



Wisconsin's Green Fire Comments on Wisconsin Department of Natural Resources Bureau of Watershed Management Draft Program Guidances on Artificial Wetland Exemptions and Nonfederal Wetland Exemptions- Guidance Numbers 3500-2018-01 and 3500-2018-02

July 20, 2018

About Wisconsin's Green Fire: Wisconsin's Green Fire- Voices for Conservation (WGF) supports the conservation legacy of Wisconsin by promoting science-based management of its natural resources. Our 390 members represent extensive experience in natural resource management, environmental law and policy, scientific research, and education. Our members have backgrounds in government, non-governmental organizations, universities and colleges and the private sector.

Summary Statement: We have reviewed the Draft Guidance documents: 3500-2018-01 & 3500-2018-02 (Draft Guidance) and have a number of comments that are outlined below. The review was conducted by a number of our members who have experience administering Wisconsin's wetland programs and regulations. We would be happy to discuss these comments with Department of Natural Resources (Department) staff.

We appreciate the challenges and constraints placed on the Department by requirements specified in Wisconsin 2017 Act 183 (Act 183) regarding nonfederal and artificial wetlands. WGF commented about the proposed legislation and will not repeat those concerns here except as they may pertain to implementation procedures. WGF also recognizes that presumably the Department will not receive additional resources to implement this new program so staff time that would otherwise be devoted to permitting, enforcement, and broader customer service will be redirected to permit exemptions for non-federal and artificial wetlands and associated program elements. Our members know from experience, the staffing limitations on the Department's waterway and wetlands program.

One of our major concerns is the need for greater clarity in the process for the nonfederal wetland exemption and whether a jurisdictional determination from the U.S. Army Corps of Engineers (USACOE) is needed for the exemption to be in place. (See further discussion under "Nonfederal Wetlands section."

Comments Applicable to both Draft Guidance Documents:

Issuing Exemptions, Tracking, Compliance, and Enforcement: The Draft Guidance discusses the process to apply for an exemption. We encourage the Department to clarify whether exemptions will be formally issued for projects to fill artificial and nonfederal wetlands, and whether those exemptions will be listed in a publicly available database such as Sharepoint. We encourage tracking and auditing of wetland fills of artificial and nonfederal wetlands to evaluate impact of the legislation and regulatory compliance. We fully recognize Department staff constraints in this regard. We suggest the Guidance discuss



that parties using these exemptions are responsible to ensure the project qualifies, the law is followed, and that the state is responsible for enforcing the law.

Wetlands created to satisfy mitigation requirements: The Draft Guidance should clarify that mitigation sites should not be considered eligible for either a nonfederal or artificial wetland exemption.

Executive Summaries: The Executive Summaries in both Draft Guidance documents state that “Before a landowner, developer or builder “completes” a project, they must submit an exemption request. This should be modified to state that before they “start” a project they need to submit an exemption application.

Links in documents: We found that not all links were active.

Comments on Artificial Wetlands Draft Guidance

Step 2: Wetland history:

The list of maps and aerial photos in the Draft Guidance is not extensive enough to provide "definitive evidence" of prior wetland or stream history. In most cases, the mapping from the original government land survey, Bordner survey, and USGS topography maps are not sufficiently accurate to identify wetlands. Stream locations are also often inaccurate or have been modified over time. While the quality and coverage of aerial photography has improved dramatically, many wetlands smaller than 5 acres are not apparent on typical statewide imaging until after 2005. We suggest the Guidance direct people to high resolution aerial photographs, such as those obtained by Wisconsin Department of Transportation (DOT) or municipalities, and to the U.S. Department of Agriculture (USDA) Farm Service Agency (FSA) for annual photos of cropland. USDA soils maps and the Wetland Indicators and Potentially Restorable Wetlands layers from the DNR Surface Water Data Viewer should be submitted. The combination of images from multiple sources, over several years and seasons, leads to more reliable determinations.

Because of the amount of time required for organic soils to develop, nearly all sites where organic soils are found can be considered natural wetlands unless there is evidence to show that organic soils have been transported to the site. The minimum soils mapping unit is typically 5 acres, so on-site soil mapping data, such as what would be required for a wetland delineation, should be required to make an accurate determination, however we recognize the limitation in Act 183.

Step 3: Human disturbance:

This section should refer to Chapter 5, Difficult Situations, in the US Army Corps of Engineers (USACOE) Regional Supplements. This chapter outlines the procedures for making wetland determinations when wetland indicators (hydrology, soils and/or vegetation) are not present. The chapter refers to difficult situations which are the result of human disturbance (atypical situations) or which may result from natural conditions. In all parts of the Guidance, the reference to the USACOE's 1987 Wetland Delineation Manual should also include the most recent applicable Regional Supplement documents.

We suggest that the sentence in the Guidance: “wetland boundaries shrink or swell over time” is inaccurate. Wetlands may change in appearance, but unless there are significant changes in hydrology, wetland boundaries are generally fairly stable.

Comments on Nonfederal Wetlands Draft Guidance

Nonfederal Wetland Determination

This section states that the USACOE must make a jurisdictional determination (JD) for nonfederal wetland determinations but that an exemption request may also be submitted to the Department without a JD. This is confusing. This Guidance should state whether the Department can make a nonfederal wetland determination without the JD. We believe that the Department cannot and should not, issue a determination prior to the USACOE issuance of a JD, since it may result in the loss of a federal wetland and put project proponents in violation of the Clean Water Act with substantial penalties.

Step 1: Wetland boundary confirmation

The Draft Guidance states that a wetland boundary confirmation is valid for 15 years unless additional information or a site visit is deemed necessary by the Department. Wetland boundaries may change gradually over a few years with changes in land use at a site, i.e. when cropping is abandoned, or when land use changes on adjacent properties affects wetland hydrology. Changes in wetland hydrology may occur from extensive tree clearing, road construction, and utility construction.

We recognize that Act 183 places limitations on Department staff to conduct site visits as a routine procedure. However we recommend the follow steps to assure that a wetland boundary is accurate:

- Review recent DOT aerial photos and Natural Resource Conservation Service/FSA crop photos to determine if land use changes have occurred. This step is especially important for sites near the urban fringe or urban area as defined in the statute.
- Conduct a site visit if possible with a wetland professional representing the landowner or developer if it appears the wetland boundary has changed after initial review.

From our experience, a site visit when deemed necessary will adequately address uncertainties and assure an accurate wetland boundary.

Step 2: Rare and High Quality Wetlands

Act 183 clearly defines “high quality” wetlands for the purposes of this law as being directly adjacent or contiguous to a class I or class II trout stream or consisting of 75 percent or more of certain wetland types. The legislation does not address wetland quality as determined by any specific assessment methods. However, the Draft Guidance includes a method for wetland quality assessment which would serve to further restrict wetlands to be considered as high quality. Use of this assessment method would result in more wetlands eligible for the permit exemption than is provided under the law. The Legislature directed in Section 227.10 (2m) Wis. Stats., that “No agency may implement or enforce any standard, requirement, or threshold,...unless that standard is explicitly required or explicitly permitted by statute.” We caution the Department not to exceed the requirements placed in Act 183 by the Legislature. We recommend that the following reference for “high quality” determinations be removed from this Guidance: http://www.bwsr.state.mn.us/wetlands/wca/Eggers-Reed_Plant_Comm_Key.pdf.

The Draft Guidance describes “clear documentation” for determining wetland type as using botanical surveys and “windshield surveys.” Windshield surveys are not adequate or appropriate for determining wetland type. The limited view of windshield surveys reflects the influence of the road and may not be representative of the rest of the wetland. In order to meet the statutory standard of 75 percent or more of a certain wetland type, the Department should ensure that the entire wetland be evaluated appropriately.



Step 5: Mitigation Requirements:

This section refers to the mitigation requirement for nonfederal wetlands, but does not state that mitigation wetlands should not be considered eligible for a nonfederal wetland exemption. Besides wetland mitigation banks listed in the RIBITS database, on-site or permittee-responsible mitigation sites are not eligible. We are not aware of a comprehensive source for wetland mitigation sites. The Department should develop a comprehensive list of mitigation sites to prevent potential future loss or degradation of these restored wetlands.

Overall comment: The determination of wetland quality is interpreted very narrowly by Act 183 and the Draft Guidance. Under the Clean Water Act and wetland water quality standards in NR 103 Wis. Adm. Code, "use designations" are based on potential. The uses of wetlands are defined as wetland functional values. If a landowner attempts to degrade a wetland which ranks high in performing one or more functional values through removal of vegetation, the wetland will still be a high quality wetland based on that potential because the vegetation can be restored. Only the loss of the wetland through filling or draining would remove the potential for the wetland to perform functional values.

Thank you for the opportunity to comment on this Draft Guidance to implement Act 183. Please do not hesitate to contact us to discuss further.

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