



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 58

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

**TO:** File

### Issue 58 (Waters of the State Definition)

In EPA's July 11, 2011 letter to the Wisconsin Department of Natural Resources (WDNR), Issue 58 stated the following:

Wisconsin's definition of "waters of the state" in Wis. Admin. Code NR §[ ]205.03(44) does not refer to mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, or playa lakes. These categories are included in the definition of "waters of the United States" as set out at 40 C.F.R. § 122.2, which includes these categories where "the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters." Are the more specific categories in the federal definition included under the umbrella language of Wis. Admin. Code NR § 205.03(44) which states "and other surface or groundwater, natural or artificial, public or private within the state or under its jurisdiction. . ." In its response to this letter, Wisconsin must explain how it will address the potential deficiency noted in this comment, either through corrective rulemaking or in a written explanation from the State's Attorney General citing existing, specific authority.

Letter from Susan Hedman, Regional Administrator, U.S. EPA, to Cathy Stepp, Secretary, WDNR (July 11, 2011) (on file with U.S. EPA).

### Wisconsin Attorney General's Written Explanation

Following EPA's 2011 letter to WDNR, through mutual agreement between EPA and WDNR, the issues in EPA's letter were prioritized for correction, with some 13 issues identified for resolution through an updated Wisconsin Attorney General's opinion. A letter from the Wisconsin Attorney General to WDNR was submitted to EPA in early 2012, and in a December 5, 2012 letter, EPA concluded that issues covered by this letter were resolved. In 2014, the views of the Attorney General's letter as to issue 5 of EPA's 2011 letter were not found persuasive by a state court of appeals in *Clean Water Action Council of*

*N.E. Wisconsin v. Wisconsin Dep't of Nat. Res.*, 2014 Wis. App. 61 (Wis. Court of Appeals, District III, April 29, 2014). This is the only decision of which EPA is aware where a court has formally nullified the State's position as expressed in the Attorney General letter. As a result of this decision, however, EPA requested that WDNR revisit the issues covered by the Attorney General letter. The additional information considered by EPA is included in this memorandum. As noted below, should the State take actions contrary to the positions outlined, EPA will reconsider the resolution of this issue.

## Information Provided by WDNR

Attorney General Van Hollen's January 19, 2012 letter to WDNR addressed Issue 58 as follows:

[Question: ]Is Wisconsin's definition of "waters of the state" broad enough to include mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, and playa lakes?

Response: In my view the answer is yes. Wisconsin's broad definition of "waters of the state" is "those portions of Lake Michigan and Lake Superior within the boundaries of Wisconsin, all lakes, bays, rivers, streams, springs, ponds, wells, impounding reservoirs, marshes, water courses, drainage systems and other surface water or groundwater, natural or artificial, public or private within the state or under its jurisdiction, except those waters which are entirely confined and retained completely upon the property of a person." Wis. Stat. § 283.01(20); See also Wis. Admin. Code § NR 205.03(44).

The definition includes wetlands and other water places where water is part of the groundwater or near or at the surface. Wisconsin statutes define "wetland" as "an area where water is at, near, or above the land surface long enough to be capable of supporting aquatic or hydrophytic vegetation and which has soils indicative of wet conditions." Wis. Stat. §§ 23.32(1) and 281.01(21). Under Wis. Stat. § 281.15(1), the Department is required to establish water quality standards for all waters of the state. As a result, the Department promulgated Wis. Admin. Code ch. NR 103, Water Quality Standards for Wetlands.

Moreover, the phrase "other surface water or groundwater" in Wis. Stat. § 283.01(20) is broad enough to include mudflats, sandflats, sloughs, prairie potholes, wet meadows, and playa lakes which, like wetlands, are areas that consist of water either below, at, or above the land surface, which is surface or ground water. Point source discharges into these areas undoubtedly would enter ground or surface waters, and thus are prohibited without a permit.

Letter from J.B. Van Hollen, Wisconsin Attorney General, to Matt Moroney, Deputy Secretary, WDNR (January 19, 2012) (on file with U.S. EPA). In communications with the State since 2012, WDNR confirmed that the definition of "waters of the state," as explained in the 2012 Wisconsin Attorney General letter, remains the interpretation of the State. Specifically, WDNR provided information regarding its authority to issue permits for those sources discharging to wetlands. Email from Robin Nyffeler, WDNR to Barbara Wester, U.S. EPA (August 25, 2016) (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 the EPA or the State determine that there is insufficient authority to regulate discharges to the waters covered by the federal definition, EPA will revisit the resolution of this issue.

## Conclusion

Based on EPA's review of Wisconsin's provisions above, EPA concludes that Issue 58 is resolved.