



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

AUG 29 2018

REPLY TO THE ATTENTION OF:

WN-15J

MEMORANDUM

SUBJECT: Wisconsin Legal Authority Review - Review and Recommendation of Resolution for Issue 13

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

TO: File

Issue 13 (BMP Authority)

In EPA's July 11, 2011 letter to the Wisconsin Department of Natural Resources (WDNR), Issue 13 stated the following:

The federal rule at 40 C.F.R. § 122.44(k) identifies circumstances in which best management practices (BMP) must be included as conditions in permits. Except for the practices in Wis. Admin. Code NR §§ 216 and 243 pertaining to storm water and concentrated animal feeding operations, respectively, EPA did not find that Wisconsin has a statutory or rule provision requiring incorporation of BMPs into permits as provided in 40 CFR § 122.44(k). The response to this letter needs to include the State's plan, with a schedule and milestones, for promulgating a rule equivalent to 40 C.F.R. § 122.44(k).

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

Comparison between the Federal and State Provisions

To address EPA's concerns with this Issue, the State added the requirement to incorporate BMPs into permits by creating Wis. Admin. Code NR § 205.10. Table 1, below, shows that Wisconsin aligned its BMP regulations with their federal counterparts.

Table 1: Comparison Between the Federal and State BMP Regulations

Federal Regulations	Wisconsin Regulations
<p>40 C.F.R. § 122.44 provides:</p>	<p>Wis. Admin. Code NR § 205.10 was created to read:</p>
<p>In addition to the conditions established under [40 C.F.R.] §122.43(a), each NPDES permit shall include conditions meeting the following requirements when applicable.</p> <p>...</p> <p>(k) Best management practices (BMPs) to control or abate the discharge of pollutants when:</p> <ul style="list-style-type: none"> (1) Authorized under section 304(e) of the [Clean Water Act or] CWA for the control of toxic pollutants and hazardous substances from ancillary industrial activities; (2) Authorized under section 402(p) of the CWA for the control of storm water discharges; (3) Numeric effluent limitations are infeasible; or (4) The practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the CWA. 	<p>Best management practices. Best management practices to control or abate the discharge of pollutants shall be included in a WPDES permit issued by the department in all of the following cases:</p> <ul style="list-style-type: none"> (1) When the permit is authorized under section 33 USC 1314(e) [[CWA 304(e)]] for the control of toxic pollutants and hazardous substances from ancillary industrial activities. (2) When numeric effluent limitations are infeasible. (3) When the practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of ch. 283, Stats. <p>Note: Chapters NR 216 and 243 also include regulations requiring best management practices for WPDES permittees for control of stormwater discharges and concentrated animal feeding operations (CAFOs).</p>

We note that, while the language in the State's rule does not include an analog to 40 C.F.R. § 122.44(k)(2), the Note in Wis. Admin. Code NR § 205.10 makes a reference to Wis. Admin. Code NR ch. 216 that adequately defines the requirement to include BMPs for the control of storm water discharges.

Rule Package 5, Public Notice, Hearing, and Comment

WDNR published a public hearing notice on proposed revisions to Wis. Admin. Code chapters NR 106, 200, 205, 207, 210, 220, 221, 225, 228, 231, 236, 239, 240, 245, 247, 250, 258, 261, 268, 269, 275, 276, 277, 280, 281, 284, 286, 290, 294, 295, and 296 on January 9, 2017 in the Wisconsin Administrative Register. 733A2 Wis. Admin. Reg. CR 17-002 (January 9, 2017). The public comment period was open through March 1, 2017, and public hearings were held in Green Bay, Wisconsin on February 6, 2017 and Madison, Wisconsin on February 7, 2017. Wis. Nat. Res. Bd., Agenda Item No. 2.A.1, July 10, 2017, Correspondence/Memorandum Attachment to Order WT-12-12. At the Green Bay hearing no one appeared in person. *Id.* Two members of the public attended the Madison hearing without providing

oral comments. *Id.* Four entities, other than the Wisconsin Legislative Council Rules Clearing House, provided written comments: US EPA, Wisconsin Manufacturers & Commerce, WE Energies, and Midwest Environmental Advocates. Wis. Nat. Res. Bd., Agenda Item No. 2.A.1, July 10, 2017, Response to Comments on Rule Package 5, Attachment to Order WT-12-12. WDNR responded to the written comments in a written response summary, which adequately explained why certain rule changes were made in response to the comments received, and why other comments did not warrant changes. *Id.* After Wisconsin completed rulemaking, the revised regulations were published in the Wisconsin Administrative Register on April 30, 2018. 748B Wis. Admin. Reg. CR 17-002 (April 30, 2018).

Conclusion

Based on EPA's review of Wisconsin's regulations above, EPA concludes that Issue 13 is resolved.