

The attached “Delayed Implementation Guidance” was developed to inform and provide direction to internal staff on how to reconcile the discrepancy between the delayed implementation date set in s. NR 151.242 (3), Wis. Adm. Code, for highway reconstruction projects to meet 40% Total Suspended Solids (TSS) control and the 2011 Wisconsin Act 32 provision that requires Best Management Practices (BMPs) that are placed on or before July 1, 2011 to remain in place. This guidance document was also developed to provide guidance to permitted MS4s and WisDOT facilities located within a permitted MS4 that have highway reconstruction projects required to meet these standards.

The guidance was developed by a team of Department staff. A combination of legal authority and environmental considerations were used to develop the guidance. A significant portion of the guidance identifies conditions, which allow taking credit for the construction of a new best management practice (BMP) to offset a BMP removed for a highway reconstruction project taking place prior to January 1, 2017.

We are now soliciting comments from the public on this guidance. Once the 21 day notice period is complete, all comments will be considered, revisions will be made to the guidance document as needed, and final guidance will be made available to internal and external stakeholders.

Comments related to this draft guidance document should be sent to:

dnrguidancedocuments@wisconsin.gov.



BUREAU OF WATERSHED MANAGEMENT PROGRAM GUIDANCE

Storm Water Management Program

Maintaining BMPs in Locations that Qualify for Delayed Implementation for the Highway Reconstruction Standard

Effective (Insert Date), 2013
Guidance #: 3800-2013-06

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

APPROVED:

Pam Biersach, Director
Bureau of Watershed Management

Date

A. Statement of Problem Being Addressed

The January 1, 2011 update to ch. NR 151, Wis. Adm. Code includes a provision in s. NR 151.242(3), Wis. Adm. Code, which sets a delayed implementation date of January 1, 2017 for meeting the highway reconstruction total suspended solids performance standard for municipalities regulated under subch. I of ch. NR 216, Wis. Adm. Code (permitted MS4s) and WisDOT facilities located within MS4s. The reason for this provision was to allow permitted municipalities an opportunity to find regional solutions to meeting the 40% TSS reduction standard of the existing urban area rather than site by site. However, s. 281.16(2)(am)3., Wis. Stats., as amended by 2011 Wisconsin Act 32, prevents the Department from enforcing this 40% TSS reduction standard. Instead, the statute requires that if a permitted MS4 has achieved, on or before July 1, 2011, a reduction of more than 20 percent of total suspended solids carried by runoff, the permitted MS4 shall, to the maximum extent practicable, maintain all of the best management practices (BMPs) that the permitted MS4 has implemented on or before July 1, 2011, to achieve that reduction. Therefore, certain projects performed in a permitted MS4 may be required to maintain BMPs such as swales that were used to demonstrate compliance with the developed urban area standard even if the project qualifies for the delayed implementation of the highway reconstruction standard.

The purpose of this guidance is to advise staff on how to reconcile these two citations and to provide flexibility for the permitted municipality prior to January 1, 2017. This guidance only applies to highway reconstruction projects within the municipal boundary of a permitted MS4, including WisDOT facilities.

B. Background

The purpose of s. NR 151.242(3), Wis. Adm. Code, is to allow permitted MS4s and WisDOT flexibility in meeting the developed urban area standard found in s. NR 151.13(2)(b)2., Wis. Adm. Code. This allowed permitted MS4s and WisDOT to have the option of achieving TSS reductions through the use of regional practices as opposed to meeting the 40% TSS reduction standard on each individual highway reconstruction project. However, following promulgation of the revisions to ch. NR 151, Wis. Adm. Code, 2011 Wisconsin Act 32 was signed into law creating s. 281.16(2)(am)2., Wis. Stats., which prevents the department from enforcing the developed urban area standard of 40% TSS reduction.

Section 281.16(2)(am)3., Wis. Stats., prevents backsliding caused by removal or discontinued maintenance of BMPs that were already in place prior to July 1, 2011. Removal of swales or other BMPs may be considered out of compliance with s. 281.16(2)(am)3., even if no practices are required for a highway reconstruction project in an MS4 until January 1, 2017 per s. NR 151.242(3), Wis. Adm. Code.

While s. NR 151.242(3), Wis. Adm. Code, only applies to sites where an acre or more of land disturbing construction activity occurs as part of a highway reconstruction, s. 281.16(2)(am)3., Wis. Stats., is applicable regardless of the area of land disturbance.

C. Guidance

The Department has determined that for highway reconstruction projects taking place prior to January 1, 2017, it is possible to take credit for the construction of new BMPs to offset BMPs removed. The following guidance identifies the conditions under which this is allowed.

1. Existing BMP Evaluation

- a. Prior to claiming the delayed implementation exemption from the highway reconstruction standard, permitted MS4s or WisDOT should identify any practices that will be removed as part of the proposed project. Practices that require mitigation for maintenance include any practices that are capable of providing stormwater treatment to development constructed prior to October 1, 2004 and for which one or more of the following apply
 - The practice is owned by the municipality or WisDOT.
 - The municipality or WisDOT had entered into a maintenance agreement with a third party to take credit for TSS reductions for meeting the developed urban area standard of s. NR 151.13, Wis. Adm. Code.Practices may include but are not limited to swales, ponds, catch basins, bioretention basins and proprietary devices.
- b. An analysis should be conducted to determine the mass of TSS that is currently being removed from the existing urban area by the portions of the BMP or BMPs that are proposed to be removed.

2. On-Site Replacement BMPs

- a. If new BMPs will be constructed as part of the highway reconstruction project, an analysis should be conducted to show that the proposed BMPs will remove an equivalent mass of TSS from the existing urban area as those that will be removed.
- b. A maintenance plan should be developed for the proposed BMPs.
- c. The BMPs shall be maintained in accordance with the maintenance plan.

3. Off-Site Replacement BMPs

- a. Off-site BMPs may be constructed to offset the removal of existing BMPs for a highway reconstruction project under the “maximum extent practicable” provision of s. 281.16(2)(am)3., Wis. Stats.
- b. An analysis should be conducted to show that the proposed BMPs will remove an equivalent mass of TSS from existing urban highway or parking lot area within the same 12-digit Hydrologic Unit Code (HUC) whenever possible, as those that will be removed as part of the highway reconstruction.
- c. The off-site BMPs must be constructed before or in conjunction with the removal of the existing BMPs.
- d. Regional BMPs may be constructed to offset future removal of existing BMPs for highway reconstruction projects. Offset credit for future highway reconstruction projects will only be given under the following circumstances:
 - Credit should be given consistent with s. NR 151.003, Wis. Adm. Code, except that the regional BMP must be constructed after July 1, 2011.

- The qualifying TSS reductions are from TSS generated on existing urban area developed prior to October 1, 2004.
- A long-term maintenance plan is developed for the BMP.
- The BMP is maintained in accordance with the maintenance plan.

4. Equivalent Analysis

The existing BMP TSS mass removed should be determined using the same water quality model and version as that are used for determining the proposed BMP's TSS replacement credit.

5. Water Quality Standards

The use of replacement BMPs to make up for TSS removal credit does not exempt a highway reconstruction project from having to meet other applicable water quality standards such as those to protect outstanding resource waters (ORWs) and exceptional resource waters (ERWs) or water quality requirements to improve waters listed in section 303(d) of the federal clean water act.

CREATED:

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On behalf of the Storm Water Liaison Team

Date

APPROVED:

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Date

Runoff Management Policy Management Team approved on _____ (date).