



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 67

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

**TO:** File

**Issue 67 (MS4 Evaluation/Public Records)**

In EPA's July 11, 2011 letter to the Wisconsin Department of Natural Resources (WDNR), Issue 67 stated the following:

The Wisconsin rules for small [municipal separate storm sewer systems] MS4s do not contain provisions equivalent to 40 C.F.R. § 122.34(g)(1)<sup>1</sup> (required storm water management program evaluation) and (2) (records must be available to the public). 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).

**Analysis**

Issue 67 raised two separate matters related to small MS4 evaluation and recordkeeping.

**(1) Small MS4 Evaluation:**

The federal regulations require the operators of small MS4s to, "... evaluate program compliance, the appropriateness of your identified best management practices, and progress towards achieving your identified measurable goals." 40 C.F.R. § 122.34(d)(1). Wisconsin's regulations do not require small

<sup>1</sup> 40 C.F.R. § 122.34(g) has been changed to 40 C.F.R. § 122.34(d).

MS4s to perform such an evaluation. However, under Wis. Stat. § 283.37, WDNR has broad authority to request information from permittees or applicants for both individual and general permits:

(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.

Thus, WDNR has authority to require MS4s to evaluate program compliance, best management practices, and progress toward identified goals. Specifically, WDNR requests a program evaluation from its permittees on an annual report form provided by the State—WDNR Form 3400-195 (R 12/15). Thus, WDNR's current practice ensures that permittees provide evaluations in accordance with the federal regulation at 40 C.F.R. § 122.34(d)(1).

In addition to its federally consistent practice, Wisconsin has committed to modifying its regulations to require MS4 permittees to evaluate program compliance, best management practices, and progress toward identified goals. 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 provide evaluations that are consistent with the federal requirement at 40 C.F.R. § 122.34(d)(1).

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).

**(2) Small MS4 Recordkeeping:**

As part of Issue 67, EPA raised the concern that Wisconsin lacked the recordkeeping rule for MS4s found at 40 C.F.R. § 122.34(d)(2). To address the matter, WDNR provided a discussion of its authority pursuant to existing Wisconsin statutes and regulations related to records retention and access. Email from Jim Bertolacini, WDNR, to Brian Bell, EPA (August 30, 2017). Table 1, below, compares the relevant federal and state recordkeeping provisions as they relate to MS4s.



Table 1: Comparison of Federal and State Recordkeeping Provisions Relating to Small MS4s

Federal Provision	Wisconsin Provisions
<p style="text-align: center;"><b>40 C.F.R. § 122.34(d)(2)</b></p> <p>Recordkeeping. You must keep records required by the NPDES permit for at least 3 years. You must submit your records to the NPDES permitting authority only when specifically asked to do so. You must make your records, including a description of your storm water management program, available to the public at reasonable times during regular business hours (see §122.7 for confidentiality provision). (You may assess a reasonable charge for copying. You may require a member of the public to provide advance notice.)</p>	<p style="text-align: center;"><b>Wis. Admin. Code NR §§ 205.07(1)(f) and (l)</b></p> <p>The following conditions shall be included in all WPDES permits issued by the department.</p> <p>...</p> <p>(f) Records retention. The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by the permit, and records of all data used to complete the application for the permit for a period of at least 3 years from the date of the sample, measurement, report or application.</p> <p>...</p> <p>(l) Duty to provide information. . . The permittee shall also furnish the department, upon request, copies of records required to be kept by the permittee.</p> <p style="text-align: center;"><b>Wis. Stat. § 19.35(1)(a)</b></p> <p>Except as otherwise provided by law, any requester has a right to inspect any record. Substantive common law principles construing the right to inspect, copy or receive copies of records shall remain in effect. . . .</p>

As shown above, the federal small MS4 record rule at 40 C.F.R. § 122.34(d)(2) has 3 major requirements: (1) records required by NPDES permits must be kept 3 years, (2) records must be submitted to the permitting authority upon request, and (3) records must be made reasonably available to the public. Wisconsin’s regulations and statutes fulfill the three federal records requirements. First, Wis. Admin. Code NR § 205.07(1)(f) provides for the retention of WPDES permitting records for 3 years. Second, Wis. Admin. Code NR § 205.07(1)(l) requires permittees to provide the department permitting records upon request. Finally, Wis. Stat. § 19.35(1)(a) broadly provides anyone the right to inspect any record. When taken as a whole, Wisconsin’s recordkeeping provisions are consistent with the MS4 record requirement found at 40 C.F.R. § 122.34(d)(2).

## Conclusion

Based on EPA’s review of Wisconsin’s statutes, regulations, forms, and rulemaking commitments, EPA concludes that Issue 67 is resolved.

## Additional Notes

1. As discussed above, Wisconsin has committed to modifying its regulations to explicitly require MS4 permittees to evaluate program compliance, best management practices, and progress toward identified goals consistent with 40 C.F.R. § 122.34(d)(1).
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. Code 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.