. In determining whether these processes are substantially independent, the Director shall consider such factors as the extent to which the new facility is integrated with the existing plant; and the extent to which the new facility is engaged in the same general type of activity as the existing source.</p> <p>(2) A source meeting the requirements of paragraphs (b)(1) (i), (ii), or (iii) of this section is a new source only if a new source performance standard is independently applicable to it. If there is no such independently applicable standard, the source is a new discharger. See § 122.2.</p> <p>(3) Construction on a site at which an existing source is located results in a modification subject to § 122.62 rather than a new source (or a new discharger) if the</p>	<p>(q) Reporting requirements. The permittee shall give notice to the department as soon as possible of any planned physical alterations or additions to the permitted facility. Notice is required only when:</p> <ol style="list-style-type: none"> 1. The alteration or addition to a permitted facility may meet one of the criteria for determining whether a facility is a new source.

construction does not create a new building, structure, facility, or installation meeting the criteria of paragraph (b)(1) (ii) or (iii) of this section but otherwise alters, replaces, or adds to existing process or production equipment.	
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As can be seen in Table 1, the federal rules and Wisconsin's rules both require a facility with alterations that results in meeting the definition of a "new source" to notify the permitting authority. In Wisconsin, the definition of "new source" is found at Wis. Stat. 283.01(8)(a)-(b), which is defined as "any point source the construction of which commenced after the effective date of a standard of performance under 33 USC 1316 that is applicable to the point source," or where the construction of a point source commenced after the publication of a federal standard of performance which was published within 120 days of the publication of the proposal of such standard. Wis. Stat. 283.01(8)(a)-(b).

The federal regulations at 40 C.F.R. 122.29(b)(i)-(iii) provide additional qualifications that narrow the scope of which facilities, deemed to fall under the federal definition of "new source," would actually fall within the scope of a new source determination. Wisconsin has not included these narrowing provisions in determining the scope of the universe of facilities that must give notice as a "new source."

In responding to clarification sought by EPA regarding the scope of the corrections made, the State provided the following explanation:

The Department's rule change, s. NR 205.07(1)(q)(1), requires that a permittee must notify the department of any changes or alterations to a facility that may meet one of the criteria for a new source. This requirement simply means any of the new source criteria in 40 CFR 122.2. As stated in the response to issue 27 above, a new source is a source that is subject to applicable the federal new source performance standards established pursuant to 33 USC 1316. Email from Robin Nyffeler to Quintin White, September 19, 2016, enclosing "Questions/Comments for WDNR Regarding Selected WI LAR Issues 09.06.2016."

EPA believes that the state's rule is broader than the federal requirement and does not limit such notice. Thus, the State has adequately resolved the notification issue.

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 Wisconsin's corrections to its regulations, EPA concludes that Issue 49 is resolved.