




UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
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 51

FROM: Kevin Pierard, Chief 
NPDES Permits Branch

TO: File

Issue 51 (Public Hearing Procedures)

In EPA's July 11, 2011 letter to the Wisconsin Department of Natural Resources (WDNR), Issue 51 stated the following:

Federal regulations at 40 C.F.R. § 124.11 provide that "any interested person. . . may request a public hearing, if no hearing has already been scheduled," as long as the request is in writing and states the nature of the issues proposed to be raised in the hearing. The regulation at 40 C.F.R. § 124.12 provides that there is significant public interest in the draft permit. The Wisconsin rules governing public hearings appear to be set out in Wis. Admin. Code NR § 203.10(5) and Wis. Stat. 283.49 (public hearing), and limit hearing requests to those made by groups of five or more petitioners. Wisconsin must explain how its provisions for allowing requests for hearing are consistent with federal requirements. 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 Federal and State Provisions

The federal regulation at issue, 40 C.F.R. § 124.11, provides:

(Applicable to State programs, see 40 C.F.R. §§ 123.25 (NPDES)). . . During the public comment period provided under § 124.10, any interested person may submit written comments on the draft permit...and may request a public hearing, if no hearing has already been scheduled. A

request for a public hearing shall be in writing and shall state the nature of the issue proposed to be raised in the hearing.

In addition, 40 C.F.R. § 124.12(a), divides mandatory and discretionary public hearings:

(Applicable to State programs, see 40 C.F.R. §§ 123.25 (NPDES). . . (1) The Director shall hold a public hearing whenever he or she finds, on the basis of requests, a significant degree of public interest in the draft permit(s);

(2) The Director may also hold a public hearing at his or her discretion, whenever, for instance, such a hearing might clarify one or more issues involved in the permit decision. . .

Wis. Stat. § 283.49(1) (public hearing), provides:

(a) The department shall provide an opportunity for the applicant, any affected state, the U.S. environmental protection agency, any interested state or federal agency, person or group of persons to request a public hearing with respect to a permit application. Such request for a public hearing shall be filed with the department within 30 days after the public notice of the complete permit application is provided and shall indicate the interest of the party filing the request and the reasons why a hearing is warranted.

(b) The department shall hold a public hearing on a permit application or a group of applications if requested by the U.S. environmental protection agency, any affected state, on the petition of 5 or more persons or if the department deems that there is a significant public interest in holding such a hearing.

(c) The department shall promulgate by rule procedures for the conduct of public hearings held under this section. Hearings held under this section are not contested cases under s. 227.01 (3).

The rule amendment at Wis. Admin. Code NR § 203.05(2) includes the following provision relating to scheduling a mandatory hearing for a proposed permit or permit application:

The department shall schedule a public hearing on any permit if any of the following occur:

- (a) If requested by the US EPA.
- (b) If requested by any state affected by the discharge.
- (c) Upon receipt of a petition signed by 5 or more persons.
- (d) If the department determines that there is significant public interest in the permit application.

Additionally, Wis. Admin. Code NR § 203.05(1) includes the following provision relating to scheduling a discretionary hearing for a proposed permit or permit application:

The department may schedule a public hearing on a proposed permit or permit application if requested by:

- (a) The applicant.
- (b) A state agency.
- (c) A federal agency other than the US EPA.
- (e) Fewer than 5 persons.

EPA's regulations provide that while any interested person may request a hearing, a hearing "shall" be held where the Director finds that there is "a significant degree of public interest in the draft permit(s)." The Director has additional discretion under the federal rule that allows him or her to "hold a public hearing at his or her discretion, whenever, for instance, such a hearing might clarify one or more issues involved in the permit decision."

Wis. Stat. § 283.49(1)(b) and the regulation at Wis. Admin. Code NR § 203.05(2)(c) appear to interpret the federal regulation to require a public hearing when there is a petition signed by 5 or more persons. Wis. Stat. § 283.49(1)(a) and the regulation at Wis. Admin. Code NR § 203.05(1)(d) appear to interpret the federal regulation to provide discretion to hold a public hearing when there are requests from "fewer than 5 persons."

The federal regulation for mandatory public hearings does not define the basis of determining that there is "a significant degree of public interest in the draft permit(s)." Thus we find that the State's regulation is not inconsistent with the federal regulation.

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 above review of Wisconsin's corrections to its regulations, EPA concludes that Issue 51 is resolved.

Additional Notes

While we decline to find that the state's regulation in this instance is inconsistent with the federal regulation, we strongly recommend that the State remove the "5 or more persons" threshold, which has no basis in the federal program.