

Summary of Public Comments and DNR Response – Water Use General Permits

Comment Period: September 28, 2011 to October 31, 2011

Comments were received from: Lawrie Kobza, Municipal Environmental Group; Marc Smith and Sara Gosman, National Wildlife Federation; Karen Hobbs, Natural Resources Defense Council; Jared Teutsch, Alliance for the Great Lakes; John Jackson, Great Lakes United; George Meyer, Wisconsin Wildlife Federation; Ezra Meyer, Clean Wisconsin; and Jodi Habush Sinykin, Midwest Environmental Advocates.

Comments Concerning All General Permits

1. Front page; first paragraph. It is not clear that the permit requirement applies to withdrawals from the Great Lakes Basin only. I would suggest the first sentence on the front page be revised as follows: Pursuant to section 281.346(4s), Wis. Stats., persons with existing withdrawals from the Great Lakes Basin that meet the applicability criteria listed in this general permit and who receive a Notice of Coverage may withdraw water from the Great Lakes Basin in amounts averaging 100,000 gallons per day or more in any 30-day period but less than 1,000,000 gallons per day for any 30 consecutive days in accordance with the requirements and conditions set forth in this permit.

Department Response: The Department made the suggested change.

2. Front page; second paragraph. It is not clear how the baselines and withdrawal amounts for a covered person will be identified. Will the baselines and withdrawal amounts only be listed in the database -- or will the Notice of Coverage issued to a covered person include this information? This question is related to the questions in nos. 4, 7 and 8 below.

Department Response: The Department added a sentence to General Permit No. 1 stating that baselines and withdrawal amounts will be set forth in each Notice of Coverage.

3. Page 2; Section 1.
 - a. It is not clear in this Applicability Section that the permit requirement only applies to withdrawals from the Great Lakes Basin. I would suggest the first clause in this Section be revised as follows: This general permit applies to withdrawals from the waters of the Great Lakes Basin that meet all of the following:

Department Response: The Department made the suggested change.

- b. What happens if an owner's system has the capacity to withdraw over 1 mgd but the owner intends to keep its withdrawal less than 1 mgd averaged over 30 consecutive days?

Department Response: At any time, a withdrawer may request to be covered under a general permit instead of an individual permit.

- c. In subs. (2) and (4), it is not clear how the system capacity, withdrawal amount and baseline fit together.

Department Response: Baselines were set based on system capacity or the maximum withdrawal listed in a permit or approval. The withdrawal amount is the maximum allowed withdrawal as of the date of permit issuance—which will equal the baseline, unless the person requested an increased withdrawal between 12/8/2008 and 12/8/2011. The established baseline does not impact the applicability criteria of General Permit No. 1. Only existing withdrawers that withdraw an amount less than or equal to their established withdrawal amount qualify for General Permit No. 1. If an existing withdrawer plans to withdraw more than their withdrawal amount, they have an increased withdrawal and would need to apply for General Permit No. 2.

4. Page 2; Section 3. This section refers to a Notice of Coverage. What will be included in the Notice of Coverage? Section 4(5) refers to updating information submitted in an application. Is it the Department's intent to include this type of information in the Notice of Coverage for each covered owner?

Department Response: Each Notice of Coverage will contain the baseline, withdrawal amount, a summary of the owner's information and water source information, and appeal rights.

5. Page 3; Section 4(3)(c). This subsection provides that the DNR must be allowed to inspect at reasonable times any facilities, equipment, including monitoring and control equipment, practices or operations regulated or required under the permit. However, I see nothing in the general permit that would regulate or require any particular facilities equipment, practices or operations. What is the DNR's intent with regard to this subsection?

Department Response: Wisconsin Administrative Code Chapter NR 856 sets forth requirements for equipment and facilities for measuring water withdrawals.

6. Page 3; Section 4(4). This subsection requires the permittee to measure and record the amounts of withdrawal and annually report to the department. How frequently must the permittee measure and record the amounts of withdrawal?

Department Response: Pursuant to Wisconsin Administrative Code Chapter NR 856, withdrawers must measure and record the amounts of the withdrawal by month. The Department added this clarification to this permit condition.

7. Page 3; Section 4(5). This subsection requires the permittee to notify the DNR of changes to the information submitted in the application that require amendment. My understanding is that for existing withdrawers that receive a Notice of Coverage there is no application. What is the DNR's intent here? Will this information be included in the Notice of Coverage?

Department Response: The Department added clarifying language to state that information contained in an application or Notice of Coverage that is changed requires an amendment.

8. Page 3; Section 5. This Section refers to a withdrawal amount established in the Notice of Coverage. Will the withdrawal amount be included in the Notice of Coverage, and not just in a separate database? See question 1 above.

Department Response: See response to comment #2.

9. Page 4; Section 7(2). To clarify, I would suggest that after the word "redetermination", the DNR insert "of eligibility for coverage under a general permit."

Department Response: The Department added "of coverage under a general permit" to provide clarification.

10. *Specify the criteria the DNR will use to decide when an individual permit will be Required.* Section 281.346(4s)(dm), Wis. Stats., gives the DNR the authority to require an owner to obtain an individual permit "if the withdrawal is located in a groundwater protection area, as defined in s. 281.34(1)(a), or a groundwater management area designated under s. 281.34(9)." Neither the permitting rules in ch. NR 860 nor the proposed general permits explain how the DNR will decide when to exercise this authority. The DNR should specify the criteria it will use, either in the general permits or in a guidance document.

Department Response: The Department will be working on a guidance document in the future to set forth the criteria for requiring an individual permit in lieu of a general permit in groundwater protection areas and groundwater management areas.

11. *Reserve the authority to require monitoring of the withdrawal.* Under section 281.346(4s)(a)(2), Wis. Stats., the DNR must include in a general permit "[r]equirements for estimating the amount withdrawn, *monitoring the withdrawal, if necessary*, and reporting the results of the estimating and monitoring, as provided in rules promulgated by the department" (emphasis added). While there are reporting requirements in ch. NR 856, Wis. Adm. Code, there are no monitoring requirements to assess impacts to water resources. The DNR should include the following permit condition in each general permit, which is modeled on a provision in Minnesota's general permits: The department may, as it deems necessary, require the permittee to

install gages and/or observation wells to monitor the impact of the permittee's withdrawal on the water resource and require the permittee to pay necessary costs of installation and maintenance.

Department Response: The Department does not currently have rules that set forth requirements for monitoring withdrawals for Water Use permits. The Department may in the future develop rules for this purpose. The Department added a permit condition that states, "The department may modify the conditions of this permit as necessary, following established legal procedures."

12. *Assure transparency and accuracy in permitting records.* Section 281.346(9)(e), Wis. Stats., provides that "[a]ny record or other information provided to or obtained by the department regarding a proposal for which an application under sub. (4) 2 *Id.* 4 [general permits] or (5) [individual permits] is received is a public record." The DNR is required to "make available to and provide facilities for the public to inspect and copy any records or other information provided to or obtained by the department regarding a proposal," with the exception of trade secrets or domestic security information. Section NR 860.14, Wis. Adm. Code, provides a process for the DNR to consider whether the location of a withdrawal implicates domestic security. To ensure that permittees are aware of the public nature of permit records and to condition the permit on submission of accurate information, each permit should have the following section entitled "Public Record," which is modeled on a provision in Minnesota's general permits: All data, facts, plans, maps, applications, annual water use reports, and any additional information submitted as part of this permit, and this permit itself are part of the public record and are available for public inspection at the Water Use Section of the DNR unless the department has determined that the record or information is confidential. The information contained therein may be used by the department as it deems necessary. The submission of false data, statements, reports, or any such additional information, at any time shall be deemed as just grounds for revocation of this permit.

Department Response: The Department added a section to address public records and open records requests.

13. We are glad to see the reporting requirements of the Great Lakes Compact and Wisconsin's Compact implementing statutes are consistently applied across these permits. We all know that you cannot manage what you do not measure, and this is crucially important when it comes to managing the Great Lakes in a sustainable way.

Department Response: Comment noted.

14. We agree that water conservation and efficiency is a critical requirement for all new and increased withdrawals and that required conservation and efficiency measures must be in place before an applicant can receive coverage under the proposed general permits. Specifically, we support the requirements that 1. an applicant must perform all water conservation and efficiency measures applicable to them in NR 852, and 2.

that they must then submit a water conservation plan for Department approval that reflects the work they have done under #1, and 3. that a Department-approved water conservation plan is a requirement for coverage under the proposed general permit for new or increased withdrawals.

Department Response: Comment noted.

15. We also support the proposed permits' coordination with existing law governing high capacity wells in the state, although we would like to see gaps in that law addressed at the statutory level to more fully protect Wisconsin's groundwater and interconnected surface water resources. Specifically, we agree wholeheartedly that the Department should be able to require a withdrawal proposal that falls within a Groundwater Protection Area, as defined in s. 281.34 (1) (a), Wis. Stats, or a Groundwater Management Area, as designated under s. 281.34 (9), Wis. Stats., to obtain an individual Great Lakes water use permit rather than coverage under the proposed general permit. Perhaps in all of those cases, but certainly in those cases where NR 820 directs the Department to perform an environmental review of the proposed withdrawal, the process should involve an individual water use permit, not a general permit.

Department Response: Comment noted.

16. Overall, we compliment the WDNR on the clarity and consistency of each permit's reporting requirements directing permittees to "measure and record the amounts of withdrawal and annually report to the department following the requirements in ss. NR 856.30 and 856.31."

Department Response: Comment noted.

17. We recognize the value of the Department's clearly stated requirement, with respect to the Water Use General Permit for New or Increased Withdrawals (i) that all conservation and efficiency measures applicable under NR 852 be accomplished and (ii) that a water conservation plan be approved by the Department before an applicant can be eligible for coverage under the proposed general permit. In fact, we'd recommend that a comparable level of water conservation requirements be added to the applicability criteria of the proposed general permit relating to existing withdrawals as well.

Department Response: The Department does not have the authority under Wisconsin Administrative Code Chapter NR 852 to require water conservation for existing withdrawers. The Department continues to build a statewide voluntary water conservation program that encourages all withdrawers to conserve water and/or use water more efficiently.

18. While we recognize the constraints imposed on these proposed permits by the provisions of s. 281.346, Wis. Stats., namely, the statutory language providing:

(dm) Requiring individual permit. *The department may require a person who is making or proposes to make a withdrawal...to obtain an individual permit under sub. (5) if the withdrawal is located in a groundwater protection area, as defined in s. 281.34 (1) (a), or a groundwater management area designated under s. 281.34 (9).* we nonetheless ask that the that the Department require all permittees to obtain an individual Great Lakes water use permit if the withdrawal is located in either a groundwater protection area or a groundwater management area in view of the sensitivity of the water resources and vulnerability of the communities already appropriately singled out for special consideration.

Department Response: See response to comment #10.

19. We are concerned over the lack of adequate adaptive management provisions in the proposed general permits. The permits fail to provide the Department with an adequate recourse, or even reasonable options, to deal with recognized adverse impacts to Basin waters arising from the cumulative build-up of existing, new and increased withdrawals on nearby groundwater and surface water resources. The “danger of imminent harm” language set forth within the permits’ Emergency Order section will not prove useful in the more likely scenario of gradual, cumulative harm. As such, we’d recommend the addition of language in the proposed permits that would provide the Department with the adaptive capability to modify general permit withdrawal conditions, or revoke permits within the 25 year permit period, if necessary to limit the extent of ongoing, scientifically-demonstrated harm to Great Lakes Basin water resources.

Department Response: The Department added a section that reiterates the Department’s authority to suspend or revoke Notice of Coverage under a general permit for “cause”.

20. We would like to see a mechanism whereby the Department could react to circumstances on the ground where the cumulative effects of existing and new/increased withdrawals on tributary or other water resources within the basin could be factored into decisions to modify withdrawal approvals during the course of a 25-year general permit period, if such action were necessary to avoid significant adverse environmental impacts to Great Lakes water resources and/or the land and wildlife resources that rely on them, which in turn affect the people and economies that rely on those resources. It is not clear to us whether the Emergency Order provisions in the draft permits would allow for the kind of adaptive management that we would urge you to include here as a necessary management tool for the Department. We encourage the Department to seek a reasonable mechanism within these permits to manage for cumulative impacts over time from the kinds of withdrawals governed by these permits, which fall below the thresholds for the state decision-making standard and the Compact decision-making standard yet are no less important when it comes to watching out for cumulative adverse impacts on our treasured resources.

Department Response: See response to comment #19.

21. We would like to see the water conservation and efficiency requirements (from NR 852) referenced in the draft permit for new and increased withdrawals applied to existing withdrawals as well. The business of using water more efficiently often leads to monetary savings for the user and ancillary benefits for the environment, but with our relatively low water costs in the Midwest the price signals that might lead to those kinds of win-win outcomes are often muffled or hidden. Reasonable water conservation requirements, like those in NR 852, ought to apply to existing withdrawals as well as new and increased ones.

Department Response: See response to comment #17.

22. In the draft permit for temporary dewatering withdrawals, we would urge a prohibition on diverting that water across subwatershed divides. Every effort should be made in these kinds of circumstances to return the water back from where it came, without changes to its quality, quantity, or temperature, and we would like to see the final permit include those requirements.

Department Response: The Department does not have the authority to require this in a general permit.

Comments Concerning General Permit No. 1—Existing Withdrawals

23. *Add reporting requirements to improve water conservation and efficiency.* Section 281.346(4s)(a)(3), Wis. Stats., states that the "department shall include all of the following in a general permit: . . . Requirements for water conservation, as provided in rules promulgated by the department under sub. (8)(d)." Section 281.346(8)(d) directs the WDNR to promulgate rules "specifying water conservation and efficiency measures" based on, among other factors, whether the withdrawal is existing or new. The only limitation is that the WDNR "may not require retrofitting of existing fixtures, appliances, or equipment." The WDNR has not specified conservation and efficiency measures for existing users in chapter NR 852, Wis. Adm. Code. This is unfortunate, since such measures could have a significant impact on water use and could be tailored to be cost effective by sector. Until the WDNR specifies measures for existing users through rule, the WDNR should require permittees under this general permit to annually: (1) report on the conservation and efficiency measures they currently use; (2) set targets for continual improvement; and (3) review a list of sector-specific best management practices for possible adoption. (The list should include practices from Tables 1 and 2 of chapter NR 852, as well as the optional CEM list in NR 852.08(2).) These requirements could be combined with the annual measurement and recording requirements under Section 4(4) of proposed Permit No. 1.

Department Response: See response to comment #17.

Comments Concerning General Permit No. 2—New and Increased Withdrawals

24. *Clarify that permittees must comply with the most recent version of the conservation and efficiency requirements.* Since conservation and efficiency will no doubt change over the 25-year term of the general permit, it is critically important that permittees are required to meet the most recent requirements in chapter NR 852. To this end, we suggest that Section 4(7) of proposed Permit No. 2 read: "*The permittee shall remain in compliance with all applicable requirements of ch. NR 852, Wis. Adm. Code, as amended over time.* The permittee shall implement the applicable water conservation and water use efficiency requirements of an approved water conservation plan and annually report the information required under ch. NR 852, Wis. Adm. Code."

Department Response: The Department added the following permit condition, "The department may modify the conditions of this permit as necessary, following established legal procedures." The General Permits are subject to change through time to reflect updates to statutes and codes.

25. *Clarify the definitions of new and increased withdrawals.* Under Section 1(2) of proposed Permit No. 2, the permit applies to new and increased withdrawals as defined in the conservation and efficiency rule. This rule's definition of an increased withdrawal includes a withdrawal that exceeds the withdrawal amount for individual permits under s. 281.346(5), Wis. Stats, while the definition of a new withdrawal includes any withdrawal greater than 100,000 gallons per day. Section NR 852.03(11), (18), Wis. Adm. Code. While Section 1(3) of proposed Permit No. 2 states that the owner must intend to withdraw an amount averaging 100,000 gallons per day or more but less than 1 million gallons per day, it would be clearer if the permit set forth the definitions of a new withdrawal and increased withdrawal that are applicable in the context of a general permit.

Department Response: The Department added a note that includes the definitions of new withdrawal and increased withdrawal.

Comments Concerning General Permit No. 3—Temporary Construction Dewatering

26. *Define key terms for this exception to the conservation and efficiency requirements, such as "temporary" and "construction dewatering."* This proposed permit appears to implement an exception to the conservation and efficiency requirements in s. NR 852.02(4)(c) for temporary construction dewatering activities. In order to ensure that the exception is applied to truly temporary situations, the DNR should limit dewatering to one year from the beginning of pumping. This is the condition of Minnesota's general permit for temporary water appropriations, including construction dewatering. In addition, the type of activity should be clearly delimited. Section 1(1) of proposed Permit No. 3 generally states that the withdrawal must be for the purpose of "temporary dewatering of a construction site, including a construction site for a building, road, or utility." But the exception in s. NR 852.02(4)(c), Wis. Adm. Code, applies only to "temporary pit or trench dewatering

including construction pits, sewer extension construction, pipe trenches, and other similar operations." In the permit, the DNR should make clear that the temporary dewatering activity at issue is shallow pits and trenches, not high capacity dewatering wells.

Department Response: The Department changed the description of temporary construction dewatering to reflect the exception language in NR 852. The Department added language to define "temporary". The use of high capacity wells to temporarily dewater pits or trenches including construction pits, sewer extension construction, pipe trenches, and other similar operations will qualify for General Permit No. 3.

27. *Clarify that the permit applies only to new or increased withdrawals.* Proposed Permit No. 3 does not state whether it applies to existing withdrawals, or new or increased withdrawals. It appears from the proposed criteria and conditions that the permit is intended to apply to new or increased withdrawals. (In any event, withdrawals that have existed since December 2008 should not be considered "temporary.") The applicability criteria in the permit should specify that the owner is proposing to make a new or increased withdrawal.

Department Response: It is the Department's opinion that the applicability criteria already limit the use of General Permit No. 3 to new and increased withdrawals.