

# STATEMENT OF SCOPE

## Department of Transportation

**Rule No.:** Trans 401

**Relating to:** Construction Site Erosion Control And Storm Water Management Procedures For Department Actions

**Rule Type:** Permanent

### 1. Finding/nature of emergency (Emergency Rule only):

The rule will be proposed as a permanent rule.

### 2. Detailed description of the objective of the proposed rule:

The purpose of this rulemaking is to propose modifications and updates to ch. Trans 401 to bring the rule into conformance with the relevant subchapters of ch. NR 151 Runoff Management and ch. NR 216 Storm Water Discharge Permits, and other current state and federal legal standards for erosion control and stormwater discharges. Modifications may include the incorporation of additional provisions found in relevant subchapters on chs. NR 151 and NR 216, such as best management practices or technical standards, not currently in ch. Trans 401.

State statutes ss. [30.2022](#), [84.01 \(2\)](#) and [\(5\)](#), [84.03 \(9\) \(a\)](#) and [\(10\)](#), [85.19 \(1\)](#), [86.25 \(2\)](#) and [114.31 \(7\)](#) Stats require the Department of Transportation (“WisDOT”) to establish standards for the control of soil erosion related to highway, bridge, or other transportation projects constructed using state or federal funds and that are directed and supervised by WisDOT. Under s. 30.2022, Stats. transportation activities affecting waters of the state are exempt from specified prohibitions, permits, and approvals of the Department of Natural Resources (“WDNR”). In the past s. 30.2022 exemptions included stormwater discharges, but they are now subject to WDNR-issued stormwater permits issued under s. 283.33(4m), Stats. under legislation enacted in March 2016. Chapter Trans 401 is an important component of interdepartmental cooperation between WDNR and WisDOT in ensuring efforts to reduce nonpoint source water pollution and comply with related water regulations during the construction of WisDOT transportation projects.

Chapter Trans 401 was first adopted in 1994. It was developed to meet state and federal law which required the development and implementation of erosion control and stormwater management procedures for construction sites. In 2002, ch. Trans 401 was amended to complement the WisDOT and WDNR cooperative agreement, administrative code ch. NR 216. It also developed transportation facility water quality standards specific to WisDOT transportation projects. In 2018 ch. Trans 401 had minor updates however, it did not reference all the conditions in the two WDNR transportation general WPDES permits WI-S066796-2 for transportation construction discharges and WI-S066800-2 for transportation separate storm sewer discharges, as well as other changes to chs. NR 151 and NR 216. WisDOT proposes to update ch. Trans 401 to recognize and align with current WDNR permit conditions, chs. NR 151 and NR 216 standards. This will ensure consistency with state and national environmental regulations (e.g., Clean Water Act) and clarify compliance processes for WisDOT projects.

### 3. Description of the existing policies relevant to the rule, new policies proposed to be included in the rule, and an analysis of policy alternatives:

#### *Existing Policies*

Chapter Trans 401 establishes the minimum performance standards which all WisDOT projects must comply with, to the maximum extent practicable. This code governs WisDOT directed and supervised

activities that potentially impact waters of the state. Its focus is on erosion control during construction and stormwater quality after construction is complete. Chapter Trans 401 requires a designed erosion control plan and a contractor developed erosion control implementation plan and provides acceptable erosion control best management practices (“BMPs), standards for site inspections, site inspection reporting, processes for corrective action orders, liability for prohibited discharges and post-construction performance standards.

#### *Proposed Policies*

The purpose of this rulemaking is to propose modifications and updates to ch. Trans 401 to bring the rule into conformance with the relevant subchapters of ch. NR 151 and ch. NR 216, and other current state and federal legal standards for erosion control and stormwater discharges. This rulemaking will update erosion control and stormwater performance standards to align with current chs. NR 151 and NR 216 standards and permit conditions in WDNR’s Transportation Construction General Permit (TCGP) and the Transportation Separate Storm Sewer System (TS4) permit, and clarify transportation facility standards specific to WisDOT projects. WisDOT may also consider updates and clarifications to construction erosion control best management practices and processes to address sediment performance standards and other measures during and after construction. WisDOT may also examine language to clarify the applicability of ch. Trans 401.

#### *Analysis of Policy Alternatives*

A no-action alternative would mean WisDOT transportation construction projects, by only following ch. Trans 401, would continue to not be in full compliance with state and federal environmental law and enforcement requirements. This generates two processes that WisDOT transportation projects adhere to. This creates confusion by inconsistent requirements in the rules of various agencies, as well as extra work, and increases the potential for error.

Completing the proposed rulemaking would ensure stormwater runoff from WisDOT transportation activities be in compliance with applicable environmental laws and provide a more streamlined design and construction process.

#### **4. Detailed explanation of statutory authority for the rule (including the statutory citation and language):**

Chapter Trans 401 authority: s. [30.2022](#), [84.01 \(2\)](#), [85.19 \(1\)](#), [114.31 \(7\)](#) [227.11 \(2\)](#) and [283.33\(4m\), Stats.](#)

Federal Clean Water Act discharges of contaminated storm water require National Pollution Discharge Elimination Permit [NPDES] coverage under 33 USC § 1342(p), part of the federal Clean Water Act. The USEPA has delegated NPDES permit authority to Wisconsin under 33 USC § 1342(b). The Wisconsin DNR regulated stormwater discharges under authority of permits issued pursuant to s. 283.33, Stats. Without stormwater permit coverage complying with WDNR’s stormwater permits, discharge of stormwater from WisDOT’s transportation activities would require NPDES permit coverage and regulation by the USEPA.

#### **5. Estimate of amount of time that state employees will spend developing the rule and of other resources necessary to develop the rule :**

It is estimated that department staff will spend approximately 1,000 hours.

#### **6. List with description of all entities that may be affected by the proposed rule:**

Local units of governments with transportation projects directed and supervised by WisDOT as well as other WisDOT transportation projects (e.g., airport, harbors and railroads).  
Transportation construction industry.  
Wisconsin Department of Natural Resources.

Federal agencies such as Environmental Protection Agency (EPA).  
Non-governmental organizations and environmental groups  
Other entities who use WisDOT construction standards, e.g., county highway commissions.

**7. Summary and preliminary comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule :**

Amendment of Ch. Trans 401 to meet current standards will result in regulation by the WDNR under its delegated Clean Water Act authority as detailed in par. 4. above.

**8. Anticipated economic impact of implementing the rule (note if the rule is likely to have any economic impact on small businesses):**

Implementation of the proposed changes is anticipated to have an overall minimal impact on small businesses and industries in Wisconsin. However, the level of impact is currently indeterminate.

The proposed changes may affect design and erosion control costs for WisDOT oversight projects.

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