

Comments on Wisconsin DNR Bureau of Watershed Management Waterway and Wetland Protection
Draft Guidance

Artificial Wetland Exemptions #3500-2018-01

Nonfederal Wetland Exemptions #3500-2018-02

October 10, 2018

Thank you for considering our comments on the initial draft of the guidance to implement Act 183 and for the opportunity to discuss the guidance with staff following the public comment period. We recognize the current working draft guidance addresses some of our earlier comments, most importantly the need for the nonfederal wetland guidance to clarify the role of the U.S. Army Corps of Engineers as the sole agency responsible for a nonfederal wetland jurisdictional determination.

We have reviewed draft guidance documents #3500-2018-01 and #3500-2018-02 received on October 2, 2018 and offer the comments listed below. The review was conducted by several of our members who have extensive experience with Wisconsin's wetlands and with administering Wisconsin wetland programs and regulations. We appreciate the opportunity to submit these additional comments. Please let us know if you would like to discuss them further.

Comments on Artificial Wetland Exemption Draft Guidance

- Executive Summary
Requiring an exemption request “prior to completion” and “at least 15 days in advance of their project” implies that one can begin a project, assuming it will qualify for an exemption, before submitting an exemption request. An exemption request should be filed, if one expects the project will qualify for the exemption, and at least 15 days before the project begins.

“Using this Guidance”

The description of the process suggests that anyone may make an artificial wetland exemption eligibility determination. The description should be clear that the responsibility for the determination lies with the Department, and the guidance explains the steps the Department uses to fulfill its responsibility.

- Step 1. Knowing Your Wetlands
The 1987 USACOE Wetland Delineation Manual alone is not sufficient to determine whether a wetland is present. The Manual is only applicable if used with the appropriate current Regional Supplement. Step 1 needs to include this requirement.
- Step 2. Wetland History
The statutory definition of definitive evidence of prior wetland history includes surveys that use

a scale of not more than 100 feet per inch. The requirement for definitive evidence is important to insure a level of confidence that a wetland was present or not. Without a reasonable level of confidence, the absence of evidence of a wetland isn't evidence of the wetland's absence. Consequently, the required documentation should note the scale requirement, and note the limitations of the recommended sources, which are not equally reliable.

The scale of the required map sources listed in the table far exceed 100 feet per inch. Soil Survey Mapping comes closest and varies across the state from 1000 to 1667 feet per inch. Soils information generally is also more reliable than the other sources because it's closely connected with essential wetland features and represents long-term conditions rather than a snapshot in time.

While Soil Survey Mapping suffers from scale limitations, we support the requirement to consider Soil Survey Mapping in the determination. It not only "should be combined with other types of definitive evidence", but additional sources of information must be provided to determine whether there is, or isn't, wetland history, and that information must be sufficient to provide definitive evidence.

Some of the recommended additional sources, such as Google Earth and NWI maps for WI, were not available until long after 1991 and so are not useful to document historical conditions.

- Step 5. Mitigation Sites
Qualification for the artificial wetland exemption requires eliminating all wetland mitigation sites. The link to the list of wetland mitigation sites, the Corps' Regulatory In-lieu fee and Bank Information Tracking System, or RIBITS, does not include on-site or permittee responsible compensatory wetland mitigation locations. The locations of these additional sites must be available.

Comments on Nonfederal Wetland Exemption Draft Guidance

- Executive Summary
The requirement to submit an exemption request to the Department prior to completing a project should be modified to require the submittal prior to beginning a project.

"Using this Guidance"

The description of the process suggests that anyone may make a nonfederal wetland exemption eligibility determination. The description should be clear that the guidance explains the steps the Department uses to make an eligibility determination.

- Nonfederal Wetland Exemption Flow Chart
The question: Is the wetland believed to be a "rare and high quality wetland"? should be definitive, for example: Is the wetland a "rare and high quality wetland" as defined by Act 183?

- Step 2. Rare and High Quality Wetlands

Act 183 clearly defines “high quality” wetlands for the purpose of this law as being directly adjacent or contiguous to a Class 1 or Class 2 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 method. The guidance, however, expands on the statutory definition of rare and high-quality wetlands by confounding wetland type with wetland quality by linking the exemption to wetlands considered ruderal.

Since 1991 state wetland regulations have consistently referenced the wetland types classified by Eggers & Reed. By statutory definition, wet meadow and shrub swamp are not rare and high quality wetland types, but deep marsh and wooded swamp are. The ruderal designation, one used rarely in other DNR non-regulatory programs, is not relevant, has no basis in Act 183, or in other state wetland regulations.

Assessing wetland type may be possible using remote sensing methods, but often requires a field inspection, especially for herbaceous wetland types. The exemption criteria do not include a wetland assessment beyond determining wetland types and their relative extent.

Consequently, interpreting aerial photos and conducting windshield surveys to assess wetland quality, as the guidance suggests, are not required and not relevant. Even if a quality assessment were needed, neither of these methods is reliable for that purpose.

- Step 5. Mitigation Requirements

The language “Once an applicant has selected a preferred option . . .” for the mitigation approach is misleading. The DNR mitigation coordinator selects the appropriate mitigation approach following the DNR-USCOE Guidelines for Wetland Compensatory Mitigation in Wisconsin. The guidelines explicitly state a preference of bank credit purchase or ILF over the permittee-responsible approach.

We appreciate the challenges and constraints that affect the Department’s ability to implement Act 183 and the considerable effort it takes to develop the tools for staff and the public to enable compliance. We remain interested in the outcomes and future opportunities to assist.

Thank you for the opportunity to meet with DNR staff and to comment further on the draft guidance to implement Act 183. Please do not hesitate to contact us for further discussion.

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