

The attached draft guidance entitled “**Applicability of the exemptions for agricultural use or farm drainage ditches under Ch. 30 and s. 281.31, Wis. Stats.**” was developed to help Department of Natural Resources staff understand and apply statutory exemptions for projects related to agricultural use.

Several statutory exemptions for agricultural use or farm drainage ditches in Ch. 30 and section 281.31, Wis. Stats., determine whether the Department has jurisdiction over activities in, over, or adjacent to waterways and whether those activities are exempt from shoreland zoning standards. This guidance will help Department staff understand and consistently apply the various exemptions for agricultural use and farm drainage ditches.

This guidance does **not** address agricultural exemptions or jurisdiction under state and federal wetland regulations, floodplain zoning, drainage statutes in Ch. 88, Wis. Stats., or any other local, state or federal regulations that may apply to agricultural lands.

This draft guidance was developed by staff from the Department’s Bureau of Watershed Management and has been reviewed internally.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Comments related to this draft guidance should be provided to Martye Griffin via e-mail at dnrwywrzguidance@wisconsin.gov or phone at (608) 266-2997.

Applicability of the exemptions for agricultural use or farm drainage ditches under ch. 30 and s. 281.31, Wis. Stats.



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Description and Purpose of This Guidance

Agriculture remains a vital part of Wisconsin's economy, contributing to both jobs and income. The department recognizes the unique nature of the state's agricultural industry and the industry's declared interest in protecting and preserving the state's natural resources. To promote agricultural production the statutes protecting navigable waters under Ch. 30 and s. 281.31, Wis. Stats., contain a number of exemptions for agricultural activities that are in, over, or adjacent to waterways and farm drainage ditches.

The variation in language between the statutory exemptions has resulted in ambiguity and difficulty in applying these exemptions. This document will (1) help staff consistently apply the statutory exemptions, and (2) provide certainty and clarity to help the agricultural industry understand each exemption and when various activities on agricultural lands are regulated or are exempt under chs. 30, 88, and s. 281.31. Wis. Stats.

Scope of This Guidance

This document does **not** address agricultural exemptions associated with state and federal wetland regulations, floodplain zoning or any other local, state or federal regulations that may apply to agricultural lands. This document also does **not** discuss s. 94.26, Wis. Stats. ("The Cranberry Law") that courts have held that cranberry growers are exempt from certain requirements under Chs. 30 and 31, Wis. Stats. Also note that the exemptions in Ch. 30 and s. 281.31, Wis. Stats., do not apply to the regulation of dams under Ch. 31, Wis. Stats.

Overview of Statutory Exemptions for Agricultural Use and Farm Drainage Ditches

Four statutes in Ch. 30 and s. 281.31, Wis. Stats. exempt specific agricultural activities that are undertaken in, over, or adjacent to navigable waterways or farm drainage ditches. The agricultural use exemptions are:

- A. *Ch. 30 Agricultural Use & Farm Drainage Ditch Exemptions (Ss. 30.19, 30.20, and 30.10, Wis. Stats.)*
 1. *S. 30.19, Wis. Stats. - An activity that meets the exemption criteria does not need a s. 30.19 permit.* Section 30.19(1m), Wis. Stats., exempts grading the bank of a navigable waterway or constructing, dredging, or enlarging any part of an artificial water body connected to or within 500 feet of a navigable from needing a s. 30.19 permit for activities with an agricultural purpose occurring on land used for agriculture.

Applicability of the exemptions for agricultural use or farm drainage ditches under ch. 30 and ss. 94.26 and 281.31, Wis. Stats.

2. *S. 30.20, Wis. Stats. - An activity that meets the exemption criteria does not need a s. 30.20 permit (see exception below). Section 30.20(1g)(a)1., Wis. Stats., exempts the removal of material from the bed of a farm drainage ditch which was not a navigable stream before ditching from needing a s. 30.20 permit, unless the department finds removal may have a long-term adverse effect on cold-water fishery resources or may destroy fish spawning beds or nursery areas.*
3. *S. 30.10(4)(c), Wis. Stats., provides that “navigable in-fact” farm drainage ditches as defined in s. 30.10 are not navigable within the meaning of s. 30.10 unless they were navigable streams before ditching.*

B. Shoreland Zoning Exemption (S. 281.31, Wis. Stats.)

An activity conducted on land adjacent to a farm drainage ditch that meets the exemption criteria in s. 281.31, Wis. Stats., is not subject to shoreland zoning ordinances enacted under ss. 59.69 and 281.31, Wis. Stats. Section 281.31(2m), Wis. Stats., exempts lands adjacent to a farm drainage ditch from ordinances created under state shoreland, wetland, and construction site erosion control and storm water management zoning statutes if the lands are not adjacent to a natural navigable stream or river, the ditch was a non-navigable stream before ditching, and the lands are maintained in nonstructural agricultural use.

Understanding and Applying the Agricultural Use and Farm Drainage Ditch Exemptions

A. Chapter 30 Farm Drainage Ditch & Agricultural Use Exemptions

The three Ch. 30 farm drainage ditch and agricultural use exemptions apply broadly to all other agricultural sectors, except for cranberry production.¹ Each statute exempts certain uses and ditches from its permit requirements. To decide whether an activity qualifies for any of the three ch. 30 exemptions, staff should first ask 2 questions:

Q: Is land next to the waterway or ditch at the site of the proposed activity now in “agricultural use”?

To assess whether any of the three ch. 30 exemptions applies, staff should determine whether land adjacent to the waterway or ditch at the site of the proposed activity is currently in “agricultural use.” Although “Agricultural use” is not defined in ss. 30.19, 30.20, 30.10, or 281.31, Wis. Stats, in 1989 the legislature enacted a definition of “agricultural use” in s. 30.40(1), Wis. Stats., and the department began using that definition in applying the exemptions in ss. 30.19, 30.20, 30.10 and 281.31, Wis. Stats:

Wis. Stat. s. 30.40(1) “Agricultural use” means beekeeping; dairying; egg production; feedlots; grazing; floriculture; raising of livestock; raising of poultry; raising of fruits, nuts and berries; raising of grains, grass, mint and seed crops; raising of vegetables; and sod farming.”

In 2005 the department defined “agricultural use” for s. 30.19, Wis. Stats., by rule. Those definitions may be found in Chs. NR 341.03(1) and 343.03(1), Wis. Adm. Code. While these definitions are equivalent to the definition in s. 30.40(1), Wis. Stats., staff should refer to these definitions when deciding if the s. 30.19 exemption for “agricultural use” applies to a proposed activity.

¹ Section 94.26, Wis. Stats., exempts owners of cranberry growing land from certain requirements of chs. 30 and 31, Wis. Stats. Please see the Department’s existing guidance to understand the scope of this exemption.

Q: Will the purpose of the proposed activity serve an agricultural use?

If the adjacent lands are currently in “agricultural use,” staff should determine if the purpose of the proposed activity will serve an agricultural use. Since exemptions are for *proposed* activities to facilitate an *existing* agricultural use of land, staff should consider *why* an activity is being proposed on land currently used for agriculture – what is the purpose of the project and will it serve an agricultural use once completed? The exemptions do not apply to activities that are not for the purposes of facilitating the agricultural use of the land. For example, the installation of a utility line through a waterway on agricultural land would be exempt if the utility line facilitates agricultural production, such as electricity to operate an irrigation system; whereas a utility line that is meant to provide electricity to the community is not exempt. Also the activity is not exempt if the purpose of the project is to support future non-agricultural uses of the land, such as the installation of sanitary sewer for future development, or to convert land that is not currently in agricultural use into agriculture, such as clearing and grading a forested area to allow for agricultural use.

Once staff determine a proposed activity will be conducted on lands in existing agricultural use and the purpose of the project will serve an agricultural, they should determine which exemption may apply to the proposed activity.

1. S. 30.19, Wis Stats. exemption - grading the bank of a navigable waterway/creating an artificial water body

Section 30.19 (1m), Wis. Stats., provides an exemption for grading on the banks of a navigable waterway and the construction of artificial waterways located within 500 feet of a navigable waterway or connected to a navigable waterway if the adjacent land is in agricultural use. The statute does not define “agricultural use” but the intent is to exempt activities that serve an agricultural use— e.g., constructing livestock ponds, tilling, and cropping - from the need to obtain a s. 30.19 permit.

Section NR 341.03(1), Wis. Admin. Code, defines “agricultural use” when the proposed activity is to grade the bank of a navigable waterway under s. 30.19(1g)(c):

Wis. Adm. Code NR 341.03 Definitions. For the purposes of this chapter the following definitions apply:

(1) "Agricultural use of land" means planting, growing, cultivating and harvesting of crops for human or livestock consumption, pasturing or yarding of livestock, sod farms and beekeeping. This definition does not include the construction of structures such as barns, manure storage facilities or barnyard runoff control systems.

Note: This definition is equivalent to the definition in s. [30.40 \(1\)](#), Stats., and differs from the definition in ss. [NR 151.002 \(2\)](#) and [216.42 \(2\)](#) only in that beekeeping is included and tree nurseries are not included.

...

(4) "Grading" means the physical disturbance of the land surface by the addition, removal or redistribution of soil.”

Section NR 343.03(1), Wis. Admin. Code, defines “agricultural use” when the proposed activity is to construct, dredge, or enlarge an artificial water body that connects with or is located within 500 feet of an existing navigable water body under s. 30.19(1g)(a) or (am):

Wis. Adm. Code NR 343.03 Definitions. For the purposes of this chapter, the following definitions are applicable:

(1) "Agricultural use of land" means planting, growing, cultivating and harvesting of crops for human or livestock consumption, pasturing or yarding of livestock, sod farms and beekeeping.

Note: This definition is equivalent to the definition in s. [30.40 \(1\)](#), Stats., and differs from the definition in ss. [NR 151.002 \(2\)](#) and [216.42 \(2\)](#) only in that beekeeping is included and tree nurseries are not included.

Applicability of the exemptions for agricultural use or farm drainage ditches under ch. 30 and ss. 94.26 and 281.31, Wis. Stats.

Department staff should use these administrative rule definitions when deciding if the s. 30.19 exemption for “agricultural use” applies to a proposed activity. Since the legislative intent is to exempt activities that serve an agricultural use from the s. 30.19 permit requirement, department staff should ask the two questions discussed on pages 3 and 4 about agricultural use and purpose. For example:

- A landowner proposes to construct a pond in a pasture within 500 feet of a navigable waterway to use as a livestock watering pond. If the land is currently in agricultural use the purpose of the proposed activity will serve an agricultural use and is exempt from obtaining a permit under s. 30.19, Wis. Stats..
- A landowner proposes to construct the same pond in the same location to use as a landscape or wildlife pond. The purpose of the activity will not serve an agricultural use and requires a permit under s. 30.19, Wis. Stats.
- A farmer is disturbing the banks of a waterway by tilling or harvesting an agricultural crop in a manner that redistributes topsoil to constitute grading under s. NR 341.03(4). The land is currently in agricultural use and the purpose of the proposed activity will serve an agricultural use and is exempt from obtaining permit under s. 30.19, Wis. Stats.
- A landowner proposes to grade on the bank of a navigable water. The adjacent land is currently in agricultural use, but the purpose of the grading is to prepare the land for residential, industrial, commercial, or other nonagricultural development. The purpose of the grading activity will not serve an agricultural use and it requires a permit under s. 30.19, Wis.Stats.
- A landowner proposes to grade on the banks of a navigable waterway to stabilize the stream bank to reduce erosion of the tillable land into the waterway. The adjacent land is currently in agricultural use. Because the land is in agricultural use and the purpose of the proposed activity will serve an agricultural use, the activity is exempt from the need for a s. 30.19 permit.
- A landowner proposes to grade and place fill on the banks of a navigable waterway to increase tillable land by changing the stream course to eliminate natural meanders or by filling a wetland vegetative buffer. The adjacent land is currently in agricultural use. Because the land is in agricultural use and the purpose of the proposed activity will serve an agricultural use, the activity is exempt from the need for a s. 30.19 permit.

Keep in mind that activities exempt from a s. 30.19 permit still may require other permits, e.g.:

- A permit under s. 30.195, Wis. Stats., may be needed if the activity includes changing the course of or straightening a navigable stream, since the s. 30.19(1m)(b) exemption only exempts the activity from s. 30.19 permit requirements. However, section 30.195 may not apply if the waterway section to be changed is a farm drainage ditch considered non-navigable under s. 30.10(4)(c), Wis. Stats. (*see below*).
- A permit under s. 281.36, Wis. Stats. may be needed if the activity includes filling a wetland, since the s. 30.19(1m)(b) exemption will not exempt the activity from state or federal *wetland* permit requirements. However, if wetlands are proposed to be filled, department staff should then determine whether any wetland agricultural exemption under s. 281.36(4) to (6), Wis. Stats., or federal law may apply.

Staff should evaluate these projects on a case by case basis and consult with the waterway policy team as needed to determine the department’s jurisdiction over a proposed activity.

2. S. 30.20, Wis. Stats. exemption - dredging the bed of any lake, outlying water, or navigable stream

Section 30.20, Wis. Stats., requires a contract or permit to remove material from (dredge) the bed of any lake or outlying water or any *navigable* stream. Under s. 30.20(1g)(a)1., Wis. Stats. a farm drainage ditch that was not a navigable stream before ditching (even if it is navigable in fact now) is exempt and would not be required to obtain a permit under s. 30.20, Wis. Stats. However, there is one important situation when the exemption does *not* apply - a s. 30.20 permit is still needed to dredge a farm drainage ditch that was not a navigable stream before ditching if the department determines the proposed dredging may cause long-term adverse impacts on cold-water fishery resources or may destroy fish spawning or nursery areas. This means:

- A navigable stream or farm drainage ditch created by ditching a navigable stream needs a s. 30.20 permit.
- A farm drainage ditch that was not created by ditching a navigable stream generally does *not* need a s. 30.20 permit unless the department finds the proposed dredging may have a long-term adverse effect on cold-water fishery resources or may destroy fish spawning beds or nursery areas. Also it is important to note that the farm drainage ditch need not be navigable in fact for the department to require a permit under s. 30.20, Wis. Stats. under this exemption.

To determine if the s. 30.20 dredging exemption applies, ask the following questions:

- a. Is the waterway a “farm drainage ditch”?

S. 30.20(1g) does not define “farm drainage ditch” - it simply says the farm drainage ditch cannot have been a navigable stream prior to ditching. In applying the s. 30.20(1g) exemption, the Department uses the definition of “farm drainage ditch” in an earlier statutory exemption at s. 30.10(4)(c), Wis. Stats.: “any *artificial* channel which drains water from lands which are *used for agricultural purposes*.” (See *below* for a discussion of s. 30.10(4)(c) and its definition of “farm drainage ditch.”)

It is a fairly common practice for owners of agricultural lands to “clean out” or dredge ditches that flow through their agricultural lands. Since the legislative intent of the s. 30.20(1g) farm ditch exemption is to exempt activities that serve an agricultural use from the need for a s. 30.20 permit, department staff first should ask the two questions discussed on pages 3 and 4 regarding agricultural use and purpose (*see above*). For example:

- A landowner proposes to dredge a waterway with adjacent lands in agricultural use to install utilities such as sewer, water or electrical services. Generally the purpose of such dredging will not serve an agricultural use and needs a s. 30.20 permit.
- A landowner proposes to dredge a waterway with adjacent lands in agricultural use to provide electrical, sewer, or water service for an agricultural purpose – e.g., power for an irrigation well pump, silo dryer, milking equipment, heating for a structure used to store crops, house livestock, incubate eggs, etc. The purpose of this dredging is to serve the agricultural use of the land and a s. 30.20 permit is not required unless the department finds that the project may cause long-term adverse impacts on cold-water fishery resources or may destroy fish spawning or nursery areas .

- b. Was the farm drainage ditch a navigable stream before ditching?

If the adjacent lands are in agricultural use and the purpose of the proposed dredging serves the agricultural use, department staff should determine if the ditch was a navigable stream before ditching (*see below* for discussion

Applicability of the exemptions for agricultural use or farm drainage ditches under ch. 30 and ss. 94.26 and 281.31, Wis. Stats.

regarding a determination of navigability before ditching). If the evidence indicates the ditch was a navigable stream before ditching, the exemption in s. 30.20(1g), Wis. Stats. does not apply and a dredging permit is needed.

- c. If the farm drainage ditch proposed to be dredged was *not* a navigable stream before ditching, does it comply with the requirements for exemption under s. NR 345.04(1)(c), Wis. Adm. Code?

Section NR 345.04(1)(c), Wis. Adm. Code, contains standards for the dredging exemption, so consult it to make sure the proposed dredging meets those standards. One of those standards requires the applicant to notify the department 10 days before dredging; another is that the dredging may not have a long-term adverse effect on cold-water fishery resource or may not destroy cold water or warm water fish spawning beds or nursery areas.

- d. If the farm drainage ditch was *not* a navigable stream before ditching, will dredging cause certain adverse impacts?

If there is insufficient evidence to show the ditch was a navigable stream before ditching, the proposed dredging still may require a s. 30.20 permit if the department determines the dredging may result in long-term adverse impacts on cold-water fishery resources or if the dredging may destroy fish spawning or nursery areas. To determine if and how the dredging may affect these resources, department staff should obtain the opinion of and rely on the expertise of the fisheries and water resource biologists within the department. If department staff identify concerns that dredging a farm drainage ditch may cause long-term impacts on a cold-water fishery resource or may destroy fish spawning or nursery areas, the department should document those concerns and notify the landowner that the project does not qualify for an exemption under s. 30.20(1g)(a), Wis. Stats., and requires a s. 30.20 dredging permit. Keep in mind that this “recapture” provision to prevent harm to resources only applies to *ditched* non-navigable streams, and may not be used to assert s. 30.20 jurisdiction over an unditched or natural non-navigable stream.

Again keep in mind that activities exempt from a s. 30.20 permit still may require other permits, e.g.:

- A permit under s. 30.195, Wis. Stats., may be needed if the dredging activity includes changing the course of or straightening a navigable stream, since the s. 30.20(1g) exemption only exempts the activity from s. 30.20 permit requirements. However, section 30.195, Wis. Stats. may not apply if the waterway section to be changed is a farm drainage ditch considered non-navigable under s. 30.10(4)(c), Wis. Stats. (*see below*).
- A permit under s. 281.36, Wis. Stats. may be needed if the activity includes filling a wetland, since the s. 30.20(1g) exemption will not exempt the activity from state or federal *wetland* permit requirements. However, if wetlands are proposed to be filled, department staff should then determine whether any wetland agricultural exemption under s. 281.36(4) to (6), Wis. Stats., or federal law may apply.

3. S. 30.10(4), Wis. Stats. exemption – “farm drainage ditch”

S. 30.10(4)(c), Wis. Stats., prohibits the department from declaring a waterway navigable under s. 30.10(2), even if that waterway is navigable in fact, if that waterway is adjacent to land used for agriculture and the waterway is a farm drainage ditch that was not a navigable stream before ditching. Section. 30.10(4)(c), Wis. Stats. states: “For purposes of this paragraph, ‘farm drainage ditch’ means any *artificial* channel which drains water from lands which are used for agricultural purposes.” Since 1987, the department has interpreted these terms as follows:

- “artificial channel” means a channel that exists as a result of human excavation and is either wholly artificial or a natural stream so altered as to be relatively void of meander patterns and relatively uniform in stream slope and cross section.
- “drains lands for agricultural purposes” means improving or expanding an *existing* drainage system to more efficiently drain surface waters or lower the existing water table on existing agricultural lands.

To determine if s. 30.10(4)(c), Wis. Stats. prevents the department from declaring a section of a navigable in fact farm drainage ditch navigable under s. 30.10(2), Wis. Stats., department staff should first ask the two questions discussed on pages 3 and 4 regarding agricultural use and purpose (*see above*).

If the land is in existing agricultural use and the purpose of the proposed activity will serve an agricultural use, department staff then should determine if the ditch was a navigable stream before ditching. This determination may require a review of historical maps, photos, and other available historical materials such as the Land Economic Inventory (Bordner Survey) and the original government survey maps and field notes, which were completed in the early to mid-1800’s, along with other mapping or historical resources. If the ditch is navigable in fact and the evidence shows it was a historical stream that was navigable before ditching the s. 30.10(4)(c) exemption does not preclude it from being declared navigable under s. 30.10(2).

Keep in mind a few important points about the s. 30.10(4)(c) exemption:

- Section 30.10(4)(c), Wis. Stats. exempts activities where department permitting depends on a ditch being *declared navigable under s. 30.10(2), Wis. Stats.* It does not affect activities that need permits in navigable or non-navigable waters. For example:
 - S. 30.18, Wis. Stats., requires a permit to withdraw water for irrigation or agricultural purposes from *any* stream (including an outlet lake) whether navigable or not. So a s. 30.18 permit is needed to withdraw water for irrigation or agricultural purposes from a farm drainage ditch created by ditching *any* stream, even if the ditch is considered non-navigable under s. 30.10(4)(c), Wis. Stats..
 - Water that flows through a farm drainage ditch that is connected to a navigable waterway is considered part of the navigable waterway and a s. 30.18 permit is needed to withdraw water for irrigation or agricultural purposes even from a wholly artificial farm drainage ditch that is considered non-navigable under s. 30.10(4)(c), Wis. Stats. However, the ditch must be connected to a navigable waterway at or below a point where the waterway becomes navigable.
- Even if s. 30.10(4)(c), Wis. Stats. prevents a section of a farm drainage ditch from being declared navigable under s. 30.10(2), Wis. Stats., a s. 30.20 permit is needed to dredge that ditch section if the department finds the proposed dredging may result in long-term adverse impacts on cold-water fishery resources or may destroy fish spawning or nursery areas (*see above*).

The issue of whether s. 30.10(4)(c), Wis. Stats. prevents the department from declaring all or part of a farm ditch navigable under s. 30.10(2), Wis. Stats. usually arises for activities other than those regulated by a s. 30.19 or 30.20 permit- e.g., proposals to place structures such as bridges, culverts and fords in, over, or on the bed of a farm drainage ditch, or proposals to relocate or enclose all or part of a farm drainage ditch into a pipe or conduit.

In analyzing whether s. 30.10(4)(c), Wis. Stats. prevents the department from declaring all or part of a farm ditch navigable under s. 30.10(2), Wis. Stats. in such cases, the initial questions are the same - is adjacent land

at the proposed project site in agricultural use? Will the purpose of the proposed activity serve an agricultural use? For example:

- A bicycle, ATV, or snowmobile trail proposed to be placed in, on, or over a navigable in fact farm drainage ditch (even with adjacent land in existing agricultural use) will be subject to the requirements in ch. 30, Wis. Stats. since its purpose is not for agricultural use.
- A driveway/culvert proposed to be placed in, on, or over a navigable in fact farm drainage ditch built to reach a personal residence will be subject to the requirements in ch. 30, Wis. Stats.
- A driveway/culvert proposed to be placed in, on, or over a navigable in fact farm drainage ditch (with adjacent land in existing agricultural use) to reach a barn, silo, livestock pens, or other agricultural structures will *not* be subject to the requirements in Ch. 30, Wis. Stats. based on navigability if other requirements in s. 30.10(4)(c), Wis. Stats. are met to prevent the ditch from being declared navigable under s. 30.10(2), Wis. Stats..
- A structure (e.g., pipes) constructed and placed to convey: (a) non-metallic mining minerals, (b) septage, or (c) sewage in, on, or over a navigable in fact farm drainage ditch will be subject to ch. 30 requirements. The same structure constructed and placed to convey manure from an agricultural operation will *not* be subject to ch. 30 requirements based on navigability if other requirements in s. 30.10(4)(c), Wis. Stats. are met to prevent the ditch from being declared navigable under s. 30.10(2), Wis. Stats..

In each example above where the purpose of the proposed activity will not serve an agricultural use, s. 30.10(4)(c), Wis. Stats. does not prevent the ditches from being declared navigable under s. 30.10(2) even if the waterway is a farm drainage ditch and the lands adjacent to it are in agricultural use.

For activities regulated under ch. 30, Wis. Stats. that only apply to navigable waterways, staff should determine whether the provisions at s. 30.10(4)(c), Wis. Stats. may apply if a waterway is a navigable in fact farm drainage ditch.

B. Shoreland Zoning

Section 281.31(2m), Wis. Stats., exempts lands adjacent to farm drainage ditches from shoreland, shoreland-wetland zoning, and certain other zoning not covered in this guidance if such lands are not adjacent to a natural navigable stream, the part of the farm drainage ditch adjacent to these lands was wholly artificial or was a non-navigable stream before ditching, and the lands are maintained in *nonstructural agricultural use*. Keep in mind that the exemption in s. 281.31(2m), Stats. from shoreland zoning is narrower than the farm drainage ditch exemptions in ss. 30.10, 30.20, and s. 30.19, Wis. Stats.. Section 281.31(2m), Wis. Stats. has an additional requirement that the other exemptions do not – it applies only to agricultural lands maintained in *non-structural agricultural use*.

Section 281.31, Wis. Stats. does not define non-structural agricultural use, but the department interprets this phrase to mean that land within 300 feet of the agricultural ditch must remain as cropped fields, pasture, or other open space uses. If a landowner proposes to construct barns, manure storage pits, or other structures, the statutory exemption in s. 281.31(2m), Wis. Stats. would not apply, and the structures would have to meet the standards in the applicable county shoreland zoning ordinance. (Agricultural waterway crossings and agricultural fences have not been considered to be structures that render the shoreland zoning exemption inapplicable.)

Applicability of the exemptions for agricultural use or farm drainage ditches under ch. 30 and ss. 94.26 and 281.31, Wis. Stats.

Because the shoreland zoning exemption is narrower than most ch. 30 exemptions, some farm drainage ditches that are exempt from specific ch. 30 statutes or ch. 30 generally are still regulated under shoreland and shoreland-wetland zoning. For example, some activities may not require a ch. 30 permit from the department because the farm drainage ditch is exempt under ch. 30, Wis. Stats., but the land adjacent to the farm drainage ditch could be regulated by the county under its shoreland zoning ordinance if it has at least some structural uses.

C. Farm Drainage Districts

Drainage districts are local governmental districts, which are organized to drain lands for agricultural or other purposes.² The majority of the existing drainage districts in the state were formed in the early 1900s.³ Drainage districts are responsible for construction, operation, maintenance, and repair of district drains, which include ditches, tiles and other drainage features, within the boundaries of the drainage district.⁴ Although there are other methods to classify a district drain, in general “a drain is classified as a district drain if it is designated as such by the circuit court and shown on the approved specifications as a district drain”.⁵ For additional information regarding drainage districts and maps of the existing drainage districts please see the website for the Drainage District Program in the Department of Agriculture, Trade and Consumer Protection at http://datcp.wi.gov/Environment/Drainage_Programs/index.aspx.

Except for specific exemptions for the Duck Creek Drainage District in ss. 30.10(4)(d) and 88.31(7m), drainage districts must apply for and obtain a permit from the department to “clean out, widen, deepen or straighten any stream that may be navigable” under s. 88.31, Wis. Stats. To establish the Department’s jurisdiction to require permits under Chs. 30 or s. 88.31, Wis. Stats., staff should utilize the statutory exemptions for agriculture and farm drainage ditches, as described in this guidance, in ss. 30.10, 30.20, and s. 30.19, Wis. Stats..

Conclusions

To promote agricultural production the regulations protecting navigable waters under ch. 30 and s. 281.31, Wis. Stats., contain a number of statutory exemptions for agricultural activities that are in or adjacent to waterways and farm drainage ditches. This guidance should help department staff and the public understand the requirements of the various agricultural exemptions and determine when an exemption applies to a specific activity. A flow chart is also attached to help determine which exemptions may apply to a specific activity. Staff should evaluate these projects on a case by case basis in consultation with the waterway policy team to determine the department’s jurisdiction over a proposed activity

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² County Drainage Board Handbook. Wisconsin Department of Agriculture, Trade, and Consumer Protection. Revised February 2007, page 1-2 found at <http://datcp.wi.gov/uploads/Environment/pdf/DrainageHandbook.pdf>

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 4-1.

Approved:

DRAFT

Pam Biersach, Bureau Director, Watershed Management

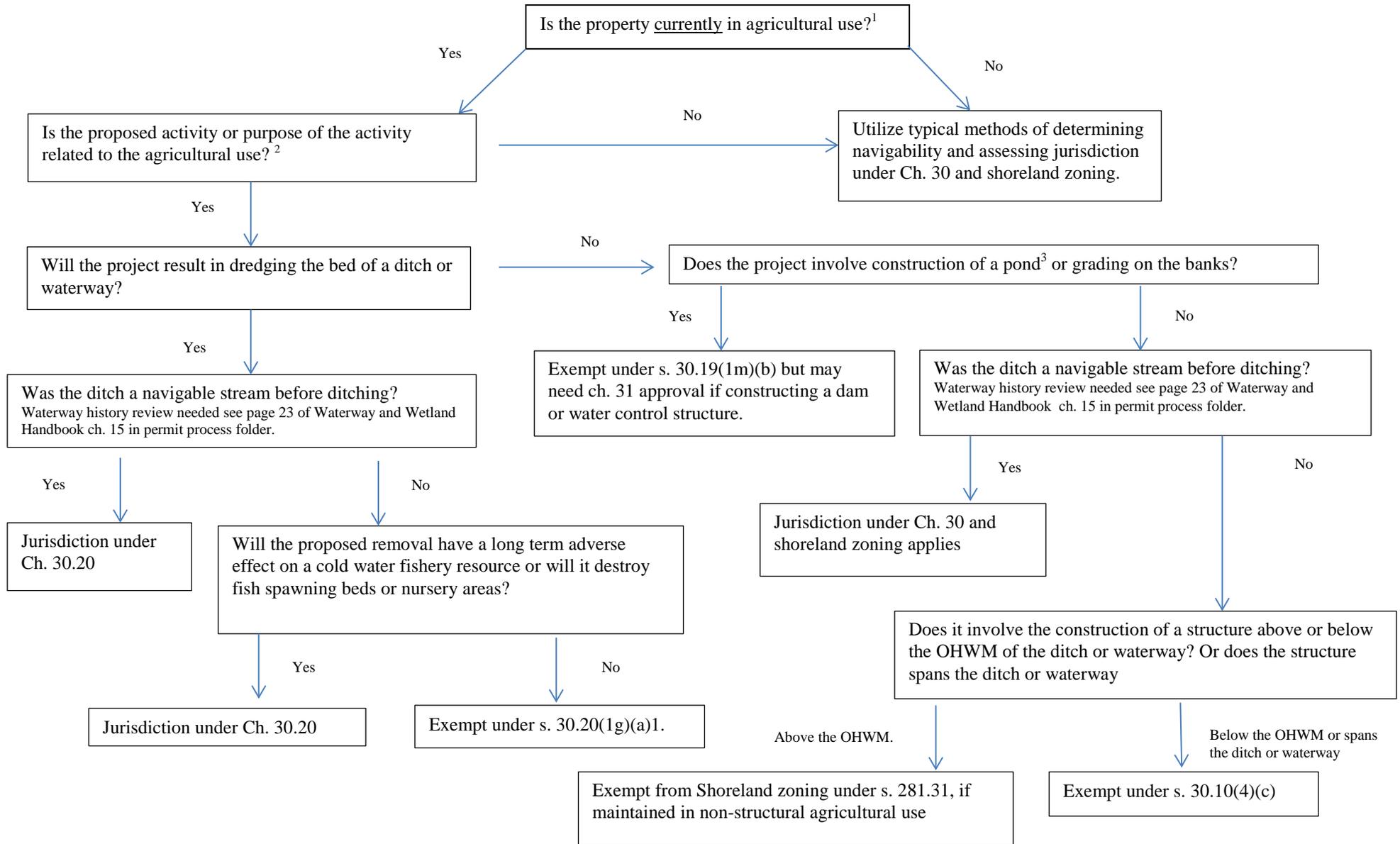
Date

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

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Flow chart for Agricultural exemptions under Ch. 30 and s. 281.31, Wis. Stats.



¹ s. 30.40(1), Wis. Stats.: "Agricultural use" means beekeeping; dairying; egg production; feedlots; grazing; floriculture; raising of livestock; raising of poultry; raising of fruits, nuts and berries; raising of grains, grass, mint and seed crops; raising of vegetables and sod farming. See also legal memo regarding definition of floriculture in navigability folder at \\CENTRAL\Watershed\POLICY_WW\Navigability

² s. 421.301(4), Wis. Stats. defines "Agricultural purpose" to mean "a purpose related to the production, harvest, exhibition, marketing, transportation, processing or manufacture of agricultural products by a person, other than an organization, which cultivates, plants, propagates or nurtures those agricultural products." So for example if the project involves the construction of a road to build a residential house, then it is not related to an agricultural purpose even if the house is for the farmer. On the other hand if the purpose of the road is to reach another agricultural field, then the activity is related to an agricultural purpose.

³ Artificial waterways constructed within 500 feet of a navigable waterway or connected to a navigable waterway