

**State of Wisconsin  
Department of Natural Resources**

**Responses to Comments  
WT-09-19  
Chapter NR 216, Wis. Adm. Code  
Storm Water Discharge Permits  
July 2021**

This document presents a summary of comments received on rule package WT-09-19, modifications to ch. NR 216, Wis. Adm. Code, the Department of Natural Resources (the department) responses, and a summary of resulting changes to the Board Order.

Below is a summary of comments received, department responses, and amendments to the rule that the department has made in response to comments.

**Comments on the Economic Impact Analysis:**

A public comment period on the draft economic impact analysis (EIA) occurred from December 20, 2020 to January 20, 2021. The request for information concerning potential economic impacts of the proposed rule was sent to the municipal, construction, and industrial storm water distribution list, which has 19,753 subscribers.

During the EIA comment period, the department received five responses on the solicitation for economic impacts of this rule. Minor changes were made to the draft EIA and the draft board order as a result of the comments received. A summary of comments received on the draft EIA and department responses to comments was included with the updated economic impact analysis provided during public comment on the draft board order. In response to comments on the EIA, the department also provided a document explaining the basis for the proposed increase in construction site permit application fees.

**Comments by Wisconsin Legislative Council Rules Clearinghouse Report**

**Comment LCRC-1:** The Council has the following comments on form, style, and placement in Administrative Code:

- a. In s. NR 216.003 (1), the reference to s. NR 205.08 should not be underscored.
- b. In SECTIONS 4 and 16 of the proposed rule, the stricken “and” should precede the addition of new material. Similarly, the order of stricken and underscored text in SECTIONS 14, 30, 32, 41, 45, 47, 53, 57, 65, and 66 should be reviewed.
- c. SECTION 8 of the proposed rule should refer more specifically to the treatment of s. NR 216.03 (1).
- d. In s. NR 216.07 (intro.), “Department” should be changed to the lowercase. In sub. (8) (b), “subs.” should be indicated as “~~sub~~. subs.”. In sub. (10) (b) Note, “two” should be changed to “2” and “Department” should be changed to the lowercase. In sub. (11), a period should follow “RECORDS”.
- e. In s. NR 216.075, it appears that the numbering and internal references in the rule are incorrect. In the second notation of sub. (2), “shall not” should be changed to “may not”.
- f. In SECTIONS 29 and 59 of the proposed rule, newly created material should not be underscored.
- g. In SECTION 43 of the proposed rule, provisions that are not amended should be excluded from the rule text, and the treatment clause should be revised accordingly to cite only the provisions subject to amendment. [s. 1.04 (6) (d), Manual.] As renumbered in this SECTION, in sub. (5) (e), “must” should be changed to “shall”.

- h. In s. NR 216.42 (3m), a subsection title should be added because the other subsections of s. NR 216.42 contain subsection titles. [s. 1.10 (2) (a) 2., Manual.]

Response: The department has modified the proposed board order as requested for comments a to h.

Comment LCRC-2: The Council has the following comments on clarity, grammar, punctuation, and use of plain language:

- a. Section NR 216.006 (6) and (7) (b) use the term “owner” and sub. (7) (intro.) and (7) (a) (intro.) and 7., use the term “landowner”. The department should review these provisions to ensure it intended to use a different term in each.
- b. The material created in SECTION 10 should not be duplicated in SECTION 14. However, in SECTION 14, the treatment of s. NR 216.031 (1) (a), as renumbered, should be reviewed. At minimum, it appears this material should be underscored.
- c. In s. NR 216.06 (4) Note, it appears that either “Department’s Internet site” should be changed to “department website”, the term used in s. NR 216.03 (1) Note, or “department website” should be changed to “department’s internet site”. The entire rule should be checked to ensure that the same term is used consistently.
- d. In s. NR 216.27 (1), “a” should be inserted between “with” and “storm water discharge”.
- e. In s. NR 216.29 (1) (f), it is unclear what type of “plans and submissions” should be submitted for review and approval.
- f. In s. NR 216.10 (5) (g), it would improve the clarity of the rule if the department could be more specific about what “non-compliance issues which cannot be resolved” means.
- g. In s. NR 216.42 (2), “Stat.” should be changed to “Stats.”.
- h. In s. NR 216.47 (7), it appears that “the storm water management plan required under s. NR 216.46” should be changed to “the erosion control plan required under s. NR 216.46”. In addition, is the storm water management plan requirement to “identify measures taken to avoid or minimize those impacts” referring to impacts identified in the erosion control plan?
- i. In s. NR 216.49 (4), “EPA approved” should be hyphenated.

Response: The department has modified the proposed board order in response to these comments as follows:

- a) The reference sections were updated to use ‘owner’ as this applies to both construction and industrial permits.
- b) Section 10 has been deleted and the referenced material has been underlined in Section 14.
- c) The document has been searched and all instances of ‘Department’s Internet site’ were changed to ‘department website’.
- d) The requested word was added.
- e) Section NR 216.29 (1) (f), has been modified to specify that the plans and specifications are for storm water best management practices.
- f) Section NR 216.10 (5) (g) has been clarified to indicate that ‘non-compliance with provisions in subch. III that are not corrected by the permittee within 14 days’ must be reported to the department.
- g) The correction has been made as requested.
- h) Section NR 216.47 (7) has been eliminated in response to public comment.
- i) The hyphen has been added.

**Public Hearing Summary:**

Fifty persons attended the public hearing, held via Zoom on April 20, 2021, including 9 department staff. Of the non-department attendees, fourteen persons completed hearing appearance forms. Three registrants indicated that they were in support of the proposal and the balance indicated ‘as interest may appear’ or did not indicate a position. No registrants indicated that they were opposed to the rule proposal. Jim Bertolacini, a retired department employee, spoke in favor of the code revision. Mr. Bertolacini specifically spoke in favor of revisions related to electronic permitting, addressing EPA issues identified in 2011, construction fee updates, and revisions to the authorized local program.

**Comments from the Environmental Protection Agency:**

Comment EPA-1: Among other items, the proposed modifications address eight of the 75 issues outlined in the Environmental Protection Agency’s July 18, 2011 letter to former Secretary Cathy Stepp, including specifically issues 24, 25, 26, 52, 53, 56, 57, and 67. We thank you for the productive discussions that our respective staffs have had regarding rule modifications over the past decade; and, especially relevant for this rule package, the discussions we have had since October of last year.

Response: Thank you.

Comment EPA-2: Proposed Wis. Admin. Code NR § 216.42 (3m) provides:

Storm water discharges from land containing dredged material removed from a drainage district ditch, if the land is adjacent to the ditch from which the dredged material was removed, are not regulated by this subchapter. This subsection only applies to a drainage district subject to ch. 88, Stats.

As you are aware, the Clean Water Act (CWA) requires a permit for discharges of pollutants into waters of the United States from point sources. The federal regulations provide for specific exclusions from National Pollutant Discharge Elimination System (NPDES) permitting, under 40 C.F.R. § 122.3, and for some stormwater discharges, under 40 C.F.R. § 122.26(a)(2). The proposed rule at Wis. Admin. Code NR § 216.42 (3m), however, does not appear to fall under these exclusions. Therefore, we ask that you explain how the proposed regulation would be consistent with the CWA and its implementing regulations, or that you modify the rule to clearly establish that a permit is needed if required by the CWA.

Response: The department is proposing to modify the board order to clarify the application of implementing regulations within the Clean Water Act (CWA) to drainage district projects such that the exemption applies where consistency with the CWA can be demonstrated. Based on a review of past permit applications from drainage districts, it is anticipated that on average about one drainage district project per year is likely to require permitting under the CWA and equivalent state storm water regulations proposed.

Comments received from the EPA concern equivalent exemptions from permitting of storm water discharges under the CWA to those within the department’s proposed rules. The department notes that certain exemptions may be applicable where Wisconsin’s rules preclude storm water discharges from land containing dredged material removed from a drainage district ditch if the land is adjacent to the ditch from which the dredged material was removed. Those circumstances may include land disturbing construction activity of routine maintenance in s. NR 216.42(8), where the routine maintenance for project sites that involve under 5 acres of land disturbance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the facility. This exemption is consistent with implementing regulations in 40 CFR 122.26 (a)(15)(i). An additional circumstance would include land disturbing construction activity of one acre or less, since only discharges under s. NR 216.42(1) require a Notice of Intent to be filed (40 CFR 122.26 (a)(15)(i)). Lastly, discharges from planting, growing, cultivating and harvesting of crops for human or

livestock consumption are not regulated by this subchapter. This exemption is consistent with implementing regulations in 40 CFR 122.3 (e).

To meet the intent of the CWA and these equivalent implementing regulations, the department is proposing to create NR 216.42(8m), to clarify that storm water discharges from land containing dredged material removed from a drainage district ditch are not regulated by this subchapter if: the work is authorized by a drainage district subject to ch. 88, Stats.; the land is adjacent to the ditch from which the dredge material was removed; and the area of land disturbing activity that does not meet the agricultural exemption in 216.42(2) is less than 5 acres for activities that qualify as routine maintenance and less than one acre for all other activities.

As this relates to ch. NR 216, storm water discharges that fall outside the existing exemption criteria of routine maintenance that are performed to maintain the original line and grade, hydraulic capacity, or original purpose of the facility; are less than one acre of land disturbance; or have discharges that are associated with planting, growing, cultivating and harvesting of crops for human or livestock consumption, would require storm water discharge permitting.

The department has also included a note under the created provision to clarify that the provisions in ch. 30, Stats. for drainage district dredging still apply, and that the erosion and sediment performance standards under s. NR 151.105 or 151.11, Wis. Adm. Code are used to implement s. 88.74(3)(b), Stats.

The department has updated the EIA to include costs associated with storm water permitting for one drainage district project per year.

**Comment by the League of Municipalities (LM):**

Comment LM-1: Current stormwater discharge permits, unlike wastewater discharge permits, do not include numeric water quality standards and do not measure compliance by numeric end of pipe standards. Nor would it be practicable to impose such numeric standards in stormwater discharge permits. Instead, stormwater discharge permits include best management practices (“BMPs”) designed to achieve compliance with water quality criteria. However, language in Sections 6 and 16 of the board order could be interpreted to lead to the imposition of numeric standards in storm water discharge permits.

The League understands that these revisions relate to the National Pollutant Discharge Elimination System (“NPDES”) MS4 General Permit Remand Rule and that this language is not intended to lead to the imposition of numeric standards in stormwater discharge permits. However, the League respectfully requests a clarification and assurance that numeric standards are not intended. To that extent, the Department could add text to the administrative code language or add a clarifying note in NR 216.07 providing as follows:

NOTE: Reduction of pollutants and compliance with water quality standards are intended to be monitored and achieved through the implementation of best management practices (“BMPs”).

Response: The department understands that due to the number of outfalls and the variability of storm water flows, meeting ‘end of pipe’ numeric effluent water quality standards is much more challenging for storm water permittees than for traditional point source permittees, such as wastewater treatment plants, who have one or two outfalls and more predictable flows. Therefore, the department has traditionally implemented numeric standards in storm water permits by requiring best management practices, many of which are modeled to determine performance on an average annual basis. The department plans on continuing the practice of implementing numeric standards as a percent reduction in the average annual pollutant discharge for most pollutants, as

determined by modeling best management practices. However, some pollutants, such as bacteria, are not easily modeled, so there may be instances where limited end of pipe monitoring will be needed to demonstrate the effectiveness of best management practices and to identify drainage basins where targeted actions are most needed. The department is not proposing any changes to the administrative code language in response to this comment.

**Comments by Midwest Environmental Advocates, Milwaukee Riverkeeper, Clean Water Action Council of NE WI, and River Alliance of Wisconsin (MEA):**

Comment MEA-1: 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.

Response: The department's storm water program does not have direct regulatory authority over placement of materials within the floodplain. In accordance with s. NR 216.27 (2), Wis. Adm. Code, when plans are developed or activities conducted in accordance with other federal, state, or regulatory programs that meet the requirements of this section, the plans may be incorporated in the SWPPP by reference.

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 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.

Subsequently, the SWPPP may be modified to reflect changes to minimum source area controls, best management practices, and good housekeeping measures where activities and materials may be present in the floodplain or incorporated by reference into the SWPPP where these conditions are present.

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

Comment MEA-2: 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."

Response: The department agrees that a note regarding common plan of development is warranted but believes it would be best placed in NR 216.42 (1).

The department updated the following note in the proposed rule:

NOTE: Disturbances less than one acre may require a permit if the disturbances are part of a common plan of development with one acre or more of total land disturbance as described in s. NR 216.002 (2).

Comment MEA-3: 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.

Response: The department has previously added a note to s. NR 216.002(11) stating that “A discharge listed in the definition above may be regulated on a case-by-case basis under s. NR 216.07 (3) (b) or s. 283.31, Stats., if the MS4 permittee, municipality, or the department identifies it as a significant source of a pollutant to waters of the state. In a memorandum dated December 21, 2017, the US EPA accepted this clarification as resolving their comment regarding illicit discharge regulation. No changes to the board order have been made in response to this comment.

Comment MEA-4: 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.

Response: The department agrees that it is reasonable to require the authorized local program to submit NOIs to the department at least 14 working days prior to the presumptive approval date.

The department has modified s. NR 216.10 (6) (b) 2 in response to this comment.

Comment MEA-5: DNR should clarify what form should be used to report the results of the non-stormwater evaluations described in § NR 216.28(1)(c).

Response: The department has modified s. NR 216.29 (1) (e), Wis. Adm. Code, to allow continued usage of the SWPPP Summary form. The form allows permittees to document non-stormwater discharge monitoring required under s. NR 216.28, Wis. Adm. Code. No changes to the board order have been made in response to this comment.

**Comment by Midwest Food Products Association (MWFPA):**

Comment MWFPA-1: MWFPA urges the Department to reconsider Section 36 of the Draft Rule, which requires industrial permittees to submit their entire Storm Water Pollution Prevent Plan (SWPPP) to the Department. The proposed requirement is administratively burdensome for permittees and is not necessary for the effective administration of the storm water permitting program.

Submitting a full plan, even by electronic means, shoulders permittees with an additional administrative reporting burden. Also, requiring permittees to submit the full plan may cause confusion as to when a revision to the SWPPP necessitates resubmittal of the entire plan. If a SWPPP is not resubmitted for each update, Department staff may rely on a prior version of the SWPPP that is not current for the facility. For these reasons, we support retaining the current language of NR 216.29, requiring submission of the SWPPP summary rather than the facility’s entire SWPPP.

Response: Section NR 216.29 of the proposed rule applies to owners and operators of a proposed industrial stormwater discharge that have not yet begun industrial operations. The department has removed many of the proposed changes and instead has provided the option in s. NR 216.29 (1) (a) and (b), Wis. Adm. Code, to allow permittees to submit either the full SWPPP or SWPPP Summary when applying for coverage under this section. For facilities that currently have storm water discharge permit coverage, the provisions of ss. NR 216.27 (4) and 216.29 (6), Wis. Adm. Code, are applicable.

**Comments by the City of Watertown (CW):**

Comment CW-1: NR 216.031 (1) (e) and NR 216.032 (h), “Any other information that the department requests”. We encourage a revision of this language to more clearly indicate the type of information the department may require during the Municipal Separate Storm Sewer System (MS4) Permit application or reapplication process, such as specifying that the information would be related to the storm water pollutant reduction programs regulated under NR 216, Wisconsin Administrative Code. As written, the language is broad and unclear, subject to the interpretation of the individual requesting the information.

Response: The department is updating ch. NR 216, Wis. Adm. Code, to align with federal storm water requirements. 40 CFR § 122.34 (a) (2) requires the department to reissue permits based upon evaluation of current permit requirements, record of permittee compliance and program implementation progress, current water quality conditions, and other relevant information. This ensures MS4 permits have requirements necessary to meet the MS4 permit standard “to reduce pollutant discharges from the MS4 to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act.” Pursuant to s. 283.37 (5), Stats., the department may require the applicant to submit information in addition to that supplied on the permit application. The department wants to ensure that any additional information can also be collected electronically. The board order has been revised to read ‘other relevant information’ in the two locations referenced.

Comment CW-2: NR 216.07(8) (h) and (j), regarding additional information required in the MS4 Permit Annual Reports.

- We encourage a revision NR 216.07 (8) (h) to describe the type of evaluation expected to meet this requirement, with potential alternative examples of submittals that could be used instead.
- In the first sentence of NR 216.07(8) (j) we encourage a substitution of the word “necessary” to “anticipated” (“... to comply with permit requirements or to achieve measurable goals.”) While staff try to forecast annual expenditures, municipal budgets are subject to review and approval by many individuals, committees and councils prior to adoption on an annual basis and may not reflect the originally planned budget that was initially developed by those managing the stormwater program. In addition, while a plan to implement a selection of specific projects over a 5-year permit term may serve as a guide to improving water quality, the real opportunity to implement a specific project often changes within a few years. The availability of land, willingness of partners to provide easements or assistance, and the evolution of the storm water industry and our understanding of pollutant control through new technologies result in conditions that may influence priorities and provide new opportunities for municipalities to cost effectively evaluate and embrace new opportunities which may be better suited to an area than the previously planned projects. For these reasons, we encourage the substitution of the word “necessary” to “anticipated” (“... to comply with permit requirements or to achieve measurable goals.”)

Response: Additional detail on the evaluation required under s. NR 216.07 (8) (h) is more appropriate within the text of permits and guidance documents. The evaluations are required under 40 CFR § 122.34 (d), which states that “the MS4 permit must require the permittee to evaluate compliance with the terms and conditions of the permit, including the effectiveness of the components of its storm water management program (SWMP), and the status of achieving the measurable requirements in the permit. This includes appropriate record keeping by the permittee, written storm water management programs, and annual reporting. Based on the permittee’s annual review of their program via the annual report, they shall also report any changes made to their storm water management program.” The federal language is used as the basis for developing permit language and guidance related to this requirement. The department has modified s. NR 216.07 (8)

(j) in response to this comment and re-ordered 216.07 (8) (i) to (j) based on the order the required actions need to occur.

Comment CW-3: NR 216.07(10) (c), US EPA-approved TMDL. We recommend a clarification of the information to be considered by department staff as listed below:

- Sections (1), (4) and (5). Much of this information is compiled and analyzed through extensive and costly TMDL planning, often with funding through the Wisconsin Department of Natural Resources (WDNR) Urban Nonpoint Source and Storm Water Grant program. Input from department staff on the need for structural best management practices and related land acquisition, financing, and infrastructure changes (1), an evaluation of the effectiveness of previously implemented best management practices (4), and whether a TMDL implementation plan is “appropriate and necessary” (5) would be better provided during the planning process than after plan completion as a condition of permit compliance. If the information referred to in Sections (1), (4) and (5) is different than the information typically found in the TMDL planning activities performed prior to implementation, we encourage examples of the types of reports, studies, analyses, or the decision tree or flow chart that staff would use to evaluate this information. As written, the language is very unclear to the municipality on what may need to be developed to meet this requirement, and subsequently the resources that will be needed to achieve compliance with this aspect of the permit.
- Section (3), “The extent to which the permittee has made good faith efforts to attain the wasteload allocation and other requirements in prior permits, if applicable.” We recommend adding examples after this existing language, to clarify the types of efforts department staff may consider in this evaluation. The term “good faith efforts” can be subject to individual interpretation.

Response: The ‘TMDL implementation plan’ is what comes out of the planning process as a permit condition. Sections (1), (4), and (5) are the items the department will consider when evaluating the permittee’s proposed implementation plan for achieving the TMDL reduction goals. These sections do not impose additional requirements on the permittee, rather provide a framework for review of the permittees plan and additional flexibility appropriate to implementing a TMDL in a municipal storm water permit context rather than a traditional wastewater treatment plant.

Section (3) recognizes that there are actions that the permittee can take to make progress towards achieving the TMDL reduction goals that are not always directly quantifiable. For example, a permittee may implement fall leaf collection in high density residential areas. The action is known to reduce pollutants for which there is a wasteload allocation, but the level of reduction may not be easily quantifiable. Ultimately, the goal of TMDLs is to delist the waterbody, and any action taken to reduce pollutant discharges to the waterbody can be considered.

No changes to the board order have been made in response to this comment.

Comment CW-4: NR 216.07(10) (d), Assessment. We encourage additional language be included in section (d) regarding the assessment to be included as a permit condition, per NR 216.07(10). Specifically, clarification on the extent of modeling that will be required in each 5-year permit term, or if alternative summaries or tabular summaries of pollutant loading data would be acceptable alternatives to costly municipal-wide modeling analyses.

Response: The requirement for an updated or new assessment of pollutant loading and reduction is not specified in code as the requirement is generally incorporated into permits following a precipitating event, such as a permittee’s first permit term, EPA approval of a new TMDL, or annexation of additional area. Permittees are encouraged to structure their modeling results in such a manner as to facilitate updates with minimal effort. Alternative approaches to providing pollutant

loading data and best management practice performance may be discussed with regional storm water engineers to determine if the proposed approach is acceptable.

No changes to the board order have been made in response to this comment.

Comment CW-5: NR 216.075 (2) and (3), regarding if the department finds that an agreement or implementation of a control measure does not meet the requirements of the permit. We encourage adding language to allow the noncompliance issue to be resolved by the other entity before disallowing a municipality from working with the other entity. In most cases, agreements between municipalities and other entities to meet the MS4 Permit program compliance is the result of the municipalities lack of resources to effectively meet the requirements individually. A revised program that addresses the noncompliance may be more effective and cost efficient than the program the municipality may try to create as a replacement.

Response: As with any disciplinary action the department takes, we have discretion on when to take enforcement. The overall department goal is to obtain voluntary compliance; however, when there is a violation, enforcement occurs in a sequence, or stepped process. The process usually begins with primary enforcement, termed informal enforcement. Department staff make these first steps as a part of routine operations. The enforcement process is outlined within internal department procedures, not within regulatory code.

This section is providing authority to require the MS4 to implement its permit program on its own, when the department finds a co-permittee or 3rd party is inadequate. This section should not be interpreted that the department will immediately revoke the ability to work cooperatively upon identification of a deficiency.

No changes have been made in response to this comment.

Comment CW-6: Please consider developing and including language in the revised NR 216 to address a timeframe for WDNR staff to review and respond to the MS4 Permit applications and reapplications, MS4 Permit Annual Reports, and permit compliance checks and audits.

Response: The department has internal procedures for staff regarding level of review and timeframes associated with review for certain documents. Depending on management decisions, competing workload, staff positions filled, etc., response time needs to remain flexible.

No changes to the board order have been made in response to this comment.

Comment CW-7: In NR 216.29, it is unclear on when existing permitted sites will be required to submit a full SWPPP. An anticipated date of implementation will help existing permittees budget for this expenditure.

Response: The proposed rule applies to owners and operators of a proposed industrial stormwater discharge but have not yet begun industrial operations. The department has amended this section to the previous language and provided the option in s. NR 216.29 (1) (a) and (b), Wis. Adm. Code, to allow permittees to submit either the full SWPPP or SWPPP Summary when applying for coverage under this section. For facilities that currently have storm water discharge permit coverage, the provisions of ss. NR 216.27 (4) and 216.29 (6), Wis. Adm. Code, are applicable.

No changes to the board order have been made in response to this comment.

**Comment by Wisconsin Builders Association (WBA):**

Comment WBA-1: Wisconsin faces a work force housing crisis. We are not building enough houses to keep up with demand.

1. The cost to build housing (multi-family and single family) is rising faster than inflation and incomes.
2. The state has seen a decline homeownership especially among younger families, first-time homebuyers, and African American and Hispanic families.
3. The latest data shows that, on average, regulations and fees imposed by government at all levels account for 24.3 percent of the final price of a new single-family home built for sale.
4. The WBA opposes the dramatic increase in proposed fees for permitting, which range from 79% to 400%. This is the worst time for the Department to increase fees on new single-family and multi-family projects. Such fee increases will continue to hinder Wisconsin's efforts to create more workforce and affordable housing.

Response: Construction site storm water permits are required when one or more acres of land will be disturbed, and for sites of less than one acre if they are part of a larger common plan of development or sale. An application for subdivision development is typically associated with a single fee for the entire project rather than construction of individual homes. Therefore, any design costs and fees are divided among the number of residential lots within the subdivision.

For example, according to the department's WPDES permit database, a recent subdivision included 45 residential lots across 24 acres. The construction site storm water permit application fee paid was \$235, or \$5.22 per residential lot. Another example included 58 lots across 49 acres. The storm water permit application fee paid was \$350, or \$6.03 per residential lot. Using the proposed fees amended in response to public comment, the estimated fee for similar developments would amount to \$12.22, and \$13.79 respectively, per residential lot. Therefore, it is not anticipated that the proposed construction site permit application fee increases would have a significant effect on the affordability of housing.

Proposed fee increases have been lowered in response to this comment.

**Comments by the Wisconsin Manufacturers & Commerce:**

Comment WMC-1: Electronic reporting requirements are described in Section 5 of the proposed NR 216. The requirements appear to grant the department very broad discretion. WMC urges the DNR to limit the scope of Section 5 (NR 216.006) to only apply to applications, and only to the extent required under federal law, as required by s. 283.11(2)(b). At a minimum this should include the deletion of NR 216.006(4) and NR 216.006(5). Additional revisions to Section 5 may also be necessary to accomplish this purpose.

Response: The National Pollutant Discharge Elimination System Electronic Reporting Rule (40 CFR 127) requires authorized NPDES programs to electronically collect, manage, and share NPDES data to EPA relating to applications and Notice of Intent, Notices of Termination, program reports (such as MS4 annual reports), and compliance and inspection information. Section NR 216.006 (4) and (5), Wis. Adm. Code, allow the department to establish an electronic system to collect the aforementioned data. EPA estimated that some authorized NPDES programs may need to update their regulations or statutes to make clear that electronic reporting is required for the reports. In order to incorporate electronic reporting into permits, authority needs to be established in ch. NR 216, Wis. Adm. Code.

The department notified EPA of their intent to be the initial recipient of electronic information from regulated facilities (verse EPA as the initial recipient) (40 CFR § 127.27). Pursuant to 40 CFR §

127.13, the department has responsibility for the quality of the information provided by permittees. NPDES permittees, facilities, and entities subject to this must use quality assurance and quality control procedures to ensure the quality of the NPDES information submitted. Additionally, 40 CFR § 127.23 requires electronic data transfers to be timely, accurate, complete, and consistent. To meet federal requirements and ensure consistent data collection and transfer, the department requires the use of their electronic system. The EPA also acknowledged that the authorized NPDES program may also require NPDES regulated entities to submit more data than what is listed in federal code. EPA is expected to expand the extent of electronic submittals required in their permits and then expect the states to follow suit in subsequent permit reissuances. The proposed rule allows the department to adapt to the anticipated changes in EPA electronic reporting requirements as the federal government further develops its electronic reporting systems.

As businesses move increasingly to electronic communications, electronic reporting is expected to be less of an administrative and economic burden than paper reporting. Electronic submittal of documentation eliminates time and money spent on printing paper submittals and shipping them to regulators. Companies may also search the water permit system for previous submissions and examples from similar businesses when developing information for new or modified facilities. The rule includes waiver provisions consistent with federal rules for the rare situations where electronic submittal may not be feasible.

The phrase ‘as needed to comply with s. 283.43 (1)(b), Stats.’ will be added to the end of s. NR 216.006 (4) and (5).

Comment WMC-2: WMC requests that the DNR delete the proposed NR 216.27(3)(cm) and NR 216.47(7) found in Sections 35 and 61, respectively. These wetland requirements go beyond what is required under s. 283.11(2)(b), and are beyond the scope of the rule. At a minimum, WMC urges the Department to explicitly state that the proposed NR 21.627(3)(cm) only applies to “landfills and nonmetallic mining states,” as previously indicated by DNR staff.

Response: The proposed sections directly implement water quality standards in ch. NR 103, Wis. Adm. Code that protect the aquatic and wildlife habitat within wetlands that could be impacted by a significant increase or decrease to the quantity of storm water discharged to them. The intent for including an assessment of these impacts in the SWPPP and the storm water management plan was to encourage evaluation of these concerns early in the design process when it can be most cost-effectively addressed. As the storm water permits are required to be conditioned to not cover any activities that would violate ch. NR 103, the requirement is already in place but is often overlooked until permit review. However, after further consideration, the department believes that these provisions are better addressed within ch. NR 151, Wis. Adm. Code, along with other performance standards developed to maintain water quality during and after construction. Therefore, these revisions have been removed from the proposed board order but may be included in a scope statement for ch. NR 151 updates in the future. The EIA has also been updated to remove costs associated with the removed provisions.

Comment WMC-3: WMC urges the DNR to eliminate Sections 36-39 from the proposed NR 216, and retain the SWPPP summary requirement found in the existing rule. This will remove an undue administrative burden on the regulated community, and remove an unlawful change included in the rule.

Response: The department amended sections of the board order back to the original language, but included the option to submit either the full SWPPP or the SWPPP summary in s. NR 216.29 (1) (a) and (b), Wis. Adm. Code.

Comment WMC-4: WMC urges the Department to withdraw the proposed fee increases included in Table 5 of Section 54 of the proposed rule. If the Department believes it is under a statutory obligation to reset fees under s. 283.33(9)(b), WMC urges the DNR to examine lowering, not raising, fees.

Response: The department has reduced the proposed fee increases in response to this comment. The department believes that the fee increase is necessary for the reasons provided in the memo titled ‘Fee analysis related to proposed rule changes to NR 216 (WT-09-19)’. These reasons include increased demand for department services on top of 20 years of inflation occurring between the last fee update and the anticipated effective date of proposed fees. When we asked our stakeholder what the construction cost was for typical projects requiring construction permit coverage, most of them identified project costs over \$1 million, therefore the proposed fees would reflect less than a tenth of a percentage of overall project costs. The department believes that the statutory obligation to set fees under s. 283.33 (9) (b), Stats. was intended to support administration of the program so it was not entirely dependent on general tax revenue. The storm water program engages in continual improvement, so there are always efforts underway to provide something ‘new’ to our permittees, such as improved electronic permitting functionality, new technical standards, and outreach to help the regulated community comply with permits. Increasing fees will enable the program to continue to support these efforts.

Comment WMC-5: WMC encourages the Department to reconsider the following improvements suggested by WMC in its July 21, 2020 letter:

- If the DNR clarifies “routine maintenance” under NR 216.42(8), it should consider including the phrase “Routine maintenance may include, but is not limited to...” to avoid limiting businesses’ options and flexibility.
- “Consider establishing a standardized method for the assessment of existing storm water ponds.”
- “Consider clarifying the phrase “separately or as part of a larger plan of development” with respect to routine activities – specifically, to clarify how many parcels of land must be disturbed, or how expansive a project must be, before it reaches the threshold where a permit is required.”
- “Consider clarifying this exemption with respect to earth disturbing activities associated with the general non-metallic mining permit for aggregate pits and quarries. Some of our members feel that regulators and industry are not on the same page in terms of what constitutes “routine activities” in this context.”

Response: The department considered the suggested changes as follows:

- In response to the comments provided on the economic impact assessment, the department decided not to modify the text of the code regarding routine maintenance. The definition of routine maintenance as it currently reads in ch. NR 216 is based in federal code. Instead a note is provided to clarify specific situations that we are commonly asked about. The modification proposed by WMC to the definition of routine maintenance was not implemented as it would expand the routine maintenance exemption beyond that supported by federal code.
- The suggestion to have a standardized method for assessment of existing storm water management ponds has merit as a potential new technical standard. The department has authority to develop that technical standard within subch. V of ch. NR 151, Wis. Adm. Code. This item has been added to the department’s list of potential technical standard development projects.

- The concept of common plan of development and the definition of routine maintenance are established in federal rule. The routine maintenance exemption specifies that the exemption applies to projects disturbing 5 acres or less, consistent with federal rule.
- The proposed non-metallic mining general permit, which is currently in the process of being reissued, includes language clarifying the circumstances under which activities would need to be covered under a construction site permit. Specifically, creation of new impervious surfaces that would warrant post-construction storm water measures would need to be covered under a construction site general permit. The proposed language is expected to improve understanding and consistency in this area.

No changes to the board order have been made in response to this comment.

**Comments by the Wisconsin Paper Council (WPC):**

Comment WPC-1: DNR should not require the submittal of the entire SWPPP, and instead continue to allow for the submittal of a summary of the SWPPP. Given current regulatory requirements, submittal is not necessary to ensure adequacy of SWPPPs. NR 216.29(1) requires owners or operators to develop a SWPPP that meets administrative code requirements prior to operation, and to submit a SWPPP summary to DNR. In addition, owner or operators must keep the SWPPP on site, and to make it available to DNR upon request.

Furthermore, DNR has the authority under its current rules to require the submittal of a complete SWPPP if it determines a SWPPP summary is inadequate. Specifically, NR 216.29(1)(f) provides: “The department shall notify the permittee if it determines that the SWPPP summary is inadequate and may require that permittee to submit the SWPPP for review.” Thus, the DNR can obtain and review the entire SWPPP if it determines such a review is necessary.

Also, DNR did not provide any information as to why it believed submittal of the SWPPP summary was insufficient, or why the existing requirements outlined above were not adequate to address any concerns. Requiring submittal, and presumably reviewing complete plans, would be less efficient than using the current rule provisions to address deficiencies.

Response: The department amended sections of the board order back to the original language, but included the option to submit either the full SWPPP or a SWPPP summary in s. NR 216.29 (1) (a) and (b), Wis. Adm. Code.

Comment WPC-2: In summary, we do not believe DNR’s fee increase proposal is reasonable for the following reasons:

- According to the FAM, the current fees are estimated to generate \$433,625 in FY 23. Under DNR’s proposal, fees would generate \$1,366,460, which is more than three times the amount of fee revenue that would be generated by the current fees in FY 23.
- A comparison of the current fees to the proposed fees, indicate fee increases ranging from 79% for sites less than two acres, to a 397% increase for sites of 50 acres or more.
- The fee increases far exceed inflation since 2003.
- DNR’s state fee comparison shows the Wisconsin’s fees would be significantly higher than fees imposed by other states, in many instances.

Response: The department has reduced the proposed fee increases in response to this comment. The smallest sites would have an increase slightly above inflation and the highest fee proposed is close to the maximum charged by neighboring states. The resulting estimated fee income divided by the total number of NOIs is comparable to the \$400 flat fee charged by Minnesota and Michigan.

**Comments by the Wisconsin Transportation Builders Association (WTBA):**

**Comment WTBA-1:** Section 1 – The definition of “receiving water” is too broad. The “receiving water” should be limited to the water body that initially receives the discharge. The proposed standard of “affected by the discharge” is vague and could conceivably include downstream waters that are a considerable distance from the discharge

**Response:** The storm water permit program is a pollution discharge elimination system permit program required by the Clean Water Act. 40 CFR section 131.10 (b) requires consideration of downstream uses and water quality standards when establishing permit requirements.

No changes to the board order have been made in response to this comment.

**Comment WTBA-2:** Section 6 – The relationship between TMDLs and the permitting process, particularly the reissued general permit, needs to be clarified. WTBA believes the past practice of use of BMPs or, if applicable, compliance with water discharge limits listed in the general permit instead of specific wasteload allocations should be continued. WTBA is opposed to individual wasteload allocations to implement TMDLs.

**Response:** The department understands that due to the number of outfalls and the variability of storm water flows, meeting ‘end of pipe’ numeric effluent water quality standards is much more challenging for storm water permittees than for traditional point source permittees, such as wastewater treatment plants, who have one or two outfalls and more predictable flows. Therefore, the department has traditionally implemented numeric standards in storm water permits by requiring best management practices, many of which are modeled to determine performance on an average annual basis. The department plans on continuing the practice of implementing numeric standards as a percent reduction in the average annual pollutant discharge for most pollutants, as determined by modeling best management practices. For pollutants such as bacteria that are not easily modeled, implementation may be via a combination of best management practices and targeted monitoring to identify drainage basins where actions are most needed.

No changes to the board order have been made in response to this comment.

**Comment WTBA-3:** Section 29 – The definition of “industrial waste” needs to be clarified so that it is clear that it does not include stockpiles of concrete rubble, recycled asphalt pavement, and other materials that are routinely used in the construction of transportation facilities.

**Response:** The department has combined sections 28. and 29. of the board order to provide appropriate context for interpretation of this section, and has clarified that the term as used in this subdivision does not include placement of recycled materials used during construction.

Sections 28 and 29 have been combined into s. NR 216.21 (2) (b) 7. and amended to read that landfills, land application sites and open dumps that receive or have received any industrial waste from any of the facilities identified in this section, including those subject to regulation under subtitle D of the Resource Conservation and Recovery Act, 42 USC 6901 et seq., or ch. 289, Stats. For the purposes of this subdivision, “industrial waste” means a disposed material generated by any of the facilities identified in this section and including construction and demolition waste from a construction site regulated under subch. III. The term does not include placement of recycled material used during construction.

This section was amended to specifically pertain to landfills, land application sites, open dumps, and construction and demolition waste landfills which may receive these types of waste, or that receive or have received industrial waste manufactured from the facilities regulated under s. NR 216.21, Wis. Adm. Code. This clarification is needed to align with the discharges that require industrial permit coverage commensurate with the clean water act, 40 CFR 122.26 (b) (14) (v). Therefore, landfills, land application sites, open dumps, and construction and demolition waste landfills that receive or have received wastes that were ultimately manufactured but disposed of in these facilities necessitates permit coverage.

Please note that definition of ‘industrial waste’ in the context of ch. NR 216 is regulated separately from ‘industrial waste’ defined in s. NR 500.03 (109) Wis. Adm. Code, which is administered through the department’s solid waste program. Furthermore, s. NR 500.08 (2) (a), Wis. Adm. Code, exempts clean soil, brick, building stone, concrete or reinforced concrete not painted with lead-based paint, broken pavement, and wood not treated or painted with preservatives or lead-based paint from licensing and regulation under chs. NR 500 to 538 provided the locational requirements of s. NR 504.04 (3) (c) and (4) (a) to (f), Wis. Adm. Code, are met and the facility is operated in a nuisance-free and aesthetic manner.

Comment WTBA-4: Section 33 – The scope of the applicability section needs to be clarified. As DNR is aware, internally drained non-metallic mines currently do not need to prepare a SWPPP. This practice should continue.

Response: Under s. NR 216.30 (2), Wis. Adm. Code, a non-metallic mining facility is considered internally drained if all storm water that contacts disturbed areas or excavated material is directed to onsite seepage areas that are entirely confined and retained within the property boundaries of the site. During initial mine site development, this provision also applies to the construction of best management practices that may not drain internally to the mine site. Once stabilized with vegetation, these areas are no longer considered disturbed area. Therefore, this provision is applicable to new facilities and facilities which may undergo expansion if the construction of best management practices results in storm water runoff containing conventional pollutants common to the industry are not entirely contained on the site. Additionally, internal drainage designation requires department concurrence.

No changes to the board order have been made in response to this comment.

Comment WTBA-5: Section 35 – The scope of the evaluation regarding impacts to wetlands needs to be clarified, particularly regarding ongoing operations that span many years. Alternative language is suggested as follows: “For industrial activities that include ongoing changes to drainage and grading, the SWPPP shall identify actions to avoid and minimize impacts to wetlands resulting from a change in hydrology.”

Response: The department has removed the proposed language from the board order in response to comment WMC-2. The EIA has also been updated updated to remove costs associated with this provision.

Comment WTBA-6: Section 36 – It is WTBA’s understanding that the ability to submit a SWPPP summary versus a SWPPP will remain. SWPPP summaries are a useful tool for certifying compliance with NR 216 without the excessive burden to continually submit updates for facilities with ongoing changes to drainage and grading. WTBA believes that ability is a critical aspect of the current NR 216 framework.

Response: The department has amended sections of the board order back to the original language, but included the option to submit either the full SWPPP or the SWPPP summary in s. NR 216.29 (1) (a) and (b), Wis. Adm. Code.

Comment WTBA-7: Section 40 – The transfer termination language needs to account for situations where a lessee no longer has access to a facility and the lessor will not cooperate in the transfer or termination of the permit. Also, the ability to use paper form submissions should continue as an alternative compliance mechanism for transfer termination.

Response: The board order, s. NR 216.31, has been updated to include the case where there is no contact between the permittee and the new owner or operator. This language allows the new owner or operator to submit a Notice of Intent without the transfer request form. Additionally, the electronic reporting waiver process is defined in s. NR 216.006 (6) through (8) for paper form option.

### **AMENDMENTS BY THE DEPARTMENT**

The following minor revisions were made by the Department:

1. Sections NR 216.005 (note), 216.07 (5) (a), and (10) (a) were revised to simplify the references to NR 151.
2. Subsections under s. NR 216.032 have been changed to correct the section numbering from par. (a) to sub. (1).
3. Proposed s. NR 216.06 (4) was renumbered to keep it with the balance of s. NR 216.06 which was renumbered s. NR 216.031.
4. Sections NR 216.10 (1) (2), and (4) were changed to replace ‘pursuant to’ with ‘under’ to align with board order style.
5. Section. 216.42 (8) (note) was changed to replace ‘regrading a dirt road’ with ‘Grading an existing dirt road’.
6. Section NR 216.43 (4) was revised to change ‘par.’ to ‘sub.’.

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