



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 59

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

**TO:** File

**Issue 59 (Landfill Exclusion)**

In EPA's July 11, 2011 letter to the Wisconsin Department of Natural Resources (WDNR), Issue 59 stated the following:

Wisconsin appears to exempt from NPDES permitting "the disposal of solid wastes, including wet or semi-liquid wastes, at a site or operation licensed pursuant to chs. NR 500 to 536, except as required for municipal sludge in ch. NR 204 or where storm water permit coverage is required under ch. NR 216." (Wis. Admin. Code NR § 200.02) [Wis. Admin. Code NR § 200.03(3)(f)]. This exclusion goes beyond those exclusions enumerated at 40 C.F.R. § 122.3. Wisconsin must explain whether the State prohibits discharge of such materials and whether Wisconsin requires permits for such discharges when they occur. 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 deficiency.

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. That opinion was submitted to EPA in early 2012, and in a December 5, 2012 letter, EPA concluded that issues covered by the Attorney General 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 59 as follows:

[Question: ]Is the exemption from a permit application for disposal of solid waste into a solid waste facility consistent with federal law?

Response: In my view the answer is yes. The exemption in Wis. Admin. Code § NR 200.03(3)(f) allows a person to deposit solid waste into a licensed solid waste facility without obtaining a pollution discharge permit. A solid waste facility is not included among "waters of the state" and, therefore, a discharge of solid waste to a solid waste facility does not require a WPDES permit. See Wis. Stat. § 283.31(1); Wis. Admin. Code § NR 200.03(f). If the solid waste facility discharges solid waste into ground or surface waters of the state, then the solid waste facility is a point source and must have a WPDES 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). Wisconsin has many siting and performance standards associated with landfill permitting that cover both NPDES and groundwater requirements (the latter which are outside the scope of the federal NPDES program). Landfills which discharge to facilities regulated under Wis. Admin. Code Chapters 500 to 538, by definition, do not discharge leachate to waters of the State. Additionally, landfills that discharge industrial wastes to land treatment systems are separately regulated under Wis. Admin. Code NR § 214, which requires permit coverage for any discharge to surface water or groundwater. Email from Andrew Simek, WDNR, to Barbara Wester, et al, EPA (July 26, 2017) (on file with U.S. EPA).

Thus, the State's position remains that landfills that are within the scope of Wis. Admin. Code NR § 200.03(3)(f) are not subject to a separate NPDES permit requirement for leachate collection because they do not discharge to waters of the state, and that the exemption identified in EPA's 2011 letter does not, in fact, exclude landfills from obtaining necessary NPDES coverage should they discharge to surface waters of the state.

## 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 the facilities at issue, EPA will revisit the resolution of this issue.

## Conclusion

Based on EPA's review of Wisconsin's provisions above, EPA concludes that Issue 59 is resolved.