



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 63

FROM: Candice Bauer, Chief 
NPDES Permits Branch Section 2

TO: File

Issue 63 (False Statements)

In EPA's July 11, 2011 letter to the Wisconsin Department of Natural Resources (WDNR), Issue 63 stated the following:

Wisconsin rules appear to lack a provision which allows the State to assess multiple penalties for multiple instances of knowingly making false statements. This requirement is found in the federal regulations at 40 C.F.R. § 123.27. Wisconsin must document where it has the equivalent authority required to address cases involving multiple false statements. 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 63 as follows:

[Question:]Does the state have the authority under either state statutes or rules to assess multiple penalties for multiple instances of knowingly making false statements consistent with 40 C.F.R. § 123.27?

Response: In my view the answer is yes. 40 C.F.R. § 123.27(a)(3)(iii) states that "[c]riminal fines shall be recoverable against any person who knowingly makes any false statement . . . fines shall be recoverable. . . for each instance of violation." Wisconsin Stat. § 283.91(4) states that "[a]ny person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this chapter shall be fined not less than \$10 nor more than \$10,000 or imprisoned for not more than 6 months or both."

On its face, Wis. Stat. § 283.91(4) allows the assessment of multiple penalties for multiple instances, respectively, of knowingly making false statements. The statute states that "any" person making "any" false statement on "any" application shall be fined. Therefore, each false statement made by a person on a single application is a false statement that will subject the person to a fine or imprisonment. This is not only the interpretation of the Department, but is also the interpretation and practice of the Department of Justice in charging violations under this statute.

Letter from J.B. Van Hollen, Wisconsin Attorney General, to Matt Moroney, Deputy Secretary, WDNR (January 19, 2012) (on file with U.S. EPA). Following receipt of the 2012 letter, EPA requested that WDNR provide further information clarifying the State's ability to collect penalties for multiple incidents of false statements. In response, the State provided examples of two state court proceedings and the following analysis:

As follow up information to EPA on issue 63, I enclose two documents: The first document is a Court of Appeals decision in a case in which a defendant was charged with two separate counts of perjury for separate false statements made during testimony at one proceeding. *State v. Warren*, 229 Wis.2d 172, 599 NW2d 431 (Ct. App. 1999). The false statements involved a bank robbery. One false statement was about casing a bank to plan the robbery; the other was about hiding the money. The Court of Appeals ruled the false statements were different in fact and therefore could be charged separately under the perjury statute, s. 946.31, Wis. Stat., which provides "whoever under oath or affirmation orally makes a false material statement which the person does not believe to be true in any matter, cause, action or proceeding. . . is guilty of a Class D felony." Although the perjury statute itself does not indicate whether the legislature

intended to allow multiple false statements in the same proceeding to be brought as multiple counts, our courts begin with the presumption that the legislature intended multiple punishments. *State v. Anderson*, 219 Wis.2d 739, 751, 580 N.W.2d 329 (1988). The Court of Appeals ruled there was no basis for overcoming that presumption, noting that the legislature's use of the words "false material statement" suggested that each false material statement was punishable as a separate count.

The second document is an example of a false statements case brought by the Wisconsin Department of Justice under s. 283.91(4), Wis. Stat. [*State v. Collins*, Case No. 08-CM-738, 08-CM-739 (State of Wisconsin Circuit Court Branch 4, December 12, 2008)]. As you know, this statute mirrors the federal statute and states that any person who knowingly makes any false statement may be fined or imprisoned. It is Wisconsin's longstanding interpretation that this statute would allow each false statement made by a person on a single application, record, report, plan or other document required to be filed or maintained under the WPDES program to be charged as a separate violation. Although as we have discussed, Wisconsin does not have an example of a complaint alleging multiple counts based on multiple false statements in the same document, we do have an example (attached here) of a complaint which alleges separate counts for the same false statement regarding the volume of discharge. The false statement was made on multiple DMRs and each false statement is charged as a separate violation. We provide this information as corroboration for the analysis in the Attorney General's statement and support for our request that EPA view Issue 63 as resolved.

Email from Cheryl Heilman to Barbara Wester, et al. (September 28, 2017) with attachments (on file with U.S. EPA).

Analysis

We find that the State's explanation of its statutes 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 for purposes of a future proceeding, EPA will revisit the resolution of this issue.

Conclusion

Based on EPA's review of Wisconsin's provisions above, EPA concludes that Issue 63 is resolved.