



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**

*Candice Bauer*

**SUBJECT:** Wisconsin Legal Authority Review - Review and Recommendation of Resolution for Issue 75

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

**TO:** File

### Issue 75 (Adequate enforcement Authority)

In EPA's July 11, 2011 letter to the Wisconsin Department of Natural Resources (WDNR), Issue 75 stated the following:

Wisconsin law at Wis. Stat. § 227.10(2m) was recently amended to provide that "No agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter." [footnote omitted] The response to this letter must include a statement from the Attorney General explaining the relationship between the limitation in Wis. Stat. § 227.10(2m), the permitting and enforcement provisions set forth in Wis. Stat. § 283 and the applicable administrative code provisions, and the federal requirements for permitting and enforcement authority for state NPDES permit programs set out in 40 C.F.R. §§ 123.25 and 123.27. If corrective legislation or rulemaking is required to ensure that the State has permitting and enforcement authority commensurate with 40 C.F.R. §§ 123.25 and 123.27, the State must explain in its response to this letter the timetable and milestones the State will follow to address this potential 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 the issue.

## Information Provided by WDNR

Attorney General Van Hollen's January 19, 2012 letter to WDNR addressed Issue 75 as follows:

[Question: ] Taking into account the recent enactment of Wis. Stat. § 227.10(2m), does the state still have adequate permitting and enforcement authority required pursuant to 40 C.F.R. §§ 123.25 and 123.27?

Response: In my view the answer is yes. 40 C.F.R. §§ 123.25 and 123.27 are provided with this letter. They provide a list of the federal requirements for permitting and enforcement, respectively. Your question is whether the long-standing authority to comply with these requirements remains after enactment of Wis. Stat. § 227.10(2m). Recently enacted Wis. Stat. § 227.10(2m) states, in part, that "[n]o agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter."

First, the enactment of Wis. Stat. § 227.10(2m) did not change the Department's express and clear authority for permitting discharge of pollutants as stated in 40 C.F.R. § 123.25. Under Wis. Stat. § 283.31(1), "[t]he discharge of any pollutant into any waters of the state . . . by any person is unlawful unless such discharge. . . is done under a permit issued by the department." The Department is "explicitly" granted authority to issue a permit for the discharge of a pollutant based on whether the discharge will meet certain limitations and standards, including any more stringent limitation "[n]ecessary to comply with any applicable federal law or regulation." Wis. Stat. § 283.31(3).

The enactment of Wis. Stat. § 227.10(2m) did not change the Department's explicit authority and duty to promulgate rules that ensure compliance with federal standards. Wisconsin Stat. § 283.001(2) states that "[t]he purpose of [Wis. Stat. ch. 283] is to grant to the department of natural resources all authority necessary to establish, administer and maintain a state pollutant discharge elimination system to effectuate the policy set forth under sub. (1) and consistent with all the requirements of the federal water pollution control act amendments Of 1972, P.L. 92-500; 86 Stat. 816." (Emphasis added.) That authority specifically is provided under Wis. Stat. § 283.11(1), in which the Department is explicitly required to "promulgate by rule effluent limitations, standards of performance for new sources, toxic effluent standards or

prohibitions and pretreatment standards for any category or class of point sources established by the U.S. environmental protection agency and for which that agency has promulgated any effluent limitations, toxic effluent standards or prohibitions or pretreatment standards for any pollutant." Furthermore, Wis. Stat. § 283.11(2) explicitly requires that all rules promulgated by the Department under Wis. Stat. ch. 283 "as they relate to point source discharges, effluent limitations, municipal monitoring requirements, standards of performance for new sources, toxic effluent standards or prohibitions and pretreatment standards shall comply with and not exceed the requirements of the federal water pollution control act, 33 USC 1251 to 1387."

Letter from J.B. Van Hollen, Wisconsin Attorney General, to Matt Moroney, Deputy Secretary, WDNR (January 19, 2012) (on file with U.S. EPA).

## Analysis

EPA distinguishes the question (1) whether a state has adequate enforcement authority, from the question (2) whether a state is adequately enforcing that authority. The first question is the one that is the subject of issue 75 of EPA's 2011 letter. The second question is one that is raised outside the scope of EPA's legal authority review process and will be addressed outside the scope of the Legal Authority Review process. EPA finds that for the purpose of addressing the adequacy of the State's enforcement authority, that Wisconsin has sufficiently explained the basis and scope of its authorities.

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 75 is resolved. Our determination does not affect nor prejudice any findings the Agency may make regarding the degree to which the State has implemented these authorities.