

# Midwest Environmental ADVOCATES

*pro bono publico*

## VIA ELECTRONIC MAIL

January 7, 2005

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Mr. Eric Rotvedt, WT/2  
Wisconsin Department of Natural Resources  
101 S. Webster Street  
Madison, WI 53707-7921

**Re: Comments on Proposed WPDES Permit No. WI-S059145-2, General Permit to Discharge Storm Water Associated with the Dismantling of Vehicles for Parts Selling and Salvage;**

**Comments on Proposed WPDES Permit No. WI-S058831-2, General Permit to Discharge Storm Water Associated with the Recycling of Scrap and Waste Materials.**

Dear Mr. Rortvedt:

Thank you for the opportunity to comment on the Wisconsin Department of Natural Resources' ("DNR's") Proposed Wisconsin Pollutant Discharge Permit ("WPDES") Permit No. WI-S059145-2 ("Proposed Vehicle Parts Permit") and WPDES Permit No. WI-S059931-2 ("Proposed Scrap Recycling Permit") (collectively, "Proposed Permits"). 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.

**A. The DNR Should Exclude from General Permit Coverage Storm Water Discharges to Waters Impaired By Pollutants Associated with the Recycling of Scrap Materials and Auto Dismantling.**

The DNR may not issue a new WPDES permit to a new source or a new discharger if "the discharge from its construction or operation will cause or contribute to a violation of water quality standards." 40 C.F.R. § 122.4(i).

"New sources" are defined as "any building, structure, facility, or installation from which there is or may be a discharge of pollutants..." 40 CFR § 122.2 "Discharges of pollutants" include "surface runoff which is collected or channeled by man; discharges through pipes, sewers or other conveyances owned by a State (and) municipality or other person that do not lead to a treatment works." *Id.*



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Thus, the prohibition precludes both new outfalls as well as any new source, such as scrap recycling yards and auto dismantling sites, which would discharge pollutants to an outfall. While this requirement does not prohibit the existence of scrap recycling yards and auto dismantling sites, it does require that those sites be managed in such a way that the storm water discharged does not cause or contribute to a violation of water quality standards.

We are particularly concerned that the Proposed Permits appear to allow discharges of impairing pollutants to 303(d) listed waters.

Many industrial pollutants, including those associated with scrap recycling yards and auto dismantling sites, are toxic, or “priority,” pollutants for which numeric water quality criteria have been established by the EPA, and which are included in the National Toxics Rule. In addition, industrial facilities like those covered in the Proposed Permits have the potential to discharge other non-priority pollutants, such as oil and grease and other pollutants that may violate water quality standards. The discharge of an impairing pollutant above water quality standards by an industrial facility to waters already impaired by that pollutant and put on the 303(d) list, by definition, causes or contributes to impairment of water quality in violation of 122.4(i).

It is important to note that Wisconsin may permit a new or additional point source discharge of a pollutant responsible for limiting water quality only if the state has calculated for the segment in question a “pollutant load allocation”—a Total Maximum Daily Load (“TMDL”)—that both contains an allocation for future growth, and establishes compliance schedules for current permit holders to meet the water quality standard. If the state has not completed a TMDL, a new source or a new discharge cannot make the demonstration required by 40 C.F.R. 122.4(i) to not cause or contribute to a violation of a water quality standard. Similarly, the DNR must prohibit the excessive discharges if an existing TMDL does not contain an allocation for future growth and a compliance schedule for current permit holders.

**COMMENT:** In order to comply with the Clean Water Act, the Proposed Permits should exclude coverage for discharges to waters listed as impaired by toxic pollutants, particularly those associated with scrap recycling yards and auto dismantling sites. In situations where there is no TMDL or the existing TMDL does not allow future growth, the discharge must be prohibited. In situations where there is a TMDL with allocation for future growth and a compliance schedule, an individual permit should be required. These individual permits must ensure that the discharge will not cause or contribute to a violation of water quality standards.

**B. The DNR Should Exclude Storm Water Discharges to Outstanding Resource Waters, Exceptional Resource Waters, Treaty Rights Waters.**

Wisconsin’s antidegradation policy prohibits any lowering of water quality in the waters of Wisconsin unless a discharger can affirmatively demonstrate “that such a change is justified as a result of necessary economic and social development, provided that no new or increased effluent interferes with or becomes injurious to any assigned uses made of or presently possible in such waters.” Wis. Admin. Code § NR 102.05(1)(a); 40 C.F.R. 131.12(a)(2) and (3)(requiring the maintenance of water quality better than that necessary to support “fishable/swimmable” goals). The finding required under Wisconsin’s antidegradation policy can only be made on a case-by-

case basis, and is impossible to apply in the context of general permits. *Ohio Valley Environmental Coalition v. Horinko*, 279 F. Supp.2d 732 (S.D. W.Va. 2003). In *Ohio Valley Environmental Coalition*, the court held that the review of requests to lower the quality of high quality waters is necessarily location-specific and requires public participation; as a consequence, it cannot be done at the time a general permit is issued, but must be done at the time new individual discharges are proposed. *Id.* at 737.

**COMMENT:** To ensure that Wisconsin’s highest quality waters are not unnecessarily degraded by storm water discharges associated with scrap recycling yards and auto dismantling sites, storm water discharges to those waters should be excluded from coverage under the Proposed Permits. These include Outstanding Resource Waters, Exceptional Resource Waters, and waters on which Wisconsin tribes have federally recognized treaty rights to hunt, gather, and fish. Stormwater discharges to these waters should require individual permits.

**C. The DNR Must Ensure that the Proposed Permits, if Complied With, Will Meet Water Quality Standards.**

All WPDES Permits in Wisconsin must ensure compliance with state and federal water quality standards. Wis. Stat. § 283.31(3). An NPDES permit must require compliance with effluent limitations established under 33 U.S.C. Section 1311. 33 U.S.C. Sections 1342 (a)(1), (3). Effluent limitations are defined in the Act as restrictions on “quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters . . .”. 33 U.S.C. Section 1362(11). The CWA requires all NPDES permits to include effluent limitations necessary to meet WQSs. 33 U.S.C. § 1311(b)(1)(c)).

Congress further provided in the 1987 Water Quality Act (amendments to the CWA) regarding industrial stormwater discharge permits:

Permits for discharges associated with industrial activity shall meet all applicable provisions of this section *and section 1311* of this title.

33 U.S.C. § 1342(p)(3)(A) (emphasis added). Further, in *Defenders of Wildlife v. Browner*, 191 F.3d 1159 (9<sup>th</sup> Cir. 1999), the Ninth Circuit Court of Appeals held that Congress has expressly required industrial stormwater dischargers to comply with the requirements of Clean Water Act Section 301 and, therefore, such dischargers shall achieve any more stringent effluent limitation, including those necessary to meet water quality standards established pursuant to any state law or regulation. According to the Ninth Circuit: “In other words, industrial discharges must comply strictly with state water quality standards.”

The US EPA has adopted the National Toxics Rule and has promulgated a Stormwater Multi-Sector Permit General Permit (“Multi-Sector Permit”), 65 Federal Register 64839, for states not authorized to implement their own NPDES permits. This is instructive for Wisconsin. In the Multi Sector Permit, the EPA established benchmark values for certain pollutants, including those associated with Dismantling of Vehicles and those vehicles with the SIC code 5093. Industrial stormwater discharges must comply strictly with these water quality standards and the

Proposed Permits issued by the DNR must include requirements to achieve compliance with these standards.

Not only must industrial discharges comply strictly with water quality standards, the DNR is required to issue a permit with requirements that ensure industrial discharges comply strictly with water quality standards. Wis. Stat. § 283.31(3). However, the DNR may not simply tell a discharger *not to* violate water quality standards, but must also tell the dischargers *what to do* to comply with water quality standards by providing permitting requirements that (if followed) will ensure industrial discharges comply strictly with water quality standards.

As the gulf between beneficial uses listed and beneficial uses actually achieved in Wisconsin's waters continues to grow, it is clear that the narrative BMPs contained in the Proposed Permits cannot ensure that industrial discharges do not impair our waters. In fact, the DNR's reliance on narrative BMPs in the Proposed Permits has resulted in the continued discharge of industrial and other pollutants to the state's waters, and due to a lack of monitoring, has not produced any measurable water quality improvement. If anything, the Proposed Permits perpetuate and legalize toxic pollution without actually holding the polluters accountable to make measurable pollutant reductions. Instead, the Proposed Permits appear to require the generation of a great deal of paper that no one, including the DNR and the public, may ever see. (*See e.g.* Proposed Scrap Recycling Permit, Section C(1) – not requiring a facility to submit its Storm Water Pollution Prevention Plan to the DNR for review).

**COMMENT:** Currently the Proposed Permits do not include a statement requiring compliance with state and federal water quality standards. In order to comply with the Clean Water Act and state law, the DNR should amend the Proposed Permits to include a provision that requires compliance with state and federal water quality standards. This provision should be followed by a description of what is required to meet water quality standards.

**D. The DNR Must Specify the Maximum Levels of Discharges of Pollutants in the Proposed Permits.**

Moreover, Wisconsin state law requires that the DNR specify in all permits, in addition to requirements to meet water quality standards, the maximum levels of discharges. Wis. Stat. § 283.31(5). "Maximum levels of discharges shall be developed from the permittee's reasonably foreseeable projection of maximum frequency or maximum level of discharge resulting from production increases or process modifications during the term of the permit." Wis. Stat. § 283.31(5). Yet, the DNR has not specified the maximum levels of discharges in these Proposed Permits in violation of state law.

Numeric effluent limitations in stormwater permits are not infeasible, and are the only way Wisconsin can ensure that all permitted industrial stormwater discharges within the state meet water quality standards. Numeric criteria have been used in permits for industrial and municipal point sources. The DNR has collected years of sampling data that is available for analysis by the State for the development of numeric water quality based effluent limits ("WQBELs"). While it appears that none of this data has been considered by DNR staff in developing the Proposed Permits, it is clear that more than adequate data is available to develop numeric WQBELs.

These numeric criteria will establish measurable goals that will form the basis of WQBELs, that will in turn ensure maintenance of water quality standards.

**COMMENT:** The DNR should abandon the strictly narrative BMP approach to regulating industrial storm water discharges from scrap recycling yards and auto dismantling sites. Instead, the DNR must include more stringent numeric effluent limitations to ensure that all industrial discharges comply strictly with water quality standards.

**E. The DNR Must Conduct A Reasonable Potential Analysis and Establish WQBELs for Industrial Stormwater Discharges Covered by the Proposed Permits.**

The U.S. Environmental Protection Agency (“US EPA”) has provided a regulatory scheme that NPDES permitting authorities must follow to ensure that WQBELs are developed and included in NPDES permits for discharges containing pollutants at levels that will cause, or have the reasonable potential to cause, or contribute to an excursion above WQSs.

Limitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the [DNR] determines, are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard . . .

40 C.F.R. section 122.44(d)(1)(i).

EPA has developed guidance documents to assist permit writers in undertaking the reasonable potential analysis (“RPA”). The EPA Permit Writer’s Handbook (1996) (“Permit Writer’s Handbook”) sets out the threshold requirement for RPAs:

**Reasonable Potential and Numeric Criteria**

When conducting an effluent characterization to determine if WQBELs are needed based on chemical-specific numeric in the water quality standards, the permit writer projects the receiving waters concentration of pollutants contained in the effluent once that effluent enters the receiving water. If the projected concentration exceeds the applicable numeric water quality criteria for a specific pollutant, there is reasonable potential that the discharge may cause or contribute to an excursion above the applicable water quality standards and the permit writer must develop a WQBEL.

Permit Writer’s Handbook, p. 100.

The Handbook goes on to explain the data to be evaluated:

**Determining Reasonable Potential With Effluent Monitoring Data**

When characterizing an effluent for the need for a WQBEL, the permit writer should use **any available effluent monitoring data** as well as other information relating to the discharge...as the basis for a decision...EPA recommends monitoring data be generated prior to permit limit development for the following reasons: (1) the presence or absence of a pollutant can be more clearly established or refuted; and (2) effluent variability can be more clearly defined.

Permit Writer's Handbook, p. 101 (emphasis added).

The DNR possesses a wealth of information and evidence relating to discharges from industrial stormwater dischargers, including the sampling data collected by the dischargers themselves since 1998. Once the RPA is complete, the Proposed Permits must include limitations that control all pollutants or pollutant parameters which the DNR determines "are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality." 40 C.F.R. § 122.44(d)(1)(i).

If the DNR has not established a water quality criterion for a specific pollutant which causes, or has a reasonable potential to cause, or contribute to an excursion above narrative water quality standards, the DNR must establish effluent limitations using either (1) calculated numeric water quality criteria which will attain and maintain applicable narrative water quality criteria and will fully protect the designated use; (2) establish effluent limitations on a case by case basis using US EPA water quality criteria and other relevant information, or; (3) establish effluent limitations for an indicator parameter provided the Proposed Permits identify which pollutants are intended to be controlled. 40 C.F.R. § 122.44(d)(1)(vi)(A) - (C).

Numeric WQBELs are feasible and necessary to develop and apply in order to achieve strict compliance with WQSs by industrial dischargers in Wisconsin as required by the CWA. For waters that are Section 303(d) listed as impaired, the RPA for discharges of impairing pollutants is simple: discharges of pollutants at levels above water quality standards have the reasonable potential to cause, or contribute, to excursions above water quality standards. Similarly, developing the WQBEL to be included in the Proposed Permits is simple: the WQBEL is the National Toxics Rule or US EPA's Multi-Sector Permit, promulgated at 65 Fed. Reg. 64839, which is implemented in states without delegated authority to implement the Clean Water Act.

For waters not impaired, and thus with some assimilative capacity, the RPA and the development of the WQBEL is more complicated. Nonetheless, DNR staff is required to undertake this analysis in developing all WPDES permits, including the Proposed Permits.

**COMMENT:** WQBELS must be included in the Proposed Permits where permitted discharges are determined to cause, or have reasonable potential to cause excursions above water quality standards.

**F. The Monitoring Program of the Proposed Permits Fail to Demonstrate Compliance (or Non-Compliance) with Water Quality Standards.**

All WPDES permits issued by the DNR must meet state and federal water quality standards. Wis. Stat. § 283.31(3). To comply with state law, the Proposed Permits must require compliance with water quality standards, and include a sampling and monitoring program designed to determine whether water quality standards are being achieved. Wis. Stat. § 283.31(3); Wis. Stat. § 283.55. Moreover, the facility is required to report monitoring results to the DNR. Wis. Stat. § 283.55(1)(b).

However, the monitoring programs proposed fail to provide an adequate mechanism for determining compliance with water quality standards, or for determining whether the narrative BMPs (e.g. a Storm Water Pollution Prevention Plan) have been effective at reducing pollutant loads.

For example, Section C of the Proposed Scrap Recycling Permit requires that facility implement BMPs as part of a Storm Water Pollution Prevention Plan in a Cooperative Compliance Program (“CCP”). However, there is no chemical sampling required to determine whether the BMPs were effective or achieved water quality standards. Oddly, if a facility does not participate in a CPP, it must conduct annual chemical sampling of the storm water discharge and submit the monitoring results to the DNR. (Proposed Scrap Recycling Permit, Section D(2)(c)). The situation is similar for the proposed auto salvage permit.

In any event, the Proposed Permits do not require compliance with water quality standards, and what little monitoring is required in Section D for scrap recycling facilities not participating in a CCP and auto salvage facilities not participating in a CCP is not sufficient to measure compliance with water quality standards.

**COMMENT:** The Proposed Permits must include a monitoring program sufficient to determine compliance with state and federal water quality standards. The current proposal for scrap recycling that allows facilities to avoid any monitoring by participating in a CCP violates state law requiring facilities to achieve water quality standards and demonstrate that by monitoring and reporting to the DNR. We urge the DNR to require facilities participating in the CCP to conduct annual monitoring of effluent at a minimum.

**G. The Monitoring Program in Section C of the Proposed Permit for Scrap Recycling Fails to Demonstrate Compliance (or Non-Compliance) with the BAT/BCP.**

Wisconsin law requires that WPDES permit holders “[e]stablish and maintain records of the volume of effluent discharged and the amount of each pollutant discharged from each point source under the owner's or operator's ownership or control.” Wis. Stat. § 283.55(1)(a). WPDES permit holders must also “[m]ake regular reports to the department on the volume of

effluent discharged and the amount of each pollutant discharged from each point source under the owner's or operator's ownership or control.” Wis. Stat. § 283.55(1)(b).

The Proposed Permits provide no mechanism for determining whether the BMPs applied at a specific site comply with the BAT/BCT requirement of the Proposed Permit. For example, Sections C and D of the Proposed Scrap Recycling Permit require the implementation of BMPs to “prevent or reduce pollutants in runoff entering waters of the state.” Section C, relating to participation in CCPs, states that selected BMPs and treatment practices will be considered best available technology and best conventional pollutant control technology. However, Section C does not require any monitoring to determine whether effluent concentrations have been reduced by application of the BAT/BCT standard.

One way to measure compliance would be to use the benchmark levels established in the US EPA’s Multi-Sector Permit as an objective standard for evaluating compliance with the BAT/BCT standard. In *Ecological Rights Foundation v. Sierra Pacific Industries*, C-01-0520 MEJ (ND Cal 2002), the Court found that while Benchmark levels do not apply directly to industrial dischargers covered by a general permit, a violation of such guidelines can provide the basis for a finding that a discharger has violated the BAT/BCT requirement of the general permit. The court found Sierra Pacific Industries in violation of the Permit’s BAT/BCT requirement because of its discharges in excess of the federal benchmarks set out in the Multi-Sector Permit.

[T]he stormwater sampling results, which show exceedances of benchmarks established by EPA, demonstrate that the management practices implemented at the Arcata Mill do not meet the BAT/BCT standard required by the General Permit.

*Id.* at 44.

**COMMENT:** The Proposed Permits must articulate benchmarks as the standard for determining compliance with the BAT/BCT standard, and/or provide an equally definitive standard for evaluating compliance. At a minimum, the DNR must provide some numeric criteria for both CCPs and non-CCP participating facilities and require monitoring under its CCP program, as the current proposal is clearly inconsistent with the law.

**H. The Cooperative Compliance Program Fails to Provide Monitoring Adequate to Demonstrate Compliance with Water Quality Standards by Whole Groups of Industrial Dischargers.**

Industries participating in the CCP provided by Section C of the proposed scrap recycling permit are not required to provide any sampling or monitoring data or analysis to demonstrate compliance with water quality standards. Section D, relating to facilities not enrolled in a CCP, requires at least some monitoring and reporting to the DNR of effluent levels in the stormwater discharge. (See e.g. Proposed Scrap Recycling Permit Section D(2)(c)) The lack of sampling and analysis under the CCP guarantees that discharges in violation of water quality standards

will go undetected. This lack of sampling requirements is provided as a “reward” for presumption that compliance rates improve in group monitoring programs.

The DNR is recklessly out of control in promoting group monitoring programs. In fact, the DNR encourages permit holders to join CCPs, in order to “to minimize YOUR risk of DNR enforcement action or a third-party lawsuit.” [emphasis in original]. The DNR states that the monitoring data “can be used against you for DNR enforcement actions or by citizen environmental groups in third-party lawsuits.”

In the most bizarre fashion, the DNR is both trying to undermine its own enforcement authority as well as that of citizens. The DNR barely stops short of promising facilities that if they join the CCP, they will not be enforced against by the DNR. And, due to the fact that the DNR does not require any monitoring (except an annual compliance report, which provides little meaningful information), any enforcement attempted by citizens will be extremely difficult.

It is doubtful that CCPs will improve water quality. CCPs have incentives not to impose effective BMPs on group members or to report non-compliance to the DNR. The largest CCPs compete for customers, and to keep CCP fees as low as possible, may provide little meaningful compliance advice.

For example, section E(c) of the proposed scrap recycling permit establishes minimum requirements for “environmental consultant” or “equivalent professional” qualifications, including someone with just “adequate experience and knowledge in management of stormwater pollution through BMPs at auto dismantle, or equivalent facilities.” There is no objective criteria, degree, license or certification required. Under this criteria practically anyone can qualify as an environmental consultant. Further, the Proposed Permit fails to provide any criteria or mechanism for de-certifying an environmental consultant. Failing to articulate the process in the General Permit virtually guarantees that no action will be taken against inadequate CCPs, and that CCP non-compliance will continue.

Further, the Proposed Permit does not make clear who has the ultimate responsibility for failure to comply with permit requirements. Is it the CCP, or is the facility? If it is the environmental consultant who certifies the annual compliance audit, who is liable for a false certification of compliance for facilities that may be in violation of storm water requirements? If the environmental consultant gives poor advice that results in noncompliance, who is ultimately liable for the resulting water pollution and violations of the Proposed Permits?

**COMMENT:** At a minimum, the Proposed Permits must require the same sampling and reporting frequency from CCPs as individual permittees to show whether CCPs do actually produce increased compliance rates and to ensure proper DNR oversight of the CCPs.

**COMMENT:** The Proposed Permits must also articulate clear criteria that establish qualifications for environmental consultants and the process for de-certifying the consultants who fail to produce environmental results.

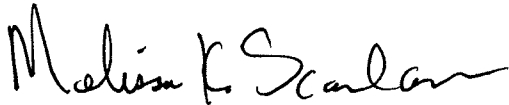
**COMMENT:** The Proposed Permits should make clear who is liable for violations of the Proposed Permits when a facility has enrolled in a CCP.

**CONCLUSION**

Industrial stormwater presents a threat to Wisconsin's waters if not adequately controlled by WPDES permits. We urge the DNR to take our recommendations in order to bring the proposed general permits into compliance with the Clean Water Act and state laws.

Sincerely,

**MIDWEST ENVIRONMENTAL ADVOCATES**



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- Neil Kagan, National Wildlife Federation
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