

**BEFORE THE
WISCONSIN DEPARTMENT OF NATURAL RESOURCES**

**In the matter of the General Permit to Discharge
Under the Wisconsin Pollutant Discharge Elimination
System (“WPDES”) Permit No. WI-S050075-1,
Municipal Separate Storm Sewer System,
dated January 19, 2006**

VERIFIED PETITION FOR REVIEW

To the Department of Natural Resources:

In accordance with Wis. Stat. § 283.63, the undersigned hereby petition for review of the Wisconsin Department of Natural Resources’ (“DNRs”) General Permit to Discharge Under the Wisconsin Pollutant Discharge Elimination System (WPDES) Permit No. WI-S050075-1, Municipal Separate Storm Sewer System (“MS4 General Permit”). The effective date of the MS4 General Permit is January 19, 2006. The MS4 General Permit authorizes owners and operators of municipal separate storm sewer systems (“MS4s”) to discharge storm water from all portions of the MS4 owned or operated by the municipality to waters of the state in accordance with the conditions set forth in the MS4 General Permit.

In support of their petition, Petitioners state:

I. INTEREST OF PETITIONERS IN THE PROCEEDING.

1. Friends of Milwaukee’s Rivers (“FMR”) is a nonprofit organization whose mission is to protect water quality and wildlife habitat in the river corridors and to advocate for sound land use in the Milwaukee, Menomonee, and Kinnickinnic River Watersheds. FMR is a member of the Waterkeeper Alliance, a national coalition dedicated to protecting and restoring the nations waterways, and the licensed Riverkeeper® for Milwaukee. FMR has 340 members,

many of whom use rivers in Ozaukee and Washington Counties. Both Ozaukee and Washington Counties are “urbanized areas” under DNR regulations at Wis. Adm. Code § NR 216.02(3), and are subject to the requirements of, and are required to seek coverage under, the MS4 General Permit. FMR is reasonably concerned that the MS4 General Permit authorizes a lowering of water quality in FAL waters under § NR 102.13, Wis. Adm. Code, without the required analysis by the DNR, and without water quality monitoring to determine whether and to what extent water quality may be lowered under the MS4 General Permit. FMR is concerned that rapid rates of development and growth in Washington and Ozaukee Counties are likely to increase polluted stormwater discharges to FAL waters in those counties. Ozaukee County increased in population by 12.9% from 1990 to 2000 based on the 2000 national census. The number of houses constructed in Ozaukee County during that time increased by almost 20%. Further, the Southeast Wisconsin Regional Planning Commission (SEWRPC) projects that by 2020, the population of Ozaukee County will increase between 13.5% and 37.4% (depending on the rates of population growth). Likewise, Washington County ranked fourth among the 72 Wisconsin counties in percentage of population growth from 1990-2000, but grew the most based upon raw numbers. Washington County grew by 22,165 individuals from 1990 to 2000. SEWRPC projects that in Washington County the population will increase from a 2000 population of 117,493 people to between 131,500 and 160,000 people by 2020 (depending on the rate of growth). Given the pace of urban development in Washington and Ozaukee Counties, FMR’s members are adversely affected and aggrieved by the MS4 General Permit’s allowance of a lowering of water quality in FAL waters without the required analysis by DNR. FMR’s members are further adversely affected and aggrieved in that the MS4 General Permit does not require water quality monitoring to determine compliance with water quality standards under

Chapter NR 102, Wis. Adm. Code, and does not require water quality monitoring to determine whether and to what extent water quality has been lowered by polluted stormwater discharges.

2. Cheryl Nenn is an adult resident of the State of Wisconsin, residing at 2400 N. 58th Street, Milwaukee, Wisconsin, 53210. Ms. Nenn is member of FMR. Ms. Nenn hikes along, canoes and kayaks in and engages in wildlife viewing along many rivers in eastern Wisconsin, specifically the East Branch of the Milwaukee River flowing through Ozaukee and Washington Counties, as well as the mainstem of the Milwaukee River in Ozaukee County. Ms. Nenn is concerned about the rapid rate of urban development along rivers in Ozaukee County and Washington Counties and that the MS4 General Permit authorizes polluted stormwater discharges from streets, rooftops, and construction sites to the East Branch of the Milwaukee River and mainstem of the Milwaukee River that will diminish her use and enjoyment of those rivers. Ms. Nenn is reasonably concerned that these discharges will cause a lowering of water quality in these rivers and, as a result, Ms. Nenn's recreational and aesthetic interests in these rivers will be adversely affected by the MS4 General Permit. Specifically, Ms. Nenn has been adversely affected and aggrieved by the MS4 General Permit's allowance of a lowering of water quality in FAL waters, namely, the East Branch of the Milwaukee River and mainstem of the Milwaukee River, without the required analysis by DNR. Further, Ms. Nenn is adversely affected and aggrieved in that the MS4 General Permit does not require water quality monitoring to determine compliance with water quality standards under Chapter NR 102, Wis. Adm. Code, and does not require water quality monitoring to determine whether and to what extent water quality has been lowered in the East Branch of the Milwaukee River and mainstem of the Milwaukee River by polluted stormwater discharges.

3. Glenn M. Stoddard is an adult resident of the State of Wisconsin, residing at 6713 Timber Lane, Eau Claire, Wisconsin, 54701. Mr. Stoddard enjoys the aesthetic beauty of Lowes Creek, an “Exceptional Resource Water” (“ERW”) under § NR 102.11(1)(d). Lowes Creek flows through Eau Claire County, south of the City of Eau Claire. Eau Claire County is an “urbanized area” under DNR regulations at Wis. Adm. Code § NR 216.02(3), and is subject to the requirements of, and is required to seek coverage under, the MS4 General Permit. Eau Claire County has been in the process of considering development plans for the area surrounding Lowes Creek. Mr. Stoddard is reasonably concerned that the MS4 General Permit will allow increased polluted stormwater discharges to Lowes Creek during the term of the MS4 General Permit and degrade the creek without the required analysis by DNR. Mr. Stoddard’s interests in Lowes Creek have been and will continue to be adversely affected by the MS4 General Permit’s failure to require review of the water quality impacts of increased discharges of polluted stormwater to Lowes Creek. Mr. Stoddard is further adversely affected by the MS4 General Permit’s failure to require monitoring to determine whether and to what extent a lowering of water quality in Lowes Creek has occurred as a result of polluted stormwater runoff authorized under the MS4 General Permit. Mr. Stoddard is further adversely affected and aggrieved by the MS4 General Permit’s failure to require water quality monitoring to determine compliance with water quality standards under Chapter NR 102, Wis. Adm. Code.

4. Clean Water Action Council (“CWAC”) has principal offices located at 1270 Main Street, Suite 120, Green Bay, Wisconsin 54302. CWAC is a non-profit citizen organization, founded in 1985, working to protect public health and the environment in Northeast Wisconsin. CWAC works to increase public awareness of the many threats to water quality, and to build support for improved management. CWAC’s members use and enjoy

waters flowing through the Green Bay, Wisconsin area. The city of Green Bay is an “urbanized area” under DNR regulations at Wis. Adm. Code § NR 216.02(3), and is subject to the requirements of, and is required to seek coverage under, the MS4 General Permit. CWAC’s members are adversely affected and aggrieved by the DNR’s issuance of the MS4 General Permit, because that permit authorizes, without the required analysis by DNR, a lowering of water quality as the result of polluted stormwater discharges to FAL waters, including Baird Creek and Willow Creek, flowing through the city of Green Bay. Further, CWAC’s members are adversely affected and aggrieved by the DNR’s failure to require water quality monitoring to measure whether and to what extent such lowering of water quality has occurred. CWAC’s members are further adversely affected and aggrieved by the MS4 General Permit’s failure to require water quality monitoring to determine compliance with water quality standards under Chapter NR 102, Wis. Adm. Code.

5. Rebecca Leighton Katers is an adult resident of the State of Wisconsin, residing at 2484 Manitowoc Road, Green Bay, Wisconsin 54311. Ms. Katers is a member of CWAC and serves as its volunteer Executive Director. Ms. Katers enjoys walking along Baird Creek, a FAL water that flows through the city of Green Bay. Ms. Katers is concerned that the MS4 General Permit authorizes, without the required analysis by DNR, a lowering of water quality as the result of polluted stormwater from streets, parking lots, and construction sites to Baird Creek. In addition, Ms. Katers owns residential property that abuts Willow Creek, a FAL water. Ms. Katers is concerned that Willow Creek is already being degraded by stormwater discharges from residential, commercial and industrial development at the headwaters of Willow Creek in the eastern portion of the city of Green Bay. Ms. Katers is concerned that the MS4 General Permit will authorize a lowering of water quality in Willow Creek as a result of polluted stormwater

discharges from those areas without the required analysis by DNR. Ms. Katers has already noticed an increase in erosion sedimentation to Willow Creek which she reasonably believes stems from new urban development at the headwaters of Willow Creek. Ms. Katers is adversely affected and aggrieved by the MS4 General Permit's allowance of a lowering of water quality in FAL waters, including Baird Creek and Willow Creek, without the required analysis by DNR. Ms. Katers is further adversely affected and aggrieved in that the MS4 General Permit does not require water quality monitoring to determine compliance with water quality standards under Chapter NR 102, Wis. Adm. Code. Ms. Katers is further adversely affected and aggrieved in that the MS4 General Permit does not require monitoring to determine whether and to what extent water quality in Baird Creek and Willow Creek has been lowered by polluted stormwater discharges.

6. Charles Frisk is an adult resident of the State of Wisconsin, residing at 560 Sunrise Circle, Green Bay, Wisconsin, 54302. Mr. Frisk is a member of the Board of Directors of CWAC. Mr. Frisk is also the past president of Baird Creek Preservation Foundation. Mr. Frisk enjoys the aesthetic beauty of Baird Creek and takes walks along Baird Creek approximately four or five times per week. Mr. Frisk enjoys viewing the wildlife, ecological diversity, birds, and flowers along Baird Creek. Mr. Frisk is reasonably concerned that Baird Creek is threatened by polluted stormwater discharges stemming, in part, from new residential development near Baird Creek over the past three years, with the attendant rooftops, driveways, asphalt roads and other impervious surfaces that carry that polluted stormwater to Baird Creek. Mr. Frisk has noticed that the character of Baird Creek has changed since the new residential development has occurred, where the stream has become more prone to flooding in the spring and more likely to dry out in the summer, partly the result of an increase in impervious surfaces

and the lack of infiltration of polluted stormwater into the groundwater. And, large flood events have made the stream broader and deeper, exposing the soil along the slopes and increasing soil erosion. Mr. Frisk is adversely affected and aggrieved by the MS4 General Permit's allowance of a lowering of water quality in FAL waters, including Baird Creek, without the required analysis by DNR. Mr. Frisk is further adversely affected and aggrieved in that the MS4 General Permit does not require water quality monitoring to determine compliance with water quality standards under Chapter NR 102, Wis. Adm. Code, and does not require water quality monitoring to determine whether and to what extent water quality has been lowered in Baird Creek by polluted stormwater discharges.

7. Christine Fossen Rades is an adult resident of the State of Wisconsin, residing at 2554 Bittersweet Avenue, Green Bay, Wisconsin, 54301. Ms. Fossen Rades is a member of the Board of Directors of CWAC, and uses and enjoys Baird Creek, flowing through the city of Green Bay. As a high school ecology teacher, Ms. Fossen Rades takes students to visit and study Baird Creek, and supervises high school students as they mentor elementary students during visits to study the ecology of Baird Creek. Ms. Fossen Rades teaches her students the geology and water flow of Baird Creek, the necessity of wetlands, and the need for green space in urban areas. Ms. Fossen Rades is reasonably concerned that Baird Creek is threatened by polluted stormwater discharges from urban development near Baird Creek. Ms. Fossen Rades is adversely affected and aggrieved by the MS4 General Permit's allowance of a lowering of water quality in FAL waters, including Baird Creek, without the required analysis by DNR. Ms. Fossen Rades is also adversely affected in that the MS4 General Permit does not require water quality monitoring to determine compliance with water quality standards under Chapter NR 102,

Wis. Adm. Code, and does not require monitoring to determine whether and to what extent water quality in Baird Creek has been lowered by polluted stormwater discharges.

II. ISSUES REQUESTED TO BE REVIEWED AND REASONS WHY A HEARING IS WARRANTED.

The specific issues to be reviewed are:

A. Violation of Antidegradation Requirements for Exceptional Resource Waters.

8. Petitioners request review of the following issue:

The reasonableness of Section 1.4.3 of the MS4 General Permit, in that Section 1.4.3 allows a lowering of water quality as the result of increased discharges of polluted stormwater to Exceptional Resource Waters under Wis. Adm. Code § NR 102.11 without conducting the required antidegradation analysis under 40 C.F.R. § 131.12(a)(2), Wis. Adm. Code § NR 102.05(1)(a), and Wis. Adm. Code §§ NR 207.04 and 207.05.

9. Section 1.4.3 of the MS4 General Permit is inconsistent with the federal antidegradation policy in 40 C.F.R. § 131.12(a)(2), Wisconsin's antidegradation policy in Wis. Adm. Code § NR 102.05(1)(a), and Wisconsin's antidegradation implementation procedures in Chapter NR 207. The MS4 General Permit states:

1.4.3 If the permittee has an existing MS4 discharge to an ERW, it may increase the discharge of pollutants if the increased discharge would not result in a violation of water quality standards.

An ERW is an "Exceptional Resource Water." ERWs are defined in Section NR 102.11 as "surface waters which provide valuable fisheries, hydrologically or geologically unique features, outstanding recreational opportunities, unique environmental settings, and which are not significantly impacted by human activities." Wis. Adm. Code § NR 102.11(1). To that end, ERWs are high quality waters that deserve protection under the state and federal antidegradation policies.

10. The applicability of the federal antidegradation policy to high quality waters such as ERWs hinges on whether there will be a lowering of water quality, not whether there will be a violation of water quality standards. 40 C.F.R. § 131.12(a)(2). Wisconsin’s antidegradation policy contains substantially similar language, focusing on a lowering of water quality to trigger antidegradation review rather than a violation of water quality standards. Wis. Adm. Code § NR 102.05(1)(a) (“No waters of the state shall be lowered in quality...”).

11. Although the federal antidegradation policy is tied to a lowering of water quality and not to a violation of water quality standards, the MS4 General Permit merely requires that there be no water quality standards violation as the result of the increased discharge of polluted stormwater from the MS4 to the ERW. The MS4 General Permit does not require the DNR to make a determination of whether there will be a lowering of water quality as a result of the increased discharge, or whether the lowering of water quality is necessary for important social or economic development where the ERW is located, nor does the MS4 General Permit require that the “highest statutory and regulatory requirements for all new and existing point sources” be achieved according to the federal antidegradation policy in 40 C.F.R. § 131.12(a)(2). Further, the DNR has not conducted such analyses prior to issuing the MS4 General Permit. As a result, the MS4 General Permit was issued in violation of the state and federal antidegradation policies.

12. Further, the DNR’s antidegradation implementation procedures in Chapter NR 207 require that the DNR apply the procedures to increased discharges from point sources such as MS4s to ERWs. Wis. Adm. Code §§ NR 207.03(4)(c), NR 207.03(6).

13. Section NR 207.03(4)(c) requires that, where an increased discharge is proposed to an ERW, the increased discharge be evaluated as though it were a discharge to a FAL water.

Sections NR 207.04 and NR 207.05 establish procedures by which the DNR determines whether there will be a lowering of water quality in FAL waters, and if so, whether the lowering of water quality will be significant and in turn whether or not the lowering of water quality is justified by important social and economic development. If the lowering of water quality is deemed significant by DNR, then the MS4 must consider a host of alternatives that would mitigate or eliminate the discharge and avoid the lowering of water quality. *See e.g.* § NR 207.04(1)(d). To the extent that the definition of “increased discharge” in Section NR 207.02(6)(a), Wis. Adm. Code, exempts increased discharges to ERWs and FAL waters from antidegradation review, Section 207.02(6)(a) is an invalid administrative rule in that it conflicts with the federal antidegradation policy in 40 C.F.R. § 131.12(a)(2).

14. In short, the MS4 General Permit allows a lowering of water quality as the result of increased discharges to ERWs and was issued by DNR without the antidegradation review required under the state and federal antidegradation policies. This violates §§ NR 102.05(1)(a), NR 207.04 and 207.05, and 40 C.F.R. § 131.12(a)(2) and therefore, a hearing on this issue is warranted to confirm that Section 1.4.3 of the MS4 General Permit was issued in violation of state and federal antidegradation policies and procedures.

B. Violation of Antidegradation Requirements for Fish and Aquatic Life (FAL) Waters.

15. Petitioners request review of the following issue:

The necessity for permit terms in the MS4 General Permit that require an analysis under §§ NR 207.04 and 207.05 to determine whether new or increased discharges of polluted stormwater to FAL waters in § NR 102.13 will cause a lowering of water quality, and whether such lowering of water quality is justified by important social and economic development, and the reasonableness of the DNR’s failure to require or conduct such analysis prior to issuing to the MS4 General Permit.

16. FAL waters fall within antidegradation review requirements under 40 C.F.R. 131.12(a)(2). FAL is the default water quality use designation in Wisconsin, meaning that all waters not otherwise classified fall into the FAL classification. Wis. Adm. Code § NR 102.13. Further, Wisconsin provides antidegradation review for all FAL waters under § NR 102.05(1)(a). *See* § NR 102.05(1)(a) (protecting all waters of the state from lowering of water quality unless socially and economically justified).

17. Antidegradation review is required for new discharges to FAL waters, according to §§ NR 207.04 and 207.05. However, similar to increased discharges to ERWs, the MS4 General Permit does not require antidegradation review to new discharges to FAL waters, nor has the DNR conducted any such review in issuing the MS4 General Permit. There is no reference to antidegradation procedures for FAL waters in the MS4 General Permit. This violates Wisconsin's antidegradation implementation procedures in Chapter NR 207, Wis. Adm. Code.

18. The MS4 General Permit also does not require antidegradation review for "increased" discharges to FAL waters. The federal policy requires the DNR to determine whether there will be a lowering of water quality in the FAL water. 40 C.F.R. § 131.12(a)(2). Yet, the MS4 General Permit does not require this analysis nor has the DNR conducted this analysis prior to issuing the MS4 General Permit.

19. For the foregoing reasons, a hearing is warranted to confirm that the MS4 General Permit violates state and federal law for its failure to require antidegradation review for new and increased discharges to FAL waters.

C. The Necessity for Water Quality Monitoring Requirements in the MS4 General Permit.

20. Petitioners request review of the following issue:

The necessity for permit terms in the MS4 General Permit that require monitoring of polluted stormwater discharges from MS4's to determine compliance with water quality standards and to determine whether and to what extent there has been a lowering of water quality, and the reasonableness of the DNR's failure to require terms for such monitoring in the MS4 General Permit.

21. The MS4 General Permit violates state and federal regulations for its failure to include monitoring requirements. Section 1.3.2 of the MS4 General Permit “does not authorize water discharges that the Department, prior to authorization of coverage under this permit, determines will cause or have reasonable potential to cause or contribute to an excursion above any applicable water quality standards.” MS4 General Permit, Section 1.3.2. Yet, the MS4 General Permit does not require water quality monitoring to determine whether the discharges will actually comply with water quality standards. *See* 40 C.F.R. 122.4(d) (prohibiting issuance of a NPDES permit that does not ensure compliance with applicable water quality requirements). Without such monitoring, the DNR has not established a method to determine whether the MS4 General Permit will actually ensure compliance with water quality standards.

22. Federal regulations require monitoring in all NPDES permits. Section 122.48 of Title 40 of the Code of Federal Regulations states that “[a]ll permits shall specify: ... (b) required monitoring, including type intervals, and frequency sufficient to yield data which are representative of the monitored activity, including, when appropriate, continuous monitoring;...” 40 C.F.R. § 122.48.

23. In addition, the U.S. Environmental Protection Agency's (U.S. EPA's) regulations for small MS4s state that the MS4 “must comply with other applicable NPDES permit requirements, standards, and conditions established in the individual or general permit, developed consistent with the provisions of §§ 122.41 through 122.49.” 40 C.F.R. § 122.34(f). And, Section 122.34(g)(1) requires a small MS4 to “evaluate program compliance [and] the

appropriateness of [the MS4's] best management practices.” 40 C.F.R. § 122.34(g)(1). In a note, the U.S. EPA states that this may include monitoring requirements in a permit. *Id.* Finally, the U.S. EPA states in its preamble to stormwater regulations in 40 C.F.R. Part 122 that it envisions that some form of water quality monitoring by MS4s may be necessary to determine compliance with water quality standards. *See U.S. EPA, National Pollutant Discharge Elimination System-Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges*, 64 Fed. Reg. 68722, 68769 (Dec. 8, 1999), to be codified at 40 C.F.R. Part 122.

24. Despite the above, the MS4 General Permit does not impose any water quality monitoring requirements to determine whether the best management practices called for under the MS4 General Permit will ensure compliance with water quality standards. Further, the MS4 General Permit does not call for any analysis to determine whether polluted stormwater discharges, after implementation of best management practices, will cause a lowering of water quality in FAL waters, ERWs, or Outstanding Resource Waters under Chapter NR 102, Wis. Adm. Code.

25. Section 1.3.2 of the MS4 General Permit specifically states that the MS4 General Permit does not authorize polluted stormwater discharges which do not comply with water quality standards. This is a permit limitation, and yet there is no monitoring requirement to ensure compliance with this permit limitation. For the foregoing reasons, a hearing is warranted to confirm that monitoring must be required under the MS4 General Permit.

Dated this 20th day of March, 2006.

Respectfully submitted,

MIDWEST ENVIRONMENTAL ADVOCATES, INC.

Melissa K. Scanlan
SBN 1034783
Andrew C. Hanson
SBN 1038367
Brent O. Denzin
SBN 1057389
551 W. Main Street, Suite 200
Madison, WI 53703
Tel. 608-251-5047
Fax 608-268-0205

VERIFICATION

STATE OF WISCONSIN)
) ss.
COUNTY OF MILWAUKEE)

_____ verifies that Friends of Milwaukee’s Rivers is a petitioner in this request for a Contested Case Hearing. She has read the foregoing Petition for Review and the information contained therein is true and correct to the best of her knowledge and belief.

Authorized Representative
of Friends of Milwaukee’s Rivers

Subscribed, sworn to, and signed before
me this ____ day of March, 2006.

Notary Public, State of Wisconsin
My Commission Expires _____

VERIFICATION

STATE OF WISCONSIN)
) ss.
COUNTY OF BROWN)

_____ verifies that he is a petitioner in this request for a Contested Case Hearing. He has read the foregoing Petition for Review and the information contained therein is true and correct to the best of his knowledge and belief.

Charles Frisk

Subscribed, sworn to, and signed before
me this ____ day of March, 2006.

Notary Public, State of Wisconsin
My Commission Expires _____

VERIFICATION

STATE OF WISCONSIN)
) ss.
COUNTY OF BROWN)

_____ verifies that she is a petitioner in this request for a Contested Case Hearing. She has read the foregoing Petition for Review and the information contained therein is true and correct to the best of her knowledge and belief.

Christine Fossen Rades

Subscribed, sworn to, and signed before
me this ____ day of March, 2006.

Notary Public, State of Wisconsin
My Commission Expires _____

VERIFICATION

STATE OF WISCONSIN)
) ss.
COUNTY OF EAU CLAIRE)

_____ verifies that he is a petitioner in this request for a Contested Case Hearing. He has read the foregoing Petition for Review and the information contained therein is true and correct to the best of his knowledge and belief.

Glenn M. Stoddard

Subscribed, sworn to, and signed before
me this ____ day of March, 2006.

Notary Public, State of Wisconsin
My Commission Expires _____

VERIFICATION

STATE OF WISCONSIN)
) ss.
COUNTY OF MILWAUKEE)

_____ verifies that she is a petitioner in this request for a Contested Case Hearing. She has read the foregoing Petition for Review and the information contained therein is true and correct to the best of her knowledge and belief.

Cheryl Nenn

Subscribed, sworn to, and signed before
me this ____ day of March, 2006.

Notary Public, State of Wisconsin
My Commission Expires _____

VERIFICATION

STATE OF WISCONSIN)
) ss.
COUNTY OF BROWN)

_____ verifies that she is a petitioner in this request for a Contested Case Hearing. She has read the foregoing Petition for Review and the information contained therein is true and correct to the best of her knowledge and belief.

Rebecca Katers

Subscribed, sworn to, and signed before
me this ____ day of March, 2006.

Notary Public, State of Wisconsin
My Commission Expires _____