

The attached draft guidance entitled “Artificial Waterbody Jurisdiction” was developed to help Department of Natural Resources staff understand and apply consistent requirements for artificial waterbody jurisdiction under the newly enacted 2015 Wisconsin Act 387

The Department is proposing that to assist in determining Ch. 30 statutory jurisdiction with regards to artificial waterbodies that the newly created terms “hydrologically connected”, “natural navigable” and “storm event” in the newly created section s. 30.053 Wis. Stats. are defined and applied consistently when determining Department jurisdiction.

This draft guidance was developed by staff from the Department’s Bureau of Watershed Management and has been reviewed internally. The Department is now soliciting comments from external stakeholders. Once the 21 day notice period is complete, the Department will consider all comments, revise the guidance if needed, and make a copy of the final guidance available to the appropriate internal and external stakeholders.

Comments related to this draft guidance should be provided to Martye Griffin via e-mail at dnrwywrzguidance@wisconsin.gov .



BUREAU OF WATERSHED MANAGEMENT PROGRAM GUIDANCE

Waterway and Wetland Protection

Artificial Waterbody Jurisdiction

Effective Date: September 1, 2016
Guidance #: WW-2016-010

Notice: This document is intended solely as guidance, and does not contain any mandatory requirements except where requirements found in statute or administrative rule are referenced. This guidance does not establish or affect legal rights or obligations, and is not finally determinative of any of the issues addressed. This guidance does not create any rights enforceable by any party in litigation with the State of Wisconsin or the Department of Natural Resources. Any regulatory decisions made by the Department of Natural Resources in any matter addressed by this guidance will be made by applying the governing statutes and administrative rules to the relevant facts.

APPROVED:

Pam Biersach, Director
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Date

A. Statement of Problem Being Addressed

Why did we have to do this guidance?

The guidance is expected to improve consistency when implementing artificial waterbody requirements and decisions under s. 30.19, Wis. Stats., to construct, dredge, or enlarge an artificial waterbody. This includes decisions on artificial waterbodies on privately owned property as well as projects involving artificial waterbodies as part of a Department led project under MC 1755.1. It will also be used to ensure that consistent messaging is being conveyed through website information, e-permit submittals, and statewide general permit creation and modification.

The guidance will help property owners and their consultants, and DNR staff, by clarifying when the Department has jurisdiction over artificial waterbodies.

B. Background

2015 Act 387 created a new statutory section in Ch. 30, Wis Stats., s. 30.053, which describes the applicability of Ch. 30, Wis. Stats., to artificial waterbodies, as defined in 30.19(1b)(a). The section creates new standards for state jurisdiction over artificial waterbodies.

*30.053 30.053 **Applicability of chapter to artificial water bodies.** Except in subch. V and except as specifically provided otherwise in this chapter, nothing in this chapter applies to an artificial water body, as defined in s. 30.19 (1b) (a), that is not hydrologically connected to a natural navigable waterway and that does not discharge into a natural navigable waterway except as a result of storm events.*

As a result of this new section, Ch. 30, Wis. Stats., no longer applies to artificial waterbodies that:

- Are not hydrologically connected to a natural navigable waterway, and
- Does not discharge into a natural navigable waterway except as a result of storm events.

C. Discussion & Guidance

To assist in determining Ch. 30 statutory jurisdiction with regards to artificial waterbodies, the Department understands that the terms “hydrologically connected”, “natural navigable” and “storm event” in the newly created section 30.053 need to be applied consistently.

Natural navigable waterway:

The term navigable waterway is already defined in s. 30.01(4m)

30.01(4m) (4m) "Navigable waters" or "navigable waterway" means any body of water which is navigable under the laws of this state.

To be consistent with other applications of Ch. 30, the department will consider any waterbody that meets the statutory definition of navigable waterway and has waterway history as being a ‘natural navigable waterway’.

Storm event

The term ‘storm event’ already is used in Ch. 30 relating to artificial waterbodies, specifically with regards to artificial waterbody jurisdiction and permit requirements. (e.g. 30.19(1g)(am)). S. NR 343, Wis. Adm. Code defines storm event as:

NR 343.03(9) (9) "Storm event" means any amount of precipitation equal to or greater than 0.01 inches with a minimum time between storms of 6 hours

Act 387 has added a new exemption from permitting to the statutes: s. 30.19(1m)(dm):

30.19(1m)(dm) The dredging of any part of an artificial water [body] that does not connect with a navigable waterway. An artificial water body that meets the requirements of this paragraph includes a stormwater management pond that does not discharge into a navigable waterway except as a result of storm events.

In determining artificial waterbody jurisdiction under s. 30.053 and the applicability of the exemption in s. 30.19(1m)(dm), Wis. Stats., the department will use the current administrative rule definition for storm event.

Hydrologically connected

The term ‘hydrologically connected’ is not defined in the statute or administrative rule. If the statute and rules do not define a term, standard statutory construction precepts allow the Department to use and apply any ‘term of art’ definition used in industry, projects, etc. or a standard dictionary definition. Some of the standard definitions of hydrologically connected are:

“connected to downstream waters via channels that convey surface and subsurface water either year-round (i.e., perennial flow), weekly to seasonally (i.e., intermittent flow), or only in direct response to precipitation (i.e., ephemeral flow)”.

“through natural or constructed channels, nonchannelized surface flows, or subsurface flows”

“connections via surface water (both channelized and nonchannelized) or groundwater, can be continuous, seasonal, or ephemeral, depending on the overall hydrologic conditions in the watershed”

All these definitions, while descriptive and all encompassing, may be difficult to implement when determining the state’s jurisdiction over artificial waterbodies. For example identifying a consistent method to determine sub surface flow and groundwater connections might be impractical when dealing with a man-made pond. For this reason and to avoid an interpretation of this term that could be in conflict with existing case law or federal interpretation of this term used in the Federal Clean Water Act, the Department has chosen to use the definition found in NR 343.03(3) to describe artificial waterbodies that are ‘hydrologically connected’ but will limit the definition applicability to ‘natural navigable waterway’ (as defined earlier in this guidance) instead of the broader ‘navigable waterway’.

NR 343.03(3) (3) "Connects with a navigable waterway" means any artificial waterbody that is attached by means of enlargement or by a natural or artificial channel or drainage course, or an open or closed conduit, any of which tend to confine and direct flow into the existing navigable waterway.

This means that artificial waterbodies that do not connect with ‘natural navigable’ waterbodies as described in the definition above (and do not discharge to natural navigable waterbodies except in as a result of storm events) will be not be considered jurisdictional and Ch. 30 would not apply. Since the advent of NR 343.03(3) definition in 2004 the Department has applied this definition to include intermittent waterways that connects with a navigable waterway and will continue to do so.

It should be noted that although an artificial waterbody that meets the criteria (as interpreted by this guidance) listed under s. 30.053, Wis. Stats., is considered non-jurisdictional, any discharge of fill associated with that artificial waterbody that occurs in a wetland will trigger wetland jurisdiction under s. 281.36, Wis Stats., (including an artificial waterbody located in a wetland, even though the artificial waterbody in itself is not regulated under Ch. 30, Wis. Stats.).

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8/22/2016

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