



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 57

**FROM:** Candice Bauer, Chief   
NPDES Permits Branch Section 2

**TO:** File

### Issue 57 (MS4 Management Program Changes)

In EPA's July 11, 2011 letter to the Wisconsin Department of Natural Resources (WDNR), Issue 57 stated the following:

The annual report required by Wis. Admin. Code NR § 216.07 lacks provisions equivalent to 40 C.F.R. § 122.42(c)(2) (proposed changes to the storm water management programs that are established as permit condition). 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

The federal regulations require operators of large or medium municipal separate storm sewer systems (MS4s) to submit an annual report under 40 C.F.R. § 122.42(c). The annual report must include, "[p]roposed changes to the storm water management programs that are established as permit condition. . . ." 40 C.F.R. § 122.42(c)(2). Notably, Wisconsin's analogue, Wis. Admin. Code NR § 216.07, does not require the inclusion of such proposed changes in the operator's annual report. However, under Wis. Stat. § 283.37, WDNR has broad authority to request information from permittees or applicants:

(5) The department may require the applicant to submit information in addition to that supplied on the permit application.

(6) Subsection . . . (5) do[es] not apply to an owner or operator of a point source eligible for coverage under a general permit under s. 283.35 and the rules promulgated by the department under that section. The department may require the owner or operator to submit information regarding any discharge.

WDNR exercises its authority to require that permittees describe any proposed changes to their storm water management program. Specifically, WDNR requires permittees to provide the required management program information when submitting the annual report form to the State—WDNR Form 3400-195 (R 12/15). Thus, WDNR's current practice ensures that permittees' annual reports are in keeping with the federal regulation at 40 C.F.R. § 122.42(c)(2).

In addition to its federally consistent practice, Wisconsin has committed to modifying its regulations to require permittees to describe proposed changes to their storm water management program in their annual report. Email from Christopher Korleski, EPA, to James Zellmer and Mark Aquino, WDNR (September 29, 2017) (on file with U.S. EPA). Wisconsin's rulemaking will further ensure that permittees' annual reports are consistent with the mandatory federal requirement at 40 C.F.R. § 122.42(c)(2).

In the meantime, WDNR recently added the following note to its regulations at Wis. Admin. Code NR § 216.07(8)(e):

Note: As authorized under s. NR 205.07 (1) (L), the department requests other relevant information in the annual report to determine the MS4 permittee's compliance with a permit issued under this subchapter, such as any reliance on another entity to satisfy some permit requirements, proposed changes to the storm water management program, and an evaluation of the storm water management program.

Email from James Zellmer, WDNR, to Christopher Korleski, et al, EPA, December 8, 2017 (on file with U.S. EPA).

## Conclusion

Based on EPA's review of Wisconsin's statutes, regulations, forms, and rulemaking commitments, EPA concludes that Issue 57 is resolved.

## Additional Notes

1. As discussed above, Wisconsin has committed to modifying its rules to require permittees to include proposed changes to their storm water management program in their annual reports consistent with 40 C.F.R. § 122.42(c)(2).

2. EPA recommends that WDNR revise Form 3400-195:
  - a. to include a reference to Wis. Stat. § 283.37(6), in addition to Wis. Admin. Chapter NR 216, so that any permittee understands the basis of WDNR's authority to request information not currently listed at Wis. Admin. Code NR § 216.07(8); and
  - b. to change its title from "Annual Report under MS4 General Permit No. WI-S050075-2" to "MS4 Annual Report" to reflect the full spectrum of permittees utilizing the form.