

**State of Wisconsin
Department of Natural Resources**

**Responses to Comments
Establishment of Protective Areas for Wetlands in Runoff Management Rules,
Wisconsin Administrative Code NR 151
Guidance #3800-2015-02**

April 2015

On January 20, 2015, the Wisconsin Department of Natural Resources (Department) issued a public notice on proposed “Establishment of Protective Areas for Wetlands in Runoff Management Rules, Wisconsin Administrative Code NR 151” guidance. The Department received several comments on the proposed guidance from the following individuals and/or organizations:

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| ATI-AE | Applied Technologies, Inc. Architects-Engineers |
| Baudhuin | Baudhuin Incorporated |
| Davel | Davel Engineering & Environmental |
| Lincoln Co. | Lincoln County Planning and Zoning |
| NEWSC | Northeast Wisconsin Stormwater Consortium |
| RA Smith | R.A. Smith National, Inc. |
| Strand | Strand Associates, Inc. |
| WM | Waste Management of Wisconsin, Inc. |
| WWA | Wisconsin Wetlands Association |

This document represents the Department’s response to the written comments on the guidance. To facilitate the responses, the Department may have paraphrased, rephrased, condensed, or consolidated comments. Thank you to all for taking the time to review and comment on the proposed guidance.

PUBLIC COMMENTS

WETLAND DELINEATIONS

ATI-AE – Comment 1: It is almost as though, the Department is mandating the use of the USACE, DNR or Assured Delineators for all new wetland work.

This would seem to create a problem for "non-assured" delineators, in that there is only so much Department staff to review their work and confirm/concur with the delineation. This also leads to the question of timing? How long will the Department take to review the work of the non-assured delineators? Unless there is a mandate on review time in the Administrative Code, this could be subject to workload, and cause significant delays in the processing of the wetland work due to staff shortages, or the sheer volume of delineation work submitted at any given time. Not sure how much Department staff is

dedicated to this review, but as a former development engineer, it was not unusual for our small firm to have several active wetland projects at any given time.

In Southeastern Wisconsin, SEWRPC does quite a few delineations annually at no cost to their member communities. I notice that SEWRPC is not considered an assured delineator at this time. Would SEWRPC and other Regional Planning Commission staff be considered a Government Agency Submittal, or would these delineations require a concurrence/confirmation letter from the Department or USACE? If confirmation is necessary, and a short turn around time is necessary, the landowners will be forced to use an assured delineator which will more or less put the Regional Planning Commission staff in the same boat as the small non-assured wetland delineators.

As to assured delineators. I know of several consultants who were trained at the Department and/or USACE level who are not presently on the assured list. I am curious as to whether they applied and were denied inclusion on the list? If so, can they re-apply?

Response: The scope of this guidance is the process of establishing a wetland protective area. Therefore, the **Wetland Boundary Delineation** section on page 6 was removed. The Department is currently standardizing the wetland review process between programs to ensure a consistent approach to permit applications. A guidance document will soon be available for public comment regarding wetland screening and delineation procedures. The Department acknowledges the comments regarding the wetland delineation procedures and will forward all the comments on this topic to the team standardizing the wetland review process. To clarify the intent of the guidance, the following language was added to the beginning of the first paragraph under **D. Guidance: Determining the Wetland Protective Area** on page 4: *An accurate wetland delineation is essential to establishing the starting point for all protective areas. The final width of the protective area will be determined based upon a given wetland's plant community. Plant community descriptions may be included as part of a wetland delineation report, or a supplemental "Plant Community Description Report" can be completed. Regardless of the reporting method used, plant community designations must be based upon data that is collected in the field and presented in the report.*

The Department expects to review the work of a non-assured delineator within 60 days. Anyone interested in applying for the wetland delineation professional assurance initiative may apply at any time. Application materials can be found at <http://dnr.wi.gov/topic/wetlands/assurance.html>.

Baudhuin – Comment 1: Often times developments occur a great enough distance from an obvious wetland limit not requiring the cost of a delineation. Obvious wetland limit may be defined as the field located line separating obvious wetland areas and actively cultivated farmland or the field located line between obvious wetland limits and a major grade change such as a steep slope exceeding 5% meeting a wetland (ex. A 10 foot high hill that leads down to a low area with a distinct change from upland plants to wetland plants I believe a statement such as “ a wetland delineation is not required should all grading activities occur greater than 150 feet from an obvious wetland limit as determined and field located by a licensed engineer or land surveyor.” With wetland delineation reports starting around \$3,000 it is unpractical for a home owner or developer of a small project to front that amount of money for an official

delineation. The option to stay clear of the wetland area will do more to protect the wetland than having a delineation completed and then building tight to the prescribed setback.

Response: When the wetland limit is not easily apparent, a wetland delineation would be required in that situation. If no potential wetlands are identified during initial screening or the wetland signature identified is 100 feet outside of the project area, a delineation will not be required, but the results of the initial screening process will need to be documented in the application submittal to the Department. The **Wetland Boundary Delineation** section on page 6 was removed from the guidance document, and all the comments regarding the wetland review process will be forwarded to the guidance development team. See the response to ATI-AE – Comment 1.

R.A. Smith – Comment 1: It states in this draft guidance that all wetland plant communities must be identified on a map, but it does not provide guidance on how this must be accomplished. What is the acceptable means of completing this task - should the plant communities be delineated using a GPS, aerial photography interpretation, field sketching, all of the above? Please keep in mind that not all areas within wetlands are accessible, particularly large wetlands. In addition, are we to provide plant species lists that correspond with the plant communities including their Floristic Quality Index? Should we provide data for determining percent cover of invasive versus non-invasive species? Please provide a clear level of effort expected for consultants' wetland reports so that we can provide accurate cost estimates to our clients.

Additionally, I'm a bit confused about the report submittal process. This guidance states that confirmation is not needed from WDNR for those that are WDNR-Assured, but the Corps "still reviews the work". For those who are not assured, a concurrence letter is needed from only one agency. Please verify – are those with assurance required to obtain Corps concurrence, but those non-assured only required to obtain concurrence from one, but not both, agencies? Also if the report is submitted with a wetland fill permit, would the permit review fee cover the cost of the wetland confirmation?

Response: The **Wetland Boundary Delineation** section on page 6 was removed from the guidance document, and all the comments regarding the wetland review process will be forwarded to the guidance development team. See the response to ATI-AE – Comment 1.

Strand – Comment 1: Page 7, Paragraph 3, Wetland Boundary Delineation. Suggest the below noted addition/modification: "In most cases, an agency concurrence letter, from either the U.S. Army Corps of Engineers (USACE), the DNR's Wetland Identification Program, or the DNR's Water Management System Specialist - during a permit application - is required to verify the accuracy of a wetland delineation.

The above note would also apply to Page 7, Paragraph 8 (Item 3.I.) - DNR Concurrence letter issued through either the: (a) DNR Wetland Identification Program or Confirmation Service for planning actions; or (b) DNR Water Management Specialist for permitting actions.

Response: The **Wetland Boundary Delineation** section on page 6 was removed from the guidance document, and all the comments regarding the wetland review process will be forwarded to the guidance development team. See the response to ATI-AE – Comment 1.

Strand – Comment 2: It would be beneficial to Clarify if “Wetland Confirmation Service” is synonymous with “Wetland Identification Program”.

Response: “Wetland Confirmation Service” is the service done by the Wetland Identification Program to concur with consultants’ delineations, while the “Wetland Identification Service” is another service describing an on-site wetland determination by the Department. The **Wetland Boundary Delineation** section on page 6 was removed (see the response to ATI-AE – Comment 1). Therefore “Wetland Confirmation Service” and “Wetland Identification Program” are no longer relevant to this particular guidance.

WETLAND PROTECTIVE AREAS

Baudhuin – Comment 2: The variable 10 to 30 foot width adds complication to the wetland buffer. Since the low quality wetlands are 90% invasive species, a straight 10’ protective area makes sense. What are we protecting? The risk exists that the Engineer performs the calculation, places a building the prescribed distance from the wetland and then the DNR re-calculates the widths using slightly different locations and finds the building is within the protective area. This could be very costly to change a site plan/design after the NOI has been submitted.

Response: The 10- to 30-foot width for less susceptible wetlands is a protective area performance standard pursuant to s. NR 151.125(f), Wis. Adm. Code, which cannot be changed by a guidance document. These performance standards are intended to limit nonpoint runoff pollution in order to achieve water quality standards.

The goal of the guidance document is to clarify the procedure to avoid future issues and misunderstandings between department staff and other professionals making wetland width determinations. Clear documentation of the site conditions, and the methodology used reduces the necessity of plan/design changes.

Davel – Comment 1:

Please see the attached mark-up.

Response: The Department did not add “nonnative” in front of “invasives species” since “invasive species” is defined in **Attachment 1, Resources: Definitions and References** as a “nonindigenous species”.

Regarding the suggestion of adding the word “functional”, the second sentence in the third paragraph under **D. Guidance: Protective Areas** on pages 2 and 3 was revised to read: *These wetlands include, but are not limited to: shrub wetlands, floodplain forests, fresh wet meadows, deep/shallow marshes, and forested wetlands (i.e. forested wetlands dominated by early*

successional species such as box elder, trembling aspen, or cottonwood) not fitting the wetland types described under “highly susceptible” or as “less susceptible”. The language “yet of higher value than wetland types identified as” has been removed from between the phrases “highly susceptible” and “less susceptible”.

The words “of the” and “listed above” were removed from the fourth sentence in the fourth paragraph under **D. Guidance: Protective Areas** on page 3 because invasive species are not limited to the common invasive species listed in the guidance when considering invasive species. Also, to clarify that “less susceptible” wetlands are degraded wetlands dominated by invasive species, the words “and are often” and “considered to be” were removed from the second and fifth sentences, respectively.

The Department agrees with clarifying the comments relating to the first paragraph under **D. Guidance: Determining the Wetland Protective Area** on page 4. See the response to NEWSC – Comment 2 below.

See the response to NEWSC – Comment 5 below regarding changes to paragraph 5 under **D. Guidance: Determining the Wetland Protective Area** on pages 4 and 5.

The **Wetland Boundary Delineation** section on page 6 was removed from the guidance document, and the suggested mark-ups regarding the wetland review process will be forwarded to the guidance development team. See the response to ATI-AE – Comment 1.

The Department considered the request to edit **Attachment 2, Figure 3**; no changes were made by the Department.

Lincoln Co. – Comment 1: How long do the protective areas, i.e. setbacks, last? In other words if you issue a stormwater permit with a wetland setback for impervious surfaces for a subdivision for instance; do all future homeowners within that subdivision have to also follow that wetland setback?

Response: As with other performance standards in ch. NR 151, Wis. Adm. Code, the protective area is expected to meet the conditions of long-term storm water maintenance requirements pursuant to s. NR 216.005, Wis. Adm. Code.

NEWSC – Comment 1: Less Susceptible (page 4) – Please modify the fourth sentence of the first paragraph as follows: “A wetland is considered to be dominated by invasive species if it currently contains more than 50 percent invasive species, as measured by absolute vegetative cover.” By definition, a dominant species has a controlling influence or defines the character of a wetland community according to US Army Corps of Engineers Wetland Delineation Manual, 1987. 50 percent is a significant majority and reasonably fits the definition of “dominated”. Without active eradication or control, a wetland with more than 50 percent invasive species is likely to further degrade in the future via the spread of invasive species such as reed canary grass, purple loosestrife, phragmites, and narrow-leaf cattail (refer to list of other potential invasive species within NR 40). A wider protective area is not anticipated to control or

reduce the spread of invasive species within an unmanaged wetland. NR 151 does not require that invasive species be eradicated or managed within a wetland.

Please cite the scientific data relied upon by DNR to establish the 90 percent value identified in the guidance document. NR 151 is a water quality regulation, not an invasive species or a wetland regulation.

A wetland located adjacent to a significant river or stream is likely more influenced by the water quality within the river or stream than from the adjacent post-construction site (please refer to Attachment 2 of the guidance document). In these instances, a wider wetland protective area is impacting the landowner of the post-construction site, rather than targeting pollutant sources located upriver/upstream of the post-construction site. The permittee of a new development post-construction site is already providing an 80 percent TSS reduction. The permittee of a re-development post-construction site is exempt from the protective area performance standards.

Response: Wetland plant communities are readily accepted in the scientific community as being indicators of runoff stressors, such as nutrient enrichment or siltation. We recommend the following document for more information on the use of plant communities as indicators of runoff stressors: *U.S. EPA. 2002. Methods for Evaluating Wetland Condition: Vegetation-Based Indicators of Wetland Nutrient Enrichment. Office of Water, U.S. Environmental Protection Agency, Washington, DC. EPA-822-R-02-024.*

The intent of the “less susceptible” designation is the acknowledgement that monocultures of invasive species are less likely to be impacted by runoff stressors, such as nutrient enrichment and/or siltation. For this document, a monoculture is considered to be a plant community that is comprised of 90 percent absolute areal coverage of invasive species. Plant communities with only 50 percent absolute areal coverage of invasive plants species could still be greatly affected by additional nutrient enrichments. For example, a plant community with 50 percent areal coverage of glossy buckthorn in the shrub layer would still meet the moderately susceptible category if the herbaceous layer were mostly comprised of native, fresh wet meadow species. In this example, nutrient enrichment has a high likelihood of causing a “flipping point” that could switch the herbaceous layer’s composition from mostly native to mostly invasive.

We agree with your assessment that wetlands subject to overbank flooding are greatly influenced by the water quality of a river or stream. That is why they are considered “moderately susceptible” instead of “highly susceptible”. Unless these wetland types are dominated by monocultures of invasive species, they do not meet the “less susceptible” criteria.

NEWSC – Comment 2: Determining the Wetland Protective Area (page 5) – Please modify the fourth sentence of the first paragraph as follows: “When two or more wetland susceptibility classifications are identified within the same contiguous wetland boundary, the final protective area boundary is to be delineated using the outermost boundary of each protective area category (i.e. highly susceptible wetland, less susceptible wetland, USGS stream, ORW/ERW, etc.)” For clarification, please create a figure that depicts all three wetland susceptibility classifications within the same contiguous wetland boundary and

then depict the respective protective area widths, including the governing outermost protective area boundary.

The statement that “the more/most susceptible type of wetland is used to determine the protective area” runs counter to the purpose of providing varying protective area widths for three different wetland susceptibility classifications in NR 151. An approach similar to Step 2 on page 5 of this guidance document is suggested. Consider the following example:

- A coniferous swamp (high susceptibility) is located at the center of a wetland boundary. The coniferous swamp (high susceptibility) is completely surrounded by a 500 foot wide reed canary grass wetland (low susceptibility).
- In our opinion, it is not justifiable from a water quality or ecological perspective to require a 75 foot protective area starting at the outer edge of the reed canary grass wetland (low susceptibility) since the edge of the coniferous swamp is located 500 feet from the outermost edge of the reed canary grass marsh. In essence, the high susceptibility wetland is buffered by the low susceptibility wetland. In this example, the outermost protective area boundary for this wetland should be 30 feet, not 75 feet.

Response: The Department agrees with the commenter’s suggestion on identifying the outermost protective area boundary. The first four sentences in the first paragraph under **D. Guidance: Determining the Wetland Protective Area** on page 4 has been removed. The following sentence was added at the end of the paragraph: *When two or more wetland susceptibility classifications are identified within the same contiguous wetland boundary, the final protective area boundary is to be established using the outermost boundary of each protective area category (highly susceptible wetland, less susceptible wetland, USGS stream, ORW/ERW, etc.).*

NEWSC – Comment 3: Determining the Wetland Protective Area, Highly Susceptible (page 5 & 6) – Please modify the last sentence of items b, d, e, and f as follows: “Invasive species make up less than 10 percent of the plant community’s composition.”

Response: See the response to **NEWSC – Comment 1**. The last sentence of items b, d, e, and f in the second paragraph under **D. Guidance: Determining the Wetland Protective Area** has been revised to read: *Invasive species make up less than 50 percent of the absolute percent vegetative cover* (i.e., the phrase “plant community’s composition” was replaced with “*absolute percent vegetative cover*”).

NEWSC – Comment 4: Determining the Wetland Protective Area, Less Susceptible (page 6) – Please modify the first sentence of the first paragraph as follows: “Less susceptible wetlands are those which consist of invasive species that make up more than 50 percent of the absolute vegetative cover.”

Response: The suggested change was not made by the Department. See Response to **NEWSC – Comment 1**.

NEWSC – Comment 5: Determining the Wetland Protective Area (page 6 and 7) – Please delete the entire paragraph that begins at the top of page 6. At a minimum, please delete the following sentence: “The wetland should be classified on the basis of the plant community that would normally be supported in the absence of the disturbance.” NR 151.125(1)(f) clearly states that cultivated hydric soils are classified as “less susceptible”, not as “the plant community that would normally be supported in the absence of the disturbance.”

Response: The Department agrees with removing the sentence above as suggested by the commenter. The fifth paragraph under **D. Guidance: Determining the Wetland Protective Area** on page 6 has been revised to read: *Wetland plant communities that have been altered by human modifications are still considered wetlands if they meet the criteria described in the 1987 Corps of Engineers Wetlands Delineation Manual and the appropriate Regional Supplement. These situations are commonly encountered in agricultural settings. Therefore, during certain times of the year, wetlands in agricultural settings may be unvegetated or may support non-wetland species, including crops such as corn or soybean. For the purpose of this guidance, unvegetated wetlands in a human-modified setting, such as cultivated hydric soils, as well as gravel pits or dredge material or fill material disposal sites that take on the attributes of a wetland, are considered “less susceptible”.* Additionally, it is not intended for someone to be able to newly-cultivate hydric soils, with development in mind, in order to achieve the “less susceptible” protective area. Therefore, the following language has been added in addition to the preceding language: *Consideration of cultivated hydric soils is limited to the growing of a crop related to agricultural practices specified in s. 281.16(1)(b), Stats., that has occurred for a minimum of three consecutive growing seasons.*

Strand – Comment 3: Definition of “Perennial or Intermittent Stream” should be provided. Also, there may be a concern from municipalities that have Drainage Districts (within or near their Urban Service Area) that such drainage ditches may be considered within such category (Perennial or Intermittent) or otherwise “NAVIGABLE”, or have an “ORDINARY HIGH WATER MARK”, that would require a 50’ or 75’ set-back rather than a 20’ setback for tillage or maintenance as noted in DATCP ATCP 48.24(2).

- a. Exemptions may need to apply to those potential navigable waters that are within drainage district boundaries that are in-turn located in Urban Service Areas.
- b. Likewise, if lands are no longer in functional and active drainage districts, drainage district law and required corridors or set-backs may not apply.

Response: Protective area performance standards are based on perennial or intermittent streams, not navigable, ordinary high water mark, or drainage district designations. To clarify protective area designation with respect to perennial and intermittent streams, the last sentence in the third paragraph under **D. Guidance: Protective Areas** on page 3 was added: *Perennial and intermittent streams are identified on a U.S. geological survey 7.5-minute series topographic map, or a county soil survey map, whichever is more current (NR 151.125(1)(b), Wis. Adm. Code.).*

STORM WATER TREATMENT

Baudhuin – Comment 3: A statement needs to be added to the text that reads: Development within the protective area is permitted provided the design engineer implements measures to increase water quality of runoff prior to it reaching the wetland. These measures may include grassy swales, bioretention areas, etc.

Response: Protective area performance standard exemptions are provided in ss. NR 151.125(4) and 151.245(4), Wis. Adm. Code. This issue is addressed in the **Storm Water Treatment** section on page 6 of the guidance.

Baudhuin – Comment 4: A statement should be added that impervious surfaces with little to no pollutant potential such as roof tops and patios may be constructed in the protective area. It should be clear that the protective area is intended to protect the wetlands from potential pollutant sources; primarily driveways and parking lots that increase risk of pollution such as winter salting/sanding and potential gas/antifreeze/oil leaks.

Response: Ch. NR 151, Wis. Adm. Code, does not distinguish between the pollution potential among various impervious surfaces. The requirements of the protective area performance standards are pursuant to ss. NR 151.125(3) and 151.245(3), Wis. Adm. Code, which states that impervious surfaces shall be kept out of the protective area entirely or to the maximum extent practicable. Maximum extent practicable is determined upon a case-by-case basis. The impervious surface definition (pursuant to ch. NR 151, Wis. Adm. Code) was added to **Attachment 1, Resources: Definitions and References** on page 7. *"Impervious surface" means an area that releases as runoff all or a large portion of the precipitation that falls on it, except for frozen soil. Rooftops, sidewalks, driveways, gravel or paved parking lots, and streets are examples of surfaces that typically are impervious.*

Baudhuin – Comment 5: A statement shall be made to clarify that the storm water treatment devices such as storm water swales and ponds may be constructed within the protective areas.

Response: Protective area performance standard exemptions are provided in ss. NR 151.125(4) and 151.245(4), Wis. Adm. Code. This issue is addressed in the **Storm Water Treatment** section on page 6.

Lincoln Co. – Comment 2: Much of this guidance document is very well written and is an improvement from the previous version. Thank you, my only comment is as follows: I think the guidance document needs to clarify what I see the real grey areas are in administering this section. My understanding of the grey area is with regard to the “protective area” which is essentially a wetland setback for impervious surfaces. In general they are supposed to keep all impervious surfaces, to the extent practical, out of the protective areas, but apparently if you treat the impervious surface then you can place it in the protective area. You can see that stated in the top of page 8 “Stormwater Treatment” of the guidance document. The way I’m reading it this essentially means that if an impervious surface is treated to meet x standard then both the impervious surface and the treatment practice, such as a swale, can be within the protective

area. This being true then my question is; isn't the whole idea behind a stormwater permit to treat the impervious surface runoff in the first place? So therefore, in theory, all the impervious surfaces are being treated and the protective areas are meaningless? I like that there is some flexibility in allowing impervious surfaces within the setback but I feel the guidance document should provide some clarity on when that can happen.

Response: The intent of the protective areas performance standards in ch. NR 151, Wis. Adm. Code, is to provide a minimal level of treatment, not to provide an immutable "setback". As such, there is some flexibility in how treatment can be achieved.

LANDFILL STRUCTURES

WM – Comment 1: Please clarify that a landfill cap or liner is not an "impervious surface" for the purpose of this guidance. Approved landfill designs requiring low-permeability caps and liners incorporate storm water management and treatment through sedimentation basin.

Response: It is outside the scope of the guidance document to identify all the various areas considered impervious surfaces pursuant to the definition in s. NR 216.002(17), Wis. Adm. Code. However, s. NR 151.125(3)(a), Wis. Adm. Code, states that impervious surfaces shall be kept out of the protective area entirely or to the maximum extent practicable. While maximum extent practicable is determined on a case-by-case basis, the Department recognizes that landfill siting and design criteria may sometimes result in landfill projects meeting protective areas to the maximum extent practicable. Furthermore, like other types of projects, treating runoff through a storm water best management practice in accordance with s. NR 151.125(4)(e), Wis. Adm. Code, provides an exemption from the protective area performance standards.

WM – Comment 2: Landfill expansions and modifications may rely on existing storm water management structures constructed under NR 504. Please clarify that a) continued use of an existing structure is acceptable; and b) existing structures do not have to be reconstructed to NR 151 standards.

Response: This comment does not appear to be specifically about the wetland protective area guidance. However, under the construction site storm water discharge permit program, the use of an existing structure or reconstruction of an existing structure depends upon the type of construction (e.g., new development, redevelopment, infill), which determines the specific requirements that must be met.

ARTIFICIAL WETLANDS

NEWSW – Comment 6: Determining the Wetland Protective Area (page 7) – Please delete the following sentence: "For artificial wetlands, the degree of susceptibility is determined by the plant community composition." Wet detention ponds and dry detention ponds can contain artificial wetlands, but are exempt from NR 103 regulations. The intent of NR 151.125 is not to delineate protective areas for artificial wetlands located within a wet detention pond, dry detention pond, or other artificial wetland. Recently, WDNR has classified a few artificial wetlands located within dry detention ponds as regulated

wetlands when NR 103 clearly exempts these facilities. Please clarify in the guidance if a wetland located within a dry detention pond, wet detention pond, or other stormwater facility that was constructed for flood control or water quality purposes is a regulated wetland that is subject to the NR 151 protective area performance standards. Please add the following sentence to the guidance document: “Pursuant to NR 103, wetlands that are located within a privately-owned or publicly-owned stormwater management facility (e.g. wet detention ponds, dry detention ponds, etc.) are not regulated by the WDNR and consequently are not subject to the protective area performance standards.”

Response: To clarify the issue for artificial wetlands, the sentence recommended for deletion in this comment has been removed, and the following language has been added as the sixth paragraph under **D. Guidance: Determining the Wetland Protective Area** on page 6: *A storm water management facility designed, constructed, and maintained for conveyance or treatment purposes is not subject to the protective area performance standards in ch. NR 151, Wis. Adm. Code. Also, the protective areas performance standards in ch. NR 151, Wis. Adm. Code, do not apply to an artificial wetland if the Department makes a determination under s. NR 103.06(4), Wis. Adm. Code, that the artificial wetland is exempt from ch. NR 103, Wis. Adm. Code.*

WM – Comment 3: The second sentence on page 7 indicates that, “For artificial wetlands, the degree of susceptibility is determined by plant community composition.” It appears that the intent is to require protective areas between artificial wetlands and impermeable surfaces. Since in recent Department interpretations artificial wetlands now include storm water features, this would result in mandating protective areas around engineered storm water basins and drainageways. Since many structures acquire wetland species vegetation, the protective area would include not just the engineered feature but also the buffer area around the feature. The more successful the structure owner is in cultivating highly susceptible wetland plant community types and minimizing invasive species, the greater the setback requirement. The unintended consequence would be to limit construction of roads, parking lots and buildings around storm water structures. Another consequence would be to discourage the establishment of high-value plant communities in order to limit the restrictions on property use.

Response: See the response to NEWSC – Comment 6. The Department removed the artificial wetland reference from the guidance.

CHAPTER NR 103

WWA Comments: Wisconsin Wetlands Association is dedicated to the protection, restoration, and enjoyment of wetlands and associated ecosystems through science-based programs, education, and advocacy. We appreciate the Department’s effort to update and clarify the protective area standards for wetlands and have received feedback from members and partners say that the new draft guidance is clearer than the 2004 version. Members also indicated that the inclusion of the glossary was helpful.

We identified several areas where additional clarification is needed, particularly with respect to how to ensure protective area requirements are implemented in a way that is consistent with Wisconsin’s Water Quality Standards for Wetlands under NR 103.03.

NR 103.06 states that NR 103 applies to, among other things, Department permits and approvals under Chapter 281. NR 103 is also directly referenced several times in both NR 151.125 and NR 151.245. This leaves no question that existing rules require the Department to ensure that decisions related to protective areas adjacent to wetlands comply with NR 103. Despite this, the proposed draft guidance makes no reference to NR 103 or any of the standards or criteria therein.

To address this and ensure compliance with NR 103, we recommend adding language to the final guidance to clarify when, how, and why NR 103 applies to protective area determinations and approvals. We would like to see a general statement added to this effect, and also recommend including additional guidance related to the following topics:

1. Exemptions: The Guidance clearly restates the exemption language contained in NR 151.125(4)(e) and 151.245(3)(d), but fails to mention the important note that directly follows which establishes that “the provisions of NR 103 still apply and should be considered before runoff is diverted to or from a wetland.” We believe this provision obligates staff to document how NR 103 was considered when rendering decisions about applicability of exemptions to protective area standards. It also means that the exemption does not apply if the encroachment into the protective area violates NR 103.

Guidance is needed to help staff complete this compliance review. NR 103.03(e) is particularly relevant as it establishes criteria for the “hydrologic conditions necessary to support the biological and physical characteristics naturally present in wetlands.” These include but are not limited to maintenance of water temperature, water chemistry, and water levels, all of which could be adversely impacted by diversions of water to and from a wetland, regardless of the quality of the water. Criteria related to the maintenance of conditions to support fish, wildlife, and vegetation (NR 103.03(2)(f)) must also be considered.

2. Best Management Practices (BMPs): Establishment of BMPs in the wetland protective areas is a form of encroachment and can compromise many water quality related functional values of the adjacent wetland. These include but are not limited to moderation of water level fluctuations (NR 103.03(1)(a)), shoreline protection (NR 103.03(1)(d)), and habitat for wildlife (NR 103.03(1)(f)).

While we recognize that in some cases there may be no choice but to locate BMPs in the wetland protective area, the guidance should encourage alternatives to activities that would disturb natural wetland buffers to increase capacity for stormwater treatment. At the very least, guidance should be provided on when and how NR 103.03 should or may apply as referenced in the note that follows sections NR 151.125(3)(c) and NR 151.245(3)(c).

3. Determining the Extent of the Protective Area: NR 151.245(1)(g) and NR 151.125(1)(g) require the Department to consider the sensitivity and runoff susceptibility of the wetland when determining the extent of the protective area adjacent to wetlands in accordance with the standards and criteria in s. NR 103.03. The draft guidance does not address this requirement.

4. Vegetative Cover: Sections NR 151.125(3)(b) and 151.245(3)(b) require 70% or greater cover of “adequate sod” and “self-sustaining vegetative cover.” This is a significant requirement, but it is not mentioned anywhere in the Guidance. It would be helpful to clarify when sod versus other types of cover

are preferred and to indicate the kinds of factors staff should consider when deciding. These include things like slope, quantity of sheet flow entering the protective area, soil type, and more. It would also be helpful to clarify how vegetative cover standards apply when BMPs or impervious surfaces are authorized in some portion of the designated protective area.

Response: The purpose of subchs. III and IV of ch. NR 151, Wis. Adm. Code, is to establish the non-agricultural performance standards intended to limit nonpoint runoff pollution in order to achieve water quality standards. As such, the protective areas performance standards are part of a collection of post-construction performance standards (i.e., total suspended solids, peak discharge, infiltration, and protective areas) intended to meet water quality standards for storm water runoff. This guidance provides direction on how to specifically establish wetland protective areas to provide water quality treatment to portions of a post-construction site that cannot otherwise receive treatment for total suspended solids and peak discharge.

The non-agricultural performance standards for construction sites are implemented through the construction site storm water discharge permits program under subch. III of NR 216, Wis. Adm. Code. The Department implements the construction site storm water discharge permit program through the general permit approach as provided under ss. 283.33(5) and 283.35, Wis. Stats. As a general permit program, the construction site storm water discharge permit program is intended to be self-certifying. Therefore, the Department needs to provide sufficient guidance to applicants so that they can independently design a project that complies with the ch. NR 151, Wis. Adm. Code, post-construction performance standards.

For most situations, the post-construction performance standards collectively achieve the intent of the qualitative standards in s. NR 103.03, Wis. Adm. Code, for secondary water quality impacts. On a case-by-case basis, there may be specific situations where the secondary impact to a wetland from a post-construction site may need more consideration and analysis. The Department is aware there may be some situations that are outside the scope of the guidance; and the Department may address those situations on a case-by-case basis. The suggested change (adding references to ch. NR 103, Wis. Adm. Code) was not made by the Department.

The final guidance was approved on April 02, 2015.

Prepared by:

Suzan Limberg, Storm Water Specialist
Runoff Management Section, Wisconsin Department of Natural Resources

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