

BEFORE THE WISCONSIN DEPARTMENT OF NATURAL RESOURCES

Application of the United States Department of the Army Corps of Engineers, for Water Quality Certification for the Final Regulations Pertaining to the Issuance, Reissuance, and Modification of Regional General Permits

On July 13, 2022, the United States Department of the Army, Corps of Engineers (COE), published on its website a notice of intent to issue Regional General Permits (RGPs). The notice of intent to issue includes 1 new (Bank Stabilization and Habitat Improvement) RGP and 7 modified RGPs (Beach Creation and Nourishment, Beach Raking, Minor Discharges, Piers and Docks, Transportation, Utility, and Wildlife Ponds). On September 20, 2022, The St. Paul District COE requested water quality certification from Wisconsin Department of Natural Resources (WDNR) under Section 401 of the Clean Water Act for each of the eight proposed RGPs.

WDNR has examined the regulations promulgated by the COE and United States Environmental Protection Agency pursuant to Section 401, CWA, and Chapters 30 and 281, Wisconsin Statutes and Chapters NR 102, 103, 105, 310, and 299, Wisconsin Administrative Code (Wis. Adm. Code).

The WDNR has determined the following conditions for the RGPs are required to ensure compliance with state water quality standards enumerated in s. 299.04, Wis. Adm. Code. Water quality in Wisconsin will be adequately protected as long as these conditions are met and the requirements of the final RGPs are consistent with the public noticed drafts. This certification shall expire when the RGPs expire.

Section 401 Certification does not release the permittee from obtaining all other necessary federal, state, and local permits, licenses, certificates, approvals, registrations, charters, or similar forms of permission required by law. It does not limit any other state permit, license, certificate, approval, registration, charter, or similar form of permission required by law that imposes more restrictive requirements. It does not eliminate, waive, or vary the permittee's obligation to comply with all other laws and state statutes and rules throughout the construction, installation, and operation of the project. This Certification does not release the permittee from any liability, penalty, or duty imposed by Wisconsin or federal statutes, regulations, rules, or local ordinances, and it does not convey a property right or an exclusive privilege.

The conditions of this Certification cannot be used for other permit decisions, permit types or licenses that are not expressly listed in the agency water quality certification request dated September 20, 2022. Pursuant to 40 CFR 121.5, a certification request must be submitted to the state of Wisconsin for all individual license or permit requests. This includes projects undertaken by federal agencies including U.S. Army Corp of Engineer projects.

This Certification does not replace or satisfy any environmental review requirements, including those under the Wisconsin Environmental Policy Act (WEPA) or the National Environmental Policy Act (NEPA).

STATE CONDITIONS AND LIMITATIONS OF CERTIFICATION

GENERAL CONDITIONS:

1. The permittee shall allow the WDNR reasonable entry and access to the discharge site to inspect the discharge for compliance with the certification and applicable laws.

Justification: On-site inspection is a critical element to gather necessary information for water quality certification decisions and quality control and assurance of data provided by the applicant. This authorization is required pursuant to s. NR 299.05(3)(d)2.c, Wis. Adm. Code.

2. Water quality certification is denied without prejudice for activities involving the temporary stockpiling of dredged or fill material in waters of the state, including wetlands for 60 or more consecutive days between May 15 and November 15 unless this includes a wetland restoration plan approved by the department.

Justification: Physical alterations can degrade surface waters through the filling, dredging or stockpiling of materials. Pursuant to ss. NR 102.05 and NR 103.03, Wis. Adm. Code, no waters of the state including wetlands shall be lowered in quality unless it has been affirmatively demonstrated to the department that such a change is justifiable. To satisfy these antidegradation and water quality protection requirements, individual certification is warranted to properly demonstrate that temporary stockpiling of dredged or fill material is warranted.

3. Water quality certification is denied without prejudice for activities that have the potential to adversely impact Area of Special Natural Resource Interest (ASNRI) waters designated under s. NR 1.05, Wis. Adm. Code.

Justification: Pursuant to ch. NR 207, Wis. Adm. Code, Wisconsin's Antidegradation procedures prohibit degradation of outstanding resource waters and limit degradation in exceptional resource waters. Additionally, formal consultation with the Voigt Task Force is needed on projects which could have impacts on wild rice or wild rice habitat. For these reasons, all projects that have the potential to degrade ASNRI waters designated under s. 30.01(1am), Wis. Stats., are denied without prejudice. ASNRI waters are available on the DNR's surface water data viewer at <https://dnr.wisconsin.gov/topic/SurfaceWater/swdv>.

4. Water quality certification is denied without prejudice for activities that have the potential to adversely impact Public Rights Features (PRFs) designated under to s. NR 1.06, Wis. Adm. Code.

Justification: Pursuant to s. NR 102.04(1)(a) and (b), Wis. Adm. Code, objectionable deposits or debris shall not be present in such amounts as to interfere with public rights in waters of the state. Public Rights Features are most sensitive to these types of deposits and warrant individual water quality certification to ensure that wildlife, recreation, and fish and aquatic life standards under ch. NR 102, Wis. Adm. Code are satisfied. PRFs are available on the DNR's surface water data viewer at <https://dnr.wisconsin.gov/topic/SurfaceWater/swdv>.

5. No discharges of dredged or fill material below the ordinary high water mark of a navigable stream, as defined by s. 310.03(5), Wis. Adm. Code, may take place during fish spawning periods or times when nursery areas would be adversely impacted. These periods are:

- September 15th through May 15th for all trout streams; to determine if a waterway is a trout stream, you may use the WDNR website trout maps which can be found at <https://dnr.wisconsin.gov/topic/Fishing/trout/streammaps.html>
- September 15th through June 15th on all Great Lakes tributaries upstream to the first dam or barrier.
- November 1st through June 15th for Lake Michigan waters surrounding Door County including Green Bay and all harbors and bays.
- September 15th through July 1st for Lake Superior waters surrounding Douglas County including St. Louis River and all harbors and bays.
- March 1st through June 15th for ALL OTHER waters.

Justification: Pursuant to s. NR 102.04(3), Wis. Adm. Code, aquatic life designations include spawning areas for cold water and warm water fish and aquatic life habitat. Water quality criteria are derived to ensure spawning activities in Wisconsin are protected.

6. The permittee must install in-water best management practices (BMPs) to minimize total suspended solids (TSS), sedimentation and nutrient loadings for any work conducted below the ordinary high water mark (OHWM). Any visual increase in turbidity outside of the approved impact area shall result in the project operations ceasing until BMPs have been modified to address the issue.

Justification: Pursuant to ss. NR 102.04(1) and NR 102.06, Wis. Adm. Code, objectionable deposits and nutrients may not be present in amounts that interfere with public rights and interests or exceed state standards for surface water. In-water BMPs also help ensure excessive sedimentation, TSS, and nutrient loadings will not result in a violation of state wetland water quality standards under s. NR 103.03, Wis. Adm. Code.

7. Erosion control measures shall meet or exceed the WDNR Technical Standards developed under Subch. V of ch. NR 151, Wis. Admin. Code. Any area where soil is exposed during construction shall be stabilized or revegetated immediately upon reaching final grade using sod, seed and anchored mulch, seed and erosion control mat, or rip rap to prevent erosion and limit sediment discharge to the waterway.

Justification: Pursuant to ss. NR 102.04(1) and NR 102.06, Wis. Adm. Code, objectionable deposits and nutrients may not be present in amounts that interfere with public rights and interests or exceed state standards for surface water. Erosion control measures also help ensure excessive sedimentation, TSS, and nutrient loadings will not result in a violation of state wetland water quality standards under s. NR 103.03, Wis. Adm. Code.

8. No discharges of dredged or fill material may be placed into wetlands that are identified by the department as being one of the following community types: a) Great Lakes ridge and swale complexes, b) interdunal wetlands, c) coastal plain marshes, d) emergent marshes containing wild rice, e) 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, f) boreal rich fens, or g) calcareous fens.

Justification: Pursuant to s. 281.36(3g)(d), Wis. Stats., impacting one of these rare wetland community types may result in significant adverse environmental effects. These wetland communities are most sensitive to these types of deposits and warrant individual water quality certification to ensure that wetland water quality standards identified in ch. NR 103, Wis. Adm. Code are met.

9. The permittee may not use any materials that contain toxic substances in toxic amounts. This may include materials used for structure placement, beneficially reused materials, or fill.

Justification: Pursuant to chs. NR 102, NR 103, NR 105, and s. NR 299.04(1)(b), Wis. Adm. Codes, water quality criteria and limitations must be satisfied to grant water quality certification.

10. The permittee must ensure that any material used to construct a project is properly contained and stabilized in a manner that will prevent the material from being eroded.

Justification: Pursuant to ss. NR 102.04(1)(a) and (b) and NR 103.03, Wis. Adm. Code, objectionable deposits or debris shall not be present in amounts that interfere with public rights and interests in waterways or the functions and values of wetlands in Wisconsin.

11. Projects permitted under any RGP must implement planning and pretreatment of equipment to minimize spread of invasive or noxious species, designated under ch. 40, Wis. Adm. Code.

Justification: Pursuant to s. NR 103.03(2)(f)3., Wis. Adm Code, water quality certification must prevent conditions conducive to the establishment or proliferation of nuisance organisms in order to protect existing wetland habitat and ecosystems. Invasive species threaten the Fish and Other Aquatic Life designated use under s. NR 102.04(3), Wis. Adm. Code.

12. Whenever an applicant is completing sediment sampling and analysis, monitoring, or disposal of materials from any dredging project, proper sampling and quality assurance methods shall be implemented in alignment with ch. NR 347, Wis. Adm. Code.

Justification: In order to protect the public rights and interests in the waters of the state and to ensure that data quality is representative of site conditions to make informed water quality certification decisions, all data gathering, sampling, monitoring, data analysis and disposal shall be completed using proper sampling and quality assurance methods in alignment with ch. NR 347, Wis. Adm. Code.

Conditions Applicable to Specific Regional General Permits Granted Water Quality Certification:

Beach Creation and Nourishment RGP:

The project may not result in the deposition of new material below the ordinary high water mark of any waterway.

Justification: Pursuant to s. NR 102.04(1)(a) and (b), Wis. Adm. Code, objectionable deposits or debris shall not be present in such amounts as to interfere with public rights in waters of the state. Unconsolidated materials commonly utilized for beach creation warrant individual water quality certification to ensure that wildlife, recreation, and fish and aquatic life standards under ch. NR 102, Wis. Adm. Code are satisfied.

Minor Discharges RGP:

The permittee must ensure that the combined permanent or temporary discharge will not result in direct and secondary impacts which together exceed 400 sq. ft.

Justification: Pursuant to s. 103.03(2)(d), Wis. Adm. Code, wetlands shall be protected from cumulative impacts of discharges which may result in concentrations or combinations of substances which are toxic or harmful to human, animal, or plant life. Ensuring that the eligibility standard for wetland impacts encompasses primary and secondary impacts as required under s. NR 103.08(3) Wis. Adm. Code will ensure adequate protection from cumulative impacts.

The project may not result in the permanent deposition of material below the ordinary high water mark of any waterway.

Justification: Pursuant to s. NR 102.04(1)(a) and (b), Wis. Adm. Code, objectionable deposits or debris shall not be present in such amounts as to interfere with public rights in waters of the state. Unconsolidated materials commonly utilized for beach creation warrant individual water quality certification to ensure that wildlife, recreation, and fish and aquatic life standards under ch. NR 102, Wis. Adm. Code are satisfied.

Wildlife Ponds RGP:

The project may not result in the creation of a pond that is permanently connected to a navigable waterway, by means of enlargement or by a natural or artificial channel or drainage course, or an open or closed conduit, any of which tend to confine and direct flow into the existing navigable waterway, as defined in s. NR 343.03(3) Wis. Adm. Code.

Justification: Physical alterations can degrade surface waters through the excavation of materials and manipulation of surface water hydrology. Pursuant to ss. NR 102.05 and NR 103.03, Wis. Adm. Codes, no waters of the state including wetlands shall be lowered in quality unless it has been affirmatively demonstrated to the department that such a change is justifiable. To satisfy these antidegradation and water quality protection requirements,

individual certification is warranted to properly demonstrate that pond construction will not cause adverse effects.

Where project proposals have existing wetlands on or adjacent to the project area, the project area must be dominated by agricultural crops, invasive wetland species, or early successional hydrophyte species, and the proposed activities will not cause significant adverse impact to undisturbed wetland plant communities.

Justification: Pursuant to s. NR 103.03, Wis. Adm. Code, no waters of the state including wetlands shall be lowered in quality unless it has been affirmatively demonstrated to the department that such a change is justifiable. Limiting such pond projects to locations that will cause minimal impacts to undisturbed wetland plant communities satisfies this water quality protection requirement.

NOTIC OF APPEAL RIGHTS

If you believe that you have a right to challenge this decision, you should know that Wisconsin Statutes and administrative rules establish time periods within which requests to review Department decisions must be filed.

To request a contested case hearing pursuant to section 227.42, Wisconsin Statutes, 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.

This determination becomes final in accordance with the provisions of s. NR 299.05(7), Wisconsin Administrative Code, and is judicially reviewable when final. For judicial review of a decision pursuant to sections 227.52 and 227.53, Wisconsin Statutes, you have 30 days after the decision becomes final to file your petition with the appropriate circuit court and to serve the petition on the Secretary of the Department of Natural Resources. The petition must name the Department of Natural Resources as the respondent.

Reasonable accommodation, including the provision of informational material in an alternative format, will be provided for qualified individuals with disabilities upon request.

This notice is provided pursuant to section 227.48(2), Wisconsin Statutes.

Dated at Madison, Wisconsin November 10, 2022

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By: 

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