

The attached guidance entitled “**The artificial wetland exemption under s. NR 103.06(4), Wis. Admin. Code**” was developed to help Department staff in the Bureau of Watershed Management interpret the “artificial wetland” exemption when making jurisdictional decisions.

Wisconsin Water Quality Standards for Wetlands, located in Ch. NR 103, Wis. Admin. Code, apply to projects in or adjacent to wetlands. Some artificially created landscape features may look like wetlands, so s. NR 103.06(4), Wis. Admin. Code, identifies certain of these features and exempts them from the wetland water quality standards in Ch. NR 103, Wis. Admin. Code, **unless** the department determines that a feature has significant functional values or uses under s. NR 103.03(1) (e), (f), or (g).

This guidance is intended to help staff interpret the Ch. NR 103 artificial wetland exemptions consistently. It does not address any exemptions or exceptions under federal wetland regulations or any other state or federal regulations.

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

Comments related to this draft guidance document should be sent to Heidi Kennedy via e-mail at DNRWYWRZGuidance@wisconsin.gov or by phone at (608) 261-6430.

The Artificial Wetland Exemption under s. NR 103.06(4), Wis. Admin. Code.



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Description and Need

Protecting and preserving Wisconsin's wetlands is crucial for the state's economy and environment. Wetlands play a critical role in maintaining the overall health and functioning of lakes, rivers, prairies and forests by providing critical habitat for many of Wisconsin's plants, fish, and wildlife. Wetlands also protect us from flooding, clean our water, provide recreational, educational and scientific opportunities, and offer natural scenic beauty. While all wetlands in Wisconsin are protected under state law, some wetlands are also protected under the federal Clean Water Act or by local government ordinances. State and Federal wetland regulations require that impacts from direct discharges of pollutants should be avoided when possible. If the wetland impacts cannot be avoided, the landowner must minimize the impacts to the wetlands and obtain a permit from the Department - and in some instances also from the US Army Corps of Engineers (ACOE) – before causing the proposed wetland impacts.

Wetlands typically exhibit (1) hydric soils, (2) hydrophytic vegetation, and (3) hydrology at or near the surface. However, alterations by humans to the landscape can result in landscape features that appear to be wetlands and that may even exhibit hydrophytic vegetation and hydrology. Wisconsin wetland water quality standards in s. NR 103.06(4), Wis. Admin. Code, recognize a few common landscape features that may appear to be wetlands but were artificially created by humans manipulating the landscape, and exempts these artificially created landscape features from Wisconsin wetland water quality standards.

This guidance is intended to clarify the exemption in s. NR 103.06(4), Wis. Admin. Code, ensure the exemption is consistently interpreted and the State's wetland water quality standards are consistently applied, and establish the process for making these decisions. However, this document does not address any exemptions or exceptions under federal wetland regulations or any other local, state or federal regulations that may apply to wetlands. Furthermore, this guidance is only intended to address the process for applying the artificial wetland exemption to determine whether or not a wetland permit for a proposed project is required from the Department under s. 281.36, Wis. Stats.

Overview of the ch. NR 103 exemptions

The exemption for artificial wetlands in s. NR 103.06(4), Wis. Admin. Code, allows landowners to impact certain artificial wetlands if the landowner notifies the department that the landowner intends to begin a project in a wetland that the landowner believes is artificial and exempt from at least 15 working days prior to initiating a project. The Department then must determine if the artificial wetland is one of the landscape features listed in the exemption and if the artificial wetland has significant functional values. The 15 working days

applies to the decision as to whether an artificial wetland is exempt under NR103, and not to the initial determination or confirmation whether a wetland is natural or artificial.

An artificial wetland is defined in NR 103.02(1m), Wis. Adm. Code as “a landscape feature where hydrophytic vegetation may be present as a result of human modifications to the landscape or hydrology for which there is not prior wetland or stream history.” The exemption then lists a number of landscape features that could be considered artificial by the Department and exempt from the State’s wetland water quality standards.

- 1) Sedimentation and stormwater detention basins and associated conveyance features operated and maintained only for sediment detention and flood storage purposes.
- 2) Active sewage lagoons, cooling ponds, waste disposal pits, fish rearing ponds and landscape ponds.
- 3) Actively maintained farm drainage and roadside ditches.
- 4) Artificial wetlands within active nonmetallic mining operations.

For wetlands that meet the exemption standards in NR 103.06(4), Wis. Adm. Code, the department does not require the landowner to obtain a wetland permit. On the other hand, if the wetland does not meet the exemption standards, the landowner must then meet the statutory standards and obtain a permit from the Department under s. 281.36, Wis. Stats. prior to impacting the wetland. These exemptions do not apply to wetlands regulated by the U.S. Army Corps of Engineers under federal rules.

Interpretation and applicability of artificial wetland exemption

As described above, an artificial wetland is defined in NR 103.02(1m), Wis. Adm. Code as “a landscape feature where hydrophytic vegetation may be present as a result of human modifications to the landscape or hydrology for which there is not prior wetland or stream history.” The definition of an artificial wetland alludes to the fact that the landscape features identified in NR 103.06(4), Wis. Adm. Code, may develop characteristics of a wetland even though the landscape features were originally constructed in an upland area. The intent of the exemption is to allow these particular features to be maintained or filled without having to meet the wetland water quality standards, unless these areas have developed significant functional values. The following paragraphs will discuss when these landscape features will be considered exempt and steps the department will take in making that determination.

Definition of a wetland

To make a determination whether a landscape feature meets the artificial wetland exemption in NR 103.06(4), Wis. Adm. Code, staff must first determine whether the landscape feature meets the definition of a wetland. A wetland is defined in NR 103.02(5) as an “area 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.” In determining whether or not a landscape feature meets the definition of a wetland, staff will need to consider whether or not normal circumstances are present. When land has been physically manipulated or disturbed, one or more of the wetland parameters may have been removed, obscured or misleading and staff need to consider whether the conditions on site represent normal circumstance or not.

To make these determinations, section 281.36(2m), Stats. directs the Department to utilize the procedures contained in the 1987 edition of the ACOE Wetland Delineation Manual and any other documents developed by the ACOE to interpret that manual. This Wetland Delineation Manual shall be used by staff for determining where wetland areas are located and for delineating wetland boundaries. The 1987 edition of the ACOE Wetland Delineation Manual and associated documents applicable to the State of Wisconsin may be found at <http://dnr.wi.gov/topic/wetlands/delineation.html>. If a landscape feature does not meet the definition of

wetland, then the State's wetland regulations under s. 281.36, Stats. and NR 103, Wis. Adm. Code, would not apply to the project and it is not necessary to apply the artificial wetland exemption.

If the landscape feature exhibits the characteristics necessary to be defined as a wetland, the next step is for staff to determine or confirm if the landscape feature was constructed in an area with prior wetland or stream history.

Prior wetland or stream history

In the past many of these landscape features were constructed in wetlands or streams, or were constructed in areas that were historically wetland or a waterway, particularly if they were constructed prior to 1991 when Ch. NR 103, Wis. Adm. Code was enacted. When these landscape features are located in an area that historically was a wetland or a stream, the exemption in NR 103.06(4), Wis. Adm. Code does not apply and projects impacting that landscape feature would need to comply with s. 281.36, Stats. unless the project falls within some other federal Clean Water Act exemption.

To determine whether or not these landscape features were constructed in areas that have prior wetland or stream history, staff must conduct a review of historical maps, aerial photos and database records. If the area in question is located in a mapped hydric soil, that shows the landscape feature has a wetland history, the landscape feature would therefore not be artificial. If the area in question is located in a mapped inclusion soil or a mapped non-hydric soil, the landscape feature may be artificial and we will need supplemental data such as a soil profile, aerial photographs, topographic surveys and the like to determine if wetland history is present. When these landscape features are constructed in areas that have wetland or stream history, projects impacting the landscape features are regulated like any other wetland in the State under s. 281.36, Wis. Stats., unless the projects falls within one of the other federal Clean Water Act exemptions. See examples in Appendix B.

On the other hand, if the historic map and records review indicates that the landscape feature was constructed in an area that historically was not a wetland or a stream, the next step is for staff to determine if the landscape feature is one of the artificial wetlands identified in NR 103.06(4), Wis. Adm. Code.

Categories of potential artificial wetlands under NR 103.06(4).

Section NR 103.06(4), Wis. Adm. Code. lists a number of landscape features that may be considered artificial wetlands and includes:

1. Sedimentation and stormwater detention basins and associated conveyance features operated and maintained only for sediment detention and flood storage purposes.
2. Active sewage lagoons, cooling ponds, waste disposal pits, fish rearing ponds and landscape ponds.
3. Actively maintained farm drainage and roadside ditches.
4. Artificial wetlands within active nonmetallic mining operations.

For staff to determine whether or not a landscape features is one of the listed artificial wetlands, staff need to request and then review information submitted by the applicant or owner. In the process section of this guidance, the department identifies the type of information staff should request in making these determinations. The remainder of this section will define or describe the meaning of these terms to ensure consistent interpretation and application of the exemption.

To begin with each of the landscape features listed uses the adjectives "active" or "maintain" or a combination of both terms to describe these landscape features. There is no definition in the Administrative Code or anywhere else in state law that defines or describes the meaning or intent of these adjectives in describing these landscape features. As such, common practice would necessitate that the department would utilize common dictionary definitions to help understand the meaning of "active" or "maintain" in the context of the exemption.

Webster's dictionary¹ contains many definitions of "active", but the one that is the most pertinent to the exemption in NR 103.06(4), Wis. Adm. Code is the definition that for something to be active it is "marked by present operation, transaction, movement or use." Similarly, the most pertinent dictionary definition of "maintained" applicable for the exemption is "to keep in an existing state (as of repair, efficiency or validity): preserve from failure or decline."

Utilizing these definitions to interpret the exemption, it becomes clear that an active nonmetallic mining operation or an active sewage lagoon is one that is being currently operated or used for nonmetallic mining or for sewage treatment or storage and those nonmetallic mining operations or sewage lagoons that have been sitting idle for years would not fall within the exemption in NR 103.06(4), Wis. Adm. Code. Sedimentation and stormwater detention basins might require very little or no maintenance for multiple years. Provided the facility continues to function as designed, the facility will still qualify for the exemption under s. NR 103.06(4)1. Sedimentation basins that are no longer operating or being maintained for sediment or flood storage would no longer fall within the exemption and may be regulated under s. 281.36, Wis. Stats. Staff should request information from the applicant showing that the nonmetallic mining operation or sewage lagoon is currently being operated or used for the intended purposes.

If the landscape feature is a sedimentation or stormwater basin and associated conveyance features, staff should request the applicant to submit information showing that the landscape feature is operating and being maintained for sediment removal or flood storage. Such information includes any or all of the following:

- the original plans and specifications that depict the purpose and design of the practice,
- the maintenance plan and/or maintenance agreement showing the procedures and schedule for inspections and maintenance,
- records of any Department permits needed for the original construction of the practice,
- records showing any previous activities to maintain the effective and intended sediment removal or flood storage capacity.

The Department will also use the same considerations for other storm water treatment best management practices that have been constructed to meet the storm water or runoff management requirements of chs. NR 216 and NR 151, Wis. Adm. Code, e.g., bioretention practices, infiltration basins, vegetated swales.

Further, an actively maintained farm drainage or roadside ditch is one that is currently being used to transport water and is being kept in a state of repair could be exempt. A common question that arises is what constitutes an actively maintained farm drainage ditch or roadside ditch. In other words, how often do these landscape features need to be maintained to be considered exempt? Staff should request from the applicant or owner information on past maintenance of these features. For example how often they dredge or grade these ditches, is there any routine vegetative maintenance or any other activities that are being conducted along the ditch to show that the ditch is being actively maintained? If the applicant or owner is unable to provide any information or a description of maintenance activities that have occurred then it is unlikely the ditch will meet the exemption under NR 103.06(4), Wis. Adm. Code.

Next, some of the landscape features listed are ambiguous and subject to multiple interpretations. For example, a common question that arises is whether or not ditches adjacent to railroads are considered roadside ditches. There is no definition in state law that defines the term road or roadside. Exemptions from regulations are to be read narrowly and while there are definitions of highway or transportation, those definitions encompass a much broader range of facilities that clearly would not fall within the definition of a road. As such, roadside ditches are those ditches adjacent to public roads utilized for vehicular traffic.

¹ <http://www.merriam-webster.com/>

Another common question is what constitutes an “associated conveyance feature” as it relates to sedimentation and stormwater detention basins. There is no definition of “conveyance” in state law, but Webster’s Dictionary defines “conveyance” as the “act of taking or carrying someone or something from one place to another.” Thus a conveyance feature that is associated with a sedimentation or stormwater detention basin includes something, like a ditch, pipe or other device that moves water to or from a sedimentation or stormwater detention basin. While, a berm may be a common stormwater practice to impede runoff into nearby streams and wetlands, if the berm is not also associated with a ditch or pipe to divert the water to a sedimentation or stormwater detention basin, then it would not be considered a conveyance feature.

While staff should look to other state statutes or administrative codes that define many of the listed landscape features², some of the other listed landscape features, such as waste disposal pits or landscape ponds, are ambiguous terms where no definition may be found in state law or the dictionary. In those cases staff should ask the applicant or owner to provide documentation showing why a particular landscape feature falls within one of the features listed in the Administrative Code and therefore qualifies for the exemption. Staff should consult with policy staff and or legal staff in making these determinations to ensure consistent interpretation of these ambiguous terms.

Significant Functional Values

When staff determine that a particular landscape feature, meets wetland criteria was not constructed in an area that historically was a wetland or a stream, and the landscape feature is one of those listed as artificial in the administrative code, the final step in the process is for staff to determine if the artificial wetland has significant functional values. While section NR 103.03(1), Adm. Code, contains the list of all of the functional values wetlands may serve in our environment for the purposes of the exemption, artificial wetlands are only regulated if they provide significant habitat for fish or other aquatic organisms and wildlife or if the wetland provides significant recreational, cultural, educational or scientific uses or natural scenic beauty. Artificial wetlands that do significantly exhibit those functional values are not exempt and must meet the standards and obtain a permit under s. 281.36, Stats., whereas those that do not would then be considered exempt under NR 103.06(4), Wis. Adm. Code.

Staff should determine the wetland functional values of the artificial wetland using the same wetland ecological evaluation methods utilized by the Department during its wetland permitting process. The assessment should be done during a site inspection and staff should generally follow the Wisconsin Rapid Assessment Methodology for Evaluating Wetland Functional Values (WRAM). This qualitative method is a standardized process for the professional to evaluate the extent to which the artificial wetland performs a given function or value.

While every wetland has some value, staff must determine whether or not the artificial wetland provides a significant amount of habitat, or human use values. For example, some of the roadside ditches in the northeastern part of the state provide significant habitat for fish spawning. This will require a case-specific assessment to assess significance as there is no formula for quantifying when an artificial wetland provides *significant* functional values vs. just some functional value for habitat or human use values. Staff may also need to consult with other department staff, such as fisheries or wildlife biologists, to determine whether or not the artificial wetland has significant functional values.

² Appendix A includes some definitions for those landscape features that are defined or described elsewhere in state law and will assist staff in determining whether a landscape feature falls within the exemption under NR 103.06(4).

Process

To fall within the exemption under s. NR .103.06(4), Wis. Adm. Code a person must notify the Department at least 15 working days prior to starting a project that may require a wetland permit from the Department under s. 281.36, Wis. Stats. The Department then has 15 working days to respond to the person whether or not the landscape feature meets one of the artificial wetland exemptions. The 15 working days does not apply to the determination of whether a wetland is artificial or natural. To evaluate the criteria described above and within the timeline established in the administrative code, the Department must request information from the person or owner of the property. If the person is unable to provide the required information, then the landscape feature should not be considered exempt and a letter should be written to the person stating that the wetland will be regulated under s. 281.36, Stats. To aid the public in submitting the necessary information the Department has developed a form and associated exemption determination checklist outlining the basic information that should be submitted to our Wetland Identification staff to accurately determine whether or not the landscape feature would be considered an artificial wetland under s. NR 103.06(4), Wis. Adm. Code. The form and associated exemption determination checklist can be found at <http://dnr.wi.gov/topic/Wetlands/identification.html>.

Some of the typical documentation requested in this form and checklist includes

- Construction plans
- Maintenance plans
- Ownership information
- Copies of state, federal or local permits obtained for construction, maintenance or operation of the landscape feature
- Documentation of any connection to storm sewer system
- Copies of any fish stocking permits, fish hatchery licenses, etc.
- Tiling or drainage plans
- Copies of work orders, bills, etc. for any past maintenance work
- Aerial photo documenting agricultural or roadway use
- Previous agency approvals or correspondence

Once the Department receives an artificial wetland exemption determination request with the information identified in the exemption determination checklist, staff will review that information and go through each of the steps outlined above. These steps include map review, aerial photograph review, database review, and review of any other information the staff deem necessary to determine if there is prior wetland or stream history. If necessary staff may conduct a field visit to determine if the landscape feature meets the definition of a wetland, provides significant wildlife, aquatic life, or aesthetic functional values, or to evaluate submitted information to determine if the landscape feature is one of those listed under NR 103.06(4). After completing their review, staff will respond to the person in writing with their determination.

Conclusions

Protecting and preserving Wisconsin's wetlands is critical for the state's economy and environment. All wetlands in Wisconsin are protected under state law and some wetlands are also protected under the federal Clean Water Act and by local government ordinances. State and Federal wetland regulations require that impacts from direct discharges of pollutants should be avoided when possible and if the wetland impacts cannot be avoided, the landowner must minimize the impacts to the wetlands and receive a permit from the Department and in some instances the US Army Corps of Engineers (ACOE) prior to proceeding with the proposed wetland impacts. However, alterations by humans to the landscape can result in landscape features that would appear to be wetlands and may even exhibit hydrophytic vegetation and hydrology.

The State's wetland water quality standards in s. NR 103.06(4), Wis. Adm. Code recognizes a few of the common landscape features that may appear to be wetlands but are artificially created by human manipulation of the landscape, and exempts these artificially created landscape features from the State's wetland water quality standards. This guidance is intended to clarify the exemption in s. NR 103.06(4), Wis. Adm. Code to ensure consistent interpretation and application of the State's wetland water quality standards and establish the process for making these decisions. It is important to note that this document does not address the exemptions and exceptions in the Federal wetland regulations or any other local, state or federal regulations applicable to wetlands.

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Approved:

DRAFT

Pam Biersach, Bureau Director, Watershed Management

Date

Contact (608) 261-6430 or DNRWYWRZGuidance@wisconsin.gov for further information.

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Appendix A Definition of Terms

S. 30.10(4)(c) Notwithstanding any other provision of law, farm drainage ditches are not navigable within the meaning of this section unless it is shown that the ditches were navigable streams before ditching. For purposes of this paragraph, “farm drainage ditch” means any artificial channel which drains water from lands which are used for agricultural purposes.

s. 95.001(1)(aj) "Fish farm" means a facility at which a person hatches fish eggs or rears fish for the purpose of introduction into the waters of the state, human or animal consumption, permitting fishing, use as bait or fertilizer or any other purpose specified by the department by rule or for sale to another person to rear for one of those purposes.

NR 116.03(12) “Flood” or “flooding” means a general and temporary condition of partial or complete inundation of normally dry land areas caused by:

- (a) The overflow or rise of inland waters;
- (b) The rapid accumulation or runoff of surface waters from any source;
- (c) The inundation caused by waves or currents of water exceeding anticipated cyclical levels along the shore of Lake Michigan or Lake Superior; and
- (d) The sudden increase caused by an unusually high water level in a natural body of water, accompanied by a severe storm, or by an unanticipated force of nature, such as a seiche, or by some similarly unusual event.

NR 135.03(13) “Nonmetallic mining” or “mining” means all of following:

- (a) Operations or activities at a nonmetallic mining site for the extraction from the earth of mineral aggregates or nonmetallic minerals for sale or use by the operator. Nonmetallic mining includes use of mining equipment or techniques to remove materials from the in-place nonmetallic mineral deposit, including drilling and blasting, as well as associated activities such as excavation, grading and dredging. Nonmetallic mining does not include removal from the earth of products or commodities that contain only minor or incidental amounts of nonmetallic minerals, such as commercial sod, agricultural crops, ornamental or garden plants, forest products, Christmas trees or plant nursery stock.
- (b) Processes carried out at a nonmetallic mining site that are related to the preparation or processing of the mineral aggregates or nonmetallic minerals obtained from the nonmetallic mining site. These processes include, but are not limited to stockpiling of materials, blending mineral aggregates or nonmetallic minerals with other mineral aggregates or nonmetallic minerals, blasting, grading, crushing, screening, scalping and dewatering.

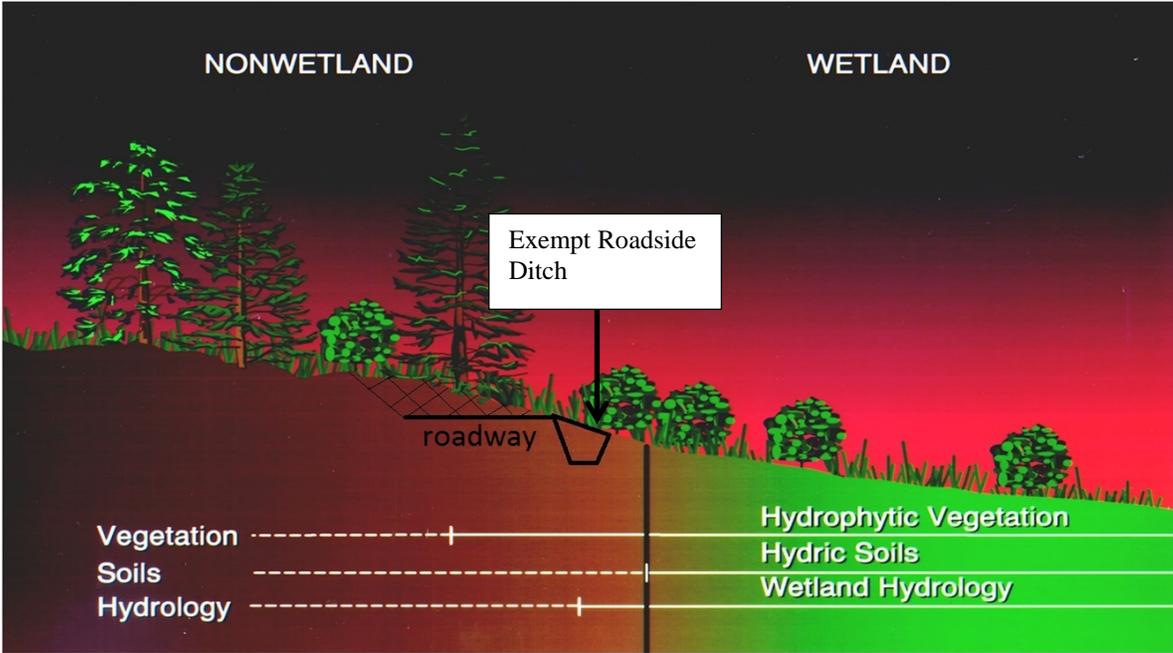
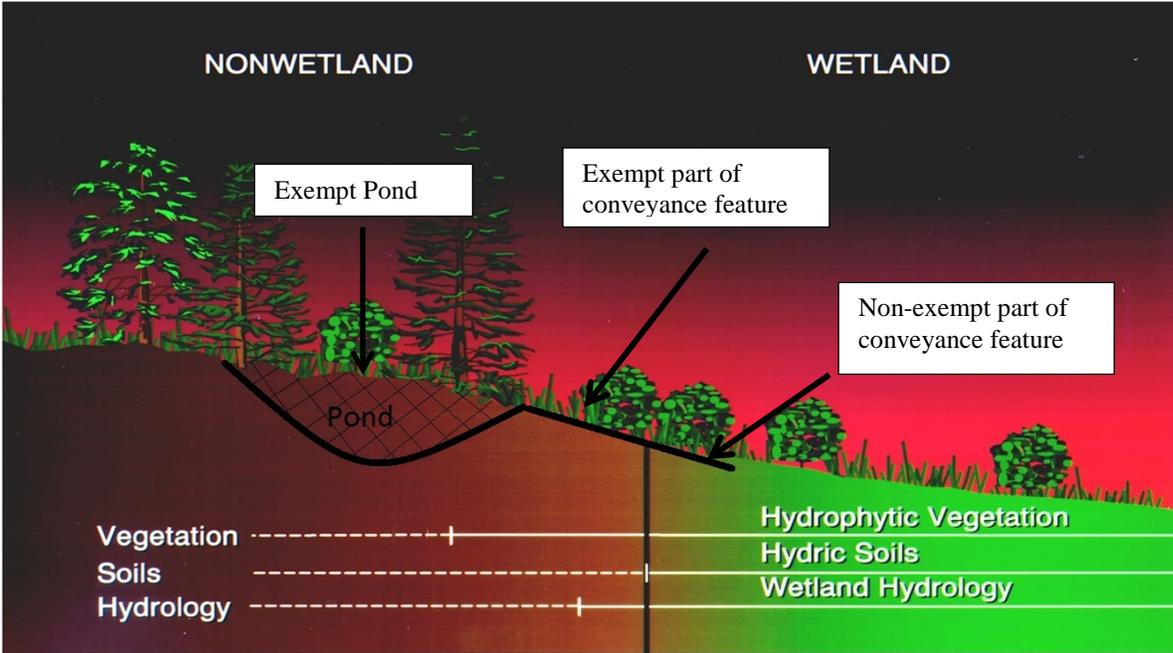
s. 281.01(13) “Sewage” means the water-carried wastes created in and to be conducted away from residences, industrial establishments, and public buildings as defined in s. 101.01 (12), with such surface water or groundwater as may be present.

NR 216.002(33) “Storm water” means runoff from precipitation including rain, snow, ice melt or similar water that moves on the land surface via sheet or channelized flow.

NR 343.03(11) “Stormwater management pond” means any temporary or permanent artificial water body designed to specifications generally accepted to reduce the water quantity or water quality impacts of stormwater and to hold water for any period of time.

s. 283.01(18) "Treatment work" means any devices and systems used in the storage, treatment, recycling, and reclamation of municipal sewage or industrial waste of a liquid nature or necessary to recycle or reuse water at the most economical cost over the estimated life of the work, including intercepting sewers, outfall sewers, sewage collection systems, cooling towers and ponds, pumping, power and other equipment, and their appurtenances; extensions, improvements, remodeling, additions, and alterations thereof; elements essential to provide a reliable recycled supply such as standby treatment units and clear well facilities; and any works, including site acquisition of the land that will be an integral part of the treatment process or is used for ultimate disposal of residues resulting from such treatment. Additionally, "treatment work" means any other method or system for preventing, abating, reducing, storing, treating, separating or disposing of municipal waste, including storm water runoff, or industrial waste, including waste in combined storm water and sanitary sewer systems.

**Appendix B
Examples**





Soil Mapping Example: Roadside ditch, Granby = hydric. Not artificial therefore, not exempt.



Soil Mapping Example:

- Road side ditch
- Hu = hydric, not exempt
- ZuB = not hydric, need supplemental soil information.
- HrC = not hydric, need supplemental soil information.