

**State of Wisconsin  
Department of Natural Resources**

**Responses to Public Comments on  
Wisconsin Pollutant Discharge Elimination System (WPDES)  
Storm Water Associated With Land Disturbing Construction Activity General  
Permit**

**September 2021**

**Wisconsin Pollutant Discharge Elimination System (WPDES) General Permit for Storm Water  
Associated with Land Disturbing Construction Activity, Permit No. WI-S067831-6**

On July 23, 2021, the Wisconsin Department of Natural Resources (department) public noticed the WPDES general permit for Storm Water Associated with Land Disturbing Construction Activity. The public comment period closed on August 24, 2021.

The department received written comments from the United States Environmental Protection Agency; BNSF Railway Company; Midwest Environmental Advocates; Merjent, Inc.; WEC Energy Group; and Wisconsin Builders Association. In this document, the department may have paraphrased or edited comments to capture the main point or to clarify a comment. Any minor corrections to typographical errors, updating page numbers and headers/footers, updating the Table of Contents and titles, and correcting formatting and web links are not included in this summary document. The acronyms and abbreviated words below used in this document have the meaning indicated:

BMPs	Best Management Practices
BNSF	BNSF Railway Company
ERW	Exceptional Resource Water
ORW	Outstanding Resource Water
MEA	Midwest Environmental Advocates
TMDL	Total Maximum Daily Load
USEPA	United States Environmental Protection Agency
WBA	Wisconsin Builders Association
WEC	Wisconsin Energy Group

Changes indicated below apply to the General Permit for Storm Water Associated with Land Disturbing Construction Activity.

**Changes Initiated by the Department**

The department has incorporated standard reporting language for permit noncompliance into Section 5.6.1 and renumbered Section 5.

**Comments by the United States Environmental Protection Agency (USEPA)**

By email dated July 29, 2021, the USEPA stated there were no comments on the proposed general permit.

Response: The department appreciates the USEPA's review of the proposed general permit.

## **Public Comments**

### **Comments by BNSF Railway Company (BNSF)**

BNSF Comment 1: Draft Permit Section 1.1.2.3 should be revised to clarify to which pit and trench dewatering discharges it applies.

Draft Permit, Section 1.1.2 provides that “[t]his permit also authorizes pit and trench dewatering discharges at a construction site covered under this permit subject to the following conditions ... 1.1.2.3 Pit trench dewatering of ground water where discharges are not subject to remediation action operations, or from an area where contamination that would be subject to remediation action operations would be required.”

BNSF requests that WDNR revise this provision to clarify to which pit and trench dewatering discharges it applies. Section 1.1.2 indicates that pit and trench dewatering discharges are generally covered under the General Permit, subject to the “conditions” set out in the subsections that follow. Subsections 1.1.2.1 and 1.1.2.2 clearly lay out conditions that the discharges must meet to be covered under the General Permit (e.g. “[d]ewatering is treated in accordance with the department’s sediment control dewatering technical standard...”). However, in Section 1.1.2.3, there is no apparent condition. As written, the provision does not specify whether the identified discharges are prohibited or allowed or what action must be taken by the permittee to ensure coverage of the discharge under the General Permit.

Further, the provision is seemingly contradictory and could potentially cover any dewatering discharge. The provision identifies dewatering “where discharges are not subject to remedial action operations,” but also identifies dewatering “where contamination that would be subject to remedial action operations would be required” (emphasis added). That is, the provision seemingly covers discharges that are not from areas where remedial actions are taking place, but also covers discharges from contaminated areas where remedial action is taking place or is legally required to take place. Taken together, this would potentially describe every dewatering discharge.

To the extent the WDNR seeks to prohibit dewatering discharges from locations undergoing active remediation, BNSF suggests that the provision be revised to more clearly state this. However, even assuming this is the intent, greater clarity should be provided. Specifically, the terms “remedial action operations” and “contamination” should be clarified and defined to be limited to specific areas that are undergoing active remediation under the auspices of Wisconsin or federal regulation. As written, these terms are vague and overly broad and the reference to areas “where contamination that would be subject to remedial action operations would be required” causes confusion, and should not be included in the final permit.

Response: Section 1.1.2.3 of the draft permit stated, “Pit trench dewatering of ground water where discharges are not subject to remedial action operations, or from an area where contamination that would be subject to remedial action operations would be required.” The purpose of this language is to align dewatering discharges at construction sites with existing state regulations pertaining to the identification, investigation and remediation of sites and facilities subject to regulation under chs. 289 and 292, Wis. Stats. Inclusion of this language precludes discharges from remedial action sites which may require specific monitoring under these chapters. Section 292.12(1)(d), Wis. Stats., defines “Remedial Action” as action that is taken in response to a discharge of a hazardous substance and is necessary to restore the environment to the extent practicable and to minimize the harmful effects of the discharge to the air, lands, and

waters of this state. Section 292.01 (5), Wis. Stats., defines “Hazardous substance” any substance or combination of substances including any waste of a solid, semisolid, liquid or gaseous form which may cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness or which may pose a substantial present or potential hazard to human health or the environment because of its quantity, concentration or physical, chemical or infectious characteristics. This term includes, but is not limited to, substances which are toxic, corrosive, flammable, irritants, strong sensitizers or explosives as determined by the department.

The department has **amended** Section 1.1.2.3 of the permit to read more consistently with preceding conditions and included Note<sup>4</sup>: Dewatering discharges at construction sites or properties where there is environmental pollution and/or a discharge of a hazardous substance subject to regulation under chs. 289 or 292, Wis. Stats., may require additional approvals and be subject to the [Contaminated Groundwater from Remedial Action Operations General Permit \(WI-0046566-07-0\)](#). Chapter 292, Wis. Stats., defines “remedial action”.

### **Comments by Midwest Environmental Advocates (MEA)**

MEA Comment 1: The draft permit should require the erosion control plan and storm water management plan to acknowledge and address the impacts of more frequent and intense rainfall events expected before the permit expires. The draft permit should be amended to require that permittees’ erosion control plan and storm water management plan identify potential contamination in floodway areas and areas activated by 500-year storm events. The permit should require BMPs to address that possible contamination.

Response: Chapter NR 116, Wis. Adm. Code, applies to all municipalities and their respective jurisdictions to regulate all floodplains where serious flood damage may occur. Municipalities are required to develop maps of the areas to be regulated under this chapter and develop floodplain zoning ordinances to define proper uses in those regulated areas. Under s. NR 116.12 (1)(c) and (g), Wis. Adm. Code, respectively, storage of materials that are buoyant, flammable, explosive or injurious to human, animal, plant, fish or other aquatic life, and placement of solid or hazardous waste disposal facilities are prohibited in floodways areas. Section NR 116.13(6), Wis. Adm. Code, provides that storage of any materials which are buoyant, flammable or explosive, or which in times of flooding could be injurious to property, water quality or human, animal, plant, fish or aquatic life, shall be either floodproofed to or placed at or above the flood protection elevation. Adequate measures shall be taken to assure that these materials will not enter the river or stream during flooding.

In accordance with Section 4.7 of the permit and s. NR 216.49 (1), Wis. Adm. Code, the erosion control and storm water management plan shall document other applicable municipal regulatory provisions, compliance with which will also meet the requirements of the permit. If these municipal provisions are more stringent than those provisions appearing in a permit issued pursuant to this subchapter, the erosion control and storm water management plans shall include a description of how compliance with the municipal provisions will be achieved.

The department has made no changes to the general permit in response to this comment.

MEA Comment 2: The erosion control plan and storm water management plans should be publicly available because it is an integral part of the Wisconsin Pollutant Discharge Elimination System permits. DNR should amend the draft permit § 2.6 to require that permittees make their erosion control plan and storm water management plan available on their own public-facing website and upload the link or the plans themselves to DNR’s database. All facilities covered under the permits should post on their publicly accessible sign indicating permit coverage a website, QR code, or other type of link directing the public to their erosion

Response: Permittees are required to provide proof of permit coverage at the construction site and post a permit certificate in accordance with s. NR 216.455, Wis. Adm. Code. Permittees are also required to retain the erosion control and storm water management plans and amendments to the erosion control and storm water management plans at the construction site until permit coverage is terminated pursuant to s. NR 216.48 (1), Wis. Adm. Code. The certificate of permit coverage contains information for the public to contact the permittee or department for access to the erosion control or stormwater management plans. The public may also use the information of the certificate to search for the facility online.

The department's Construction Permit Data webpage allows interested parties to query permitted facility data at the following link:  
<https://dnr.wisconsin.gov/topic/Stormwater/construction/data.html>. The department provides a public facing webpage for applicants who have applied for coverage starting September 2015 where the Notice of Intent, erosion control and storm water management plans are available online:  
<https://permits.dnr.wi.gov/water/SitePages/Permit%20Search.aspx>. For facilities that have applied for coverage prior to this date, interested parties may contact the department to request a facility's records. Department staff can be contacted at the following link:  
<https://dnr.wisconsin.gov/topic/Stormwater/contacts.html>.

The department has made no changes to the general permit in response to this comment.

MEA Comment 3: Required forms should be amended and audited to ensure protection of surface water and groundwater quality standards. DNR should amend the permits to require that the permittee submit photographs or videos with its required reports and indicate that DNR will audit the inspection reports to ensure that they are meaningfully completed. DNR should also amend the permit to require an amended erosion control plan or storm water control plan if regular inspections reveal that the provisions of the plans are ineffective in controlling stormwater pollutants or if the facility has expanded.

Response: Permittees subject to the permit must conduct weekly inspections and inspections of erosion and sediment control best management practices (BMPs) within 24 hours after a rainfall event of 0.5 inches or greater, and repair or replace erosion and sediment control BMPs as necessary within 24 hours of an inspection or notification indicating that repair or replacement is needed in accordance with Section 4.5 of the permit. Information outlined in the construction site inspection report and the construction site inspection corrective action photo forms are intended to assist permittees with compliance with the provisions outlined in this section. The construction site inspection form currently asks if the plan is reflective of current site operations and whether or not it addresses all erosion and sediment control issues identified during the inspection.

Sections 3.5 and 4.8.1 of the permit outline the conditions under which amendments to the erosion control or stormwater management plans must occur.

The department has made no changes to the general permit in response to this comment.

MEA Comment 4: DNR should require that the facilities authorized under this permit also comply with applicable laws related to wetlands. The draft permit should include a caution that any work performed in wetland areas, in floodplains, or near shorelands may require permits or approvals through applicable state law, state regulations, or county or local ordinances, including under chs. 30, 31 and 87, Wis. Stats. and s. 281.36, Wis. Stats. (or Wisconsin Administrative Code promulgated under these laws), and may require federal permits.

Response: Section 5 of the permit contains language related to activities performed in wetland areas,

in floodplains or near shorelands which may require permits or approvals through applicable state law, state regulations, or county or local ordinances. Additionally, state permits and/or contracts required by chs. 30, 31 and 87, Wis. Stats. and s. 281.36, Wis. Stats. (or Wisconsin Administrative Code promulgated under these laws), and federal permits may be applicable. These permits or approvals are applicable regardless of the applicability of the construction site general permit.

The permit language in Section 5 has been **updated** to be reflected as a note.

MEA Comment 5: DNR should harmonize the language in the draft permit with the proper standard for an anti-degradation analysis. DNR should amend the draft permit to mirror the anti-degradation language in DNR's regulations to clarify that water quality remains adequate to protect existing or presently possible uses fully.

Response: Chapter NR 207, Wis. Adm. Code, was established to set forth implementation procedures for the antidegradation policy in s. NR 102.05 (1) (a), Wis. Adm. Code. To the extent that ch. NR 207 does not establish implementation procedures for storm water point source discharge rules promulgated after those of ch. NR 207, Wis. Adm. Code, for an increase of an existing discharge or creation of a new discharge, the department relies on the performance standards under ch. NR 151, Wis. Adm. Code, to achieve the water quality standards outlined in s. NR 151.10, Wis. Adm. Code. The permit currently states in Section 4.3.2 that the permittee may not establish a new storm water discharge of pollutants to a fish and aquatic life water if the discharge will result in the significant lowering of water quality of the fish and aquatic life water. Significant lowering of water quality is defined within ch. NR 207, Wis. Adm. Code. Unless notified by the department in writing to the contrary, compliance with the applicable performance standards of subch. III or IV of ch. NR 151, Wis. Adm. Code, shall be deemed in compliance with the requirements of this section. "New storm water discharge" has the meaning given in Section 4.2.2.1 of this permit. Due to the complexities of storm water discharges as they relate to anti-degradation, the department has determined that the procedure waiver in s. NR 207.05(3) may be used, and the permittee must then demonstrate that the criteria of s. NR 207.04 (1) (c) 1., Wis. Adm. Code, are met.

The department has **amended** Section 4.3.2 to clarify that if discharges result in the significant lowering of water quality, the procedures of s. NR 207.04 (c) 1., Wis. Adm. Code may apply, and the permittee shall include this as additional information pursuant to s. NR 216.48 (3), Wis. Adm. Code.

MEA Comment 6: DNR should require permittees to send modeling information to determine whether a discharge to an impaired water body will allow the receiving water to meet applicable water quality standards or any applicable TMDL. DNR should amend the draft permit to require the permittee to justify whether the anticipated pollutant loading from the project will meet the requirements for discharging into an ORW/ERW or an impaired water or water subject to a TMDL by using available modelling packages.

Response: It is difficult given the highly variable nature of storm water discharges to make a determination of levels of discharge equal to or less than background levels. The department is currently engaged in a rulemaking effort to better reflect how a permittee may demonstrate compliance with these provisions in circumstances that includes point sources not previously contemplated. Meanwhile, the department retains the ability to request, on a case-by-case basis, that additional information be provided. This approach aligns with EPA and the provisions within EPA's construction site general permit.

EPA's construction site general permit focuses efforts on limiting and reducing discharges associated with short-term impacts to sensitive waters with an increased inspection frequency and streamlined stabilization requirements. The department currently has inspection frequency

requirements for all sites that reflect the increased weekly and post-rainfall inspection requirements EPA uses to address special waters, and also has a similar requirement for stabilization when land disturbing construction activities cease and final grade has been reached on any portion of the site, with added requirements for temporary stabilization where construction activity has ceased and will not resume for a period not exceeding 14 calendar days.

The department currently has performance standards that permittees must meet related to infiltration, total suspended solids, and peak flow which emulate a level of treatment commonly used by other Region 5 States to address storm water discharges to sensitive waters.

The Total Maximum Daily Loads (TMDL) for waterbodies are set to meet water quality criteria and have been approved by the EPA. Loads associated with construction general permit discharges were previously provided an allocation to meet the TMDL, and the permit allows for applicants to meet the TMDL for these waterbodies by adherence to the implementation measures outlined in the general permit requirements, as well as through implementation of the performance measures of ch. NR 151, Wis. Adm. Code.

The department has made no changes to the general permit, but will continue to evaluate the most effective and efficient ways to protect ERWs, ORWs, and impaired waters through the pending rulemaking effort.

MEA Comment 7: DNR should require permittees to submit to the DNR electronically the results of their total runoff volume with applicable controls, soil loss, sediment discharge, and, where applicable, pounds of phosphorous or other water quality metrics. DNR should amend the draft permit to require permittees to submit total volume, soil loss, sediment discharge, and other water quality metrics electronically with the NOI.

Response: The department currently requests a site-specific erosion control and storm water management plan pursuant to ss. NR 216.46 and 216.47, Wis. Adm. Code. This includes the requirement for a permittee to demonstrate compliance with the provisions of s. NR 151.11(6m)(b), Wis. Adm. Code. The department has developed both a tool and guidance that establishes the procedures to verify compliance with this provision.

Information submitted to meet the site-specific erosion control and storm water management plan pursuant to ss. NR 216.46 and 216.47, Wis. Adm. Code, are publicly available via the tracking feature of the water permit system:

<https://permits.dnr.wi.gov/water/SitePages/Permit%20Search.aspx>. The requirements of these sections and information requested when applying for construction site permit coverage are consistent with these provisions.

The department has made no changes to the permit in response to this comment.

MEA Comment 8: DNR should define “remedial action operations” as used in draft permit Section 1.1.2.3. DNR should amend the draft permit to provide a definition.

“Remedial action operations” is not a defined term at the end of the permit and should be defined.

Response: Section 292.12(1)(d), Wis. Stats., defines “Remedial Action” as action that is taken in response to a discharge of a hazardous substance and that is necessary to restore the environment to the extent practicable and to minimize the harmful effects of the discharge to the air, lands, and waters of this state.

The department has **amended** the permit and included Note<sup>4</sup>: Dewatering discharges at construction

sites or properties where there is environmental pollution and/or a discharge of a hazardous substance subject to regulation under chs. 289 or 292, Wis. Stats., may require additional approvals and be subject to the [Contaminated Groundwater from Remedial Action Operations General Permit \(WI-0046566-07-0\)](#). Chapter 292, Wis. Stats., defines “remedial action”.

### **Comments by Merjent, Inc.**

Merjent Comment 1: Section 1.2.1 previously stated “Stormwater discharges from Indian activities within Indian Country”, but the draft reissued permit removed “from Indian activities”. Does this mean that non-Indian activities, such as a public utilities’ electric transmission line located across Indian Country that does not provide direct electric connection to structures within Indian Country, would be eligible for coverage under the reissued permit?

Response: The general permit excludes from coverage land disturbing construction activity occurring within Indian Country. Projects that occur in Indian Country should contact the United States Environmental Protection Agency (USEPA) to determine eligibility. Land disturbing construction activities of one acre or more occurring outside of Indian Country are eligible for coverage under this general permit.

The department has made no changes to the general permit in response to this comment.

Merjent Comment 2: Is it possible to add to the permit guidance on when the placement of gravel is considered impervious?

Response: Section NR 151.002 (17), Wis Adm. Code, defines “impervious surface” to mean an area releases as runoff all or a large portion of the precipitation that falls on it, except for frozen soil. Rooftops, sidewalks, driveways, gravel or paved parking lots, and streets are examples of surfaces that typically are impervious.

The permit contains the requirements related to impervious surface as conditions related to post-construction at the site. Post-construction sites for which the department received a Notice of Intent for the construction project, in accordance with subch. III of ch. NR 216, Wis. Adm. Code, on or after January 1, 2011, shall meet the performance standards of ss. NR 151.122 to 151.128, Wis. Adm. Code.

The department has made no changes to the general permit in response to this comment.

### **Comments by Wisconsin Builders Association (WBA)**

WBA Comment 1: The general permit frequently uses the term “prevent” when expressing the requirement to control certain types of discharges such as the discharge of sediment and the discharge of sediment onto roadways or offsite areas. Using the term “prevent” may be appropriate in cases of prohibited discharges such as concrete or hazardous materials, but it is not appropriate for the discharge of sediment. The term “prevent” is not defined in NR 151.002, Wis. Adm. Code. The use of the term “prevent” conflicts with the Wisconsin Administrative Code’s applicable performance standards subch. III or IV of ch. NR 151, Wis. Adm. Code, which requires the regulated community to “prevent or reduce” the discharge of sediment from certain types of construction activity.

The draft general permit conflicts with both the United States Environmental Protection Agency’s (“EPA’s”) Construction General Permit and the Construction and Development Effluent Guidelines developed in 2017, that requires the permittees to minimize rather than prevent discharges of certain

pollutants, including sediment. See 40 C.F.R. § 450.21. Therefore, we suggest that the term “prevent” be replaced in certain sections of the DGP with the term “minimize” which is defined in Appendix A of the federal Construction General Permit (applicable to section 1.1.3, 2.9.3.1, 3.1.7, 3.1.7.7, 3.1.7.8, 3.1.7.12, 3.1.7.13, 3.1.7.15, 3.1.7.17, 4.8.1).

Response: The term ‘prevent’ as used in Sections 1.1.3, 2.9.3.1 and 3.1.7 are intended to align with the implementation requirements found in s. NR 151.11 (8), Wis. Adm. Code, since BMPs used to comply with these requirements shall be constructed or installed before land disturbing construction activities begin and maintained until final stabilization in accordance with the erosion control and sediment reduction plans developed under s. NR 151.11 (5), Wis Adm. Code. These measures are intended to prevent discharges to waters of the state.

The requirements of Sections 3.1.7.7, 3.1.7.8, 3.1.7.12, 3.1.7.13, 3.1.7.15 and 3.1.7.17 align with the erosion and sediment control practices and sediment performance measures outlined in ss. NR 151.11 (6m) (a) and (b), Wis. Adm. Code. The department had **amended** the language in 3.1.7 to read, “to prevent or reduce” to better align with the aforementioned provisions of ch. NR 151, Wis. Adm. Code.

Section 4.8.1 already contains the following language, “reducing and preventing the discharge of pollutants”.

WBA Comment 2: Section 2.9.1.2 requires the permittee to develop a spill prevention and response plan. We believe that the intent of this provision is to require the permittee to have a spill prevention and response plan, and to include reference to that plan in its erosion control plan. We assume that the permittee does not have to create a spill prevention and response plan for each site that needs to be submitted as its own document. Please provide clarity as to this expectation.

Response: Language in Section 2.9.1.2 is in reference to s. NR 151.11 (6m) (c) 4., Wis. Adm. Code, which states the plan shall incorporate development of a spill prevention and response plan. Spill prevention and response procedures are typically generic in nature; however, these plans may need to be modified to take into consideration unique site-specific conditions.

The department has made no changes to the general permit in response to this comment.

### **Comments by WEC Energy Group (WEC)**

WEC Comment 1: Weekly inspections during frozen conditions should be addressed under Section 4.5.1.1. WEC recognizes that winter inspections are not addressed in NR 216. Therefore, we suggest that winter inspections are clarified via a note in Section 4.5.1.1., similar to how the Department noted that additional inspections may be warranted under Section 4.5.1.2.

Response: Frozen conditions and winter inspections are not addressed in Section 4.5.1.1. since they are not addressed in ch. NR 216, Wis. Adm. Code. The department has not established a policy regarding winter inspections as Wisconsin winters can be highly variable with both freeze and thaw cycles and liquid precipitation occurring over a short period of time. Establishing a policy that could lead to uncontrolled discharges due to lack of monitoring would be contradictory to preventing and reducing sediment discharges to downstream resources. Since many permittees continue with excavation and land disturbance throughout the winter, permittees still need to monitor best management practices, such as trackout controls, even during frozen conditions.

The department has made no changes to the general permit in response to this comment.



**WEC Comment 2:** The Department should have a consistent approach on how additional information requests impact their allowed review timeframes. Currently, when the Department reviews a Notice of Intent and there is a request for additional information, the applicant is informed that the Department does not have any timeline obligation to review the requested information. The 14 working day period that is expressed numerous times throughout NR 216 is not paused, but rather abandoned. This open review period leads to great uncertainty for critical energy construction projects. The Department has addressed this uncertainty while developing the Utility General Permit, WDNR-GP3-2018 by implementing a “paused clock” approach. WEC recommends that the WDNR adopts the same concept for this general permit by adding the suggested note into Section 2.4.

**Response:** Under s. NR 216.44 (1), Wis. Adm. Code, proposed facilities that will undergo one or more acres of land disturbing construction activities as part of their construction, shall submit a Notice of Intent at least 14 working days prior to the commencement of any land disturbing construction activities at the site.

The department encourages early consultation with storm water staff on erosion control and storm water management plans for energy construction projects, complex sites, sites claiming maximum extent practicable, or projects that may require more assistance to demonstrate compliance with ss. NR 216.46 and 216.47, Wis. Adm. Code. Early communication often reduces the need for department staff to request additional information to complete a deficient application and allows the department to issue permits in a timely manner. Department staff contacts available to answer technical questions related to submittals can be found at the following link:  
<https://dnr.wisconsin.gov/topic/Stormwater/contacts.html>

The department has made no changes to the general permit in response to this comment.