

**Midwest Environmental**  
**A D V O C A T E S**  
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**STORMWATER TOOL-KIT**

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Midwest Environmental Advocates, Inc. is a nonprofit environmental law center that provides technical assistance and legal representation to communities and groups working to protect the public's right to clean air and water.

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## **I. INTRODUCTION**

### **A. The Clean Water Act Regulates Stormwater Discharges**

In 1987, Congress amended the Clean Water Act to include stormwater as a regulated discharge.<sup>1</sup> EPA promulgated regulations to address stormwater discharges in phases. The first phase (Phase I), set forth by EPA in 1990, covered stormwater discharges “associated with industrial activity.”<sup>2</sup> EPA defines “industrial activity” to include construction activities that disturb more than five (5) acres of land and discharge into waters of the U.S.<sup>3</sup> Most big-box construction projects affect at least 5 acres and have, therefore, been regulated since Phase I was implemented in 1990.<sup>4</sup> Introduced in 1999, Phase II applies to an expanded list of regulated entities, including small construction activity affecting at least one (1), but less than five (5) acres of land into the stormwater program.<sup>5</sup>

### **B. In Wisconsin, The Clean Water Act is Implemented Through WPDES Permits**

The Clean Water Act requires all owners/operators of construction sites to obtain National Pollutant Discharge Elimination System (NPDES) permits before discharging stormwater from commercial or residential construction project affecting one (1) or more acres of land.<sup>6</sup> The Wisconsin Department of Natural Resources (“DNR”) has federal authority to issue these permits, referred to as Wisconsin Pollutant Discharge Elimination System (WPDES) permits.<sup>7</sup> The WPDES stormwater permit program is set forth in section [283.33](#) of the Wisconsin Statutes, and codified in DNR rules [NR 216](#) and [NR 151](#) of the Wisconsin Administrative Code.<sup>8</sup> These sections set forth specific requirements that must be met before a WPDES permit can be obtained.<sup>9</sup>

DNR incorporates NR 216 and NR 151 requirements into a state-wide WPDES General Permit for Construction Site Stormwater Discharges. All construction sites over one acre in size must receive coverage under the WPDES General Permit before beginning land-disturbing activities.

### **C. Commercial Construction Sites are Regulated by Department of Commerce<sup>10</sup>**

For “commercial building” construction, the DNR shares regulatory responsibilities with Wisconsin Department of Commerce (“Commerce”).<sup>11</sup> “Commercial buildings” is broadly defined to include all “public buildings and buildings that are places of employment... as well as multi-family dwellings.”<sup>12</sup> Big-box developments are included in this category, as well as a wide range of other building projects.

Unfortunately, the joint DNR-Commerce oversight can be very confusing. In general, commercial sites are subject to Commerce rules which require compliance with NR 216 and NR 151 standards. In these rules, Commerce sets procedural standards for collecting applications, called Notices of Intent (NOIs), for the WPDES General Permit. While Commerce oversees its own NOIs, commercial applicants are subject to DNR inspection and enforcement once covered under the General Permit.

In the end, DNR is the only agency that has federal authority to issue permit coverage.<sup>13</sup> While Commerce can help implement the WPDES program, the WPDES General Permit is the final word with regard to Clean Water Act compliance. Once covered under the General Permit, commercial applicants are technically subject to the same permit requirements and enforcement as any other construction site in Wisconsin.

#### **D. Some Sites Need to Provide Notice to Both DNR and Commerce**

As mentioned above, Commerce screens NOIs for commercial and residential buildings and DNR screens NOIs for land clearing not associated with an individual project and aside from major road construction. Not all developments fall in just one category. The DNR provides some background on situations where two applications, or Notices of Intent (NOI), need to be submitted:

For commercial developments where land disturbing activity occurs (e.g. rough site grading of a multi-lot development, road construction or installation of public utilities) permit coverage is needed from DNR for the period until building construction begins. Before construction of the building starts, coverage from Commerce will need to be obtained. **“Thus, some commercial development projects require coverage from both DNR (for the initial construction phase) and Commerce (for the building construction phase).”<sup>14</sup>**

Big-box developments often involve additional road construction and public utility installation. Additionally, larger developments (for example, strip malls) that are followed by individual commercial buildings may need a DNR permit for the initial construction stage.

- **TIPS:** 1) If there is more than one business being constructed on the same plot of land, check with DNR about whether the site need to submit an NOI for the initial grading of the site; and 2) if there is road construction extending off site, call DNR to check whether applicants are required to submit a DNR NOI in addition to the Commerce NOI. Initial grading is a major source of water pollution and can go unprotected if developers wait to use controls until each site is being built.

## **II. OVERVIEW OF THE PERMIT PROCESS FOR BIG-BOXES**

### **A. Pre-Construction**

- Step 1)** The developer must establish an Erosion Control Plan and Stormwater Management Plan that meets the requirements in NR 216.46 and NR 216.47 of the Wisconsin Administrative Code.<sup>15</sup> The developer can choose from a variety of Best Management Practices (BMPs) that will help the site meet the NR 216 requirements. Additionally, the developer should create and submit a Long-Term Maintenance Agreement.
- Step 2)** Before a big-box development is allowed to begin construction, the developer must submit a [Notice of Intent \(NOI\)](#) form to Commerce.<sup>16</sup> This NOI must include a signed statement from the applicant that verifies that he/she has an Erosion Control Plan and Stormwater Management Plan that meet the requirements in NR 216.24 and NR 216.47 of the Wisconsin Administrative Code.<sup>17</sup> Applicants are not required to submit

the Erosion Control or Stormwater Management plans unless DNR or Commerce requests the plans.

**Step 3)** Commerce reviews the NOI.<sup>18</sup>

**Step 4)** If the site will fill in wetland or discharge stormwater into a wetland area, the project must receive Water Quality Certification, under NR 103, Wis. Admin. Code. Before DNR can grant NR 103 certification, the developer must show that there are no “practicable” design alternatives that would reduce the wetland impact.<sup>19</sup> Similarly, if endangered species or historical artifacts are found near the site, the project must undergo a full DNR review to evaluate the impact to these protected resources.<sup>20</sup>

**Step 5)** If no objection is raised within seven (7) days of submitting the NOI to Commerce, the developer obtains WPDES permit coverage automatically and can begin construction according to the erosion control and stormwater management plans they created.<sup>21</sup> However, if the DNR decides the construction site will create a “significant source of [stormwater] pollution,” it can require the developer to apply for an individual permit issued by DNR.<sup>22</sup>

**Step 6)** In some cases, the developer may need to file an additional NOI with DNR for aspects of the construction project that are not part of the commercial site.<sup>23</sup>

#### **B. Construction**

**Step 7)** Commerce is required to monitor the construction process and enforce Commerce rules.<sup>24</sup>

#### **C. Post-Construction**

**Step 8)** After construction is completed, Commerce retains authority to enforce the Long-Term Maintenance Agreement.<sup>25</sup>

**Step 9)** DNR retains authority to enforce permit requirements throughout the process, but gives Commerce the primary role in enforcement.<sup>26</sup>

**Summary:** Big-box developments need WPDES stormwater permit coverage before construction begins. The developers acquire coverage by submitting an NOI to Commerce (and sometimes DNR as well). Unless the DNR determines that the site will be a “significant source of stormwater pollution,” DNR extends WPDES General Permit coverage automatically if no other objection is made by Commerce or DNR. Enforcement is handled by Commerce.

### III. CONSTRUCTION AND POST CONSTRUCTION REQUIREMENTS

Before a big-box development can obtain coverage under the State's WPDES General Permit, the developer must file a Notice of Intent (NOI) with Commerce that verifies that the plans include:<sup>27</sup>

#### A. Construction

- [Erosion Control Plan](#)<sup>28</sup>
- Stormwater Management Plan<sup>29</sup>
- Long-Term Maintenance Plan<sup>30</sup>

##### 1. The Erosion Control Plan must include:

- Plans to install Best Management Practices ("BMPs"), as set forth in the [Wisconsin Construction Best Management Practice Handbook](#), that are designed to reduce, to the "maximum extent practicable," eighty percent (80%) of the total suspended solids (TSS) (dirt and debris that are suspended in the stormwater runoff) when compared with no runoff controls;<sup>31</sup> and
- Plans to keep BMPs in place until the site undergoes "final stabilization," meaning "all land-disturbing construction activities at the construction site have been completed" and a vegetative cover is in place.<sup>32</sup>

Examples of Best Management Practices for big-box developments are included in the section titled, "How Can I Use This Information?"

#### B. Post-Construction

Although the Stormwater Maintenance Plan needs to be created prior to construction, most aspects of the plan are implemented and maintained after construction is complete.

##### 1. The Stormwater Management Plan includes strategies to:

- Retain eighty percent (80%) of the total suspended solids (TSS) that are carried off the property with stormwater runoff.<sup>33</sup>
- Install stormwater control measures that reduce the peak discharge rate of the 2-year, 24-hour design storm, to the "maximum extent practicable."<sup>34</sup>
- Design the big-box to infiltrate sixty percent (60%) of the stormwater that is generated on site, or ten percent (10%) of the 2-year, 24-hour storm (whichever is higher). If infiltrating water from parking lots and roads, pretreatment, such as oil/grease separation, is required.<sup>35</sup> However, a developer is not required to dedicate more than 2 percent of the project site to infiltration.<sup>36</sup> There are additional exemptions regarding areas with less than 5,000 square feet of parking. However, this is unlikely the case at a big-box

development.<sup>37</sup> (NOTE: Redevelopment or “infill” developments are not subject to these requirements.)

- Design “protective areas,” that are within 50 feet of a lake or river, or 75 feet from a river that is designated an “outstanding resource water.”<sup>38</sup> These areas must be at least 10 feet away from wetlands of any type and 50 feet away from “highly susceptible wetlands.”<sup>39</sup> Among other restrictions, there should be no impervious (paved) surfaces in these “protective areas,” and BMPs should be used to decrease runoff in these areas.
- Reduce petroleum runoff from fueling and vehicle maintenance areas so that there is no visible sheen in the runoff.<sup>40</sup>

Again, developers are expected to meet these parameters “to the maximum extent practicable.”<sup>41</sup> This standard is relatively untested.

Additionally, the Stormwater Management Plan should include a Long-Term Maintenance Agreement for stormwater control.

## **2. The Long-Term Maintenance Agreement is:**

- An “agreement” that the development will meet long-term maintenance requirements in NR 151.12 and NR 151.24 of the Wisconsin Administrative Code;<sup>42</sup>
- A “plan,” containing specific provisions for maintaining the efforts outlined in the Stormwater Management Plan;<sup>43</sup> and,
- Submitted as part of the Notice of Intent (NOI) to Commerce.

Both WPDES construction stormwater permit coverage and the application of erosion control and stormwater management requirements set forth in the permit end once a construction site reaches “final stabilization.”<sup>44</sup> The Long-Term Maintenance Agreement, however, requires the owner to continue to meet control requirements even after the WPDES coverage ends.<sup>45</sup>

Again, while the DNR and Commerce both maintain the authority to regulate developments past the construction phase, Commerce is the lead agency when it comes to commercial developments.<sup>46</sup>

## **IV. HOW CAN I USE THIS INFORMATION TO PROMOTE SUSTAINABLE DEVELOPMENT?**

### **A. Pre-Construction**

#### **Action 1) Contact Commerce and DNR and provide details about environmental concerns and check on NOI review.**

**Background:** Unfortunately, the WPDES permitting of individual sites is not the best avenue to address concerns about stormwater. Although plans are generated before construction begins, the permitting process for individual developments seeking General Construction Permit coverage is not open to public comment.<sup>47</sup> Public comment on this process is currently restricted to comments on the General Permit.<sup>48</sup> As mentioned above, developers are required to submit a Notice of Intent (NOI) form to Commerce confirming that the development’s erosion control plan and stormwater management plan meet NR 216.46 and

NR 216.47 requirements from the Wisconsin Administrative Code. Commerce and DNR then make decisions, without public input, regarding coverage. Most big-box developments fall within the scope of the State's General Permit for construction activity and, therefore, are not subject to public review.

**What you can do:** As discussed above, participation in the permitting process is somewhat difficult. There are, however, avenues to express your opinion and push Commerce and DNR to pay attention to the upcoming construction site.

First, when a known development is on the horizon, it can help to call Commerce and DNR with questions and/or comments regarding the level of impact the site will have on receiving waters or other details about the site.

Comments to Commerce and/or DNR can help in a couple of ways:

- DNR is supposed to decide whether an individual site will have a “significant impact” on receiving waters. Information that suggests a “significant impact” could help DNR decide that an individual permit is needed.<sup>49</sup> Individual permits require public participation and allow residents to comment on potential problems with the site plan.<sup>50</sup>
- Comments and questions can help gain the Commerce and DNR's attention. With community pressure, the review process may be more thorough.

Second, you can submit an [open records request](#) that requests Notices of Intent, Erosion Control and Stormwater Maintenance Plans and analyze potential flaws. If you identify flaws, write to Commerce and DNR.

## **Action 2) Write DNR and Commerce and highlight design alternatives that minimize stormwater impacts.**

**Background:** In certain circumstances, DNR is required to review design alternatives that could potentially reduce stormwater impacts. For example, if wetlands are impacted, DNR must certify that the development has minimized impacts to wetland areas.<sup>51</sup>

**What you can do:** Write a letter to DNR highlighting “practicable” alternatives to the one-story, surface parking big-box prototype design. For reference, EPA has released a review highlighting a variety of Low Impact Development studies and techniques that big-box retailers could use to reduce stormwater impacts.<sup>52</sup> Additionally, multi-level designs and structured parking can dramatically reduce the store's footprint and impact.

## **Action 3) Highlight Need for Local Conditions to Minimize Stormwater Impacts**

**Background:** Beyond DNR and Commerce, local government plays a role in approving stormwater management plans.

As discussed in the [Annexation](#) and Zoning Decisions Tool-Kit, big-box developments often require re-zoning and/or annexation of property. When considering the impact of the



decision to rezone or annex land, Plan Commissions and City Councils will generally review plans for the site. Stormwater plans are generally available with the building plans and can be assessed through Public Records requests (see [Public Records Law Toolkit](#)). Additionally, City Council and Plan Commission meetings can be very educational with respect to identifying the stormwater control plans early in the process.

Even if the site is pre-zoned for commercial development, the developer must obtain a local permit before construction. The City, Village or County Plan Commission will generally review the plans to determine whether the plans comply with all local ordinances. When demonstrating compliance with building codes, developers' stormwater plans are often the subject of public Plan Commission meetings and, therefore, available for public review and potentially public comment.

**What you can do:** You can request stormwater plans from the City Clerk. Your [open records request](#) should ask for stormwater plans for specific developments. Additionally, you can go to Plan Commission and City Council meetings and voice your concern. Plan Commissions can require sites to meet stormwater requirements beyond those listed in the WPDES permit. Highlight the unnecessary stormwater impacts associated with the big-box design and promote the use of Low Impact Development techniques to reduce these impacts.<sup>53</sup>

Again, even if there is no formal public comment period, you can still submit written comments to, and even meet with, local officials.

## **THE EARLIER YOU VOICE YOUR OPINION, THE BETTER!**

### **B. During Construction**

Community groups are often the eyes and ears of regulatory agencies in Wisconsin. As of 2007, Commerce has fourteen (14) inspectors for building code violations, including stormwater violations, to cover the entire state.<sup>54</sup> These inspectors cannot continuously monitor commercial construction sites. Instead, residents make stormwater enforcement a reality when they inform themselves and watch for stormwater violations.

As residents pass by any construction site, they should ask:

#### **Question 1) Is construction ongoing?**

The source of erosion control and stormwater management requirements differ depending on the stage of development. If construction activity is still taking place and/or the land appears to be under construction (graded, not full vegetative cover, etc.), then the construction site should be subject to WPDES permit restrictions.<sup>55</sup> These permit restrictions include the erosion control and stormwater management plan requirements in NR 216.46 and NR 216.47. (See Construction and Post Construction Requirements Section.)

#### **Question 2) Has the project obtained WPDES permit coverage?**

If a plot of land, one acre (1) or larger, is under construction, the development should generally be covered by a WPDES Stormwater Construction permit. Most often, this coverage will come from the General Permit, but the site could have its own individual permit. Either way, there should be some record of their Notice of Intent (NOI) or individual permit application on file with the DNR. Check the list of covered sites on the DNR [Stormwater Permit Data website](#)<sup>56</sup> and/or [contact the DNR](#) directly.

If the site is not covered by either the General Permit or an individual permit, take the appropriate enforcement action.

### **Question 3) Are there stormwater management control measures in place?**

If it is a commercial building, like a big-box development, you should look for any signs of Best Management Practices (BMPs). Examples of BMPs are given below, as well as in the [Wisconsin Construction Best Management Practice Handbook](#). Spotting violations is difficult because BMPs are different from site to site. Each individual development site will select a combination of BMPs that are designed to reach their goals to the “maximum extent practicable.”<sup>57</sup> The lack of uniform erosion control measures makes it difficult to know whether the construction site is violating a stormwater erosion plan. However, there are general indicators that often signal violations.

Most notably, there should generally be some evidence of erosion control measures being taken *beyond* the black netting on stormwater inlets. At construction sites over 5 acres (every big-box development), you should see at a minimum:<sup>58</sup>

**Silt Fence:** Temporary sediment barrier of entrenched permeable geo-textile fabric designed to intercept and slow the flow of sediment-laden runoff.



**Storm Drain Inlet Protection:** A temporary barrier installed around a storm drain inlet, drop inlet or curb inlet.



**Some Method of Cleaning Tires from Construction Vehicles:** Stone Tracking Pad (stones on the construction site to keep tires from direct contact with the dirt) and/or Tire Washing is required so dirt is not tracked off the site.<sup>59</sup>



**While not necessarily required, you should keep your eye out for other BMPs, including:**

**Stormwater Sediment Basin:** A sediment basin is a small man-made depression that collects stormwater. The basin allows the sediment to settle to the bottom. The basin is “de-watered” through drainage holes in the side of the basin or other drainage methods.

**Sediment Traps:** Sediment control device formed by excavation and/or embankment to intercept sediment-laden runoff and to retain the sediment.

**Construction Site Diversion:** A *temporary* berm or channel constructed across a slope to collect and divert runoff.



**Channel Erosion Mats**—A protective soil cover of straw, wood, coconut fiber or other suitable plant residue, or plastic fibers formed into a mat, usually with a plastic or biodegradable mesh on one or both sides. Use near navigable waters should be “limited.”<sup>60</sup>



**Mulching:** Mulching is the application of organic material to the soil surface to protect it from raindrop impact and overland flow.<sup>61</sup>



**Watch for Poor Quality/Functionality:** Erosion controls that are in poor condition may also signal permit violations.<sup>62</sup> Check to make sure that these practices are being implemented and



are working. Have the erosion control devices been cleaned recently? Can you see a stream of water running from a graded area to a storm inlet from the construction site?



If you do not see these BMPs, or if the BMPs seem like they are malfunctioning (i.e., they are not trapping sediment), then take the appropriate enforcement action. When in doubt, call the appropriate agency.

### C. Monitoring Developments Post-Construction

#### **Monitoring stormwater on sites where construction is completed and a functioning big-box exists:**

As mentioned in Stormwater Management Plans and Long-Term Maintenance Plans, big-box developments have an ongoing responsibility to manage stormwater discharges.<sup>63</sup> Based on the “agreement” the developer makes with Commerce and DNR, the developers must maintain all long-term stormwater management practices or risk prosecution by DNR and/or Commerce.<sup>64</sup> See “What Can I Do if I Find a Violation?” [\\_](#)

Typical **long-term stormwater management practices** include:

**Infiltration basin:** an open impoundment (greater than 15 feet wide in its minimum dimension) created either by excavation or embankment with a flat, densely vegetated floor dedicated to the infiltration of the runoff through the ground surface. Pre-treatment of the water may be required.



**Wet Detention Basin:** a permanent pool of water with designed dimensions, inlets, outlets and storage capacity, constructed to collect, detain, treat and release stormwater runoff.



**Pavement Placement:** Watch for pavement near what seem to be natural water bodies. If the water body is natural, then the pavement may violate the protective area post-construction stormwater management requirements.<sup>65</sup> If the water body is an infiltration area (human-made), it is not subject to these requirements.

**No Open Contaminants:** People can monitor big-box parking lots for contaminants that may come into contact with stormwater. Some big-box parking lots are used for storage of potentially hazardous materials (i.e. fertilizers, garbage, solvents, etc.) and many home improvement stores, like Home Depot®, have an outdoor section of the store. Stormwater runoff that comes into contact with these substances should be treated or contained.<sup>66</sup>

Specifically, oil and gasoline contamination is a concern in big-box parking lots, especially Wal-Mart® Supercenters. Stormwater should not contain a “visible sheen” or oily appearance from contact with petroleum products.<sup>67</sup> At Wal-Mart Supercenters, there are multiple areas where stormwater could be contaminated with oil and gas:

**First**, Wal-Mart Supercenters have quick service oil change and lube shops. Often located in the rear of the Supercenter, these auto shops may be the source of oil leak and other auto-related stormwater contamination.

**Second**, at all big box developments, a large number of distribution trucks dock to unload new stock. These docking areas may accumulate pools of leaking oil and gas from distribution trucks.

**Finally**, a 150,000 square foot big-box development will generally have a parking lot that is roughly 6 to 10 acres, based on a conservative range of estimates.<sup>68</sup> Big-box parking lots create about 25,000 gallons of stormwater per acre during a 1-inch rain storm.<sup>69</sup> Runoff from the parking lots will most likely come into contact with oil and gas. The amount of oil and gas that runs off of these parking lots may require oil/gas separation devices and other similar Best Management Practices.<sup>70</sup>

If anyone sees petroleum contaminated runoff from any of these areas, a complaint should be filed with Commerce. See the following, What Can I Do if I Find a Violation?.

## V. WHAT CAN I DO IF I FIND A VIOLATION?

Residents that find potential stormwater management problems at commercial developments should take the following steps.<sup>71</sup>

### **Step 1) Contact the Department of Commerce (608-266-1018):**

When in doubt, call [Commerce](#).

1. Ask if the development in question submitted an NOI for construction. If so, Commerce should inspect the property to ensure compliance with the erosion control plan (during construction) and stormwater maintenance/long-term management plan (after construction).

If not, the developer is constructing without WPDES permit coverage. While it should be rare that large corporations construct big-boxes without permits, it happens to this day.<sup>72</sup> Given the large nature of these agencies, people should be prepared to follow up on their complaints with phone calls and emails. Finally, [open records requests](#) may be used to double check that your complaint was properly filed and pursued.

2. Explain what BMPs you saw (or didn't see). Ask them to send an inspector to check the site and make sure they are following the Erosion Control Plan and/or Stormwater Management Plan.
3. Identify any areas where stormwater was leaving the property.
4. Call back and ask them what they found and what they are planning to do. Stay actively involved!

Commerce can enforce all violations of NR 216.46 (erosion control) and NR 216.47 (stormwater management) of the Wisconsin Administrative Code.<sup>73</sup> Among other enforcement efforts, Commerce has the option of pursuing (1) Notice of Noncompliance, (2) Stop Work orders, (3)

revocation, (4) remedial action, (5) injunctions, (6) forfeitures, or (7) refer to Department of Justice for further legal action.<sup>74</sup>

If there is no permit coverage, request that Commerce refer the case to the [Department of Justice](#) for prosecution and/or contact [Midwest Environmental Advocates](#).

### **Step 2) Contact Department of Natural Resources (DNR).**

DNR is responsible for enforcing WPDES General Permit violations on all sites, including commercial sites. If a developer has not obtained coverage or has not installed and maintained proper BMPs, it is violating the WPDES General Permit requirements. In addition to Commerce enforcement actions, DNR has the authority to prosecute the developer under the state statutes that set forth the WPDES permitting program.<sup>75</sup>

### **Step 3) Local Authorities**

Local governments retain power to control building requirements as long as the rules and orders comply with Commerce rules and orders.<sup>76</sup> Often local ordinances cover stormwater and zoning/building permits were issued with stormwater restrictions attached. The City Attorney's Office or equivalent local law enforcement office can enforce violations of these ordinances.

Furthermore, many local government agencies are [Certified Municipalities](#) and are allowed to take enforcement actions, such as stop-work orders.

### **Step 4) Contact MEA regarding a possible Clean Water Act Citizen Suit**

Please Contact [Midwest Environmental Advocates](#) (MEA) at:  
**Midwest Environmental Advocates, Inc.**  
**551 W. Main St. Suite. 200**  
**Madison, WI 53703**  
**(608)251-6557 ext. 0**

## **VI. CONCLUSION**

Communities can protect nearby wetlands and waterways, recharge groundwater supplies and preserve open spaces and wildlife habitat by focusing on one key issue—stormwater. Stormwater runoff from large parking lots is a leading cause of water pollution and represents a significant threat to nearby waterways. Additionally, by taking steps to reduce the stormwater impacts, communities can reduce footprints, promote infill developments and preserve open farmland.

Once under construction, communities can monitor BMPs and help protect our waterways from the 30 tons of sediment that runs off every acre of construction. Construction sites across Wisconsin have not properly installed or maintained BMPs, yet elude enforcement due to the constraints on DNR and Commerce field inspectors. With a basic understanding of stormwater permits and BMPs, members of the public can be the State's eyes and ears.



Whether or not problems with erosion control and stormwater management plans convince a local Plan Commission to refuse a zoning/building permit, low impact designs and strict compliance with stormwater regulations can serve to drastically reduce the largest source of water pollution from these sites.

- <sup>1</sup> 33 U.S.C § 1342(p) (2007).
- <sup>2</sup> 40 C.F.R. § 122.26(a)(ii) (2007).
- <sup>3</sup> See 40 C.F.R. § 122.26(b)(14)(x).
- <sup>4</sup> 55 Fed. Reg. 47990 (Nov. 16, 1990) (codified at 40 C.F.R. § 122.26(b)).
- <sup>5</sup> 64 Fed. Reg. 68722 (Dec. 8, 1999) (codified at 40 C.F.R. § 122.26(b)(15)(i)).
- <sup>6</sup> 33 U.S.C. § 1342(p).
- <sup>7</sup> See Wisconsin Department of Natural Resources and U.S. Environmental Protection Agency, “Memorandum of Agreement Between the State of Wisconsin Department of Natural Resources and United States Environmental Protection Agency, Region V.” (Feb. 4, 1974).
- <sup>8</sup> See WIS. STAT. § 283.33 (2007); WIS. ADM. CODE NR §§ 216; 151 (2004).
- <sup>9</sup> See, e.g., WIS. ADM. CODE NR §§ 216.46 (erosion control plan requirements), 216.47 (stormwater management plan requirements) (2004).
- <sup>10</sup> See WISCONSIN DEPARTMENT OF COMMERCE NEWSLETTER (Dec. 2006), available at <http://commerce.wi.gov/newsletter/2006/dec/ConstructionSiteErosion.html> (last visited July 9, 2007) (clarifying construction-site erosion control and stormwater management issues); see also WISCONSIN DEPARTMENT OF COMMERCE, “Safety and Buildings Division Soil Erosion and Sediment Control/Stormwater Program”, <http://www.commerce.state.wi.us/SB/SB-SoilErosionControlProgram.html> (last visited July 9, 2007).
- <sup>11</sup> See WIS. ADM. CODE NR § 216.42(4) (2004). Note: The Department of Commerce’s authority and responsibility is set forth in the following statutes and rules regarding erosion control and stormwater management: WIS. STAT. § 101.1205 (2007) (This section gives power to Commerce to establish erosion control standards for commercial buildings. Commerce is supposed to consult DNR before establishing standards.). Notably, the source of DNR’s Clean Water Act authority, chapter 283 of the Wisconsin Statutes, *does not* mention the use of Commerce in screening applicants or enforcing the federally-based standards. Whether or not it is a legal shift of responsibility, Commerce currently has an enormous role in Clean Water Act permitting and enforcement for big-box developments. In order to make a difference, communication with Commerce is crucial.
- <sup>12</sup> WIS. ADM. CODE NR § 216.42(4); WIS. ADM. CODE COMM § 61.04(4) (2004); see WIS. DEPARTMENT OF NATURAL RESOURCES, DOES YOUR CONSTRUCTION SITE NEED A STORMWATER PERMIT?: A GUIDE TO WISCONSIN EROSION CONTROL AND STORMWATER MANAGEMENT PERMIT REQUIREMENTS 4 (May 2006) [hereinafter Wis. DNR]. Note: Commerce regulatory oversight is expanding to include single-family dwellings in COMM 20-21. These rules are still under review as of the time this tool-kit was published.
- <sup>13</sup> See Memorandum of Understanding between EPA Region V and DNR, February 4, 1974.
- <sup>14</sup> Wis. DNR, *supra* note 14, at 4.
- <sup>15</sup> WIS. ADM. CODE NR §§ 216.46, 216.47.
- <sup>16</sup> WIS. ADM. CODE COMM § 60.12 (2006).
- <sup>17</sup> See DEPARTMENT OF COMMERCE FORM 3400-162 (SBD-10367)(R 05/2007) “Standard Erosion and Sediment Control Notice of Intent,” available at <http://commerce.wi.gov/SBdocs/SB-FormSoilErosionNotofIntent10376.pdf> (last visited July 9, 2007).
- <sup>18</sup> See WIS. ADM. CODE COMM § 60.12.
- <sup>19</sup> WIS. STAT. § 1.11 (2007); WIS. ADM. CODE NR §§ 103.07(2), 103.08(3)(b) (2007).
- <sup>20</sup> See WIS. STAT. § 1.11; see also WIS. ADM. CODE NR Ch. 150 (2007).
- <sup>21</sup> WIS. ADM. CODE COMM § 60.12(1)(b) (2007).
- <sup>22</sup> WIS. ADM. CODE NR § 216.51(5)(a).
- <sup>23</sup> For example, roads and other construction around the commercial site. See Wis. DNR, *supra* note 14, at 4.
- <sup>24</sup> WIS. ADM. CODE [NR] § 216.42(4).
- <sup>25</sup> See WIS. ADM. CODE COMM § 60.30.
- <sup>26</sup> See WIS. STAT. § 283.89(1), (2m) (2007); WIS. ADM. CODE NR §§ 216.51, 216.004 (2004); see also Wisconsin Department of Natural Resources and Department of Industry, Labor and Human Relations, “Memorandum or Understanding Between the Department of Industry, Labor and Human Relations and the Department of Natural Resources” (Sept. 30, 1993).
- <sup>27</sup> See WIS. ADM. CODE COMM § 60; WIS. ADM. CODE NR § 216.44(2).
- <sup>28</sup> WIS. ADM. CODE NR § 216.46.
- <sup>29</sup> NR § 216.47(1)-(4).
- <sup>30</sup> NR § 216.47(1)-(4).
- <sup>31</sup> See NR §§ 216.46, 151.11(5),(6).
- <sup>32</sup> NR §§ 151.11(6), 151.002(15). Note: Opinions vary on the meaning of “maximum extent practicable,” and Wisconsin courts have not given any guidance on the issue. However, if it is not “practicable” to reduce total suspended solids (TSS) by eighty percent (80%), then the “plan shall include a *written and site-specific explanation* why the 80% reduction goal is not attainable and the sediment load shall be reduced to the maximum extent practicable” (emphasis added). WIS. ADM. CODE NR § 151.11(6)(b).

<sup>33</sup> NR § 151.12(5)(a).

<sup>34</sup> NR § 151.12(5)(b).

<sup>35</sup> NR § 151.12(c)(4).

<sup>36</sup> NR § 151.12(5)(c)(2)(b).

<sup>37</sup> See NR § 151.12(c)(5).

<sup>38</sup> NR § 151.12(d)(1)(a)-(d).

<sup>39</sup> NR § 151.12(d)(1)(d).

<sup>40</sup> NR § 151.12(e).

<sup>41</sup> NR § 151.11(6)(a).

<sup>42</sup> NR §§ 216.005, 216.47(5).

<sup>43</sup> NR § 216.47(5).

<sup>44</sup> NR § 216.55(1) (2004); see *supra* Construction and Post-Construction Requirements.

<sup>45</sup> As DNR states in the comment following NR § 216.005 of the Wisconsin Administrative Code, “pursuant to the requirements to maintain the long-term stormwater management practices in accordance with ss. NR 151.12 and 151.24, *the department may take enforcement action under this section [NR 216] and s. 281.98, Stats., against a landowner for not maintaining long-term stormwater management practices.*” (emphasis added).

<sup>46</sup> Both DNR and Commerce are required to regulate stormwater management plans according to the provisions in NR § 216.47 of the Wisconsin Administrative Code. Therefore, the standards for long-term maintenance agreements apply to all construction projects, regardless of which agency takes the lead role. However, it is important to know which agency has the responsibility to monitor these sites and follow up on complaints. Due to the NR § 216.42(4) exception, the Department of Commerce would be the agency retaining authority to ensure compliance with a big-box development’s long-term maintenance plans.

<sup>47</sup> See WIS. STAT. §§ 283.35; 283.37 (2007); see also WIS. ADM. CODE NR § 216.44; see also *Texas Independent Producers v. EPA*, 410 F.3d 964, 978 (7th Cir. 2005). According to *Texas Independent Producers*, a recent 7<sup>th</sup> Circuit decision, citizens shall have an opportunity, pursuant to 33 U.S.C. § 1342(j) and 1342(a), to have public access to General Permits applications and documents and be given the opportunity for public hearing with regards to the contents of the General Permit. This procedural right does not, however, apply to the Notices of Intent (NOIs), nor the pollution abatement plans contained within the NOI.

Similarly, the public has no ability to challenge endangered species review with regards to individual projects’ NOIs. *Texas Independent Producers*, 410 F.3d at 979. The Department of Natural Resources has to demonstrate that the General Permit “is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of habitat, as required in the Endangered Species Act. 16 U.S.C. § 1536(a)(2). NOIs issued under that permit do not need to do additional site-specific study. *Id.*

<sup>48</sup> *Id.*; see *Env’t. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 856 (9th Cir. 2001)(discussing current structure and potential need for NOI public participation).

<sup>49</sup> WIS. STAT. § 1.11; WIS. ADM. CODE NR § 150.20 (2007); see DNR, An Overview of the WPDES Wastewater Permit Process, <http://www.dnr.state.wi.us/org/water/wm/ww/PermProc.htm#hearings> (last visited July 11, 2007). Every DNR action, including the issuance of a permit, is listed as a type I, II, III or IV action depending on its potential to be a major action that *significantly affects* the quality of the human environment. Based on the impact potential of an action, the DNR conducts a commensurate environmental review process, including opportunity for public input before the action is taken. For type I actions, normally resulting in significant impacts, a very detailed environmental impact statement (EIS) is prepared and formal hearings are held where public input is considered. For type II actions, those which have the *potential* to cause significant impacts, an environmental assessment (an EA, which is less detailed than an EIS) is prepared and a news release normally is released to advise the public of their opportunity for review and input. Type II actions do not normally have significant impact potential, therefore, neither an EIS or EA is prepared, but a news release is put out to inform the public of their right to comment. Type IV actions are those that do not individually or cumulatively significantly affect the human environment. These actions do not involve an EIS, an EA, or public input.

<sup>50</sup> WIS. STAT. § 283.39.

<sup>51</sup> WIS. ADM. CODE. NR § 103.08(3).

<sup>52</sup> U.S. ENVIRONMENTAL PROTECTION AGENCY, LOW IMPACT DEVELOPMENT (LID): A LITERATURE REVIEW, EPA 841-B-00-005 (Oct. 2000), available at <http://www.epa.gov/nps/lid.pdf> (last visited July 11, 2007).

<sup>53</sup> See *id.*

<sup>54</sup> See Wisconsin Department of Commerce, Safety and Buildings Division Organization, <http://www.commerce.state.wi.us/SB/SB-DivOrg.html> (last visited July 9, 2007).

<sup>55</sup> WIS. ADM. CODE NR § 216.42.

<sup>56</sup> Wisconsin Department Of Natural Resources, Storm Water WPDES Permit Data, <http://www.dnr.state.wi.us/org/water/wm/nps/stormwater/permits> (last visited July 9, 2007).

<sup>57</sup> See WIS. ADM. CODE NR §§ 216.46, 216.47.

<sup>58</sup> Unless noted, all language from DNR Website on Technical Standards:  
<http://www.dnr.state.wi.us/org/water/wm/nps/stormwater/techstds.htm> (last visited July 9, 2007).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> See WIS. ADM. CODE NR § 216.46(9).

<sup>63</sup> NR § 216.47.

<sup>64</sup> See WIS. STAT. § 283.89; see WIS. ADM. CODE NR §§ 216.005, 216.47(5); see WIS. ADM. CODE COMM ch. 60.

<sup>65</sup> WIS. ADM. CODE NR § 151.12(d).

<sup>66</sup> NR § 151.11(6)(d).

<sup>67</sup> NR § 151.12(e).

<sup>68</sup> Based on the conversion: 1 acre = 44,560 sq. ft. According to Sierra Club's Big Box Sprawl Webpage, parking lots on Wal-Marts and other big-boxes can be three times as large as the store.

[http://www.sierraclub.org/sprawl/reports/big\\_box.asp](http://www.sierraclub.org/sprawl/reports/big_box.asp) (last visited July 9, 2007). Other sources have estimated parking lot size as high as four to seven times as large as the store. Wal-Mart® Spokeswoman Mia Masten estimates that Wal-Marts take up generally 11 acres. Bob Kappstatter, *Is Wal-Mart a Big Target?: Retail Giant Defends N.Y.C. Plan*, N.Y. DAILY NEWS, Aug. 10, 2005. Even in this conservative estimation, if a 150,000 sq.-ft. store takes up around 3.5 acres, the remaining area (7.5) would be more than twice as large as the store, and the 11-acre estimate is most likely not for an 150,000 square-foot Wal-Mart®.

<sup>69</sup> Sierra Club, *How Big Box Stores Like Wal-Mart Effect the Environment and Communities*, [http://www.sierraclub.org/sprawl/reports/big\\_box.asp](http://www.sierraclub.org/sprawl/reports/big_box.asp) (last visited July 9, 2007).

<sup>70</sup> See WIS. ADM. CODE NR § 151.12(c)(4).

<sup>71</sup> WPDES General Permit for "Land Disturbing Construction Activities Including Clearing Grading and Excavating Activities Which Will Result in the Disturbance of Five or More Acres," issued on August 27, 2001, applies to all construction activity commencing after September 30, 2001. This is a re-issuance of the 1994 General Permit covering the same sites. Therefore, sites before 1994 may be exempt from these requirements. Contact the Wisconsin DNR regarding to pre-1994 developments.

<sup>72</sup> *U.S. v. Wal-Mart Stores Inc.*, Consent Decree ¶ 52 (May 12, 2004), available at <http://www.epa.gov/compliance/resources/decrees/civil/cwa/walmart2-cd.pdf> (last visited July 9, 2007)); see Notice of Lodging of Consent Decree Under the Clean Water Act, 69 Fed. Reg. 10333 (May 27, 2004).

<sup>73</sup> WIS. ADM. CODE COMM ch. 60; WIS. ADM. CODE NR § 216.47(5).

<sup>74</sup> See WIS. STAT. § 101.02(5)(b),(f) (2007).

<sup>75</sup> The DNR has authority to enforce the Department's rules under section 283.89 of the Wisconsin Statutes, which include the long-term maintenance plan requirements.

<sup>76</sup> WIS. STAT § 101.02(7)(a).