



## BUREAU OF WATERSHED MANAGEMENT PROGRAM GUIDANCE

### Waterway and Wetland Protection

### Artificial Wetland Exemptions

Effective Date: November 9, 2018

Guidance #: 3500-2018-01

*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.*

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APPROVED:

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Date

## EXECUTIVE SUMMARY

[Wisconsin Act 183](#) was enacted on March 28, 2018. This Act created a wetland permitting exemption for certain types of artificial wetlands and describes the qualifications and requirements for this new exemption. This Act also created a wetland permitting exemption for some types of nonfederal wetlands. Although the nonfederal wetland exemption has a similar notification and timeline for review, it has separate eligibility and submittal requirements and is, therefore discussed in a separate guidance document. For more information about the nonfederal wetland exemption and to access this guidance, please visit <https://dnr.wi.gov/topic/wetlands/permitExemptions.html>.

Artificial wetlands are landscape features where hydrophytic vegetation may be present as a result of human modification to the landscape or hydrology, which lack definitive evidence of a wetland or stream history prior to August 1, 1991. This guidance uses a stepped process to help illustrate the eligibility requirements for the artificial wetland exemption. A checklist and online decision module have also been created to help articulate eligibility requirements and guide stakeholders through the eligibility process. Visit <https://dnr.wi.gov/topic/Wetlands/disturbance.html> for more information.

Before a landowner, developer, or builder initiates a project under the artificial wetland exemption, s. 281.36(4n)(e)1, Wis. Stat., requires the stakeholder to submit an exemption request to the department at least 15 days in advance of their project. The purpose of the submittal process is two-fold:

1. Confirm that the project is eligible and meets the requirements for the permitting exemption; and
2. Provide the stakeholder with regulatory certainty before initiating a project.

An electronic submittal process is available through the E-Permitting system to submit exemption requests to the Department. Requests are completed in a series of steps, identified by tabs. To access this system, visit <https://dnr.wi.gov/topic/Wetlands/identification.html>. Before beginning an exemption request, it is important to gather all of the necessary information that will need to be submitted. The *Artificial Wetland Exemption checklist* specifically identifies necessary information for the submittal.

The artificial wetland exemption does not change **local, county or federal permitting requirements**. Stakeholders should be sure to work with the U.S. Army Corp of Engineers and local county or municipality to obtain any other federal or local permits or approvals necessary for their project. Additionally, approvals from the Department's Storm Water program may be required depending on the overall size of the project in question. More information about the DNR Storm Water program and to determine what approvals may be needed, visit <https://dnr.wi.gov/topic/stormwater/construction/>.

### Using this Guidance

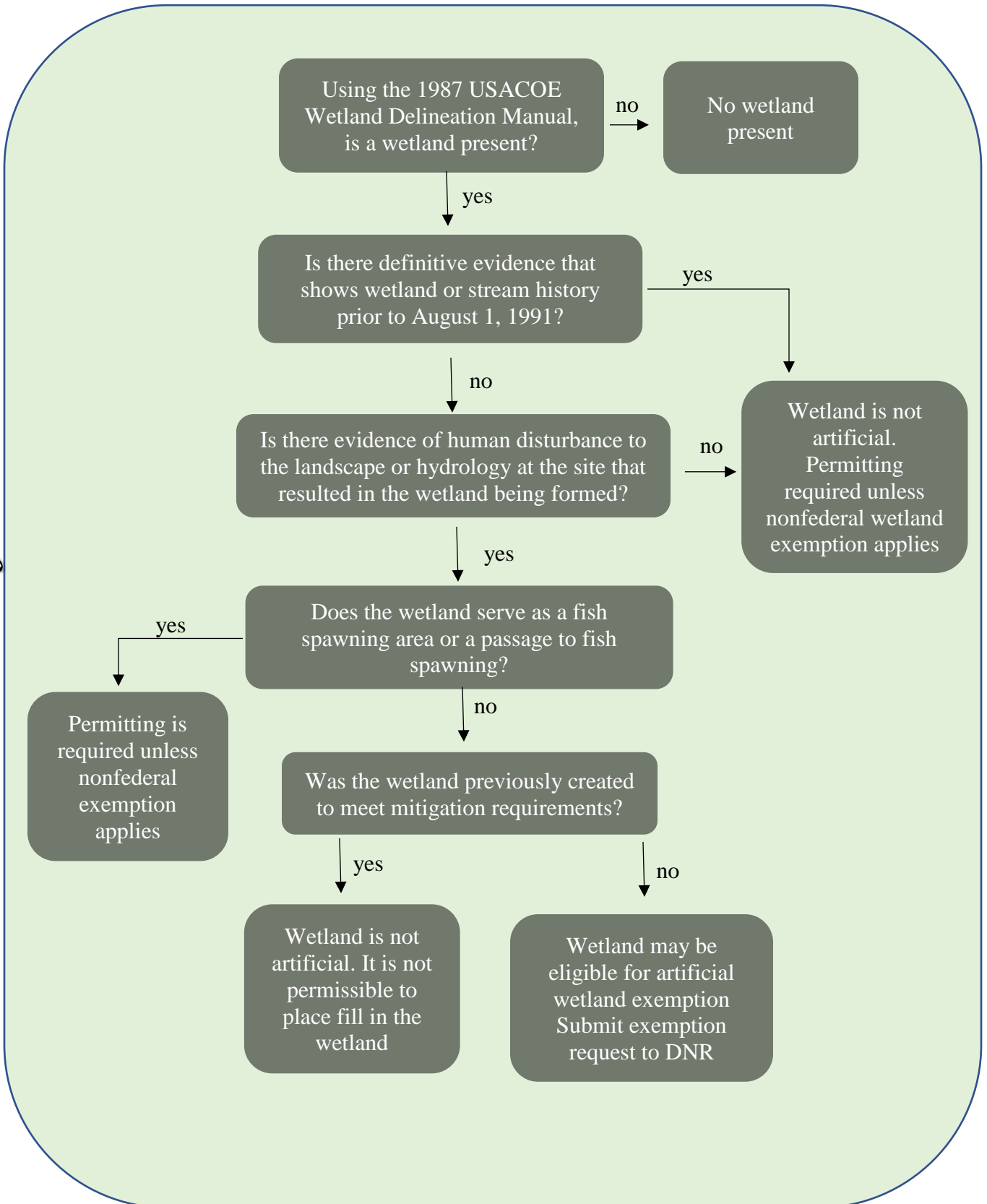
Using a stepped process, it is possible to determine artificial wetland exemption eligibility. The flow chart in this guidance illustrates the series of yes and no questions to make this determination. By clicking on the boxes of the flow chart, you will be directed to the section of the guidance that specifically addresses the question of interest. There is no obligation to use this feature but it can be a helpful feature to ensure that all required pieces of information are being reviewed and considered.

### DEFINITION OF TERMS AND ABBREVIATIONS

Artificial Wetland	"Artificial wetland" is defined in s. 281.36(4n)(a)1, Wis. Stat., as a landscape feature where hydrophytic vegetation may be present as a result of human modification to the landscape or hydrology and for which the department has no definitive evidence showing a prior wetland or stream history that existed before August 1, 1991, but does not include any of the following: <ul style="list-style-type: none"><li>a. A wetland that serves as a fish spawning area or a passage to a fish spawning area.</li><li>b. A wetland created as a result of a mitigation requirement.</li></ul>
Department	Department of Natural Resources
FSA	Farm Service Agency
ILF	In Lieu Fee Mitigation Program
NRCS	Natural Resources Conservation Service
USACOE	United States Army Corp of Engineers
USGS	United States Geological Survey

## ARTIFICIAL WETLAND EXEMPTION FLOW CHART

# Artificial Wetlands



## Step 1. Knowing Your Wetlands

Using the 1987 USACOE Wetland Delineation Manual, is a wetland present?

Knowing if wetlands are present on your property is the first step to making an informed permitting or exemption decision. If you plan to hire a professional to determine your wetland boundary, it is strongly recommended that you ask the professional to complete a wetland history assessment at the same time. This will help streamline the process for the applicant and the wetland professional completing the work, and will provide you with important information needed to determine artificial wetland exemption eligibility. Wetland professionals must use the 1987 USACOE wetland delineation manual and applicable regional supplements when performing a delineation. More information about this process is available at <https://dnr.wi.gov/topic/wetlands/delineation.html>.

The [Wetland Identification Program](#) is another option to determine if a wetland is present on your property. This service will evaluate whether wetlands are present on your property, and will also complete a wetland history assessment to help you determine artificial wetland exemption eligibility.

## Step 2. Wetland History

Is there definitive evidence that shows wetland or stream history prior to August 1, 1991?

To be considered an artificial wetland, a wetland cannot have wetland or stream history prior to August 1, 1991 (s. 281.36(4n)(1), Wis. Stat.). There are many sources of information that can help determine if an area has wetland history. Pursuant to s. 281.36(4n)(a)(3)d, Wis. Stat., the Department will utilize the available definitive evidence for the parcel(s) in question to make this decision. Definitive evidence includes: maps, aerial photos, surveys that use a scale not more than 100 ft/in, and wetland delineations. Additional supporting information may also be available to help support the conclusion that wetland or stream history is not present in a given area. The Department requires applicants to submit information the following items when providing notification of their project to help provide clear definitive evidence for this decision:

Type of definitive evidence (s. 281.36(4n)(a)(3)d, Wis. Stat.)	Information to include in submittal
<b>Maps</b>	<ul style="list-style-type: none"><li>• <a href="#">Wisconsin land economic inventory map (Bordner survey)</a></li><li>• Soil Survey Mapping</li><li>• <a href="#">Historic USGS topographic maps</a></li></ul>
<b>Aerial photographs</b>	<ul style="list-style-type: none"><li>• <a href="#">Wisconsin historic aerial images</a></li></ul>
<b>Surveys that use a scale not more than 100 feet per inch</b>	Include if available
<b>Wetland delineations</b>	Include if available

The applicant may also wish to submit additional materials to help support their exemption request, such as the results of the [original land survey](#), historic [USGS Earth Explorer](#), [Google Earth- Terra Server](#), County GIS Server historic air photos, and FSA slides.

Submitting clear documentation supporting the conclusion that there is no wetland or stream history prior to August 1, 1991 will help expedite the review of projects and ensure consistent and equitable

decision-making. Available evidence to make this demonstration will depend on the project area. Some parts of Wisconsin were not surveyed as part of the original land survey, for example. Access to frequent historic aerial photos can also vary significantly depending on location. Soils information may be a particularly good indicator to support wetland history decisions in areas where limited evidence is available. If a wetland delineation indicates that the wetland has formed on fill material, this is strong evidence that the wetland is an artificial wetland. On the other hand, if wetland soils are organic soils such as peat (slightly decomposed organic material) or muck (highly decomposed organic material), this is strong evidence that the wetland has formed from persistent decomposition of organic material in very poorly drained areas which suggests the area is a natural wetland. For more information and a complete list of Wisconsin's hydric soils, see the [NRCS hydric soils report](#). Again, it is not appropriate to use any one data point as the sole justification for determining the presence or absence of wetland or stream history so soils information should be combined with other types of definitive evidence to make a comprehensive wetland history assessment.

When developing an exemption request application, it is important to clearly identify the project boundary and the wetland(s) in question. It is possible for a project area to have both artificial wetlands as well as wetlands that have wetland history, or to have artificial wetlands which adjoin wetlands with wetland history. As indicated in Step 1, the [Wetland Identification Program](#) can help evaluate whether wetlands are located within the project boundary and can also determine if that wetland has history prior to August 1, 1991.

*Example 1.* In this example, a stakeholder is interested in modifying an existing parking lot that is adjacent to a roadway. There is a ditch between the roadway containing wetland vegetation (see green rectangle in Figure 1). The stakeholder and municipality have agreed with the redesign and are wondering if a wetland and/or waterway permit is needed or if the project could be exempt from permitting requirements. However, soils within the wetland boundary are Meridian loam (MeB) which are typically nonhydric soil and well drained (Figure 2). Wetland history maps indicate that the area has been predominately cropped or prairie oak savannah (Figure 3a and 3c). Although historical aerial photography indicates some wetness signatures within the project boundary (Figure 3b), the preponderance of evidence indicates that definitive wetland history is not present at this site.

*Figure 1. Project boundary (red rectangle) and wetland boundary (green rectangle).*



*Figure 2. Soils within the project boundary.*



Figure 3. Wetland history within the project boundary: a. Wisconsin land economic inventory map (Bordner Survey) and b. Historical Aerial Imagery 1938



### Step 3. Human Disturbance

Is there evidence of human disturbance to the landscape or hydrology at the site that resulted in the wetland being formed?

Only wetlands created as a result of human disturbance qualify for the artificial wetland exemption (s. 281.36(4n)(a)1, Wis. Stat.). Human disturbance cannot simply be the removal of wetland vegetation. The disturbance must be a change to the landscape or hydrology, which resulted in the creation of the wetland

(281.36(4n)(a)1, Wis. Stat.). This is consistent with the [1987 Army Corp Wetland Delineation Manual](#) and [Army Corp Regulatory Letter 90-07](#):

*[F]or certain altered wetlands, even though the vegetation has been removed by cropping, the basic soil and hydrological characteristics remain to the extent that hydrophytic vegetation would return if the cropping ceased.*

Although there needs to be a clear linkage between the human disturbance and the formation of the artificial wetland, the disturbance does not have to occur within the immediate vicinity of the wetland to qualify. It is possible that disturbances in the surrounding area may have resulted in hydrological modifications that created the wetland in question.

It is normal for wetland boundaries to swell and shrink over time in response to antecedent weather patterns, natural variability in groundwater levels, and hydrologic connections with nearby surface waters. It is important to differentiate between natural and anthropogenic impacts to the wetland in question. Historical aerial photographs, construction plans, previous wetland delineation reports, and other documents might be helpful resources to determine if a wetland was created because of human activities. Common situations in Wisconsin where wetlands form because of human disturbance include: wetlands forming adjacent roads, wetland forming on the exterior of artificially created ponds, and wetlands forming within fallow construction sites, among other situations. The Department does not prescribe the evidence that stakeholders can use to make this demonstration but is looking for a clear narrative and supporting documentation.

Thinking back to Example 1 (see [Step 2- wetland history](#)), a wetland was formed in a roadside ditch without stream or wetland history. Construction plans and specifications are available to illustrate that the area in question was clearly formed in man-made depressions (Figure 4). These construction plans and specifications provide evidence that the wetlands formed due to road construction activities (Figure 5).

Figure 4. Design and cross-section of roadside ditches in Example 1.

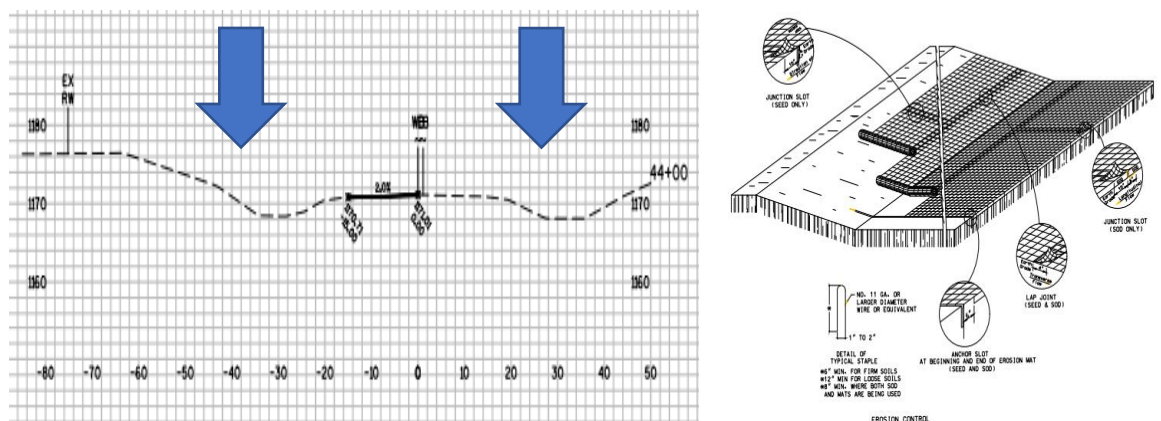




Figure 5. Current site photographs of site in Example 1.



#### Step 4. Fish Spawning

Does the wetland serve as a fish spawning area or a passage to fish spawning?

It is [well documented](#) that sportfish like northern pike, and forage fisheries that support Wisconsin's sportfish communities, utilize small waterways including intermittent streams, ditches, marsh channels, and other similar

waterways for fish spawning or passageways for fish spawning. Wetlands that have seasonal or permanent connections with larger wetland or stream complexes may be important fish spawning areas for sport and forage fish communities. Qualified professionals may need to review hydrologically connected wetlands to determine if fish spawning would be impacted if the wetland(s) in questions were filled, particularly in [NER](#) and [SER](#) areas known to have these migration patterns. Professionals that may be able to assist in making this determination include DNR fisheries staff, water quality biologists, water management specialists, private consultants or other resource specialists. Wetlands with no intermittent or permanent surface flow connection to a stream or river will likely not serve as a fish spawning habitat or passageway to spawning habitat, and can be exempted so long as the other exemption requirements are satisfied (s. 281.36(4n)(a)1.a, Wis. Stat.).

#### Step 5. Mitigation Sites

Was the wetland previously created to meet mitigation requirements?

A wetland created as a result of a wetland mitigation requirement does not qualify for the artificial wetland exemption nor is it permissible to fill in these types of wetlands (ss. 281.36 and 281.36(4n)(a)1.b, Wis. Stats. and

33 CFR 332). The objective of the Clean Water Act (CWA) is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters". Compensatory wetland mitigation replaces the loss of wetland functions in landscapes where wetland impacts are not avoidable. Methods for providing mitigation include wetland restoration, creation and enhancement:

<https://dnr.wi.gov/TOPIC/WETLANDS/mitigation/>. A list of wetland mitigation sites in Wisconsin is available at: [https://ribits.usace.army.mil/ribits\\_apex/f?p=107:158:34393713561377::NO:RP::](https://ribits.usace.army.mil/ribits_apex/f?p=107:158:34393713561377::NO:RP::). It is noted that this database does not include permittee-responsible mitigation sites in Wisconsin. This mitigation option is not widely utilized in Wisconsin at this time but Department staff will confirm permittee-responsible mitigation sites will not be impacted by the project.