

The attached guidance, “**Review of Wetlands on Dormant Development Sites**”, was developed for use by Department staff in the Bureau of Watershed Management when assessing how to review dormant development sites with wetlands that had not been previously identified.

The regulation of wetlands can be found under Wisconsin Statutes Chapter 281.36. These wetland regulations are applicable to proposed activities that will result in a discharge of dredged or fill material into wetlands. This guidance is applicable to sites where development activities began, but then stopped due to a downturn in the economy that began in approximately 2008, and jurisdictional wetlands have re-established or expanded in areas that had not been previously identified as wetland.

This guidance was developed by Department staff from the Bureau of Watershed Management. A draft of the guidance has been reviewed internally by the Bureau 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Comments related to this draft guidance document should be sent to Pamela Biersach at 608-261-8447 or at [pamela.biersach@wisconsin.gov](mailto:pamela.biersach@wisconsin.gov).

## Review of Wetland on Dormant Development Sites

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### Description:

This guidance provides sideboards the Department staff shall utilize when jurisdictional wetlands are proposed to be impacted on dormant development sites, in other words sites where development activities began, but were halted due to the recent economic recession. A dormant development site, as described in this guidance, meets all of the following circumstances:

- A wetland delineation was completed for a proposed development
- The proposed development was commenced during the economic recession but not completed within five years of the original wetland delineation.
- The proposed development plan was based on a delineation completed no earlier than 2003.
- There is renewed interest in the development of the site, and a new wetland delineation shows wetlands on the project site that were not present in the previous delineation.

### Need:

A wetland permit is required from the Department to placed dredged or fill material into a wetland under Wis. Stats. s. 281.36. The permit process requires an evaluation by the Department of practicable alternatives under Wis. Stats. ss. 281.36(3g)(h)1. and (3m)(b). The practicable alternatives analysis evaluates alternatives to avoid wetland impacts and alternatives to minimize wetland impacts. If the wetlands cannot be avoided by the proposed project, but the impacts have been minimized, the Department then must assess the significance of the environmental impact as a result of the project, before the Department may issue the permit.

The Department is encountering a number of cases where developments were designed to avoid or minimize impacts to the delineated wetlands, wetland permits were acquired if necessary, and construction started. However, construction or development of the site was never completed due to the economic recession. These dormant developments, would have been in compliance with the State wetland regulations had those sites been fully developed at that time construction was initiated. However, enough time has passed that the wetland delineations at these sites are more than 5 years old and a new wetland delineation is necessary to verify the presence or absence of wetlands based upon the existing conditions.

In a number of circumstances the new wetland delineations for these dormant development sites have delineated additional areas that may meet the definition of a wetland or wetlands that were existing and have expanded in size from the original delineation. These changes typically occur because of previous construction activities at the site or a cessation in farming. Previous construction often changes the topography and drainage at a site and can include clearing or grubbing, which modifies the vegetative characteristics at the site and can change hydrology. Similarly, farming activities often suppress wetland characteristics, through the installation of drainage systems, disturbance to the soil, and removal of vegetation. When farming ceases, the suppressed wetland characteristics may emerge, particularly if drainage systems are not maintained.

The economic downturn created a number of these dormant development sites around the state. These unique situations require a focused and consistent process so the public can provide the right information to DNR the first time and DNR staff understand the logistics and barriers associated with renewing development at these dormant development sites.

## **Statutory Provision:**

### **s. 281.36 Permits for discharges into wetlands; mitigation.**

#### **(3b) PERMIT REQUIRED.**

**(a)** For purposes of this section, a wetland general or individual permit issued by the department constitutes water quality certification as required by 33 USC 1341 (a).

**(b)** No person may discharge dredged material or fill material into a wetland unless the discharge is authorized by a wetland general permit or individual permit issued by the department under this section or the discharge is exempt under sub. (4). No person may violate any condition contained in a wetland general or individual permit issued by the department under this section. The department may not issue a wetland general or individual permit under this section unless it determines that the discharge authorized pursuant to the wetland general or individual permit will comply with all applicable water quality standards.

#### **(3g) Wetland General Permits**

**(h)** Authorizations for discharges under wetland general permits.

1. A person wishing to proceed with a discharge that may be authorized under a wetland general permit shall apply to the department, with written notification of the person's wish to proceed, not less than 30 days before commencing the discharge authorized by the general permit unless subd. 4. applies... The application shall include a detailed explanation of why the impact to the wetland cannot be avoided and how the impact to the wetland will be minimized to the greatest extent practicable...

#### **(3m) WETLAND INDIVIDUAL PERMITS.**

**(b)** Analysis of practicable alternatives. An applicant shall include in an application submitted under par. (a) an analysis of the practicable alternatives that will avoid and minimize the adverse impacts of the discharge on wetland functional values and that will not result in any other significant adverse environmental consequences.

## Implementation:

The review process for these dormant development sites shall be as follows:

1. The project proponent submits the new delineation for concurrence to DNR along with the original delineation.
2. Staff shall review the wetland delineations to identify whether any of the newly identified areas meet the definition of a wetland based on whether or not “normal circumstances” are present. Staff shall utilize the 1987 edition of the ACOE Wetland Delineation Manual and any other documents developed by the ACOE to interpret that manual, as required under Wis. Stats. s. 281.36(2m). If newly identified areas do not meet the definition of a wetland, then these areas do not fall within the Department’s jurisdiction under Wis. Stats. s. 281.36.
3. Staff shall review the wetland delineations and determine whether or not any of the newly identified areas are landscape features identified as artificial wetlands in Wis. Admin. Code Ch. NR 103.06(4). If the newly identified areas are landscape features that fall within Wis. Admin. Code Ch. NR 103.06(4), these areas do not fall within the Department’s jurisdiction under s. 281.36.
4. To be consistent with the federal rules, staff shall also determine whether the newly delineated areas are features that are identified as an exception to the definition of a “Waters of the US” under 33 CFR Part 328.3(b)<sup>1</sup>. If the newly identified areas fall within the exceptions mentioned above, the Department will not assume jurisdiction over those newly delineated areas under Wis. Stats. s. 281.36 and the project can proceed without further wetland review of those newly delineated areas.
5. If the new delineated areas meet the definition of a wetland and would not fall within the exceptions above, then those areas are jurisdictional. However, in reviewing the practicable alternatives analysis for a dormant development site, the department shall presume that avoidance of the newly delineated wetland areas is impracticable and that there are limited practicable alternatives for those areas if any of the following conditions are documented in the permit application:
  - a. If the developer or municipality has installed sewer, water, other utilities or roads to facilitate planned development it is presumed that there are no practicable alternatives to avoiding an impact to the newly delineated wetlands if the infrastructure was installed based on a municipal approval or municipal-approved plat.
  - b. If the developer has undertaken significant site preparation work including clearing, grubbing<sup>2</sup> and rough site grading, or otherwise significantly altered site topography or drainage patterns, it is presumed that there are no practicable alternatives to avoiding an impact to the newly delineated wetlands.

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<sup>1</sup> Clean Water Rule. Volume 80. Number 124. Federal Register, Published June 29<sup>th</sup>, 2015, available at <http://www2.epa.gov/cleanwaterrule/final-clean-water-rule>

<sup>2</sup> Clearing and grubbing means all trees not marked for preservation and all snags, logs, brush, stumps, shrubs, rubbish, and similar materials have been cleared. All stumps, roots, and root clusters that have a diameter of 1 inch or larger have been grubbed out to a depth of at least 2 feet.



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