

CORRESPONDENCE/MEMORANDUM

DATE: July 2, 2021

TO: Dave Siebert, Administrator, External Services Division
Brian Weigel, Director, Watershed Management Bureau

FROM: Shannon K. Haydin, Storm Water Runoff Section Chief

SUBJECT: Fee analysis related to proposed rule changes to ch. NR 216 (WT-09-19)

Chapter NR 216, Wis. Adm. Code establishes the criteria for when certain entities must obtain coverage under a Wisconsin Pollutant Discharge Elimination System (WPDES) storm water discharge permit. Activities to update this rule were approved by the Governor on May 30, 2019. The Fiscal Estimate and Economic Impact Analysis was published for public comment on December 21, 2020. Included in this proposed rule change is an increase in the application fee for construction storm water permits. The application for storm water permit coverage under a general permit is also called a Notice of Intent (NOI). The purpose of this memo is to clarify the information reviewed to support the proposed increase in fees.

Highlights

The current fees have not been updated since 2003. The average inflation rate based on the consumer price index between 2003 and 2020 was 2.05%. Applying a 2% per year rate of inflation over 20 years, the fees in 2023 would be 1.49 times (150%) the 2003 fee amount to account for inflation. Applying the inflation rate to the current fees accounts for the change in the value of money over time but does not account for changes in workload over that same timeframe. Therefore, inflation is only one of several factors that were considered.

The demand for construction site permitting services has increased since 2003. Changes affecting construction permitting since 2003 include:

- a. Adjustments to NOI review procedures to prevent environmental impacts and delays during construction.
- b. Changes to Ch. NR 151, Wis. Adm. Code, which sets performance standards for nonpoint source runoff, increased demand for technical assistance to permittees and development of new technical standards.
- c. In 2009 commercial construction permitting shifted from the Department of Commerce to DNR.
- d. Since Fiscal Year (FY) 2010, the department has experienced an increase in construction NOIs received by 48%.
- e. As communities exhaust “green field” construction sites, there has been an increase in more complex urban infill projects and urban infill construction requires an increased level of review of NOIs.
- f. Changes in municipal practices has increased the demand for faster notice of termination responses requiring staff attention.

The department is required to charge storm water fees proportional to the cost of program administration. Section 283.33 (9) (b), Wis. Stats. states, “The department shall establish the amount of the fee under par. (a) for permits for construction sites, other industrial permits and municipal separate storm sewer permits based on the costs associated with each type of permit.” The current construction fees support 16% of construction program costs. In comparison, fees collected for municipal permits cover 48% of municipal program costs and those collected for industrial permits cover 65% of industrial program costs.

Costs associated with increased efficiencies in permit turnaround time during the past decade are not sustainable at the current level of funding. Investment in the development of service platforms, databases and technology support resulted in the successful implementation of the department’s e-permitting system for construction NOIs. Implementation of this platform reduced NOI turnaround time from 31 days to 17 days. The cost to develop this system was approximately \$98,000. Maintenance and continued improvements costs about \$31,000 per year. Implementing electronic notices of termination cost approximately \$10,000 for construction permits annually.

Comparisons to other states should be considered in relative terms. As further detailed in the documentation below, 93% of construction permittees would be paying fees comparable to other states based on project size.

Increasing fees will allow the program to provide a more consistent level of service to permit applicants. Currently, the program relies heavily on General Purpose Revenue (GPR) to fund its activities which is problematic when state funds are lapsed or cut. Shifting to a more fee-based financial structure will allow the program to be more stable and maintain a level of service commensurate with the demand for construction permitting. For perspective, in 2020 the department received the second highest number of construction site NOIs in all the years that the program has existed, while incurring a GPR funding lapse.

Larger projects typically require more staff time. A 1.5-acre commercial development in an urban area may be able to be screened by intake staff in 5-10 minutes and reviewed for permit compliance in under 15 minutes. Likewise, a 1.5-acre site can often be inspected in approximately 30 minutes. In contrast, a site that exceeds 25 acres in a suburban or rural area is more likely to be close to wetlands, waterways, and habitat for threatened and endangered species. A 50-acre site may take up to an hour to screen and several hours to a couple of days to review depending on complexity. In addition, there are often advance meetings for large, high profile sites. Meetings may be necessary after the permit is issued for large complex projects with multiple phases. Most site inspections are conducted on foot, therefore large sites may require significantly more inspection time, with more photos and notes to organize in the office following the inspection. Large sites frequently include multiple best management practices (BMPs) required during construction and for post construction storm water management. There are fewer projects of this size, however when under review they take a significantly higher level of staff effort.

Fees are a small portion of overall project costs. Interviews of stakeholders were conducted in September 2020. Stakeholders were asked about the construction cost for a typical permitted project and reported costs more than \$1 million to complete. As there are sometimes small, simple projects, the fee proposal would increase the fee for sites under two acres at a rate close to inflation.

Size category	Current fee	Proposed fee starting Jan. 2023	Percent of all NOIs	Typical construction cost for regulated projects*
1-2 acres	\$140	\$250	23%	\$50,000 - \$2 Million
2-5 acres	\$140	\$350	38%	\$1.5 Million - \$5 Million
5-25 acres	\$235	\$550	32%	\$4 Million - \$5 Million
25-50	\$350	\$800	3%	\$8 Million - \$14 Million
>50 acres	\$350	\$800	4%	\$9 Million - \$40 Million

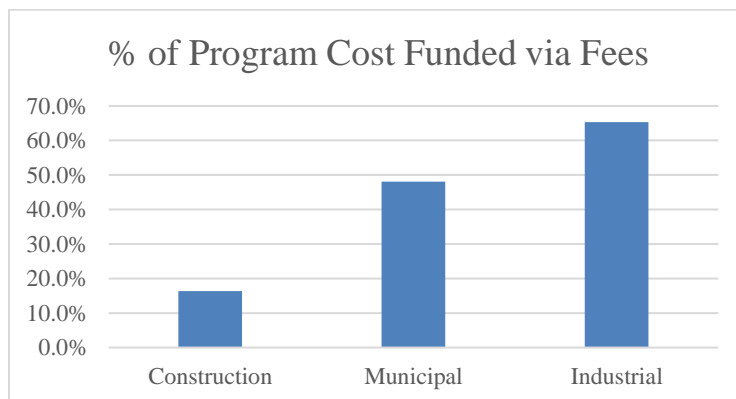
*Information obtained from stakeholder interviews in September 2020.

Detailed Background Analysis

The current application fees for construction site erosion control permits are \$140-\$350 per NOI depending on the land area disturbed. These fees are codified in s. NR 216.43 (2), Wis. Adm. Code. Storm water permit fees have not been adjusted since 2003.

Storm water permit fees are authorized under s. 283.33(9), Wis. Stats. Paragraph (b) of that statute reads “The department shall establish the amount of the fee under par. (a) for permits for construction sites, other industrial permits and municipal separate storm sewer permits based on the costs associated with each type of permit.”

The chart below shows that construction fees currently fund a lower percentage of the associated costs than the other two storm water permit sub-programs. The industrial and municipal annual permit fees fund a larger percentage of their own program costs as they are currently administered. All costs referenced in this document are estimated for the cost of a fully-staff program in FY 2020 dollars.



A study of time spent across the construction, industrial and municipal sub-programs in 2013, 2014 and 2015 showed a disproportionate amount of time processing construction permits. During this time, staff spent more than 80% of their time processing construction permits, despite the fact that these fees cover a much lower percentage of program costs.

When fees were established in 2003, they were projected to be adequate to fund the program through 2008. Since then, the following changes have occurred:

Added responsibilities

- Prior to 2003, there were some periods when minimal review of NOIs was occurring. As a result of reduced reviews, environmental issues occurred during construction and potential issues with post-construction storm water management were not identified. Limits to reviews caused delays during construction. As a result, staff time for NOI review has increased.
- Increase in the number of construction NOIs. In FY 2005, the department received 1,719 NOIs. In FY 2020, the department received 2,365 NOIs, an increase of 37.6% from 2005-2020.
- In 2004, the post-construction performance standards required in ch. NR 151, Wis. Adm. Code came into effect. A greater level of effort was required to develop technical standards and educate the regulated community.
- Additional guidance, technical standards, and outreach is needed to implement new technology and research the performance of new technologies.
- In 2009, permitting of commercial construction storm water NOIs shifted from the Dept. of Commerce to the DNR.
- The program added 28 municipal permittees to the MS4 municipal permit program as a result of the 2010 US Census, an increase of nearly 10% since the previous US Census. A significant level of effort is needed when new municipalities are required to become permitted. Staff must educate municipalities on the requirements, assist with ordinance development, help them develop education and outreach programs, review storm sewer system mapping, review permit applications and ultimately review these compliance documents.
- The implementation of Total Maximum Daily Load (TMDL) requirements necessitates more staff time devoted to municipal permit oversight. Compliance with a TMDL standard requires staff to review additional BMP modeling results prepared by consultants hired by the municipality. Compliance with the TMDL may require review, analysis and development of new technical standards for unique BMPs that had not previously been deployed. Additional staff time may be required to confer with peers and other external agency experts from partner agencies. Currently, nearly one-half of all permittees (149) are subject to additional requirements for TMDL compliance.
- The most easily developed sites are generally developed first; the complexity of proposed projects is increasing as undeveloped land becomes less available. Sites selected for

development today often have steep slopes, have more potential impact to wetlands, or other site constraints that increase the potential to impact water resources.

- Municipal inspection practices have increased the demand for timely notice of termination responses.

Efficiency Initiatives

- Implementation of the NOI triage process. Statewide, the triage process screens NOIs for level of complexity. NOIs that meet certain criteria are screened early in the process and are quickly issued permit coverage. The triage process identifies NOIs that will require higher levels of review and places them into the hands of the appropriate review staff sooner. Implementation of this process along with e-permitting has cut staff review time in half.
- Targeted outreach to improve quality of NOIs and identify common issues delaying permit coverage issuance.
- Development and maintenance of the e-permitting system has reduced the average time from NOI receipt to conveyance of coverage from 31 days to 17 days. The most recent addition to this system is the notice of termination.

Comparison with Other States

State fees for construction projects assumed 1 year of construction duration and the requirement of post-construction storm water management. Using these assumptions, 93% of the applicants would be paying fees like those charged by neighboring states under the proposed fee structure.

Table 1: Comparison with Other States

Disturbed acres:	Sample projects and associated fees				Basis for fees
	3 acres	10 acres	30 acres	50 acres	
WI	\$140	\$235	\$350	\$350	Acres Disturbed
IA	\$175	\$175	\$175	\$175	Years of coverage requested
IL	\$250	\$750	\$750	\$750	Acres disturbed
IN	\$100	\$100	\$100	\$100	N/A
MI	N/A	\$400	\$400	\$400	N/A
MN	\$400	\$400	\$400	\$400	N/A
NC	\$605	\$605	\$605	\$605	Higher fees for expedited processing and if post-construction is required, plus \$100 annual fee
OH	\$200	\$300	\$500	\$500	Acres disturbed
TN	\$250	\$1,000	\$3,000	\$6,000	Acres disturbed; annual fees of \$125-\$3,750/yr after first year

Additional Considerations

A. Inflation

The current fees were established in 2003. The average inflation rate based on the consumer price index between 2003 and 2020 was 2.05%. Any fee updates are likely to be effective no earlier than 2023. If a 2% per year rate of inflation is assumed over 20 years, the fees in 2023 should be 1.49 times the 2003 fees just to account for inflation. The inflation calculation accounts for the change in the value of money over time but does not account for the changes in workload over that time. Therefore, inflation is only one of several factors that should be considered.

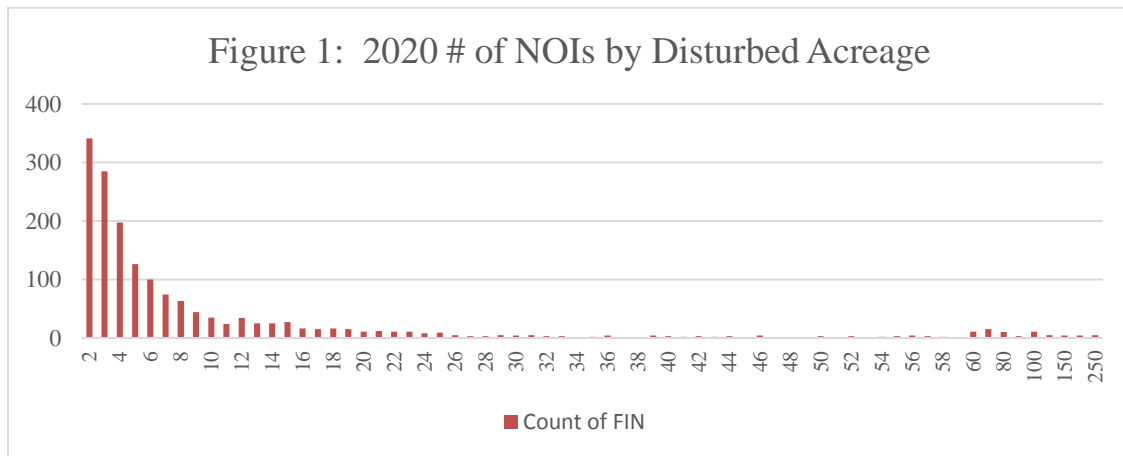
B. Site Size

The current fee structure is based on disturbed area in three ranges. Acres of land disturbance is easy to quantify and generally correlates with the level of effort required for review of the NOI. Review times for larger sites tend to be more complex due to occurrences of more natural resources such as wetlands and concentrated flow areas, and a larger number of BMPs to be implemented during and post-construction. Table 2 shows the existing fee structure and how it relates to the overall construction program proportionally.

Table 2: Current Fee Structure and Distribution

Size range	Existing fee	Proportion of total NOIs	Estimated % of construction fee income
<5 Acres	\$140	60%	45%
5-25 Acres	\$235	33%	42%
>25 Acres	\$350	7%	13%

Most NOIs are for sites less than two acres and over a third are in the 2 to 5-acre range (Fig. 1). During interviews with externals, there was interest in adding a size range category on the low end and openness to adding one on the high end.



C. Duration of Site Disturbance

The current fees provide general permit coverage for a period of three years. Permittees that intend to discharge storm water from a construction site for more than three years must re-apply for permit coverage. Reapplication typically requires paying a new application fee for another three years of coverage; Wisconsin's practice for at least the last 10 years. Iowa bases their fees on the amount of time the permit applicant intends to have the site disturbed. A challenge with establishing fees on the anticipated duration of construction is that permittees are likely to assume the minimum possible duration and then exceed that duration should delays occur due to weather, material availability, or other factors.

D. After-the Fact Fees

When an applicant begins a project before applying for and obtaining a permit, there is substantial staff time invested in obtaining permit coverage. These projects are frequently identified by a complaint, followed up by a field visit, and reviewed to determine the scope and scale of the project prior to receiving the NOI application and the associated application fees. Stakeholders contacted in September 2020, indicated support for charging after the fact fees.

E. Post-Construction Considerations

During interviews with external stakeholders, there was some interest in charging higher fees for projects subject to post-construction performance standards because there is more to review in these instances. This is a logical approach, but it may be challenging to implement. Sometimes, applicants believe they are exempt from post-construction performance standards and later learn that they are not. In these instances, fees would be underpaid at the time of application. There are also sites where the post-construction BMPs were built in an earlier phase, so even though the project is not exempt, the practices being used to satisfy the performance standard are already constructed. Staff recommends that if this option is pursued that the expectations in these scenarios are well defined.

Alternatives Considered

Based on the considerations above, the department developed the following fee alternatives:

1. No action, fees remain at 2003 levels. This does not meet statutory obligations and does not address inflation or workload increases.

Fee category	Current	Proposed	FY 23 estimated	
			NOIs	Revenue
1-5 acres	\$140	\$140	1399	\$195,860
5-25 acres	\$235	\$235	769	\$180,715
>25 acres	\$350	\$350	163	\$57,050
Total			2331	\$433,625

2. Only adjust for inflation. This would retain the existing fee structure and increase fees to account for 20 years of inflation. This does not meet statutory obligations and does not account for workload increases.

Fee category	Current	Proposed	FY 23 estimated	
			NOIs	Revenue
1-5 acres	\$140	\$210	1399	\$293,790
5-25 acres	\$235	\$350	769	\$269,150
>25 acres	\$350	\$520	163	\$84,760
Total			2331	\$647,700

3. Fund 60% of the construction portion of the storm water permit program with construction fees. Fee-based funding for the construction site permitting program would be elevated to a level comparable with the industrial storm water program. Statutory obligations to have fees proportional to the cost of administering the program and account for some of the workload increases would be met.

Fee category	Current	Proposed	FY 23 estimated	
			NOIs	Revenue
1-2 acres	\$140	\$250	536	\$134,000
2-5 acres	\$140	\$460	886	\$407,560
5-25 acres	\$235	\$780	746	\$581,880
25-50 acres	\$350	\$1,160	70	\$81,200
> 50 acres	\$350	\$1,740	93	\$161,820
Total			2331	\$1,366,460

4. Fund 100% of the construction subprogram with construction fees. This meets the statutory obligation to fund the cost of administering the program and accounts for some of the workload increases.

Fee category	Current	Proposed	FY 23 estimated	
			NOIs	Revenue
1-2 acres	\$140	\$250	536	\$ 134,000
2-5 acres	\$140	\$780	886	\$691,080
5-25 acres	\$235	\$1,300	746	\$969,800
25-50 acres	\$350	\$1,940	70	\$135,800
> 50 acres	\$350	\$3,880	93	\$360,840
Total			2331	\$2,291,520

5. In response to public comment, the department evaluated an additional option that brings the program funding from construction permit fees to 43%. The proposed fee structure sets fees

for the smaller projects to just above inflation and caps the largest projects at \$800, which is slightly higher than adjacent states, but is lower than the original fee proposal. Fee-based funding for the construction site permitting program would be elevated to a level comparable to the \$400 flat fees charged by Minnesota and Michigan. Statutory obligations to have fees proportional to the cost of administering the program and account for some of the workload increases would be partially met.

Fee category	Current	Proposed	FY 23 estimated	
			NOIs	Revenue
1-2 acres	\$140	\$250	536	\$134,000
2-5 acres	\$140	\$350	886	\$310,100
5-25 acres	\$235	\$550	746	\$410,300
> 25 acres	\$350	\$800	163	\$130,400
Total			2331	\$984,800

Comparison of Alternatives

Alternative	Estimated FY 2023 construction revenue	% of construction subprogram fee-funded	% fee-funded for all subprograms*
No Action	\$433,625	19	37
Inflation Only	\$647,700	28	43
43%	\$984,800	43	51
60%	\$1,378,920	60	61
100%	\$2,291,520	100	83

*Assumes no change to municipal and industrial permit fees

Recommendation

Amend s. NR 216.43 (2) to implement the 43% funding alternative with an effective date of January 1, 2023.

Table 5

Acres of Land Disturbance	Application Fee
Less than 2	\$250
2 or more and less than 5	\$350
5 or more and less than 25	\$550
25 or greater	\$800