

# ENVIRONMENTAL ASSESSMENT

## Wisconsin Statewide General Permit for Utility Activities

Prepared by Wisconsin Department of Natural Resources,  
Bureau of Energy, Transportation, and Environmental Analysis  
March 2013

NOTE TO REVIEWERS: This document is a Department of Natural Resources Environmental Analysis that evaluates probable environmental effects and decides on the need for an Environmental Impact Statement. The attached analysis includes a description of the action and the affected environment. The DNR has reviewed the attachments and accepts responsibility for their scope and content to fulfill requirements in s. NR 150.22, Wisconsin Administrative Code.

Your comments should address completeness and accuracy of the EA decision.

For your comments to be considered, they must be received by the contact person before 4:30 p.m., May 10, 2013.

Wisconsin Department of Natural Resources  
Bureau of Energy, Transportation, and Environmental Analysis  
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## **DESCRIPTION**

The Wisconsin Department of Natural Resources (WDNR) general permit for utility activities, WDNR-GP3-2013, has been developed for the purpose of allowing utilities to carry out routine projects that will only result in minor impacts to wetlands and waterways. The purpose of the general permit (GP) is to streamline and improve the application and review procedures, consistent with federal agencies, while not changing the overall process. WDNR-GP3-2013 was developed to address general permit provisions of the navigable waters regulations under Chapter 30, Stats., and general permit provisions of the wetland permitting regulations under 281.36, Stats. This document summarizes the proposal and the expected impacts of this new general permit.

### ***General Permit Coverage:***

Utilities would be able to apply for coverage under this proposed statewide general permit to perform work in accordance with the terms and conditions of the general permit. Coverage under this general permit would be valid for a period of five years from the date of issuance. The Department would continue to have authority to establish requirements, conditions and exceptions for statewide general permits to ensure that the authorized discharges would cause only minimal adverse environmental effects. The Department would make a determination to either issue coverage to the applicant or require an individual review process. The Department's determination would depend on whether or not the activity complies with the eligibility requirements and standard conditions outlined in the general permit.

### ***Authorized Activities:***

WDNR-GP3-2013 would authorize the removal or discharge of materials in wetlands and waterways that are necessary for the construction, reconstruction, or maintenance of utility facilities. Utility activities that would be covered under this general permit include the temporary placement of construction matting, the placement of temporary clear span bridges (TCSB), the placement and maintenance of structures in wetlands and replacement of existing structures below the Ordinary High Water Mark (OHWM), excavation in wetlands to maintain utility facilities, and the installation and maintenance of telecommunication lines in wetlands and through waterways. These projects would have to meet all eligibility standards, terms and conditions of the general permit to be eligible for coverage. WDNR-GP3-2013 authorizations would be provisional and require that project proponents obtain any other local, state or federal permits before any work is authorized. Please refer to the general permit for the specific eligibility standards, notification requirements, responsibilities, definitions and conditions required by WDNR-GP3-2013.

Below are photos of some of the activities that would be authorized under WDNR-GP3-2013, including a pedestal placed in wetlands, a structure replaced below the OHWM, and before and after photos of temporary matting placed in wetlands.



Pedestal placement in wetlands as part of a telecommunication project. Photo courtesy of Wisconsin Public Service Corp. (WPS).



Structure replacement below the OHWM. Photo courtesy of WPS.



Temporary matting in wetlands for equipment access. Photo courtesy of American Transmission Corp. (ATC).



After removal of temporary matting. Photo courtesy of ATC.

***Excluded Activities:***

Projects that do not meet all terms and conditions of WDNR-GP3-2013 would not be eligible and would be excluded from coverage. These projects would be reviewed under the individual permit review process which allows the Department a more in-depth review to assure that no deleterious impacts to wetlands and waterways would occur. If a project would permanently impact more than 10,000 square feet of wetlands or temporarily impact more than five acres of wetlands due to the placement of temporary matting, then an individual permit would be required. In addition, underground utility projects could not temporarily impact more than two acres of wetland. The Department could revoke coverage of any permits found not to be in compliance with the terms and conditions of this permit or if the Department determined the project to be detrimental to wetlands or waterways. Also, the Department would have the authority to reevaluate the effectiveness of WDNR-GP3-2013 and could modify or revoke a statewide general permit if determined necessary. The Department also would have the authority to require an individual permit in lieu of a general permit if it determined that conditions specific to the site would require additional restrictions. Proposed tribal activities located on Federal Indian Trust lands would be excluded from requiring WDNR-GP3-2013 authorization. WDNR-GP3-2013 is not for storm sewer, sanitary sewer, or routine watermain utility projects.

WDNR-GP3-2013 would not authorize any activity that would take place in, or result in adverse impacts to, the following wetland types identified as being rare or sensitive:

- Great Lakes ridge and swale complexes
- Interdunal wetlands
- Coastal plain marshes
- Emergent marshes containing wild rice
- Sphagnum bogs that are located in the area located south of a horizontal line drawn across the state based on the routes of STH 16 and STH 21 west of Lake Winnebago and on USH 151 east of Lake Winnebago
- Boreal rich fens
- Calcareous fens

## **PURPOSE AND NEED**

The purpose of issuing a statewide Utility GP is to establish a stable, relatively simple permit program that is specifically designed to effectively and efficiently regulate utilities' needs for projects that may result in minor discharges into wetlands and waterways, or require the removal of material in wetlands and waterways. The legislative intent in requiring the creation of WDNR-GP3-2013 was to establish clear criteria, conditions, and timelines to ensure more predictable permit review processes and decisions as well as provide consistency with federal and Chapter 30 permit processes and requirements.

## **ALTERNATIVES**

WDNR-GP3-2013 has been designed to achieve the same regulatory protection as an individual permit review for utility projects with minor impacts. Although the Department would have the authority to require an individual permit in lieu of a general permit, processing all discharge activities as individual permits is deemed unnecessary and inefficient. If all utility activities were required to be authorized as an individual permit, many additional procedural steps would have to be followed. First, a 30-day public notice would have to be issued to allow the public the opportunity to comment on the project. Further, a more detailed analysis of the project would be required. Additionally, the issuance of an individual permit often conflicts with the federal review process where minor projects are covered under federal general permits. Instead, this Utility GP could be issued to reduce the time and resources needed to evaluate these minor projects and to better mirror the federal process.

## **AUTHORITIES**

No utility would be allowed to proceed with a project to remove or discharge materials in wetlands or waterways as part of construction, reconstruction, or maintenance of utility facilities unless the activity was authorized for coverage under a general permit such as WDNR-GP3-2013, or an individual permit. Though legislation requires the Department to issue and provide coverage under WDNR-GP3-2013, the Department retains authority, under 281.36 (3g) (i) Stats and Chapter 30, Stats., to require a wetland or Chapter 30 individual permit in lieu of a general permit if deemed necessary. The Utility GP authorizations would be provisional and require that the applicant obtain any other federal, state, local or tribal permits or approvals that may be required for the utility activity before any work is authorized.

Coverage under WDNR-GP3-2013 could be granted for projects meeting all applicable purpose, design, construction and location terms and conditions. The Department would have 30 days to review the application, notify applicants of any further required information or missing application items, and make a determination regarding the applicant's eligibility for coverage. When Department review of the proposed project indicates that terms and conditions of the general permit were not sufficient to ensure only minimal adverse environmental effects to degraded wetlands and waterways, the Department could require an individual permit to allow for a more detailed review.

Projects requiring individual permits do not fit the pre-approved designs and terms and conditions necessary to be eligible for coverage under a general permit. Individual permit procedures require a pre-application meeting to discuss the purpose and scope of the proposed project. A more detailed permit application and Department review is required, including a more comprehensive practicable alternatives analysis and consultation with the Department's wetland mitigation coordinator. Through the individual permit process, Department staff may advise applicants on project modifications to reduce impacts to resources and ensure that the project will not result in any significant adverse environmental impacts. Additionally, individual permits require a public notice, public comment period and an opportunity for an informational hearing. Individual permit decisions are subject to appeal for review by an administrative law judge within 30 days of the decision.

Local governments use floodplain and shoreland zoning to control development along lakeshores and streams. Local zoning officials administer permit programs for buildings, land disturbance and other activities in shoreland and floodplain areas. Local authorization may be required depending on the municipality and the location of the activity.

## ENVIRONMENTAL IMPACTS

This analysis briefly describes potential impacts that would be attributable to activities authorized by WDNR-GP3-2013 for discharge or removal of materials in wetlands and waterways. This analysis further addresses any expected difference in environmental effects and impacts between the issuance of a statewide general wetland permit versus the alternative of issuing an individual permit.

### ***Impacts to Wetlands:***

Wetlands, whether part of a complex or isolated, are valuable in the economic and aesthetic benefits they provide. Wisconsin wetlands are no different. They provide habitat for a diversity of wildlife, help alleviate flooding, reduce soil erosion, cleanse polluted waters and contribute to regular water flow in streams and rivers throughout the year. They also provide opportunities for recreation, research and education. These societal benefits and ecological functions are discussed in further detail in *Wetland Functional Values*, a Wisconsin Department of Natural Resources publication available online at [www.dnr.wi.gov/topic/wetlands](http://www.dnr.wi.gov/topic/wetlands). Wetland connections to lakes, streams, groundwater, and terrestrial habitats are not always immediately obvious yet impacts to one wetland may influence the function of other wetlands or natural systems due to hydrological and biological connections.

Utility activities in wetlands can cause degradation and loss of these wetland functions. When wetlands are destroyed or degraded, the flood control, water filtering and recreational services they provide are diminished or removed altogether. Nearby lakes, rivers, streams and groundwater may suffer because wetlands help maintain stream flows and support drinking water supplies to many Wisconsin citizens. Water clarity may decrease and plant and animal species may dwindle or disappear entirely. Beneficial wetland services decrease as total wetland cover decreases.

Utility activities authorized under this general permit should not result in significant impacts to wetlands. Permanent impacts from utility projects, such as permanent wetland fill due to the placement of structures, are only authorized in small amounts so that wetland function should not be greatly affected. Authorized temporary wetland impacts such as the placement of construction matting, though an impact is meant to protect the resource from compaction, rutting, and topsoil mixing that could occur if the mats were not utilized. Other temporary impacts such as the placement of bore pits in wetlands or the installation of underground utilities by trenching typically allow for complete site restoration that minimizes long-term impacts.

The Bureau of Energy, Transportation and Environmental Analysis (BETEA) regulates the various wetland impacts mentioned above, including permanent fill in wetlands. In 2011, 2012, and 2013, BETEA authorized 150 projects that impacted wetlands in some way. Of those 150 projects, approximately 96 resulted in permanent wetland fill. Of these 96 projects, approximately 92% resulted in less than 10,000 square feet of permanent wetland fill and could have qualified for this new general permit.

When determining whether a project requires a general or individual permit, it is important to note that other regulated activities, such as the placement of more than five acres of temporary matting in wetlands or more than two acres of temporary wetland impacts as a result of underground utility projects, could also require a project to be reviewed under the individual permit process.

Further, when evaluating the impacts of WDNR-GP3-2013 on wetland protection, it is important to evaluate not only the number of projects affected by the new general permit, but also the amount of wetland fill regulated. As mentioned above, 96 projects resulted in permanent fill from 2011 – 2013. These 96 projects resulted in approximately 7.23 acres of wetland fill. According to the conditions in WDNR-GP3-2013, 92%, or 88 of these 96 projects could have been eligible for this new Utility GP. But, these 88 projects resulted in only 1.44 acres, or 20% of the authorized permanent wetland fill. This point illustrates that though only 8% of utility projects could be required to obtain an individual permit, 80% of the authorized permanent wetland fill could still be required to undergo the more-thorough review process of an individual permit.

**Impacts to Waterways:**

Many animals, most obviously fish, depend entirely on waterways to survive. There are also other animals that live most of their lives in upland areas but depend on wetlands and waterways for breeding. Many mammals, amphibians, reptiles, and birds may depend on wetlands and waterways for feeding, nesting, migration stopovers or for wintering habitat. Even small waterways and wetlands that appear dry much of the year are crucial to the survival of certain species. Discharge or dredging activities in waterways can cause a temporary adverse impact to the affected aquatic habitat. Site filling activities result in the existing natural vegetation being replaced with impervious surfaces and the elimination of aquatic habitat. Removal of materials from the bed of waterways can also temporarily disturb or eliminate habitat.

Other impacts to waterways that would be authorized by this Utility GP are expected to be minor. Many of these actions, such as TCSB placement and the crossing of waterways by utilities, are already authorized by Chapter 30 general permits. TCSB placement occurs entirely above the OHWM and the bridges are small so they typically cause little or no impact to waterways. Other activities such as replacing structures below the OHWM or dredging of streams for utilities are done at small scales so as to minimize impacts and allow for adequate restoration.

Significant adverse impacts to aquatic species could be minimized by requiring applicants to follow timing restrictions to avoid fish spawning periods or other sensitive times, as outlined in the general permit eligibility standards. Applicants would be required to use Department-approved technical standards or Best Management Practices (BMPs) during construction to avoid siltation of wetlands and waterways. In addition, adherence to NR 40 would be required in order to avoid the spread of aquatic and terrestrial invasive species in waterways.

Waterway impacts due to utility activities have been authorized by a variety of Chapter 30 general and individual permits. Since 2011, 192 TCSB GPs have been issued for utility projects. During the same time, 203 Utility Crossing GPs have been issued. These activities would now be authorized under this general permit.

**Impacts to Endangered Resources:**

When evaluating the impacts of utility projects on endangered resources, a detailed review process is initiated by the project proponent and then confirmed by the Bureau of Endangered Resources (BER). The expected impacts to all state- and federal-listed species are evaluated, following the Natural Heritage Inventory (NHI) review process. If impacts to species are possible, BER staff coordinates with the applicants to avoid impacts to the species. Timing restrictions, exclusion measures, and construction methods to avoid impacts are utilized. In the future, the BER may craft a broad incidental take permit meant to cover minor takes of approved listed species by minor utility projects.

**Impacts to Water Quality:**

Utility projects covered under this general permit have the potential to negatively affect water quality directly due to the utility activity or indirectly due to the erosion of disturbed soils from the activity. Because of utility projects, topsoil is often exposed. During runoff events, the exposed topsoil can reach nearby wetlands and waterways, causing negative impacts to water quality. Utility projects consisting of greater than 1.0 acre of earth-disturbing activity require an NR 216 permit for stormwater and erosion control. As required by the 216 permit, applicants must develop an erosion control and stormwater management plan outlining the installation, maintenance, and inspection of Department-approved technical standards and best management practices (BMPs) to minimize runoff into wetlands and waterways. See [http://dnr.wi.gov/topic/stormwater/learn\\_more/problems.html](http://dnr.wi.gov/topic/stormwater/learn_more/problems.html) for more information on construction-related waterway impacts.

**Impacts Due to Invasive Species:**

The spread of invasive species could result from construction of utility projects authorized under this general permit. If equipment is not properly cleaned or decontaminated, invasive species material may be spread from one construction site to another. In 2011, NR 40 was adopted to minimize the spread of invasive species, including their spread via utility projects. Part of NR 40 requires that BMPs be implemented on projects such as utility activities covered under this general permit. A condition of this general permit is that construction equipment must be free of invasive species prior to and after each use, in order to prevent their spread.

**Impacts to Air Quality:**

Utility activities result in emissions of vehicle exhaust and fugitive dust. Projects of the scale that would be covered under WDNR-GP3-2013 would result in only minor and temporary air emissions. Impacts to air quality would be the same for these kinds of projects regardless of coverage under WDNR-GP3-2013 or an individual permit.

**RISK – RELIANCE ON APPLICANT’S DATA**

Department staff would review all general permit applications to ensure the project will meet all of the terms and conditions and determine whether the project would be eligible for coverage. A determination would be made by the Department that authorization would assure minimal adverse impact in reliance on the information provided by the applicant and any other information required by the Department. The Department would have inspection authority in which site access would be allowed to investigate the project construction, operation, maintenance or permit compliance. The Department could deny coverage or reevaluate its decision on any authorization under this general permit at any time circumstances warrant. Circumstances would include, but would not be limited to, failure to comply with terms and conditions of general permit, information provided by the applicant proves to have been false, incomplete, or inaccurate, or significant new information surfaces which was not considered in reaching the original determination. Any act of noncompliance would constitute a permit violation and would be grounds for enforcement action.

**RISK – PRESUMPTIVE APPROVAL**

Under WDNR-GP3-2013, if the Department failed to make a determination regarding coverage under the general permit within 30 days, the project would be considered to be authorized and the applicant could proceed. According to recent wetland permitting data, the average general permit decision issued by the Department has been within this 30-day timeframe. However, given fluctuations in Department resources, the Department is not able to ensure that the risk of presumptive approval is or is not relevant. Potential risk is reduced because any presumptively approved project would still have to adhere to the terms and conditions of the general permit with any act of noncompliance constituting a permit violation that is grounds for enforcement action.

**RISK – SPILLS, FIRES, ACCIDENTS**

Construction activities always carry some risk of accidents, spills and fires. Typically such risks are minimized by means of established safety practices. These kinds of risks would not be different for utility projects covered under WDNR-GP3-2013 rather than an individual permit.

**DEGREE OF CONTROVERSY**

The authority and requirement of the Department to issue statewide wetland and waterway general permits was legislatively established. The process involves public notice of the Department’s intent to issue, modify or revoke a statewide general permit and allows for public input to address potential concerns. The issuance is not expected to be controversial. The authorization of coverage for WDNR-GP3-2013 permit activities provides no public comment opportunity, nor does it require notification to adjacent landowners of any proposed fill activity. However, this is no change from prior Water Quality Certification of Chapter 30 general permit procedures and is not expected to be controversial.

**DEGREE OF PRECEDENCE**

General permits such as this Utility GP are not a new process. General permits for a variety of activities used in utility projects, such as TCSB installation and stream crossings, are already in place. This new permit simply combines many of these activities into one permit. In addition, similar federal general permits, such as GP-002-WI, are also in place to authorize similar impacts. This new Utility GP offers a simpler process for authorizing minor utility projects that previously required more in-depth permitting and review.

Project Name: General Permit for Utilities to Place Structures on the Bed, or to Place Temporary Bridges Across Waterways, or to Place Fill in Wetlands

County: Statewide

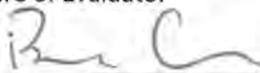
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PRELIMINARY DECISION

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In accordance with s. 1.11, Wis. Stats., and Ch. NR 150, Wis. Adm. Code, the Department is authorized and required to determine whether it has complied with s. 1.11, Wis. Stats., and ch. NR 150, Wis. Adm. Code.

The Department has made a preliminary determination that the Environmental Impact Statement process will not be required for this action/project. This recommendation does not represent approval from other DNR sections which may also require a review of the action/project.

Signature of Evaluator 	Date Signed 5-17-13
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FINAL DECISION

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The public review process has been completed. The Department received and fully considered responses to the news release or other notice.

Pursuant to s. NR 150.22(2)a., Wis. Adm. Code, the attached analysis of the expected impacts of this proposal is of sufficient scope and detail to conclude that this is not a major action, and therefore the environmental impact statement process is not required prior to final action by the Department.

The Department has determined that it has complied with s. 1.11, Wis. Stats., and ch. NR 150, Wis. Adm. Code. This decision does not represent approval from other DNR sections which may also require a review of the action/project.

Signature of Environmental Analysis Program Staff 	Date Signed 05/17/2013
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NOTICE OF APPEAL RIGHTS

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If you believe that you have a right to challenge this decision, you should know that the Wisconsin statutes and administrative rules establish time periods within which requests to review Department decisions must be filed. For judicial review of a decision pursuant to sections 227.52 and 227.53, Wis. Stats., you have 30 days after the decision is mailed, or otherwise served by the Department, to file your petition with the appropriate circuit court and serve the petition on the Department. Such a petition for judicial review must name the Department of Natural Resources as the respondent.

To request a contested case hearing pursuant to section 227.42, Wis. Stats., you have 30 days after the decision is mailed, or otherwise served by the Department, to serve a petition for hearing on the Secretary of the Department of Natural Resources. All requests for contested case hearings must be made in accordance with section NR 2.05(5), Wis.

Adm. Code, and served on the Secretary in accordance with section NR 2.03, Wis. Adm. Code. The filing of a request for a contested case hearing does not extend the 30 day period for filing a petition for judicial review.

#### **DOCUMENTS USED IN ANALYSIS:**

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Wisconsin Department of Natural Resources Website. 2012. Wetlands Benefit People and Nature. [www.dnr.wi.gov/topic/wetlands](http://www.dnr.wi.gov/topic/wetlands).

Wisconsin Wetland Team. June 2008. Reversing the Loss: A Strategy to Protect, Restore and Explore Wisconsin Wetlands. Wisconsin Department of Natural Resources. [www.dnr.wi.gov/topic/wetlands/documents/ReversingLoss08\\_gs](http://www.dnr.wi.gov/topic/wetlands/documents/ReversingLoss08_gs).

Project Name: General Permit WDNR-GP3-2013 for Utilities to Place Structures on the Bed or to Place Temporary Bridges Across Waterways, or to Place Fill in Wetlands

County: Statewide

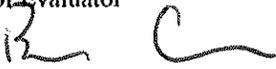
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**PRELIMINARY DECISION**

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In accordance with s. 1.11, Wis. Stats., and Ch. NR 150, Wis. Adm. Code, the Department is authorized and required to determine whether it has complied with s. 1.11, Wis. Stats., and ch. NR 150, Wis. Adm. Code.

The Department has made a preliminary determination that the Environmental Impact Statement process will not be required for this action/project. This recommendation does not represent approval from other DNR sections which may also require a review of the action/project.

Signature of Evaluator 	Date Signed 7-9-13
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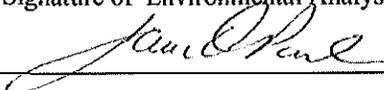
**FINAL DECISION**

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The public review process has been completed. The Department received and fully considered 9 responses to the news release or other notice.

Pursuant to s. NR 150.22(2)a., Wis. Adm. Code, the attached analysis of the expected impacts of this proposal is of sufficient scope and detail to conclude that this is not a major action, and therefore the environmental impact statement process is not required prior to final action by the Department.

The Department has determined that it has complied with s. 1.11, Wis. Stats., and ch. NR 150, Wis. Adm. Code. This decision does not represent approval from other DNR sections which may also require a review of the action/project.

Signature of Environmental Analysis Program Staff 	Date Signed 07/09/2013
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To request a contested case hearing pursuant to section 227.42, Wis. Stats., you have 30 days after the decision is mailed, or otherwise served by the Department, to serve a petition for hearing on the Secretary of the Department of Natural Resources. All requests for contested case hearings must be made in accordance with section NR 2.05(5), Wis. Adm. Code, and served on the Secretary in accordance with



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**Bruce W. Ramme, Ph.D., P.E.**  
Vice President – Environmental

May 10, 2013

Submitted Electronically

dnroeeacomments@wisconsin.gov

Attention: Mr. Benjamin Callan, Water Management Specialist

**RE: STATEWIDE GENERAL PERMIT FOR WATERWAY IMPACTS AND WETLAND DISCHARGES THAT ARE ASSOCIATED WITH UTILITY PROJECTS**

Dear Mr. Callan:

Wisconsin Electric Power Company, doing business as We Energies, submits these comments in response to the Wisconsin Department of Natural Resources (Department or DNR) proposed issuance of a statewide general permit (GP) for waterway impacts and wetland discharges that are associated with utility projects. We support the Department's issuance of this GP, and appreciate the opportunity to comment on it.

We Energies is an investor-owned electric and gas utility that serves more than 1.1 million electric customers in Wisconsin and Michigan's Upper Peninsula and more than 1.1 million natural gas customers in Wisconsin. The company's distribution infrastructure includes approximately 45,000 miles of electric distribution lines and 20,000 miles of natural gas lines. A single, consistent means of obtaining regulatory approval for routine utility maintenance, construction, and service extension work is needed in order to simplify and expedite routine permitting actions and improve We Energies services to residential and business customers.

We Energies strives to complete electric and gas service jobs for residential and/or business customers and service relocations to accommodate Department of Transportation or municipal road projects within 30 days of receipt of project requests. Therefore, the company has a significant interest in development and issuance of this utility GP.

Minimizing wetland and waterway impacts is standard operational practice at We Energies. Our energy delivery and customer service teams design projects to either avoid resource impacts all together, or if wetlands or waterways cannot completely be avoided, minimize impacts so that permit transactions are not required. Best management practices (BMPs) are implemented during construction in order to further minimize any effects on natural resources.

The company's internal standards and procedures have greatly reduced the number of necessary permit transactions with DNR, benefiting both the agency and the company by minimizing

workloads and associated costs. The availability of this utility GP will increase both We Energies and DNR project and staffing efficiencies even further.

We have organized our comments into three sections, 1) the need for consistency with the Army Corps of Engineers (ACOE) jurisdictional permitting process, 2) specific comments on the detailed standards included in the draft Utility GP, and 3) permit scope and next steps.

### **I. Priority: DNR Utility GP Consistency with Army Corps of Engineers Permitting Process**

A priority for We Energies is to make the utility GP as consistent as possible with the Army Corps of Engineers (ACOE) jurisdictional permitting process. We Energies and others have extensively relied on ACOE GP-002-WI, which covers both wetland and Chapter 30 activities. The current draft of DNR's utility GP, however, does not parallel waterway permitting coverage under ACOE GP-002-WI. This is contrary to the interests that We Energies communicated during the development of 2011 Act 118, the legislation modifying Section 281.36 to authorize and direct DNR to develop a GP specifically for utilities.

We have raised our interest in having the utility GP parallel the ACOE GP with respect to coverage of Chapter 30 activities but have been told that, according to the Department's legal review, the utility GP cannot include Chapter 30 activities in the 'non-reporting' and 'notification' categories due to statutory constraints. However, we have not received a legal response explaining the basis for this conclusion. Therefore, we are providing our legal analysis of the authorities in Section 281.36, which support the conclusion that DNR is authorized to include Chapter 30 activities in the Utility GP.

Wis. Stat. ss. 281.36(3g)(b) and (h)4. and 33 USC 1344(e) provide as follows (emphasis added):

281.36(3g)(b) Additional required permits. In addition to the wetland general permits required under par. (a), the department shall issue wetland general permits that are consistent with, and correspond to, any general permits that are issued under 33 USC 1344 (e) and that regulate discharges other than those regulated under the required wetland general permits issued under par. (a).

281.36(3g)(h)4. As part of a wetland general permit issued under par. (b) or (c), the department may waive the requirement that a person wishing to proceed under the general permit apply to the department as required under this paragraph so that the person may proceed with the discharge without specific authorization from the department.

33 USC 1344(e) authorizes the Corps to issue general permits "for any category of activities involving discharges of dredged or fill material" in both wetlands and navigable waterways – it is not limited to wetlands.

Taken together, these sections support the following analysis:

1. DNR is required to issue general wetland permits that “are consistent with, and correspond to, any general permits that are issued under 33 USC 1344(e)”.
2. ACOE GP-002-WI is such a general permit issued under 33 USC 1344(e). ACOE GP-002-WI covers both wetland and chapter 30 activities. Thus, DNR’s GP is required to be “consistent with” ACOE GP-002-WI and to cover relevant chapter 30 activities.
3. The analysis can legitimately end there. However, to the extent that one might read s. 281.36(3g) to be limited to “wetland” general permits (thus excluding chapter 30 activities), that limitation is overcome by the last portion of s. 281.36(3g)(b) as follows: ACOE GP-002-WI “regulate(s) discharges *other than those* regulated under the required wetland general permits issued under par. (a)” because ACOE GP-002-WI regulates discharges that the state regulates under chapter 30, which are arguably “*other than those*” discharges regulated under the wetland general permits required by s. 281.36(3g)(a).
4. Therefore, in order for DNR’s Utility GP to be “consistent with” ACOE GP-002-WI, DNR’s Utility GP must include relevant chapter 30 activities.

If we start from the view that the Legislative intent was to maximize the use and functionality of general permits and to streamline the permitting process as much as possible, it is reasonable to read the statutes to authorize DNR to issue a Utility GP that “is consistent with, and corresponds to” ACOE GP-002-WI and includes fills in both wetlands and navigable waterways regulated by DNR under s. 281.36 and chapter 30. The alternative is to create a DNR Utility GP that is not consistent with the ACOE GP and adds both confusion and unnecessary procedural steps for everyone, instead of creating certainty and streamlining the procedure.

We would appreciate a specific response to this issue since it is our goal to utilize a single procedure for meeting all of the applicable state and federal standards for our routine utility work affecting both wetlands and waterways.

## **II. Specific Comments on the Draft Utility GP and Related Application Materials**

In this section we provide comments on several of the detailed standards included in the draft Utility GP. These are presented in the order that they appear in the draft document. Italics are used to emphasize the specific comments that are being made.

### **COVER PAGE**

- Under the PROJECT DESCRIPTION AND LOCATION section, there is an applicability statement that states, “WDNR-GP3-2012 applies to the removal or discharge of materials to the waters of the State that are necessary for the construction, reconstruction, or maintenance of utility facilities.”

Comment: Several times throughout the GP the term *repair* is also used to describe utility activities eligible under the GP. Therefore we request that this term be added this

applicability section, “The Department has authority under ss. 30 and 281.36, Wis. Stats., to issue a permit for the construction, reconstruction, *repair*, or maintenance of utility facilities.”

### **SECTION 1 – WDNR-GP3-2012 ELIGIBILITY CRITERIA**

- #17, p.5 Projects that impact wetlands must comply with the standards outlined in s. 281.36(3g)(h), Wis. Stats., including the submission of narrative describing avoidance and minimization of wetland impacts found in the application attachment for WDNR-GP3-2012.

Comment: This standard should only apply to projects above the non-reporting threshold. Therefore please modify the first part of the standard to read, “Projects *above the non-reporting threshold* that impact wetlands...”

- #53, p.7 To minimize adverse impacts on fish movement, fish spawning, and egg incubation periods, placement and removal of the TCSB or work below the OHWM, may not occur during the following time periods:

Comment: The wording in this standard is ambiguous. Restrictions should only occur if work is done below the ordinary high water mark. As drafted, it appears that placement and removal of temporary bridges, even if they are above the ordinary high water mark are subject to seasonal restrictions. Therefore we propose that this standard be modified as follows, “To minimize adverse impacts on fish movement, fish spawning, and egg incubation periods, placement and removal of *any portion of the TCSB below the OHWM or any other* work below the OHWM, may not occur during the following time periods:”.

- #54, p.8 You must ensure that all machinery and equipment used for the project is free of invasive species prior to being used in non-infested waters of the state, including wetlands, and after work is completed. All vehicles and equipment that come in contact with waters of the state must be thoroughly disinfected. Utility right-of-way best management practices for invasive species can be accessed at:

Comment: This standard imposes more stringent requirements than are authorized through NR 40 invasive species administrative code requirements. To be consistent with NR 40, only vehicles and equipment that come in contact with *VHS or zebra mussel-affected* waters of the state should be subject to disinfection requirements. Vehicles and equipment that come in contact with other waters should meet NR 40 preventative requirements. The revised standard would read as follows, “...All vehicles and equipment that come in contact with waters of the state *must follow NR 40 preventative requirements, including disinfection requirements for VHS or zebra mussel-affected waters.*”

- P.8 Non-Reporting Standards for Minor Projects Affecting Wetlands Projects involving minor fills associated with the clean-up of an inadvertent release of drilling fluid, the installation of scientific measuring devices, or the restoration of wetlands disturbed by scientific surveying or geotechnical exploration, or projects meeting both of the following standards, in addition to the standards above, may qualify for non-reporting coverage under Section 2.

Comment: The introductory text describing the Non-Reporting Standards lists the types of projects that are eligible for coverage under the non-reporting portion of the GP. It also states that projects must meet both of the non-reporting eligibility standards (in #59. & #60.). This appears to be a typo, and should state that projects that meet *either* of the non-reporting eligibility standards may qualify for coverage.

- #60, p.8 The maintenance of a previously authorized utility facility that will not result in more than 0.5 acres of temporary wetland fill within an existing right-of-way.

Comment: The term “existing right-of-way” is used. Instead, we recommend *using* “*utility corridor*”. The term utility corridor is more generic, and less confusing about whether right-of-way is meant to only reference road right-of-way areas. The term *utility corridor* applies more broadly to other types of right-of-ways or easements.

## **SECTION 2: APPLICATION REQUIREMENTS FOR WDNR-GP3-2012 COVERAGE, B. Reporting - Notification**

- #1 c., p.9 The project will not result in more than two (2) acres of total temporary wetland impact associated with the placement of construction matting.

Comment: The language in item c. is ambiguous. We recommend the following clarification, “The project will result in *not more than 0.5 acres and less than two (2) acres* of total temporary wetland impact...” In addition, it doesn’t appear that there is a clear basis for restricting this standard to placement of just 2 acres of protective construction matting.

- #5, p.9 Unless notified by the Department to the contrary, the effective date of coverage under this permit is thirty (30) calendar days after the designated Department office receives a complete notification package.

Comment: The notification section of the GP was developed to cover activities that had very minimal or no resources impacts. As part of the development of the GP there was an expectation created that the WDNR staff will contact the applicant within 48 hours after receiving their notification either confirming coverage under WDNR-GP3-2012 or identifying the issues that are holding back the authorization. We would like the Department to acknowledge that this was and continues to be the operating assumption for how this portion of the Utility GP will be implemented.

- #9 c., p.10 Verification that you have documented that the project will not result in an adverse impact to federal or state threatened/endangered resources and/or cultural/historical resources.

Comment: Again, based on discussions during the development of the Utility GP, we understood that the information requirements for applications under the notification section consist of an application form, certain maps, and a statement that the project will not impact

endangered resources or cultural sites. The proposed application requirements appear to require, however, submittal of some sort of “verification” of project documentation that the project will not harm threatened/endangered nor cultural/historical resources. Since verification seems to imply that some other undefined evidence is required, we request that the application requirement is instead a “*statement*” that this type of project review has occurred and has been documented, “*Statement that you have documented that the project will not result in adverse impact...*”

#### **SECTION 4: WDNR-GP3-2012 GENERAL PERMIT CONDITIONS**

- #9, p.12 **Permit Posting.** A copy of the permit coverage letter and approved plan must be maintained and available on the project site prior to the execution of the regulated activity, and remaining at least five days after stabilization of the site of the regulated activity.

Comment: It is understood that the permit posting requirements can be met by crews actively working on the project site having a copy of the permit coverage letter and approved plan available electronically. We would like the Department to confirm this interpretation of this permit condition.

- #13, p.13 **Project Completion.** Within two weeks of completion of the regulated activity, you shall submit to the Department a statement certifying the permitted project is in compliance with all the terms and conditions of this permit, and photographs of the activities authorized by this permit. This statement must reference the Department-issued docket number, and be submitted to the Department staff member that authorized coverage.

Comment: This general permit condition should only apply to projects above the non-reporting threshold. Please add the following language to make this requirement clear, “*For projects above the non-reporting threshold, within two weeks of completion of the regulated activity,...*”

#### **SECTION 7: WDNR-GP3-2012 DEFINITION OF TERMS**

- #27, p.18 Temporary Wetland Fill or Impact means non-permanent wetland fill activity that disturbs wetland areas during access, construction, or utility installation, but does not result in loss of wetland, wetland degradation, or conversion from one type of wetland to another. For example, construction mats used for equipment access, or stockpiling segregated soils from trench excavation before placing an underground pipeline.

Comment: This definition of “Temporary Wetland Fill or Impact” includes two examples. We ask that it include a third example to provide necessary clarity. Please add, “*or spoils that are temporarily side cast*” as an additional example.

- #28, p.18 Upland means non-wetland.

Comment: This definition defines upland simply as non-wetland. We request that this definition be expanded to state “Upland means non-wetland *areas above the Ordinary High Water Mark.*”

### **SECTION 6: CONCLUSIONS OF LAW**

- #1, p.15 The Department has authority under ss. 30 and 281.36, Wis. Stats., to issue a permit for the construction, reconstruction, and maintenance of utility facilities.

Comment: As we explained earlier in our comments, several times throughout the GP the term *repair* is also used to describe eligible utility activities eligible under the GP. Therefore we request that this term also be added to this section, “The Department has authority under ss. 30 and 281.36, Wis. Stats., to issue a permit for the construction, reconstruction, *repair*, or maintenance of utility facilities.”

### **III. Comments on Utility GP Scope and Implementation**

A question came up early during the development of the Utility GP about the scope of the GP, and whether it was broad enough to cover utilities’ main interests. We responded that this draft Utility GP covers We Energies main interests, and that the GP could be expanded in the future to include coverage of additional types of permitting needs.

We continue to believe that it is important to publish a final Utility GP in time to use it for the remainder of the 2013 construction season. This season should be a good opportunity to gain operational experience using the Utility GP. Based on this season’s experience there may be areas of the GP that need to be revised or expanded or it may make sense for DNR to develop a Guidance document. The goal would then be to make any necessary modifications in time for the 2014 construction season.

Thank you for the opportunity to provide comments on this important GP. If you should have any questions or require further information regarding these comments, please contact Kathleen Standen, Manager Environmental Regulatory, by telephone at 608-283-3009, or by e-mail at [kathleen.standen@we-energies.com](mailto:kathleen.standen@we-energies.com).

Sincerely,



Bruce W. Ramme  
Vice President Environmental

Copy: Dave Siebert, WDNR - Office of Energy and Environmental Assessment



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May 10, 2013

Mr. Ben Callan  
Wisconsin Dept. of Natural Resources  
101 S. Webster Street  
Madison, WI 53707

Dear Mr. Callan:

Wisconsin Public Service Comments on the Draft Utility General Permit WDNR-GP3-2012

Wisconsin Public Service (WPS) is an investor owned utility in the State of Wisconsin that serves over 440,000 electric customers and more than 315,000 natural gas customers in 24 different counties. The WPS service territory covers approximately 11,000 square miles and is located primarily in northeast, central and north central Wisconsin. On a day-to-day basis WPS operates, maintains, repairs and installs facilities in order to meet the needs and demands of the general public for safe and reliable energy. Sometimes these activities are required to be conducted in wetlands and waterways of the State. WPS supports the WDNR's efforts to develop a general permit specific to utilities in order to develop a streamlined approval process while still providing protection to the State's natural resources. Creating a utility general permit that eliminates over burdensome reporting and filing allows WPS to conduct its business and remain in compliance with Wisconsin's environmental regulations in a cost effective manner. These cost savings are passed along to the WPS customers. For these reasons, WPS submits the following comments and recommendations which we believe will improve the draft version of WDNR-GP3-2012.

General Wetland Standard #14, page 4

WPS believes that Standard #14 should be deleted. As written, a utility would be penalized by utilizing too many wetland minimization measures. The use of mats should never kick a utility into an individual permit. WPS believes that Condition #14 would actually have a negative effect by making utilities choose between conducting the work without mats or enter into a lengthy individual permit process with required mitigation.

General Wetland Standard #15, page 5

Sometimes WPS installs a new utility adjacent to an existing utility and the original utility is abandoned or removed. In these cases there could be a no net loss of forested wetlands or even an increase in forested wetlands when the original corridor is allowed to reforest. WPS suggests the following language for Condition #15: *The project will not result in a net loss of more than 10,000 square feet (0.23 acres) of forested wetlands due to clearing.*

#### Temporary Bridge Standard #26, page 5

This permit condition is more restrictive than the existing condition associated with the General Permit for permanent bridges. WPS recommends the following language which mirrors the State's existing condition with the caveat that all approach fill shall be temporary: *All approach fill shall be a maximum of 1 foot deep at the bank and 0 feet at the 15 feet landward mark. All approach fill must be temporary and removed with the bridge.*

#### Miscellaneous Structure on Bed Standard #28, page 5

WPS believes that Condition #28 should be deleted. As written, WPS would not be able to proceed under the notification process described in B(1)(d) without providing documentation that all affected riparian's consent to the project. This is problematic because 1) there are numerous out-of-town, out-of-state, and even out-of-country landowners that own lake lots found in WPS's northern territory. Obtaining documentation from these individuals is unrealistic in the timeframe needed for a typical maintenance project, 2) WPS already has easement rights or prescriptive rights on these facilities and do not need any additional landowner approvals to maintain our facilities. WPS does not believe it was the WDNR's intent, but the current language could allow landowners to prevent WPS from conducting activities that it legally has the right to conduct. Lastly, this condition is not needed considering General Standard Condition #2 already requires the applicant to have legal authorization to proceed.

#### General Construction Standard #53, page 7

Condition #53 defines its purpose within the wording of the condition, "to minimize adverse impacts on fish movement, fish spawning, and egg incubation periods". The placement, use, or removal of a temporary clear span bridge does not have any impact on the three concerns that are mentioned. WPS recommends the following language for Condition #53: *"To minimize adverse impacts of fish movement, fish spawning, and egg incubation periods, work below the OHWM may not occur during the following time periods"*.

Standard #53 also proposes to place a greater restriction on utilities than what is currently found in existing general permits. Instead of restricting all work below the OHWM on all other waters from March 1<sup>st</sup> through June 15<sup>th</sup>, these dates should mirror existing WDNR timing restrictions in other general permits:

- March 15<sup>th</sup> – May 15<sup>th</sup> for all other waters south of Highway 29
- April 1<sup>st</sup> – June 1<sup>st</sup> for all other waters north of Highway 29

#### Non-Reporting Standards for Minor Projects Affecting Wetlands, page 8

As currently written, a project qualifying for a non-reporting general permit must be both 400 sq ft and a maintenance project. WPS recommends that this paragraph is changed to read *"or projects meeting either of the following standards"*. WPS believes that this was the WDNR's original intent.

#### Non-Reporting Standard #59, page 8

WPS recommends that the WDNR not define the type of fill (permanent vs. temporary) in Condition #59. This matches how the U.S. Army Corps of Engineers wrote their non-reporting general permit for minor fills and would not preclude a temporary impact of 400 sq ft qualifying for a non-reporting permit.

#### Non-Reporting Standard #60, page 8

WPS recommends the following language: *The maintenance of a previously authorized utility facility within an existing utility corridor that will not result in more than 0.5 acres of temporary wetland fill or 400.sq ft of permanent fill.*

### B. Reporting – Notification, page 9

During the development of WDNR-GP3-2012, the WDNR created the notification process to cover minor waterway activities that could not be covered under a non-reporting permit and wetland activities that have such minor impacts that they did not warrant the time and attention of the full general permit process. The intent of the notification process was to have a less stringent process that still required agency notification, but required less time to prepare application materials and less review time. However, the draft permit language describes a notification process that is just as burdening as the full general permit process. WPS strongly recommends that the following suggestions be incorporated into the final permit in order to make the notification process more streamlined than the general permit process, which was always the intent of creating a special notification designation.

First, WPS recommends that the WDNR eliminates the need to use forms supplied by the Department. Notifications should contain the necessary information but be allowed to be submitted electronically over e-mail. A simplified reporting procedure is justified when looking at the nature of the two notification activities that WPS would most likely encounter: frac out clean up within a waterway and maintenance of a previously authorized facility below the OHWM. In these scenarios, WPS may be working under emergency conditions and may need either immediate response or may need to apply for after-the-fact permits. Either way, a lengthier form does not contribute to additional resource protection.

To improve this section, WPS recommends that the 4<sup>th</sup> paragraph under the notification process be deleted and the 9<sup>th</sup> paragraph be amended to read as follows:

*9. Notifications shall contain the following information:*

- a) A statement certifying project meets the terms and conditions of WDNR-GP3-2012, including project plan and total square feet of wetland fill.*
- b) Maps or tables of the project site that includes Township, Range, and Section(s), and a description of the jurisdictional work. Maps could include Soil Survey or Wetland Indicator Maps, WI Wetland Inventory Maps, and recent aerial photographs.*
- c) Verification that the project will not result in an adverse impact to federal or state threatened/endangered resources and/or cultural/historical resources.*

Secondly, WPS recommends that all mention of 30 calendar days be reduced to 5 calendar days. This will once again confirm that the notification process is a more streamlined process than the general permit process. If the WDNR is unable to list a review period less than 30 days then WPS highly recommends that WDNR leadership express expectations to staff through a less formal process so that the notification process does not become as stringent as the general permit process.

Lastly, WPS recommends that 1b be clarified that a notification is only required for drilling mud clean up within a waterway, since drilling mud clean up in a wetland is listed in the non-reporting section.

### General Permit Condition 9 – Permit Posting, page 12

Utility projects are unique compared to a standard lot development project because the utility is working outside of land that it owns and often there is no building or structure to attach a permit. WPS supports the WDNR's proposed language indicating that a permit coverage letter shall be made available on the project site which allows a foreman to store the required paperwork within their truck. However, WPS recommends removing the requirement "and remaining at least 5 days after stabilization

of the site of the regulated activity”. This could be months after the work is complete and could cause a special trip out to the site just to take down a permit. Given WPS’s expansive service territory, this is not as simple as it may sound.

WPS understands that this may be a standard condition used in other WDNR permits; however the WDNR understands that linear utility construction is unique to other construction sites and that is ultimately the reason why the WDNR is creating a general permit specific to utilities. WPS requests that you keep this in consideration and change the permit posting permit condition to read: *A copy of the permit coverage letter and approved plan must be maintained and available on the project site during the execution of the regulated activity.*

#### General Permit Condition 13 – Project Completion, page 13

WPS recommends that the WDNR deletes this permit condition for the following reasons:

1. General Permit Condition 2 already states that if an applicant begins work under this permit they are certifying that the project meets all eligibility standards and all terms and conditions will be met. Multiple stages of certification is unnecessary.
2. This condition has a Notice of Termination (NOT) affect. This general condition, which applies to all activities covered under this permit, eliminates the non-reporting general permit. A permit is no longer non-reporting if a utility must submit certification and photographic evidence once the project is complete.

#### WDNR-GP3-2012 General Permit Application Instruction Form

WPS has several recommendations for the application instruction form that accompanies this general permit. Some involve discrepancies that don’t match the general permit and others are associated with recommendations WPS gave in regards to the permit.

- The words “if applicable” should be added to the first box. This signifies that non-reporting permits do not require the WRAPP form and hopefully the WDNR accepts our recommendation to also eliminate the WRAPP form for notifications.
- Both bullet items should be removed under the second box. As the general permit reads, a WRAPP form and certification statement is not required for non-reporting activities.
- The third box should read “*For General Permit Applications*” instead of “Wetland Impact over 400 square feet or waterway impacts”. This accounts for the different requirements for non-reporting and notification projects.
- The 5<sup>th</sup> bullet under the 4<sup>th</sup> box should be deleted for the reasons discussed above.
- General Wetland Standard #14 should be deleted for the same reasons as mentioned above.
- General Wetland Standard #15 should be amended as proposed above.
- Temporary Bridge Standard #26 should be amended as proposed above.
- Temporary Bridge Standard #28 should be deleted for the same reasons as mentioned above.
- General Construction Standard #53 should be amended as proposed above.
- Non-reporting standard #59 should be amended as proposed above.
- Non-reporting standard #60 should be amended as proposed above.

WPS appreciates the WDNR efforts prior to this public notice to gather input from the various utilities of the state. WPS hopes that the WDNR continues to value our input and takes the above mentioned recommendations into consideration prior to finalizing the utility general permit. If you have any questions or would like to discuss any of WPS's recommendations, please feel free to contact me at (920) 433-2290.

Sincerely,

A handwritten signature in black ink, appearing to read "Rick Moser", written in a cursive style.

Rick Moser  
Environmental Consultant

Enc.



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May 10, 2013

Ben Callan  
Wisconsin Department of Natural Resources  
PO Box 7921  
Madison WI 53707-7921

RE: Comments on proposed Statewide General Permit WDNR-GP3-2012

Dear Mr. Callan:

On or about April 10, 2013 the Wisconsin Department of Natural Resources (WDNR) published the Statewide General Permit WDNR-GP3-2012 and the associated documents, the Environmental Assessment, the GP Application Checklist, and the Supplemental Practicable Alternatives Analysis for public review and comment.

American Transmission Company LLC and ATC Management Inc., its corporate manager, known collectively as American Transmission Company (ATC), owns and operates electric transmission facilities, and conducts business as a transmission company with the sole purpose of planning, constructing, operating and maintaining transmission facilities to provide adequate and reliable transmission of power. A member of the MidContinent Independent System Operator, Inc. (MISO) regional transmission organization, ATC owns approximately 9,500 miles of transmission lines and 525 substations in portions of Wisconsin, Michigan, Minnesota and Illinois. In October 2005, ATC was accepted into Wisconsin's Green Tier program. The program, administered by the WDNR, recognizes businesses and organizations that demonstrate superior environmental performance and dedication to continual improvement, and strives to encourage responsible environmental decision making to protect and restore natural resources.

As a continuing Green Tier participant and a utility engaged in year round construction and maintenance activities, ATC wishes to thank the WDNR for consulting with ATC while developing the proposed general permit. If issued this general permit has the potential to save valuable company and agency resources while still providing a high level of environmental protection. To ensure that the general permit works effectively and efficiently for all involved, ATC has reviewed the proposed General Permit and associated documents and offers the following comments for consideration.

## STATEWIDE GENERAL PERMIT WDNR-GP3-2012

### 1. Section 1, General Wetland Standards, #14 (page 4):

“The project will not result in more than five (5) acres of total temporary wetland impact associated with construction matting.”

ATC strongly suggests eliminating this standard so that the general permit provides coverage for all acreages of construction mats placed to protect wetlands from impacts. An acreage limitation, such as five acres, would likely be counterproductive because it incentivizes applicants to limit their usage of construction mats, which is a highly effective method of preventing permanent wetland impacts and results in only temporary impacts that do not permanently alter the functional values of wetlands.

Under the current draft General Utility Permit, when more than five acres of construction mats are anticipated, the General Permit would no longer apply and the applicant would be required to apply for and receive an individual Permit and subsequently complete compensatory wetland mitigation. Requiring an individual permit process and compensatory mitigation simply because construction mats are utilized to protect wetlands penalizes those who employ this protective measure, and will likely have the effect of discouraging applicants from employing adequate protective measures in order to avoid the time and cost associated with matting, the individual permit process and the compensatory mitigation requirement.

ATC believes that General Wetland Construction Standard should either be deleted, or changed to reflect WDNRs authority to regulate the placement of construction mats in wetlands to the following:

14. The project will employ practices and measures to minimize the area of temporary wetland impacts including the area impacted by the use of construction mats.

This approach would be more consistent with the USACE, which regulates the use of construction mats in wetlands; however the USACE has not required compensatory mitigation for the use of construction mats.

### 2. Section 1, Miscellaneous Structure on Bed Standards – Waterways, #28 (page 5):

“If the utility does not own the land adjacent to the waterway where the miscellaneous structure is placed, then you must provide documentation that all affected riparians consent to the proposed project.”

For a utility to be eligible for the general permit, the utility would need to meet Section 1’s General Standard Number 2 requiring that “The project applicant is the landowner or easement holder or otherwise has legal authorization to proceed.” Where this standard is met, ATC believes it is not reasonable to require documented consent from all affected riparians. First, who is to determine who are the affected riparians? Second, if a riparian were to withhold consent, that individual would be able to stop activities where the applicant has the legal right to perform work. Additionally, there is no similar riparian consent requirement in the general permit for bridges and culverts under Wis. Admin. Code § NR 320.06.

ATC suggests changing the language in Miscellaneous Structure on Bed Standards – Waterways # 28 to:

If the utility does not own the land adjacent to the waterway where the miscellaneous structure is placed, then you must provide documentation that adjacent riparian owners have been notified of the proposed project.

3. **Section 1, Miscellaneous Structure on Bed Standards – Waterways, # 33** (page 6):

“This permit does not authorize any change in the course of a navigable stream, or removal of material from the bed of any waterway under ss. 30.195 and 30.20, Stats. Excavation in the stream bed, sufficient to place miscellaneous structures, is covered under this permit.”

ATC suggests this standard be expanded to include a similar activity, the removal of a structure from the stream bed:

This permit does not authorize any change in the course of a navigable stream, or removal of material from the bed of any waterway under ss. 30.195 and 30.20, Stats. Excavation in the stream bed, sufficient to place or remove miscellaneous structures, is covered under this permit.

The negligible impact associated with the removal of structures from the stream bed is similar to or less than to the placement of miscellaneous structures and should be included in this permit.

4. **Section 1, General Construction Standards, #53** (pages 7 and 8):

“To minimize adverse impacts on fish movement, fish spawning, and egg incubation periods, placement and removal of the TCSB or work below the OHWM, may not occur during the following time periods...

- September 15th through May 15th for trout streams, and ... .
- March 1st through June 15th for ALL other waters.”

ATC suggests the following language to clarify that only activities below the OHWM must comply with the timing restrictions:

To minimize adverse impacts on fish movement, fish spawning, and egg incubation periods, work below the OHWM, including the placement and removal of TCSBs below the OHWM, may not occur during the following time periods...

ATC proposes this clarification because the placement or removal of a TCSB, installed completely above the OHWM should not have an impact on fish movement, spawning or egg incubation. In most cases, it takes less than two hours to either place or remove a TCSB. Once a TCSB is in place, there is no timing restriction on its use. If this standard applied to TCSBs placed or removed above the OHWM, unnecessary environmental impacts could occur. In many cases, work on utility projects occurs during winter months to minimize adverse impacts to wetlands, waterways and threatened and endangered species. A separate mobilization into sensitive or unstable environments with equipment simply to place or remove a TCSB to comply with the timing restriction may result in disturbance to the banks or areas adjacent to the waterway that otherwise would not occur.

5. **Section 1, General Construction Standards – #54** (page 8):

“You must ensure that all machinery and equipment used for the project is free of invasive species prior to being used in non-infested waters of the state, including wetlands, and after work is completed. All vehicles and equipment that come in contact with waters of the state must be thoroughly disinfected. Utility right-of-way best management practices for invasive species can be accessed at: <http://dnr.wi.gov/topic/Invasives/bmp.html>”

As written, the standard applies to equipment used within wetlands and waters of the state, however the best management practices referenced are applicable to terrestrial species and do not address infested waters or waters of the state. Wisconsin Administrative Code chapter NR 40 was developed to control invasive species in Wisconsin. Applicants are compelled to comply with these regulations. Additionally, Chapter 30 permits have historically included a condition developed specifically to address aquatic viruses, invasive species, and decontamination and disinfection of equipment that came into contact with navigable waterways.

ATC suggests clarifying this permit condition by referencing appropriately the best management practices and addressing invasive species within wetlands as a separate condition from the one addressing viruses and invasive species within navigable waters. This would also be consistent with historical requirements:

54. To minimize the spread of invasive species within wetlands, all vehicles and equipment that come into contact with invasive species in wetlands must be decontaminated. Utility right-of way best management practices for invasive species can be accessed at: <http://dnr.wi.gov/topic/Invasives/bmp.html>

55. All vehicles and equipment or portions of equipment that come in contact with waters of the state will be decontaminated for invasive species and viruses prior to use within another public waterway.

6. **Section 1, Non-Reporting Standards for Minor Projects Affecting Wetlands** (page 8):

“Projects involving minor fills associated with the clean-up of an inadvertent release of drilling fluid, the installation of scientific measuring devices, or the restoration of wetlands disturbed by scientific surveying or geotechnical exploration, or projects meeting both of the following standards, in addition to the standards above, may qualify for non-reporting coverage under Section 2.”

ATC suggests changing the term toward the end of the standard from “both” to “either” so that it reads:

... or projects meeting either of the following standards, in addition to the standards above, may qualify for non-reporting coverage under Section 2.

7. **Section 2, B. Reporting – Notification, #1.d.** (page 9):

“The project involves the maintenance of a previously authorized utility facility below the OHWM, but does not include dredging in excess of 2 cubic yards, the placement of other miscellaneous structures, or vehicle access below the OHWM.”

ATC suggests this standard be expanded to include a similar activity, the removal of utility facilities below the OHWM:

The project involves the maintenance or removal of a previously authorized utility facility below the OHWM, but does not include dredging in excess of 2 cubic yards, the placement of other miscellaneous structures, or vehicle access below the OHWM.

The negligible impact associated with the removal of facilities from the stream bed is similar to or less than to the placement of facilities and such activities should be included in this permit.

8. **Section 2, Reporting – Notification** (pages 9-10):

During the development of the WDNR-GP3-2012, ATC worked with the WDNR to identify wetland and waterway activities that have minor or negligible impacts on wetlands and waterways, and to develop a notification process that would simplify the application process. The intent of the notification process was to still require agency notification for these activities, but would require fewer application materials and less time to review and approve the permit for those activities. However, as written, the draft permit identifies a process that is nearly identical to the reporting permit process.

ATC suggests the elimination of the need to utilize forms supplied by the WDNR, but require the necessary information be submitted electronically, via e-mail or post. The simplified notification would assist in cases such as when wetlands or waterways must be accessed for the emergency repair or replacement of facilities and the 30 day time period waiting for a response cannot be accommodated.

ATC suggests the following to improve the notification process:

Elimination of Section 2, Paragraph 4 (page 9).

Amending Section 2, Paragraph 9 (page 10) to read as follows:

9. Notifications shall contain the following information:

a) A statement certifying project meets the terms and conditions of WDNR-GP3-2012, including project plan and total square feet of wetland fill.

b) Maps or tables of the project site that include Township, Range and Section(s), and a description of the jurisdictional work. Maps would include Soil Survey or Wetland Indicators Maps, WI Wetland Inventory Maps, and recent Aerial Photographs.

c) Verification that you have documented that the project will not result in an adverse impact to federal or state threatened/endangered resources and/or cultural/historical resources.

ATC also suggests that references to the 30 day calendar in this section be replaced with a shorter time period such as five (5) days acknowledging the streamlined approach to processing permits for activities with negligible impacts. Alternatively, the WDNR should confirm that leadership and staff are aware of and will respond to notifications within a five (5) day time period.

9. **Section 4, General Permit Condition #9- Permit Posting** (page 12):

“A copy of the permit coverage letter and approved plan must be maintained and available on the project site prior to the execution of the regulated activity, and remaining at least five days after stabilization of the site of the regulated activity.”

ATC suggests that the requirement to maintain a posted copy of the permit until 5 days after stabilization of the site of the regulated activity be deleted and the condition be changed to the following:

A copy of the permit coverage letter and approved plan must be maintained and available on the project site prior to and during the execution of the regulated activity.

ATC supports maintaining a copy of the permit coverage letter on site during activities; however, in many cases it is unreasonable to maintain a copy on site until 5 days after stabilization. In some cases, site stabilization may not occur until weeks or months after the regulated activity is completed. ATC commonly works on right-of ways that we do not own and may be in areas not readily accessible and where there are no structures or building available to attach the permit. Maintaining a posted copy on site until 5 days after stabilization may cause multiple special trips into remote or sensitive areas simply to maintain and remove a permit.

10. **Section 7, Definition of Terms** (pages 15 to 18):

ATC understands and supports WDNR’s efforts to ensure clarity and consistency in its general permit by providing definition of terms. Given that a number of these terms have definitions in Wisconsin’s statutes and regulations, ATC suggests that the best way to achieve clarity and consistency is to refer to the already established definitions rather than offer a definition unique to this general permit. This approach avoids having general permit definitions that are different than the definitions found in the statutes and regulations. This could be achieved in a couple ways.

One option would be change the first sentence of this section to read:

For the purposes of this general permit, you accept the definitions found in Chapter 30, Wis. Stats., and the NR 300 series of the Wisconsin Administrative Code.” For the terms not already defined, you accept the following definitions:

In accordance with these introductory sentences, the definition of the following terms would be deleted because these terms or similar terms are already defined by statute and/or regulation:

- Miscellaneous Structures;
- Navigable waterway;
- Ordinary High Water Mark;

- Temporary Clear Span Bridges; and
- Wetland.

Another option would be to not alter the first sentence of this section, but rather adopt the terms already defined by statute and/or regulation by reference in each definition. Here are some examples of how the individual definitions would be changed:

“Navigable waterway is defined in s. NR 310.03(5), Wis. Adm. Code.”

“Ordinary High Water Mark is defined in sections NR 320.03(12), Wis. Adm. Code.”

11. **Section 7, Definition of Terms, #15 Maintenance** (page 17):

“Maintenance means the repair, replacement or reconstruction of a previously authorized utility facility within an existing right-of-way, but does not result in an increase in capacity or volume.”

ATC suggests that the definition of maintenance be expanded to include two additional maintenance related activities, the inspection of utility facilities and the maintenance of the right-of-way in which the utility facilities are located. Both inspections and vegetation management of the right-of-way are frequent activities that are often less impactful to the environment than the repair, replacement or reconstruction of the facilities. Making clear that this general permit encompasses these routine maintenance activities would ensure that the general permit fulfills its objective of protecting the environment through an effective and efficient process.

ATC suggests this standard be expanded as follows:

Maintenance means the inspection, repair, replacement or reconstruction of a previously authorized utility facility or the right-of-way within an existing right-of-way, but does not result in an increase in capacity or volume.

**WDNR-GP3-2012 GENERAL PERMIT APPLICATION INSTRUCTIONS**

ATC suggests modifying the instructions to clarify when the applicant needs to submit a completed WRAPP and a statement certifying the project complies with the eligibility standard to be consistent with the GP.

Non-reporting permits should not require any reporting to the WDNR prior to work beginning, as is stated under Section 2, Part A of the general permit (page 8). To be consistent with the language of the general permit the instructions on what the application needs to include with an application or notification should be modified under the heading “Wetland Impact 400 square feet or less.”

ATC appreciates the opportunity to provide these comments. If WDNR supports any of these changes, then ATC asks that the WDNR modify all documents associated with this general permit, such as the WDNR-GP3-2012 General Permit Application Instructions, so that these documents are consistent with the changes to the General Permit's language.

If you have any questions please do not hesitate to contact me at (608) 877-7054.

Sincerely,

*Joan Kozisek*

Joan Kozisek  
Environmental Team Lead



Thursday, May 09, 2013

Benjamin Callan  
State of Wisconsin Department of Natural Resources  
P.O. Box 7921  
Madison, WI 53707-7921

**Re: Comments on Draft Wetland and Waterway General Permit for Utilities, No. WDNR-GP2-2012**

Dear Mr. Callan:

We appreciate the opportunity to review and submit comments to the Wisconsin Department of Natural Resources (DNR) regarding its draft Wetland and Waterway General Permit for Utilities (Draft GP3). Midwest Environmental Advocates, Inc. (MEA) is a non-profit environmental law center that provides legal and technical assistance to communities and families working for clean air, clean water, and clean government.

This general permit will cover utility projects resulting in the placement of structures on the bed of wetlands or waterways or the installation of temporary bridges across waterways. The DNR's development of this general permit is consistent with its statutory obligation pursuant to Wis. Stat. § 281.36(3g)(a) to issue general permits for several categories of activities that discharge to wetlands.

We recognize that the DNR's goal in developing and issuing these general permits is to provide consistent requirements and to streamline the permitting process. We fully support the DNR's work toward that end. There are a number of provisions that we were glad to see included in the Draft GP3. We appreciate the DNR's diligent efforts to balance clarity and consistency with the protection of wetlands and the waters and aquatic life that depend on them.

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**MIRIAM OSTROV**

Staff Attorney

**JIMMY PARRA**

Legal Advocate

**KENDRA WOCHOS**

Communications



[MIDWESTADVOCATES.ORG](http://MIDWESTADVOCATES.ORG)

**A. The DNR must retain standards to ensure compliance with the minimization and avoidance requirements in Wis. Stat. § 281.36(3g)(h).**

We support the following conditions and criteria and believe that the DNR must retain these conditions to ensure compliance with the law:

Section 1 – Eligibility Criteria: “Persons proposing to do work under s. 281.36(3g)(h), Wis. Stats., requires that applicants demonstrate that adverse impacts to wetlands have been avoided and minimized to the maximum extent practicable.”

Section 1 – General Wetland Standards: Standard #18 “The proposed project cannot avoid wetland impacts;” and standard #19 “The proposed project minimizes wetland impacts to the greatest extent practicable.”<sup>1</sup>

**B. The DNR must recognize the significance of temporary impacts, in particular to certain wetland types.**

In Section 1 of the Draft GP3, under the General Wetland Standards, Standards #13 and #14 authorize general permit coverage for certain temporary wetland impacts up to two and five acres in size. The above provision in the DNR’s Draft GP3 allows coverage under the general permit for temporary impacts that are not covered under the Corps’ general permit. This will create confusion and uncertainty for permit applicants that could lead to noncompliance with federal law.

Allowing general permit coverage for temporary impacts over a very large area—up to 2 acres and 5 acres—may be inconsistent with federal and state law. It also fails to recognize the reality that temporary impacts can have a very significant effect on aquatic resources.

The federal Clean Water Act requires a federal permit for the discharge of a pollutant—or fill material—from a point source to waters of the United States.<sup>2</sup> The Clean Water Act and the federal regulations implementing the Act do not differentiate between temporary or permanent impacts or fill.<sup>3</sup> For this reason, the Corps’ general permit for Wisconsin equates temporary and permanent impacts in one of its conditions for coverage, providing coverage for “discharges of dredged or fill material ... in waters of the United States provided the activity does not, in total, *permanently or temporarily impact* more than 10,000 square feet of waters of the United States.”<sup>4</sup> In fact, the Corps’ wetland general permit for Wisconsin may require compensatory mitigation for projects that impact more than 10,000 square feet, including temporary impacts.

Similarly, Wisconsin’s wetland law does not distinguish between temporary or permanent impacts—it regulates any discharge of fill to a wetland.<sup>5</sup> The same is true of Wisconsin’s

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<sup>1</sup> Ensures compliance with Wis. Stat. § 281.36(3g)(h)1. and 40 C.F.R. § 230.10(a), (d).

<sup>2</sup> 33 U.S.C. § 1311.

<sup>3</sup> 33 C.F.R. § 323.2(d)-(f).

<sup>4</sup> GP-004-WI, at 14 (emphasis added).

<sup>5</sup> Wis. Stat. § 281.36(3b)(b) (providing that “[n]o person may discharge dredged material or fill material into a wetland unless the discharge is authorized by a wetland general permit or individual permit issued by the department under this section or the discharge is exempt under sub. (4)”).

wetland water quality standards, which apply to actions that “affect wetlands” and focus on any impacts to “wetland functional values.”<sup>6</sup>

There is no question that temporary impacts or fill are regulated under the Clean Water Act, and that federal and state law do not distinguish between temporary or permanent impacts to wetlands. Practically speaking, some temporary impacts necessarily will have less of an impact on aquatic resource functions of a wetland than will permanent fill. However, other temporary impacts may also have a significant, albeit temporary, impact on water quality, flood retention, habitat, and other vital wetland functions.<sup>7</sup>

Allowing Utility General Permit coverage for temporary impacts or fill to up to 2 or 5 acres fails to recognize the cumulative impact that even temporary impacts can have on an aquatic ecosystem. There is no limit on the amount of time that temporary impacts or fill are in place, or how long it may take to fully restore the wetland. In recognition of the significance of lost aquatic resource functions for any period of time, the draft Interagency Guidelines for Wetland Compensatory Mitigation in Wisconsin require a higher mitigation ratio, i.e., more compensatory mitigation, to account for temporal losses to aquatic resource functions, especially for certain wetland types that take longer to restore.<sup>8</sup>

The DNR should not allow temporary impacts over such a large area to go uncompensated. We understand that the DNR retains its authority to require individual permit coverage, and thus compensatory mitigation and additional wetland protections, for any application. However, we are also aware that many seeking permit coverage incorrectly presume that they have a right to permit coverage if they believe they meet the criteria in the wetland general permit. We believe that the DNR should recognize the likelihood that temporary impacts over a large area will require compensatory mitigation or additional conditions to protect wetland functional values in order to ensure that the project will not have a significant adverse impact on aquatic resource functions.

We ask that the DNR either limit the size of impacts covered by Draft GP 3 to 10,000 square feet for any activity, or to provide that compensatory mitigation may be required for projects that impact more than 10,000 square feet. In the alternative, we ask that the DNR clarify the utility general permit does not provide coverage for projects that impact more than 10,000 square feet of any forested wetland, including coniferous bogs, shrub-carr, alder thicket, hardwood swamp, coniferous swamp, and floodplain forest because all of the above will take additional time to reestablish.<sup>9</sup>

**C. The DNR must require compliance with all applicable water quality standards in the final Utility General Permit.**

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<sup>6</sup> Wis. Admin. Code §§ NR 103.06, 103.08(4)(c).

<sup>7</sup> Wis. Admin. Code § NR 103.03.

<sup>8</sup> United States Army Corps of Engineers and Wisconsin Department of Natural Resources, Guidelines for Wetland Compensatory Mitigation in Wisconsin, at 9 (draft Feb. 2013).

<sup>9</sup> See Standard #15 under General Wetland Standards in Section 1, Draft GP3.

Conditions in the following section of the Draft GP3 appropriately require that the DNR have reasonable assurance that a project seeking general permit coverage will comply with all applicable water quality standards.

Section 5 – Findings of Fact: Standard #3 “Pursuant to s. NR 299.04(1), Wis. Adm. Code, the Department has reasonable assurance that the proposed project will meet all applicable water quality standards;” and standard #4 “The Department has determined pursuant to wetland water quality standards under s. NR 103.03, Wis. Adm. Code, and s. 281.36(3g)(d), Wis. Stats., that the proposed project will only result in minimal adverse environmental effects.”

In order to ensure that projects covered by the Utility General Permit do in fact comply with all applicable water quality standards, the DNR should exclude from general permit coverage any projects that impact wetlands or waters adjacent to impaired waters on the EPA’s Section 303(d) list. The Draft GP3 does not expressly prohibit or separately regulate impacts to wetlands adjacent to impaired waters. This is a concern because, according to federal and state antidegradation requirements, “[n]o waters of the state shall be lowered in quality unless” the permittee complies with the antidegradation analysis.<sup>10</sup> Since impaired waters by definition already fail to meet water quality standards, a wetland fill cannot be permitted to cause a discharge of a pollutant to a water that is impaired for that pollutant. Accordingly, the Corps’ wetland general permit for similar projects in Wisconsin excludes from coverage projects that impact more than 0.1 acres of waters or wetlands in or adjacent to Section 303(d) listed impaired waters.<sup>11</sup>

We ask the DNR to exclude from coverage under Draft GP3 any projects that impact over 0.1 acres of waters or wetlands adjacent to waters that are in the EPA-approved Section 303(d) list for any of the following impairments: nutrients, dissolved oxygen, ammonia, suspended solids, turbidity, sediment, streambank erosion, flow habitat, hydrological modification, wetland loss, siltation and organic enrichment. This will maintain consistency with the federal process and will ensure that the Utility General Permit complies with antidegradation requirements.

**D. The DNR should revise conditions in Draft GP3 to ensure that “temporarily” impacted wetlands are fully restored.**

In Section 1 of Draft GP3, Standard 20 provides as one of the General Wetland Standards, “Except where permanent fill is authorized, all wetlands must be restored to pre-existing elevations and hydrology.” We appreciate the inclusion of this condition to ensure that permittees fully restore impacted wetland areas. In order to provide better protection of existing wetlands, MEA requests that the DNR also include in this condition that permittees must restore the *type of vegetation* that existed prior to the permitted impacts.

Similarly, Standard 46 in Section 1 of the Draft GP3 provides, “Final site stabilization in wetlands the re-establishment of perennial vegetation to at least 70 percent vegetative cover.”

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<sup>10</sup> See Wis. Stat. § NR 102.05(1).

<sup>11</sup> GP-002-WI, at 13-14.

MEA requests that the DNR revise Standard 46 to require re-establishment of *native or preexisting* perennial vegetation.

**E. Questions remain regarding how the DNR will implement certain sections of the Draft GP3.**

1. *Utility General Permit coverage for the clean-up of an inadvertent release of drilling fluids.*

Section 1 provides coverage for projects that involve placing temporary structures in wetlands and dredging up to 2 cubic yards below the ordinary high water mark in order to clean up inadvertent releases of drilling fluids under the heading Clean-Up of Releases of Drilling Fluids Standards. Will this authorize coverage only for utilities that inadvertently release drilling fluids from a directional bore, or will other industries engaged in drilling be able to seek coverage under this general permit? For example, could this extend coverage for mining companies or other companies that can fit under the broad definition of a utility?

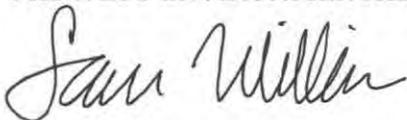
We are concerned that this activity is included as one of the non-reporting activities because of the potential harm to the environment and public health associated with spills of drilling fluid. Will utilities be required to report spills, including what chemicals were spilled and in what quantity? If that is not required, we ask that the DNR require utilities to apply for coverage under the Draft GP3 for projects associated with the clean-up of inadvertent releases of drilling fluid that impact wetlands or waters.

2. *Non-reporting coverage under the Utility General Permit.*

Consistent with Wis. Stat. § 281.26(3g)(i) and Wis. Admin. Code ch. NR 103, this section provides that the DNR has the authority to require an individual permit in lieu of general permit coverage in order to provide reasonable assurance that no significant adverse impacts to wetland functional values will occur. We are concerned about how this will work in practice if an applicant is not required to notify the DNR before beginning work. How does the DNR plan to be able to make a determination that an individual permit is required if it is not notified of the proposed project?

Thank you for the opportunity to review and comment on the Draft GP3. We look forward to your response.

Sincerely,  
MIDWEST ENVIRONMENTAL ADVOCATES, INC.



Sarah Williams  
Staff Attorney

**From:** [Brown, Joshua A - DNR](#)  
**To:** [Pardee, James D - DNR](#)  
**Subject:** FW: WDNR-GP3-2012 COE comments (UNCLASSIFIED)  
**Date:** Friday, June 28, 2013 2:54:38 PM

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-----Original Message-----

From: Callan, Benjamin S - DNR  
Sent: Thursday, May 16, 2013 12:02 PM  
To: Brown, Joshua A - DNR  
Subject: FW: WDNR-GP3-2012 COE comments (UNCLASSIFIED)

-----Original Message-----

From: Graser, Rebecca M MVP [<mailto:Rebecca.M.Graser@usace.army.mil>]  
Sent: Thursday, May 02, 2013 4:04 PM  
To: Callan, Benjamin S - DNR  
Cc: Siebert, David R - DNR  
Subject: WDNR-GP3-2012 COE comments (UNCLASSIFIED)

Classification: UNCLASSIFIED  
Caveats: NONE

Ben:

Thank you for the opportunity to review the draft WDNR general permit (WDNR-GP3-2012) for utility projects. In general we believe the GP is well developed and well written with enforceable conditions and clear eligibility criteria.

On behalf of our agency, I offer the following comments:

1. The draft GP is written in part to apply to maintenance of utility facilities. State wetland statute contains an exemption that mirrors our exemption for maintenance. We would recommend close coordination with our staff to arrive at consistent decisions regarding applicability of exemptions, and when a permit is required.
2. In general, we appreciate inclusion of information that informs readers that permits are needed from our agency for discharges to federal wetlands and discharges to navigable waters.
3. Eligibility criteria #10 (under General Waterway Standards) seems like it is more appropriate as a General Standard and not tied to waterways.
4. Eligibility criteria #59 indicates that non-reporting authorization is available for "400 square feet of total permanent wetland fill." The application checklist materials reference "permanent and temporary". A limitation of 400 square feet (permanent and temporary) fits our non-reporting program.
5. Section 2.B.1.c activities may be reporting for our agency. We appreciate that an application to the state is required; however, we are not clear that the WRAPP form proposed will satisfy federally complete application requirements. We would like to work with the State to develop a new WRAPP form that allows our agency to accept an application as complete from the start.
6. Section 2.C.1. includes a note to apply to our agency - again, we appreciate the notation. Could this notification also be provided in the preceding section? Also, in this section you reference a complete application package as 6.i, should this reference be corrected to C.6?

Again, we appreciate the opportunity to comment on your draft GP. Please feel free to contact me

should you have any questions. Thank you.

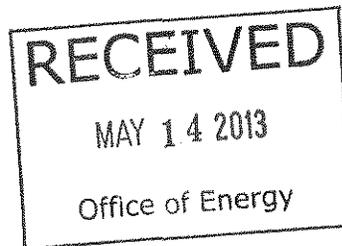
Rebecca Graser, WI Program Manager  
USACE-MVP-OP-R

(262) 717-9531, extension 5728  
(651) 290-5728 (direct office line)  
(262) 422-3051 (cell)

Classification: UNCLASSIFIED  
Caveats: NONE

Comments Regarding WI DNR GP 3 2012

The following comment has been prepared in response to the WI DNR's request for public input regarding the recently proposed General Permit (i.e.; WDNR-GP3-2012) for utilities which would, under certain conditions, authorize the placement of structures on the bed, or to place temporary bridges across waterways, or place fill in wetlands in Wisconsin. The proposed permit is an improvement over the existing regulatory process, however it appears that an essential component commonly found in similar regulatory rules and regulations is lacking in this draft permit, that being a provision allowing for a utility to take immediate steps necessary to protect human health and the environment when an emergency situation has been identified. It is the opinion of this commentator that emergency provisions should be promulgated at this time with this permit such that the immediate actions necessary to protect human health and the environment be defined without ambiguity. The potential risk of adverse impacts to human health and the environment increases with each regulatory step that would induce delays in utilities ability to implement the necessary response measures to given situation. In an emergency, it is in the public's best interest to allow immediate, unfettered access to the location of the emergency situation with the equipment necessary to take the appropriate actions necessary to prevent further potential impacts to the resources at risk.



## **MEMO**

The Department of Natural Resources (DNR) has proposed a general permit to streamline the wetland and waterway permitting process for utility projects. This proposed statewide general permit, WDNR-GP3-2012 – or "GP3" - is the third of its kind required under laws passed in 2012 by state lawmakers. It would enable straightforward utility projects resulting in only minor impacts to waterways and wetlands to be permitted more quickly.

A 30-day public comment period for GP3 started on April 10, 2013. Written comments were received from Dairyland Power Cooperative, American Transmission Company, Wisconsin Public Service, We Energies, U.S. Army Corps of Engineers, Wisconsin Wetlands Association, Midwest Environmental Advocates, and one anonymous comment. DNR addressed each of the following comments with a set of responses. Each comment was given a number in the left margin matching the corresponding "DNR Response" number. The responses are located after the comments. Some comments are addressed in multiple responses, as noted in the comment's margins.

## **DNR Responses to Written Comments – June 19, 2013**

### **GENERAL PERMIT FOR UTILITIES TO PLACE STRUCTURES ON THE BED OR TO PLACE TEMPORARY BRIDGES ACROSS WATERWAYS, OR TO PLACE FILL IN WETLANDS**

DNR Response 1: The activities regulated by this GP have been regulated before Act 118, either under Wis. Stat 281.36 or Ch. 30. Wis. Stat 281.36 was revised as part of Act 118. The DNR must fully implement all parts of the new law, including requiring wetland compensatory mitigation.

DNR Response 2: The “NOTE” in Section 1, page 3, and Section 2.C. page 11, contain standard GP language, also used in GP1 and GP2.

DNR Response 3: Changed Standard 1, page 4. The original Standard 4 addressing ongoing enforcement actions was removed. Legally, due process requires that the project proponent being investigated for alleged wetland or waterway violations not suffer punitive action by the DNR until the case is resolved.

DNR Response 4: Changed Definition 27, page 18. The U.S. Army Corps of Engineers determined this change is consistent with GP-002-WI.

DNR Response 5: Changed introduction to the Non-Reporting Standards for Minor Projects Affecting Wetlands, page 8, and Definition 27, page 18.

DNR Response 6: Changed Definition 29, page 18.

DNR Response 7: Standard 53 has been changed. This change allows utilities to comply with the law by implementing the Invasive Species Best Management Practices for Transportation and Utility Rights-of-Way Manual.

DNR Response 8: Based on an analysis of DNR-regulated utility projects from 2011 – 2013, approximately 90% of projects involved less than five acres of temporary matting. This GP creates a streamlined permit process for these minor projects, allowing a more thorough review of complex projects. Furthermore, additional analysis after implementation of this GP will provide an accurate assessment of the impact acreage limits when determining if a project requires an IP.

DNR Response 9: Changed Standard 27, page 5.

DNR Response 10: Changed Standard 32, page 6.

DNR Response 11: DNR fisheries biologists have documented that fish migration and habitat access can be impacted by activities occurring over waterways, including the placement and

removal of temporary bridges. As such, even though this activity is located above the OHWM, it can still disrupt fish activities. To be clear, this standard does not apply to the use of a temporary clear span bridge, but only its placement and removal. This standard has been implemented under NR 320 for several years, and can be waived with approval from the local DNR fisheries staff. Therefore, this change will not be made.

DNR Response 12: Changed Standard 1d, page 9.

DNR Response 13: If the applicant has an application form already on file, then an additional form will not need to be completed (see Standard 9a, page 10). Concerning the 30-day timeline, the DNR's intent is to address notifications within 2-5 days, though the statute states that the DNR has up to 30 days to make a decision, so the 30-day timeline must remain in the permit.

DNR Response 14: Based on several comments, Condition 9, page 12 was changed to read "A copy of the permit coverage letter and approved plan must be maintained and available on the project site prior to and during the execution of the regulated activity."

DNR Response 15: The definitions listed in this GP will remain due to the potential for definitions found in statutes and codes to change. If laws were to change, and GP definitions only referenced statutes and codes, then the general permit would need to be updated as well.

DNR Response 16: Changed Definition 15, page 17.

DNR Response 17: The DNR recognizes the possibility of this scenario. But, this possible reversion to forested wetland would be wholly dependent upon landowner activity, regardless of the utility's intent. The utility would not have authority to require reforestation in the ROW or released ROW, therefore this change will not be made.

DNR Response 18: Changed Standard 26, page 5, to be consistent with the current Chapter 30 TCSB application.

DNR Response 19: Removed the words "temporary" and "permanent" from Standards 58 and 59, page 8.

DNR Response 20: The notification process proposed in this GP reflects a move towards an electronic log-in and tracking system consistent with the DNR Water Program. This system will allow for more timely and efficient permit processing overall. Further, if the applicant has an application form already on file, then an additional form will not need to be completed (see Standard 9a). Concerning the 30-day timeline, the DNR's intent is to address notifications within 2-5 days, though the statute states that the DNR has up to 30 days to make a decision, so the 30-day timeline must remain in the permit.

DNR Response 21: Changed Condition 13, page 13, to read “For projects authorized under the Notification or Reporting sections...”

DNR Response 22:

- “if applicable” is added to show that the application form is not required for non-reporting activities. Though the form must be “on file” for activities requiring notifications.
- Bullet points removed.
- Third box changed.
- The fifth bullet in the fourth box cannot be deleted due to language in Ch. 30.12.
- Standard 13, page 4, will not be deleted.
- Standard 14, page 4, will not be deleted.
- Standard 25, page 5, will be amended as suggested.
- Standard 27, page 5, cannot be deleted due to the language in Ch. 30.12.
- Standard 52, page 7, will not be amended.
- Standards 58 and 59, page 8, will be amended as suggested.

DNR Response 23: This analysis has been given to DNR Legal Services for their response.

DNR Response 24: Changed Project Description and Location, page 1 and Conclusion of Law 1, page 15.

DNR Response 25: Changed Standard 16, page 5.

DNR Response 26: Changed Standard 59, page 8, from “right-of-way” to “easement”.

DNR Response 27: Changed Standard 1c, page 9.

DNR Response 28: The DNR’s intent is to address notifications within 2-5 days, though the statute states that the DNR has up to 30 days to make a decision, so the 30 days must remain in the permit.

DNR Response 29: Changed Standard 9c, page 10.

DNR Response 30: Changed Condition 13, page 13.

DNR Response 31: “Spoils that are temporarily side cast” has the same meaning as “stockpiling of segregated soils” which is already included in the definition.

DNR Response 32: Changed Definition 28, page 18.

DNR Response 33: This standard has been moved from the General Waterway Standards section to the General Standards section.

DNR Response 34: The DNR Water Program will work with Corps to develop a new WRAPP form acceptable to the Corps.

DNR Response 35: A reference to apply to the Corps was added to Section 2.B and Section 2.C.1 was corrected to read "C.6".

DNR Response 36: Added sentence to Standard 19, page 5.

DNR Response 37: In order to ensure the safe and reliable operation of utility facilities, vegetation management in utility rights-of-way is regulated by federal agencies (e.g. FERC, USDOT, etc.). Secondary wetland impacts, including vegetation management, will be considered as part of standards 16, 18, and 45. Additionally, the potential degradation resulting from vegetation clearing should be minimized by following Standard 53, page 8, requiring utilization of right-of-way BMPs for invasive species.

DNR Response 38: This example is addressed in the Practical Alternatives Analysis requirements in the application.

DNR Response 39: Changed Standard 19, page 5. This comment is also addressed in the change to Standard 45, page 7.

DNR Response 40: Changed Standard 45, page 7.

DNR Response 41: Criteria will remain in GP3.

DNR Response 42: The DNR provided the draft Utility General Permit to the U.S. Army Corps of Engineers for review and comments. The Corps determined that GP3 is consistent with federal regulations because federal and state anti-degradation policy and procedures do not apply to these state wetland permits. Both s. NR 102.05(1) and all of Chapter NR 207 (Wis. Adm. Code) are applicable only to discharges of WPDES permitted effluent or wastewater and thus do not apply to wetland fill activities. With respect to 40 CFR 122.4, this federal provision is a prohibition on new discharges that will exceed water quality standards and it only applies to the NPDES permit program. Since wetland fill is not issued a NPDES/WPDES permit, the Department has determined that this prohibition is not applicable.

DNR Response 43: The DNR believes that the definition of "utility" and the narrow scope of activities allowed by the GP will limit unintended activities by other entities not targeted for this GP. When spills occur, utilities still must follow NR500 and other applicable statutes and codes even if it is not a regulated activity under Wis.Stat. 281.36.

DNR Response 44: This GP, as well as Wis. Stat. 281.36 and NR 103 require compliance with wetland water quality standards regardless of whether the project proponent provides notification or not. Water quality standards apply to the nonreporting, notification, and reporting sections of the GP.

DNR Response 45: The DNR does not determine what constitutes an "emergency situation," as those determinations are made by other state and federal agencies. Historically, if that determination has been made, the DNR has used its discretion in dealing with regulated

activities that commence prior to permit issuance without hindering the immediate access to utility facilities in such situations.

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May 8, 2013

Mr. Ben Callan  
Wisconsin Department of Natural Resources  
PO Box 7921  
Madison WI 53707-7921

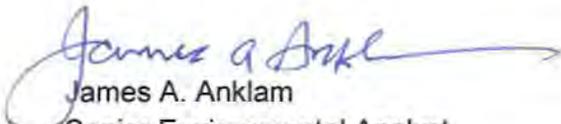
Re: Comments on WDNR –GP3-2012

Dear Mr. Callan;

We appreciate the opportunity to provide comments on the proposed General Permit affecting utilities. Enbridge Energy, Inc. is supportive of the proposed General Permit No. WDNR-GP3-2012, "General Permit for Utilities to Place Structures on the Bed or to Place Temporary Bridges across Waterways, Or To Place Fill in the Wetlands". The proposed General Permit will streamline the pipeline maintenance permitting process and reduce the delays related to permitting while still providing protection to the environment.

We look forward to the approval of this General Permit. Please contact me if you have any questions about this comment.

Sincerely

  
James A. Anklam  
Senior Environmental Analyst  
Enbridge Energy, Inc.

# Hearing to streamline wetland permits for some projects set

By Staff

Thursday, April 11, 2013

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MADISON — A proposed general permit to streamline the wetland and waterway permitting process for some utility projects affecting wetlands and waterways is now out for public comment. The proposal also is the topic of a public informational hearing, held Thursday, April 25, from 1:30 to 4:30 p.m. in Room G09 at the State Natural Resources Building, otherwise known as GEF 2, 101 S. Webster Street, in Madison.

The proposed statewide general permit - or “GP” - is the third of its kind required under new laws passed last year by state lawmakers. It would enable utilities to get their permit decisions more quickly for eligible routine projects resulting in minor impacts to waterways and unavoidable impacts to wetlands, according to Ben Callan, water management specialist for the DNR.

“The proposed general permit is tailored to the specific elements that utilities must address in constructing and maintaining their facilities. These projects must serve a public benefit while minimizing environmental impacts. This proposed general permit will simplify the process,” Callan said.

Right now, utility officials proposing routine projects that involve wetland fill must seek an individual permit and lengthier environmental review. Those same projects could also require a separate review process concerning impacts to waterways, he said.

The proposed general permit identifies the location, design, and construction standards and other conditions any project must meet to qualify for the general permit and to ensure that minimal environmental impacts occur. Once in effect, the statewide general permit would be valid for five years. When utilities apply for coverage under the general permit, DNR is required to issue a decision within 30 days.

Individual permits would still be required for projects that do not meet the general permit standards and conditions; projects that involve more than 10,000 square feet of permanent wetland fill; those involving more than 2 acres of temporary wetland impact from trenching; or projects involving more than 5 acres of temporary wetland impact from construction matting.

The DNR has also prepared an environmental assessment of the general permit and has made a preliminary determination that an environmental impact statement is not required because the GP is not expected to result in significant environmental impacts, Callan said.

To view a copy of the proposed statewide general permit and environmental assessment, go to the [DNR website](#) and search for utility regulations.

Public comments are being accepted through May 10, 2013. For more information or to submit written comments on the draft general permit or environmental assessment, contact Ben Callan

(OE/7), DNR Headquarters, 101 S. Webster, P.O. Box 7921, Madison, WI 53707-7921, by phone at 608.266.3524 or via email at: [dnroeeacomments@wisconsin.gov](mailto:dnroeeacomments@wisconsin.gov).

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**Published at:** <http://www.GazetteXtra.com/news/2013/apr/11/hearing-streamline-wetland-permits-some-projects-s/>



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May 9, 2013

Ben Callan  
Wisconsin Department of Natural Resources  
PO Box 7921  
Madison WI, 53707-7921

**Re: Comments on Proposed General Permit for Utilities (WDNR-GP3-2012)**

Wisconsin Wetlands Association (WWA) is dedicated to the protection, restoration and enjoyment of wetlands and associated ecosystems through science-based programs, education and advocacy. WWA is a non-profit 501(c)(3) organization.

We appreciate the opportunity to comment on the above referenced draft General Permit ("GP3"), and also appreciated the opportunity to review and comment on earlier drafts. The comments below largely re-iterate our prior comments, none of which were incorporated into the final draft. We respectfully request that the Department reconsider these recommendations. If the Department chooses not to integrate all or some of these recommendations into the final permit, we would appreciate a written response (i.e., *response to comments*) explaining why.

To retain consistency with GP1 and GP2, WWA recommends that GP3 be amended to incorporate the following wetland protection standard:

- *The project will be constructed in a manner that will maintain wetland hydrology in the remaining wetland complex.*

We also offer the following comments in regards to specific standards in GP3:

- Standard #4: This standard was revised from an earlier version to now state that "The Department may determine" rather than concretely stating that "project proponents with ongoing waterway or wetland enforcement actions are not eligible for coverage under WDNR-GP3-2012." WWA believes the original language should remain. Applicants with pending enforcement actions should **not** be eligible for GP3.
- Standard #13 and #14: WWA encourages WDNR to maintain the thresholds for temporary impacts **at a minimum** of 2 and 5 acres. These impact thresholds should be based on science, and lowered if temporary impacts may impair the extent and functions of wetlands.
- Standard #15: We support discouragement of forested wetland clearings greater than 10,000 square feet; however WWA recommends adding language that specifies that clearing is discouraged in other wetland types (e.g., shrub carr, alder thicket, sedge

meadow, etc.), as well. WWA is concerned that this standard will not appropriately limit the types of wetlands that may be converted to another type due to vegetation clearing.

- Standard #19: Though this standard may uniformly require project applicants to take measures to minimize wetland impacts to the greatest extent practicable, WWA suggests making special mention that temporary impacts are to be *specifically* minimized by narrowing construction corridors through wetlands.
- Standard #20: We are concerned that native vegetation is not mentioned in this standard that reads “except where permanent fill is authorized, all wetlands must be restored to pre-existing elevations and hydrology.” Please require that pre-existing vegetation also be preserved and restored to the greatest extent practicable when a wetland has been disturbed.
- Standard #46: WWA would like to see this standard strengthened to require establishment of *native* perennial vegetation during final site stabilization if at all possible. In cases where this is not feasible, we recommend that the standard provide for vegetation representative of the community type present prior to disturbance.

Thank you for the opportunity to submit comments on the draft general permit. If you have any questions about these comments, please contact Kyle Magyera 608-250-9971 or [kyle.magyera@wisconsinwetlands.org](mailto:kyle.magyera@wisconsinwetlands.org).

Sincerely,

A handwritten signature in black ink, appearing to read "Kyle Magyera". The signature is fluid and cursive, with a large, stylized initial "K" and "M".

Kyle Magyera  
Wetland Policy Specialist