



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

DEC 21 2017

REPLY TO THE ATTENTION OF:

WN-15J

MEMORANDUM

SUBJECT: Wisconsin Legal Authority Review - Review and Recommendation of Resolution for Issue 55

FROM: Candice Bauer, Chief
NPDES Permits Branch Section 2

TO: File

Issue 55 (Storm Water – Illicit Discharge Definition)

In EPA's July 11, 2011, letter to the Wisconsin Department of Natural Resources (WDNR) Issue 55 stated the following:

Under 40 C.F.R. § 122.26(b)(2), illicit dischargers to an MS4 are defined as "any discharge to a municipal separate storm sewer that is not composed entirely of storm water except discharges pursuant to a NPDES permit. . . and discharges resulting from fire fighting activities." The State definition of illicit discharges appears to exempt many more classes of activities from the definition. As a result, the requirement that MS4s identify illicit discharges pursuant to Wis. Admin. Code NR § 216.07(3), appears less comprehensive, and therefore less stringent, than the federal requirement found at 40 C.F.R. § 122.34(b)(iii), which requires MS4s to address all illicit discharges ". . . which are [] found to be a significant contributor of pollutants to the [MS4]." 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

40 C.F.R. § 122.26(b)(2) "Illicit Discharge"

Illicit discharge means any discharge to a municipal separate storm sewer that is not composed entirely of storm water except discharges pursuant to a NPDES permit (other than the NPDES

permit for discharges from the municipal separate storm sewer) and discharges resulting from fire fighting activities.

In the letter from Susan Sylvester, WDNR, to Kevin Pierard, U.S. EPA (June 23, 2016) (on file with EPA), WDNR asserted that while the State lacks a regulatory provision equivalent to 40 C.F.R. § 122.26(b)(2), the State interprets existing Wisconsin regulations in a manner consistent with the federal definition. Specifically, WDNR explained that it has the authority to require a discharger to obtain a NPDES permit, including for those discharges exempted under Wis. Admin. Code NR § 216.002(11), pursuant to the authority in Wis. Admin. Code NR § 216.07(3)(b) and Wis. Stat. § 283.33(1)(d) These provisions are set forth below.

Wis. Admin. Code NR § 216.002(11) "Definitions"

"Illicit discharge" means any discharge to a municipal separate storm sewer system that is not composed entirely of storm water except discharges authorized by a WPDES permit or other discharge not requiring a WPDES permit such as landscape irrigation, individual residential car washing, fire fighting, diverted stream flows, uncontaminated groundwater infiltration, uncontaminated pumped groundwater, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation water, lawn watering, flows from riparian habitats and wetlands, and similar discharges.

Wis. Stat. § 283.33(1)(d) "Storm water discharge permits"

Requirement. An owner or operator shall obtain a permit under this section for any of the following:

...

(d) A discharge of storm water from a facility or activity, other than a facility or activity under pars. (a) to (c), if the department determines that the discharge either contributes to a violation of a water quality standard or is a significant contributor of pollutants to the waters of the state.

Wis. Admin. Code NR § 216.07(3)(b) "Permit Requirements"

Illicit discharge detection and elimination. A program to detect and remove illicit discharges and improper disposal of wastes into the municipal separate storm sewer system, or require the discharger to obtain a separate WPDES permit. The program shall include all of the following:

...

(b) A strategy to address all types of illicit discharges. In addition, non-storm water discharges or flows such as landscape irrigation, diverted stream flows, uncontaminated groundwater infiltration, uncontaminated pumped groundwater, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation water, lawn watering, individual residential car washing, flows from riparian habitats and wetlands, fire fighting and discharges authorized under a WPDES permit shall be included in the strategy if identified by the municipality as significant sources of pollutants to waters of the state.

Thus, a discharger, even if exempted in Wis. Admin. Code NR § 216.002(11), can be required to obtain permit coverage where the discharge is a "significant source of pollutants to the waters of the state."

The State further agreed proposed to clarify this issue by adding a note to the regulation at Wis. Admin. Code NR § 216.002(11):

Note: A discharge listed in the definition above may be regulated on a case-by-case basis if the MS4 permittee, municipalities, or the department identifies it as a significant source of a pollutant to waters of the state pursuant to s. NR 216.07(3)(b).

As recommended in an email from Candice Bauer, EPA, to Jim Bertolacini, et al, WDNR (September 6, 2017) (on file with U.S. EPA).

Analysis

We find that the State's explanation of its regulations is a reasonable interpretation of its authorities for the purpose of addressing the issue identified by EPA in our 2011 letter. Should EPA or the State determine that there is insufficient authority to regulate the discharges at issue, EPA will revisit the resolution of this issue.

Conclusion

Based on the review of Wisconsin's provisions above, EPA concludes that Issue 55 is resolved.

Additional Note

To ensure that there is clarity for the potential regulations of sources covered by Wis. Admin. Code NR § 216.002(11), EPA recommends that Wisconsin revise its regulation defining illicit discharge, to remove the exemptions, aside from firefighting activities, so as to more closely align with the federal program.