BUREAU OF WATERSHED MANAGEMENT PROGRAM GUIDANCE

Storm Water Management Program

Implementation of 2013 Wisconsin Act 20 for Construction Site Erosion Control and Storm Water Management

Effective: October 2014
Guidance #: 3800-2014-03

Notice: This document is intended solely as guidance, and does not contain any mandatory requirements except where requirements found in statute or administrative rule are referenced. This guidance does not establish or affect legal rights or obligations, and is not finally determinative of any of the issues addressed. This guidance does not create any rights enforceable by any party in litigation with the State of Wisconsin or the Department of Natural Resources. Any regulatory decisions made by the Department of Natural Resources in any matter addressed by this guidance will be made by applying the governing statutes and administrative rules to the relevant facts.

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A. Statement of Issue Being Addressed

The 2013-2015 fiscal biennial budget bill, 2013 Wisconsin Act 20 ("Act 20"), became effective on July 2, 2013. Act 20 made several changes to state statutes relating to construction site erosion control and storm water management. These changes include local and state regulation of construction site erosion control and post-construction storm water management and the establishment of uniform statewide standards for these activities by the DNR. DNR staff, municipalities, developers, and consultants need guidance on how the DNR will implement these changes.

In July 2011, the DNR received a letter from the U.S. Environmental Protection Agency Region 5 (USEPA) documenting its review of the Wisconsin Pollutant Discharge Elimination System program. The review letter outlined several programmatic/legal omissions or deviations from federal requirements. One item of concern (#24 in the July 2011 USEPA letter) requested that DNR address the bifurcation of erosion control and storm water management regulation in ch. NR 216, Wis. Adm. Code, between the DNR and the Department of Commerce (now the Department of Safety and Professional Services or DSPS) for commercial buildings (s. NR 216.42(4)) and one- and two-family dwellings (s. NR 216.42(9)). To address this USEPA concern, the DNR recommended statutory changes to clearly identify the DNR as the sole state agency responsible for erosion control and storm water management regulation and permitting at construction sites where one or more acre of land will be disturbed, including those for commercial buildings and one- and two-family dwellings.

Please note that this guidance does not pertain to construction sites regulated by the DSPS and does not attempt to interpret the statutory changes affecting activities that fall under the responsibility of the DSPS.

B. Background

Overview of 2013 Wisconsin Act 20

Act 20 amended s. 281.33, Stats., and state statutes governing the DSPS to identify the DNR as the sole state agency responsible for erosion control and storm water management regulation and permitting at construction sites where one or more acre of land will be disturbed, including those for commercial buildings and one- and two-family dwellings. This change became effective as of July 2, 2013. Additionally, s. 281.33, Stats., directs the DNR to establish "uniform statewide" standards rather than "minimum" standards as the statutes previously provided for. Furthermore, Act 20 made several changes to state law relating to the authority of a city, village, town or county to enact an ordinance regulating erosion control or storm water management. These changes require a local ordinance to strictly conform with the uniform statewide standards established by the DNR. The statutory changes are described in more detail below under the Summary of Statutory Changes Related to this Guidance.

Summary of Statutory Changes Related to this Guidance

1) The DSPS has responsibility for establishing statewide standards for erosion control at building sites that have a land disturbance that is less than one acre in area and that are for the construction of public buildings and buildings that are places of employment (commercial buildings).

2) The DSPS has responsibility for promulgating rules for the administration of construction site erosion control at one- and two-family dwellings sites that have less than one acre of land disturbance in area.

3) All previous references in s. 281.33 (3) to DNR's "minimum" standards have been changed to "uniform statewide" standards.

4) The DNR shall establish by rule uniform statewide standards for the following:
    - Activities related to construction site erosion control at sites that have a land disturbance that is one acre or more in area.

- Activities related to construction site erosion control at sites that have a land disturbance that is less than one acre and that are not for commercial buildings and one- and two-family dwellings.
- Storm water management.

5) The Wisconsin Department of Transportation (WisDOT) in consultation with the DNR shall, by rule, establish standards for the control of soil erosion related to highway and bridge construction that is funded in whole or in part with state or federal funds.

6) The DNR, in cooperation with the WisDOT, shall establish by rule uniform statewide standards for activities related to construction site erosion control and storm water management for WisDOT transportation projects.

7) The DNR shall require a city, village, town, or county to comply with the DNR's uniform statewide standards for any construction site erosion control and storm water management zoning ordinance enacted under a municipality's enabling statutes.

8) The DNR shall prepare a model zoning ordinance for construction site erosion control at sites regulated by the DNR and storm water management in the form of an administrative rule.

9) If the DNR determines that rules promulgated under s. 281.16 (2) [i.e., ch. NR 151, Wis. Adm. Code] prescribe performance standards that meet the requirements for establishing uniform statewide standards, then those rules satisfy the rule-making requirements to establish uniform statewide standards.

10) A city, village, town, or county may enact ordinances for construction site erosion control and storm water management regulating the conduct regulated by the DNR only if the ordinances strictly conform with the uniform statewide standards established by the DNR.

11) The Dane County Lakes and Watershed Commission may establish minimum standards for construction site erosion control ordinances provided that the minimum standards for activities regulated by the DNR strictly conform with the DNR's applicable uniform statewide standards.

12) A city, village, town, or county may enact and enforce provisions of an ordinance that are stricter than the uniform standards for storm water management established by the DNR if the stricter provisions are necessary to do any of the following:
    - Control storm water quantity or control flooding.
    - Comply with federally approved total maximum daily load requirements.

13) Strict conformance to the uniform statewide standards does not apply to provisions of an ordinance enacted by a city, village, town, or county if the provisions of the ordinance regulate storm water management relating to existing development or redevelopment, as defined in s. NR 151.002, Wis. Adm. Code.

C. Discussion

DNR Authorities

Under s. 281.33(3(d), Stats., the DNR is authorized to determine that the performance standards in ch. NR 151, Wis. Adm. Code, satisfy the requirement for the DNR to establish the uniform statewide standards. Therefore, the changes to s. 281.33, Stats., do not require the DNR to create uniform statewide standards that do not already exist. This guidance only addresses the requirement for the DNR to establish uniform statewide standards pertaining to water quality at construction sites. The DNR is not required nor does it intend to direct municipalities on administrative requirements of their ordinances.

The DNR has direct regulatory authority over a municipality's administration of a storm water program through the Municipal Separate Storm Sewer System (MS4) permit program under subch. I of ch. NR 216. Not all municipalities in Wisconsin are covered under an MS4 permit. However, the changes to s. 281.33, Stats., requiring strict conformance to the uniform statewide standards apply to a city, village, town or county whether the municipality is a permitted MS4 or not. For municipalities covered under an MS4 permit, the requirement to adopt ordinances with equivalent uniform statewide standards to those established by the DNR will be implemented through the MS4 permits reissued or issued by the DNR. For municipalities not covered under an MS4 permit, the requirement to strictly conform with the uniform statewide standards stands on its own.

With the changes to s. 281.33, Stats., and state statutes governing the DSPS, the DNR now has sole state permitting authority under state statute and ch. NR 216, Wis. Adm. Code, to regulate storm water discharges at construction sites where one or more acre of land will be disturbed. Although the DNR needs to amend ch. NR 216 to align with the statutory changes, the applicability exceptions under s. NR 216.42 (4) [commercial buildings] and s. NR 216.42 (9) [one- and two-family dwellings] are now moot.

Section 281.33(4), Stats., directs the DNR to prepare a model zoning ordinance for construction site erosion control at sites regulated by the DNR and storm water management in the form of an administrative rule. An existing administrative rule, ch. NR 152, contains model zoning ordinances for construction site erosion control storm water management, but these model ordinances need to be updated by the DNR. The DNR will proceed with updating the model ordinances for construction site erosion control and post-construction storm water management under ch. NR 152 via rulemaking, but in the meantime, additional guidance will be issued by the DNR that a municipality may use to adopt or update an ordinance for equivalency with the uniform statewide standards pertaining to water quality. The model ordinances may suggest that there be provisions for other administrative aspects of a local ordinance, but municipalities will have discretion on how they administer their ordinances. For example, the DNR will not set standards for ordinance provisions such as fees, enforcement, application procedures, or other means by which a municipality will administer an ordinance. The directive for DNR to create a model ordinance does not include any authority to establish new standards.

Municipal Authorities

Since the passage of Act 20, the DNR has received several inquiries about the impact of the legislation, how the DNR interprets and will implement the changes, and how the legal authority of municipalities to adopt and administer local erosion control and storm water management ordinances is affected. Also, some municipalities have questioned what legal authority they have to adopt and administer local ordinances for erosion control and storm water management, particularly construction sites where less than one acre of land will be disturbed.

Municipal legal authorities are granted in the Wisconsin Statute under ch. 59 for counties; ch. 60 for towns; ch. 61 for villages; and ch. 62 for cities. Act 20 amended these statutes relating to a municipality's authority to enact construction site erosion control and storm water management ordinances. Also, the Dane County Lakes and Watershed Commission (Commission) is granted certain authorities related to erosion control in subch. V of ch. 33, Stats. Act 20 amended this statute relating to the Commission's authority to establish minimum standards for construction site erosion control ordinances enacted by Dane County. While the DNR does not administer the statutes listed above, the DNR believes that a municipality has the authority to adopt and administer erosion control and storm water management ordinances that apply to construction sites, regardless of the size, and that any restriction on local authority as a result of the statutory changes only pertains to compliance with the uniform statewide standards established by the DNR. The DNR recommends that municipalities review the relevant municipal statute to determine the authorities they have as a result of Act 20.

Conformance with the uniform statewide standards by municipalities for erosion control only applies to new development, redevelopment, and infill. Conformance with the uniform statewide standards by

municipalities for post-construction storm water management only applies to new development and infill. Strict conformance to the uniform statewide standards does not apply to provisions of an ordinance enacted by a municipality if the provisions of the ordinance regulate storm water management relating to existing development or redevelopment.

Under s. 281.33(6), Stats., municipalities have the authority to adopt ordinances with stricter provisions than the uniform statewide standards to control storm water quantity or control flooding, or to comply with federally approved total maximum daily load (TMDL) requirements. A municipality has the authority to enact ordinances without restriction for these purposes.

D. Guidance

The DNR will rely on the existing performance standards promulgated under ch. NR 151 for establishing the uniform statewide standards. Therefore, the applicable non-agricultural performance standards for construction site erosion control and post-construction site storm water management in ch. NR 151 are the uniform statewide standards under s. 281.33(3)(d), Stats. Section 281.33, Stats., does not require the DNR to create any new standards where a standard did not already exist, and therefore, a municipality is not restricted by the DNR for a standard that does not exist in ch. NR 151. A municipality regulated under an MS4 permit is responsible for representing that its ordinance is compliant with the MS4 permit and the uniform statewide standards by submitting a legal opinion from its corporation counsel to the DNR by the due date specified in the MS4 permit. The DNR does not provide legal review or approvals of local ordinances. The DNR's enforcement authority is limited to situations where non-compliance with the ordinance requirements in an MS4 permit fails to protect water quality.

<u>Uniform Statewide Standards for Construction Sites Where Less than One Acre of Land will be Disturbed</u>
For construction sites where less than one acre of land will be disturbed and that do not involve commercial buildings or one- and two-family dwellings, the existing performance standards in subchs. III and IV of ch. NR 151 are the uniform statewide standards. The DNR does not have a regulatory mechanism to enforce strict conformance with these performance standards. However, if a municipality enacts an ordinance for these types of constructions sites, the DNR has promulgated the following performance standards and has determined that they act as the uniform statewide standards (Please note that in ch. NR 151there are no post-construction storm water management performance standards for construction sites with less than one acre of land disturbance and not part of a larger common plan of development):

- Construction sites where less than one acre of land will be disturbed and that do not involve commercial buildings or one- and two-family dwellings:
    - Non-transportation construction sites: s. NR 151.105(4)
    - Transportation construction sites: s. NR 151.225(3)

<u>Uniform Statewide Standards for Construction Sites Where One or More Acre of Land will be Disturbed</u>
Under ch. NR 216 and the MS4 permits issued by the DNR, regulated municipalities are required to adopt construction site pollutant control and post-construction storm water management ordinances. As MS4 permits are issued or reissued, the DNR will require that a regulated municipality adopt or amend construction site pollutant control and post-construction storm water management ordinances to conform with the uniform statewide standards for construction sites where one or more acres of land will be disturbed. Therefore, for construction sites where one or more acre of land will be disturbed, a provision to adopt equivalent performance standards to those in subchs. III and IV of ch. NR 151 will be included in MS4 permits. A regulated municipality will be given up to 24 months to adopt or amend an ordinance.

The DNR has promulgated the following performance standards and has determined that they act as the uniform statewide standards:

- Construction sites where one or more acre of land will be disturbed:
  - Construction site pollutant control for non-transportation construction sites (i.e., erosion and sediment control practices, sediment performance standards, preventive measures): s. NR 151.11(6m)
  - Post-construction storm water management for non-transportation construction sites (i.e., total suspended solids performance standard, peak discharge performance standard, infiltration performance standard, protective areas performance standard, fueling and vehicle maintenance areas performance standard): ss. NR 151.122 through 151.126

    Note: Under s. 281.33(6)(b), Stats., a municipality may enact and enforce provisions of an ordinance that are stricter than ss. NR 151.122 through 151.126, Wis. Adm. Code, for redevelopment.
  - Construction site pollutant control for transportation construction sites (i.e., erosion and sediment control practices, sediment performance standards, preventive measures): s. NR 151.23(4m)
  - Post-construction storm water management for transportation construction sites (i.e., total suspended solids performance standard, peak discharge performance standard, infiltration performance standard, protective areas performance standard, fueling and vehicle maintenance areas performance standard): ss. NR 151.242 through 151.246

Uniform statewide Standards for WisDOT Transportation Projects

Chapter TRANS 401, Wis. Adm. Code, specifies the construction site erosion control and storm water management procedures for WisDOT directed and supervised transportation projects. The DNR will cooperate with the WisDOT through the existing interagency liaison process to incorporate the uniform statewide standards into all appropriate and applicable regulatory mechanisms for WisDOT transportation projects.

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