

Delivered via email

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Wisconsin Department of Natural Resources
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RE: Comments on NR 216 rule changes

Dear Amy Minser:

Below are the comments of the undersigned organizations on the DNR's proposed changes to NR 216 regarding industrial storm water discharges. Please let us know if you have any questions or concerns.

Sincerely,

s/

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COMMENTS ON DNR NR 216 RULE UPDATES

1. DNR should consider Wisconsin’s changing rainfall patterns and anticipated heavier and more intense rainfalls in the administration of its stormwater program.

Climate change has and will exacerbate both the intensity and frequency of precipitation for large areas of Wisconsin.¹ For example, since the 1950s, Wisconsin’s annual precipitation has increased 15% or 4.5 inches.² Further, in Ashland, WI, there were 500-year storm events in both 2012 and 2016.³ We have already seen the consequences of historic floods throughout the past decade.⁴ These are just a few examples of the impacts that climate change has already had on Wisconsin, and studies have shown that those extreme weather events are likely to become more prevalent.⁵ As such, DNR should engage in a continued effort to implement its environmental regulatory programs to address these changes and promote climate resiliency.

Specifically, major storms or rain events can affect areas of a facility that do not normally have contact with storm water or surface waters. The Storm Water Pollution Prevention Plan (SWPPP) required under NR 216 must “identify all potential source areas of storm water contamination”⁶ and this includes contamination from sources that lead to discharges during a major storm or flood event. DNR should make it clear to all permittees that, in identifying all sources of contamination in its SWPPP, a facility must include those that could be activated during a large storm or flood event. Similarly, the SWPPP should document best management practices that include storing all materials, waste, and contaminants out of the designated 100-year floodplain, reinforcing material storage structures to ensure they can withstand flooding, and securing structures and eliminating outdoor storage when a major rain event is forecast. This approach is in line with EPA’s new 2021 Multi-Sector General Permit (MSGP) which requires facility operators to consider enhanced storm water control measures if their facility may be, or

¹ See State of Wisconsin, Governor’s Task Force on Climate Change, at pp. 14 (2020), available at https://climatechange.wi.gov/Documents/Final%20Report/USCA-WisconsinTaskForceonClimateChange_20201207--HighRes.pdf.

² *Id.*

³ *Id.* at 58.

⁴ *Id.*

⁵ See Wisconsin Initiative on Climate Change Impacts, Wisconsin’s Changing Climate: Impacts and Adaptation, at pp. 30 (2011), available at <https://wicci.wisc.edu/wp-content/uploads/2019/12/2011-wicci-report.pdf>.

⁶ Wis. Admin. Code § NR 216.27(3)(e).

has previously been, impacted by major storm events or flood events.⁷ Given that major rainfall and storm events have been affecting Wisconsin and will continue to do so, this documentation should be part of the SWPPP for most facilities in the state.

Comment: DNR should ensure that facilities' SWPPP identify potential contamination during major storm or flood events and include measures to reduce that contamination, including moving sources of contamination out of the 100-year floodplain.

2. The definition of “construction site” should be amended to clarify that it may apply to disturbances of less than one acre.

The DNR must amend the definition of construction site to clarify that disturbances of less than one acre that are part of a common plan of development that will affect more than one acre, must be permitted. This deficiency was described in Issue 54 of the 75 Issues identified by EPA Region 5 in its letter dated July 18, 2011.

The federal regulation 40 C.F.R. § 122.26(b)(15)(i) requires a permit for stormwater discharges from disturbances of less than one acre, when part of a common plan of development that disturbs more than one acre. The proposed amendments to NR 216 do not address EPA Region 5's comment related to Issue 54 that DNR amend the definition of construction site in Wis. Admin. Code § NR 216.002(2). *See* EPA Region 5 Letter Review and Recommendation of Resolution for Issue 54 (Sept. 1, 2016).

We recommend that DNR, at a minimum, include a clarification note under NR 216.002(2).

Comment: DNR should add a clarifying note to NR 216.002(2) that: “Disturbances that are less than one acre must be permitted if they are part of larger common plan of development that may occur at different times and/or on different schedules.”

3. The definition of “illicit discharge” in NR 216.002(11) should be amended to be consistent with federal regulations or, in the alternative, any stormwater permits that rely on the state definition of “illicit discharge” should be amended to ensure that significant sources of pollutants are properly regulated.

The federal Clean Water Act regulation defining illicit discharges to a municipal separate storm sewer system only exempts fire fighting activities from that definition. *See* 40 C.F.R. § 122.26(b)(2). In contrast, the Wisconsin regulatory definition exempts numerous other activities.

⁷ 2021 MSGP § 2.1.1.8. *See also* MSGP Fact Sheet Part 2.1.1, available at <https://www.epa.gov/npdes/stormwater-discharges-industrial-activities-epas-2021-msgp>.

See Wis. Admin. Code § NR 216.002(11) (exempting “landscape irrigation, individual residential car washing, ... diverted stream flows, uncontaminated groundwater infiltration, uncontaminated pumped groundwater, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation water, lawn watering, flows from riparian habitats and wetlands, and similar discharges”). In response to the EPA Region 5’s Issue 55 of the 75 Issues discussion about the definition of illicit discharge, Wisconsin DNR clarified that, on a case-by-case basis, the DNR may regulate a discharge otherwise exempted from the illicit discharge definition if it is a “significant source of a pollutant to waters of the state.” *See* Wis. Admin. Code § NR 216.002(11) (Note).

However, DNR has not similarly clarified the use of “illicit discharge” in the context of its stormwater general permits. Those permits’ use of “illicit discharge” appear to allow permittees to discharge under the existing broad exemptions from “illicit discharges.” *See, e.g.*, 2021 Draft Tier 1 Industrial Stormwater Permit §§ 5.3.2, 5.3.4. General stormwater permittees may therefore believe they may rely on this improperly broad definition to decline to report, detect, or eliminate discharges that are clearly an “illicit discharge” under federal law but do not meet the state definition.

DNR should therefore amend Wis. Admin. Code § NR 216.002(11) to remove all exclusions from the definition of illicit discharge except “fire fighting activities.” In the alternative, it should amend all stormwater permits that use the term “illicit discharges” to require that permittees report, detect, and eliminate all discharges to a municipal separate storm sewer system – including those discharges from “landscape irrigation, individual residential car washing, ... diverted stream flows, uncontaminated groundwater infiltration, uncontaminated pumped groundwater, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation water, lawn watering, flows from riparian habitats and wetlands, and similar discharges,” if those discharges cause a “significant source of a pollutant to waters of the state pursuant to § NR 216.07(3)(b).” In this manner, the case-by-case evaluation required under state law for significant sources of pollution will be properly mandated in the context of stormwater permits and permittees will be on notice that they must report all discharges to municipal separate storm sewer systems even if they are described as an exemption to the illicit discharge definition. This amendment should also be made to any individual stormwater permit that uses the term “illicit discharge.”

Comment: DNR should amend the definition of illicit discharge to comply with federal law or, at a minimum, clarify in stormwater permits that all permittees must report any discharge to a municipal separate storm sewer system.

4. Notice requirements for municipalities operating an authorized local program should be longer to allow DNR more time to address issues.

The proposed revised regulations provide that a municipality operating an authorized local program must make a discharger's application "available" to DNR five business days before land disturbing activities or "before granting coverage" authorized under that local program. *See* Proposed Wis. Admin Code § NR 216.10(6)(b)2. This provides DNR an insufficient amount of time to review the application and identify issues. The regulation should be clarified to require that the municipality send the application to DNR and lengthen the notice period to 14 days before either land disturbing activities begin or before the authorized local program grants coverage to the locality. DNR will otherwise not have the ability to address potentially problematic activities within only 5 business days.

In addition, DNR should consider clarifying whether the municipality has an affirmative duty to send the application to DNR. The current proposed language in § NR 216.10(6)(b)2 provides that the municipality shall "make available" the application. This language could be amended to clarify what the municipality is supposed to do with the application.

Comment: DNR should amend proposed § NR 216.10(6)(b)2 to require 14-day notice and specify that the municipality "shall provide DNR" with the application.

5. Consistency suggestion regarding the use of the SWPPP "summary form"

The DNR proposes eliminating the summary form of the SWPPP by striking language in NR 216.29(1)(e) and the note. Current Wis. Admin. Code § NR 216.28(1)(c) should be amended to indicate which form should be used to report results of the non-stormwater evaluations if the DNR will no longer be accepting a SWPPP summary form.

Comment: DNR should clarify what form should be used to report the results of the non-stormwater evaluations described in § NR 216.28(1)(c).