



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5  
77 WEST JACKSON BOULEVARD  
CHICAGO, IL 60604-3590


SEP 01 2016

REPLY TO THE ATTENTION OF

WN-16J

**MEMORANDUM**

SUBJECT: Wisconsin Legal Authority Review - Review and Recommendation of Resolution for Issue 54

FROM: Kevin Pierard, Chief   
NPDES Permits Branch

TO: File

**Issue 54 (Storm Water, Definition Plan of Development)**

In EPA's July 11, 2011 letter to the Wisconsin Department of Natural Resources (WDNR), Issue 54 stated the following:

Wis. Admin. Code NR § 216.42(1) requires a permit for construction sites that are one or more acre in size. However, Wisconsin does not include the requirement found in 40 C.F.R. § 122.26(b)(15)(i) that disturbances less than one acre, when part of a common plan of development that disturbs more than one acre, also require permit for discharges. Wisconsin's definition of "construction site" at Wis. Admin. Code NR § 216.002(2) includes common plan language but does not explicitly include areas less than one acre. In its response to this letter, Wisconsin must explain how it will address the deficiency noted in this comment, either through corrective rulemaking or by citing existing, specific authority in a written explanation from the State's Attorney General.

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

**Comparison between the Federal and State Provisions**

40 C.F.R. § 122.26(b)(15) provides:

Storm water associated with small construction activity means the discharge of storm water from:

...

(i) Construction activities including clearing, grading, and excavating that result in land disturbance of equal to or greater than one acre and less than five acres. Small construction activity also includes the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one and less than five acres. Small construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the facility....

Wis. Admin. Code NR § 216.002(2) (2004) provides:

Construction site means an area upon which one or more land disturbing construction activities occur that in total will disturb one acre or more of land, including areas that are part of a larger common plan of development or sale where multiple separate and distinct land disturbing construction activities may be taking place at different times on different schedules but under one plan such that the total disturbed area is one acre or more. A long-range planning document that describes separate construction projects, such as a 20-year transportation improvement plan, is not a common plan of development.

Wis. Admin. Code NR § 216.42 (2011) provides:

(1) Construction sites of one acre or more of land disturbance. Except as provided in subs. (2) to (11), a notice of intent shall be filed with the department pursuant to s. NR 216.43 or to an authorized local program pursuant to s. NR 216.415 by any landowner who intends to create a point source discharge of storm water from a construction site to waters of the state. The landowner of the construction site regulated by this subchapter shall comply with all applicable provisions of this subchapter and the appropriate WPDES permit issued pursuant to this subchapter.

...

(11) Quarter Mile Separation. Where discrete construction projects within a larger common plan of development or sale are located at least 1/4 mile apart and the area between the projects is not being disturbed, each individual project may be treated as a separate plan of development or sale provided any interconnecting road, pipeline or utility project that is part of the same "common plan" is not concurrently being disturbed.

## Conclusion

Based on EPA's review of the State's regulations, EPA concludes that although Issue 54 has been resolved as previously communicated to WDNR in EPA's December 5, 2012 letter to WDNR, the State should revise Chapter NR 216 of the Wisconsin Administrative Code to further clarify the definition of "Construction Site." Letter from Tinka G. Hyde, Water Division Director, U.S. EPA, to Kenneth G. Johnson, Administrator Division of Water, WDNR (Dec. 5, 2012) (on file with U.S. EPA).

## Additional Notes

In order to clarify that "Construction Sites" where less than an acre of land is disturbed may require permit coverage if they are part of a common plan of development or sale, EPA recommends that the State revise Wis. Admin. Code NR § 216.002(2) as follows:

"Construction site" means an area upon which one or more land disturbing construction activities occur that in total will disturb one acre or more of land, including areas that are less than one acre which are part of a larger common plan of development or sale where multiple separate and distinct land disturbing construction activities may be taking place at different times on different schedules but under one plan such that the total disturbed area is one acre or more. A long-range planning document that describes separate construction projects, such as a 20-year transportation improvement plan, is not a common plan of development. (alteration in original)

EPA also recommends that the State revise Wis. Admin. Code NR § 216.42(1) as follows:

~~CONSTRUCTION SITES OF ONE ACRE OR MORE OF LAND DISTURBANCE.~~ Except as provided in subs. (2) to (11), a notice of intent shall be filed with the department pursuant to s. NR 216.43 or to an authorized local program pursuant to s. NR 216.415 by any landowner who intends to create a point source discharge of storm water from a construction site defined in NR 216.002(2) to waters of the state. The landowner of the construction site regulated by this subchapter shall comply with all applicable provisions of this subchapter and the appropriate WPDES permit issued pursuant to this subchapter. (alteration in original)