

**State of Wisconsin
Department of Natural Resources**

**Responses to Comments
Implementation of 2013 Wisconsin Act 20 for
Construction Site Erosion Control and Storm Water Management
Guidance #3800-2014-03**

October 2014

On August 27, 2014, the Wisconsin Department of Natural Resources (Department) requested public input on the proposed guidance “Implementation of 2013 Wisconsin Act 20 for Construction Site Erosion Control and Storm Water Management”. The Department received the following written comments on the proposed guidance. This document represents the Department’s response to the comments on the guidance. Copies of the original documents received from commenters are attached.

PUBLIC COMMENTS

Comments by NEWS

Comment 1: Please clarify which of the NR 151.122 through NR 151.126 performance standards are intended to “control storm water quantity or control flooding”. For example, from the DNR perspective, are the NR 151.123 (peak discharge) and NR 151.124 (infiltration) performance standards intended to both “control storm water quantity” and storm water quality?

Response: Chapter NR 151 is a water quality rule. However, some storm water facilities may serve both water quality and water quantity purposes. The exception under s. 281.33(6)(a)1., Wis. Stats., allows a municipality to enact and enforce provisions of an ordinance that are stricter than the uniform standards for storm water management if needed to control storm water quantity or control flooding. Therefore, a municipality may require stricter design standards for a storm water facility if it deems it necessary to control storm water quantity.

Comment 2: On page 4, the first paragraph in Item C states the “requirement for the DNR to establish uniform statewide standards only pertains to standards for water quality at construction sites”. Portions of Act 20 appear to contradict this statement.

Response: This comment does not describe what portions of Act 20 contradict the statement nor does it make any recommended changes for the Department to consider. However, to clarify the intent of the guidance, the 3rd sentence of the paragraph under DNR Authorities on page 4 has been amended to read as follows: *This guidance only addresses the requirement for the DNR to establish uniform statewide standards pertaining to water quality at construction sites.*

Comment 3: Please clarify if the TMDL construction site category includes both sites with more than 1 acre of land disturbance and sites with less than 1 acre of land disturbance. For instance, if the TMDL identifies an 80% TSS reduction for the construction site category, does the 80% TSS reduction apply to sites that are less than 1 acre or only those sites with more than 1 acre? If the TMDL construction site category does not include a TSS allocation for construction sites with less than 1 acre of land disturbance, is the allocated TSS load for these smaller construction sites located within the urban stormwater categories (regulated and un-regulated)?

Response: This comment seeks clarification on a TMDL issue that is not the subject of this guidance. As it pertains to TMDLs, the guidance reiterates that under s. 281.33(6)(a)2., Wis. Stats., a municipality may enact and enforce provisions of an ordinance that are stricter than the

uniform standards for storm water management if needed to comply with federally approved TMDL requirements.

Comments by We Energies

Comment 1: As noted in the Draft Guidance, the Legislature’s purpose in amending Wis. Stat. § 281.33 was to “require a local [erosion control or storm water management] ordinance to *strictly conform* with the *uniform state standards* established by the DNR.” Draft Guidance at 3; *see also* Wis. Stat. § 281.33(3m) (emphasis added). The Guidance correctly notes that the Legislature “direct[ed] DNR to establish ‘uniform statewide’ standards rather than ‘minimum’ standards” Draft Guidance at 3. In fact, the Legislature expressly amended “minimum standards” to “uniform statewide standards” at several points in Wis. Stat. § 281.33. Where state rules are “comprehensive” and intended to “insure statewide uniformity,” that overall depth of legislative coverage means “that the ‘strict conformity’ language was intended to stop local rulemaking wherever the state law was silent, not enable it.” *U.S. Oil, Inc. v. City of Fond du Lac*, 199 Wis. 2d 333, 349-50, 352 (Ct. App. 1996).

However, a portion of one sentence in the Draft Guidance is inconsistent with this comprehensive statutory structure. The Draft Guidance states that “Section 281.33, Stats., does not create any new requirements for standards where a standard did not exist before, ***nor is a municipality restricted by the DNR for a standard on which ch. NR 151 is silent.***” Draft Guidance at 6 (emphasis added). One interpretation of the bolded statement might be that a municipality could enact additional requirements related to erosion control or storm water management so long as NR 151 is silent on the subject. That would turn the NR 151 standards into “minimum standards”, contrary to the comprehensive statutory structure and requirement of “uniform statewide standards,” as recognized previously in the Draft Guidance. It would also create the opportunity for an end run around the statutory requirement that municipal ordinances “strictly conform” to the uniform state standards.

Response: The Department disagrees with the commenter’s suggestion that Act 20’s use of the term “uniform statewide standards” should be used interchangeably with “comprehensive statewide standards.” Act 20 requires uniformity where statewide standards exist. It does not require the Department to promulgate the additional rules necessary to establish a comprehensive menu of erosion control or storm water management options. Absent comprehensive state rules, *U.S. Oil, Inc. v. City of Fond du Lac* is not controlling. However, as a clarification, the sentence in the guidance referred to in the comment has been amended to read as follows: *Section 281.33, Stats., does not require the DNR to create any new standards where a standard did not already exist, and therefore, a municipality is not restricted by the DNR for a standard that does not exist in ch. NR 151.*

AMENDMENT BY THE DEPARTMENT

Independent of public comments received, the Department added the following clarifying note on page 6: **Note:** *Under s. 281.33(6)(b), Stats., a municipality may enact and enforce provisions of an ordinance that are stricter than ss. NR 151.122 through 151.126, Wis. Adm. Code, for redevelopment.*

The final guidance was approved on October 10, 2014.

Prepared by: Jim Bertolacini, Storm Water Program Coordinator
Runoff Management Section, Wisconsin Department of Natural Resources

From: [Nick Vande Hey](#)
To: [DNR Guidance Documents](#)
Subject: WDNR Guidance Comments for Act 20
Date: Wednesday, September 17, 2014 5:27:56 PM
Attachments: [Act 20 Comments 2014 Sept 5.docx](#)

Jim,

Attached are comments on the WDNR draft guidance for "Implementation of 2013 Wisconsin Act 20 for Construction Site Erosion Control and Storm Water Management". Let me know if you have questions.

Nick Vande Hey, PE

Associate / Senior Project Engineer



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NEWSC Comments – September 5, 2014
Implementation of 2013 Wisconsin Act 20
for Construction Site Erosion Control
and Storm Water Management
(Guidance #: 3800-2014-03)

Comment 1

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Please clarify if the TMDL construction site category includes both sites with more than 1 acre of land disturbance and sites with less than 1 acre of land disturbance. For instance, if the TMDL identifies an 80% TSS reduction for the construction site category, does the 80% TSS reduction apply to sites that are less than 1 acre or only those sites with more than 1 acre? If the TMDL construction site category does not include a TSS allocation for construction sites with less than 1 acre of land disturbance, is the allocated TSS load for these smaller construction sites located within the urban stormwater categories (regulated and un-regulated)?

From: [Standen.Kathleen](#)
To: [DNR Guidance Documents](#)
Cc: [Bertolacini, Jim K - DNR](#); [Siebert, David R - DNR](#); [Ramme, Bruce](#)
Subject: 2014-09-16 We Energies comments on Erosion Control and SW Guidance.PDF
Date: Tuesday, September 16, 2014 4:25:05 PM
Attachments: [2014-09-16 We Energies comments on Erosion Control and SW Guidance.PDF](#)

Please accept the attached comments being submitted by We Energies regarding Draft Guidance #3800-2014-03 (Implementation of 2013 Wisconsin Act 20 for Construction Site Erosion Control and Storm Water Management). Thank you for the opportunity to comment.

Kathleen Standen

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

September 16, 2014

Submitted Electronically

DNRGuidanceDocuments@Wisconsin.gov

Attention: Mr. Jim Bertolacini, Runoff Management Section

RE: Draft Guidance #3800-2014-03 (Implementation of 2013 Wisconsin Act 20 for Construction Site Erosion Control and Storm Water Management)

Dear Mr. Bertolacini:

Wisconsin Electric Power Company and Wisconsin Gas LLC, doing business as We Energies, appreciates the opportunity to provide comments on the Department's Draft Guidance #3800-2014-03 entitled "Implementation of 2013 Wisconsin Act 20 for Construction Site Erosion Control and Storm Water Management" (the "Draft Guidance"). We Energies appreciates the Department's time spent in preparing the draft guidance and its willingness to engage stakeholders in the development process.

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 spanning much of the entire state. Therefore, uniform state standards for erosion control and storm water management are extremely helpful in expediting routine utility maintenance, construction, and service extension work. Having a single, consistent regulatory standard allows efficient and timely project implementation, and improved utility services to residential and business customers.

As noted in the Draft Guidance, the Legislature's purpose in amending Wis. Stat. § 281.33 was to "require a local [erosion control or storm water management] ordinance to *strictly conform* with the *uniform state standards* established by the DNR." Draft Guidance at 3; *see also* Wis. Stat. § 281.33(3m) (emphasis added). The Guidance correctly notes that the Legislature "direct[ed] DNR to establish 'uniform statewide' standards rather than 'minimum' standards" Draft Guidance at 3. In fact, the Legislature expressly amended "minimum standards" to "uniform statewide standards" at several points in Wis. Stat. § 281.33. Where state rules are "comprehensive" and intended to "insure statewide uniformity," that overall depth of legislative coverage means "that the 'strict conformity' language was intended to stop local rulemaking

wherever the state law was silent, not enable it.” *U.S. Oil, Inc. v. City of Fond du Lac*, 199 Wis. 2d 333, 349-50, 352 (Ct. App. 1996).

However, a portion of one sentence in the Draft Guidance is inconsistent with this comprehensive statutory structure. The Draft Guidance states that “Section 281.33, Stats., does not create any new requirements for standards where a standard did not exist before, ***nor is a municipality restricted by the DNR for a standard on which ch. NR 151 is silent.***” Draft Guidance at 6 (emphasis added). One interpretation of the bolded statement might be that a municipality could enact additional requirements related to erosion control or storm water management so long as NR 151 is silent on the subject. That would turn the NR 151 standards into “minimum standards”, contrary to the comprehensive statutory structure and requirement of “uniform statewide standards,” as recognized previously in the Draft Guidance. It would also create the opportunity for an end run around the statutory requirement that municipal ordinances “strictly conform” to the uniform state standards.

In short, the bolded statement should be deleted from the Draft Guidance because it tends to defeat the Legislature’s purposes in amending Wis. Stat. § 281.33, and because it is inconsistent with the revised statutory structure and with other statements in the Guidance.

Again, we appreciate the opportunity to comment on this important guidance. Please feel free to contact Dave Lee, Manager Water Quality, by telephone at (414) 221-2158, or by email at david.lee@we-energies.com if you have questions or would like to discuss this comment.

Sincerely,



Bruce W. Ramme
Vice President Environmental

Copy: Dave Siebert, WDNR, Director - Bureau of Energy, Transportation and Environmental Analysis

September 16, 2014

Page 3

Bcc: Joel Brieske
Mike Grisar
Beth Hellman
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