

A Guide to WATER RESOURCE PERMITTING for Pipeline Construction in Wisconsin*

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Pipeline construction impacts water resources through the disturbance and filling of wetlands, grading on the bank of waterways, placing structures on or under the bed of waterways, or discharging stormwater runoff from construction. Based on the characteristics of those water resources, they may be regulated at both the state and federal levels or only at the state level. The Clean Water Act (CWA) and the Rivers and Harbors Act (RHA) authorize the **U.S. Environmental Protection Agency** (EPA) and the **U.S. Army Corps of Engineers** (the Corps) to regulate activities impacting **Waters of the United States** or **navigable waters**. Wisconsin law authorizes the **Wisconsin Department of Natural Resources** (DNR) to regulate activities impacting **wetlands**, **navigable waters**, or **Waters of the State**. For some activities, the EPA has delegated its regulatory authority to DNR. In other instances, the regulatory authority of the EPA and the Corps overlaps with the regulatory authority of DNR. As a result, state and federal permitting has been streamlined into a joint permitting process known as the **Water Resources Application for Project Permits** (WRAPP). Permitting requirements are very similar under state and federal law, which supports the joint permitting process. Due to this similarity, this guide focuses on state permitting requirements.

Wetland Permitting

Whether a particular wetland qualifies for regulation at the federal level or only at the state level, permits are generally required to disturb or place fill material in wetlands. Under the CWA, the EPA establishes the technical requirements for permits, and the Corps administers the permitting program. DNR exercises all wetland permitting responsibilities under state law. Depending on the extent of impacts to all wetlands along the entire pipeline route, projects generally need to obtain either a **general permit** (GP) or an **individual permit** (IP).

GPs streamline the regulatory process for specific types of activities with minor impacts through predetermined permit conditions. DNR is required to issue GPs that are consistent with and correspond to any GPs that are issued by the Corps and has the authority to issue other GPs. Some pipeline construction activities that occur in wetlands may qualify for GPs such as surveys or geotechnical boring. Public comments are taken when the general permit is developed for the category of activity, not when the permit is applied to a specific project. As such, there is no public input opportunity for pipeline activity covered by a GP.

If the activity does not qualify for a GP, an IP is typically required. Before

Definitions of Water Resources

Waters of the United States—Wetlands are regulated under the CWA if they constitute Waters of the United States. In 2020, the EPA and the Corps significantly narrowed the definition to (1) territorial seas and traditional navigable waters; (2) tributaries of seas and navigable waters; (3) certain lakes, ponds, and impoundments; and (4) wetlands adjacent to the first three categories.

Navigable Waters—Waterways are regulated under the RHA if they constitute navigable waters, which include tidal waters and those waters that are, have been, or may be used to transport interstate or foreign commerce. Under state law, navigable waters include waters that are navigable in fact, which means that it is possible to float a canoe or other small craft down that waterway at any point on a recurring basis.

State Wetlands—Under state law, wetlands are defined as areas where water is at, near, or above the land surface long enough to be capable of supporting aquatic or hydrophytic vegetation and which has soils indicative of wet conditions.

Waters of the State—The definition of Waters of the State, which is used in the Wisconsin Pollution Discharge Elimination System, is extremely broad and includes all lakes, bays, rivers, streams, springs, ponds, wells, impounding reservoirs, marshes, water courses, drainage systems, and other surface water or groundwater, whether natural or manmade, public or private within the state or under its jurisdiction.

granting an individual wetland permit, DNR must analyze practicable alternatives that will avoid and minimize adverse impacts to wetland **functional values** and that will not result in any other significant adverse environmental impacts. Wetland functional values include ecological benefits like flood water storage, water quality protection, and fish and wildlife habitat. The alternatives analysis is generally limited to those alternatives that are consistent with the overall purpose and scope of the project. When a proposed project will have unavoidable impacts on wetlands, those impacts must be compensated through restoration, enhancement, creation, or preservation of wetlands, which is known as mitigation. Mitigation can be accomplished through the purchase of credits from an approved wetland mitigation bank or the DNR's Wisconsin Wetland Conservation Trust, or the permittee can complete its own mitigation project within the same watershed or within a half-mile of the proposed impacts. Finally, DNR must ensure that proposed projects receiving individual wetland permits comply with state water quality standards.

Waterway Permitting

Pipeline construction inevitably requires crossing navigable waters by placing the pipeline either underneath or on the bed of a waterway. Placing a pipeline underneath a navigable water, which may even be required in certain instances, is accomplished through methods such as directional boring and often does not trigger permitting requirements. Although GPs may be available in limited circumstances, IPs are typically required to place a pipeline on the bed of navigable waters, to grade more than 10,000 square feet on the bank of navigable waters, to build bridges over navigable waters, or to remove material from the bed of navigable waters. Before granting an IP for these activities, DNR must ensure that the project will not obstruct navigation, be detrimental to the public interest, reduce flood flow capacity of the waterway, or adversely impact fish, wildlife, or scenic beauty. For waterways with special designations such as outstanding or exceptional resource waters, GPs and certain exceptions may not be available and an IP may be required. DNR must determine that the issuance of the permit is consistent with the public interest in the waterbody.

Processing Permits & Public Input Opportunities

The procedural requirements for wetlands and waterway individual permits at the state level are virtually the same and are almost always fulfilled simultaneously. When a WRAPP includes a request for individual wetlands or waterway permits, DNR has 30 days to review the application and determine either that it is complete or that additional information is needed. However, if DNR will prepare an **Environmental Impact Statement** for a project, the agency delays its determination that an application is complete until the environmental review process has concluded. After DNR determines that an application for an individual permit is complete, the department must provide public notice of that pending application. Although not required to do so, DNR typically will hold a public informational hearing on the application, and includes information about that hearing in the public notice. Any person may also request that DNR hold a public informational hearing within 20 days after DNR issues the public notice of the pending application. DNR is required to hold the public informational hearing within 15 days of either issuing the public notice or receiving a hearing request. DNR must accept written comments for 30 days after issuing the public notice or until 10 days after the public informational hearing is held. DNR is required to consider all comments received in making its decision on applications.

Stormwater Permitting

When a pipeline construction project will disturb more than one acre of land, a **Wisconsin Pollutant Discharge Elimination System** (WPDES) stormwater construction GP from DNR must be obtained. This permit is typically applied for in a WRAPP along with wetland and waterway permits. The purpose of the stormwater permit is to provide effective control of erosion from stormwater runoff during the construction period and to ensure permanent stabilization of all disturbed areas. To that end, pipeline companies are required to develop site-specific erosion control plans for each construction site and to implement best management practices. Like other GPs, pipeline companies apply for coverage under the construction stormwater WPDES permit and there is no public input opportunity at that time. However, any person may submit a written request to DNR that it require an individual WPDES permit, and DNR has the authority to grant that request if certain conditions are met.

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