



## WISCONSIN DEPARTMENT OF NATURAL RESOURCES NOTICE OF FINAL GUIDANCE & CERTIFICATION

*Pursuant to ch. 227, Wis. Stats., the Wisconsin Department of Natural Resources has finalized and hereby certifies the following guidance document.*

**DOCUMENT ID WT-19-0038**

**DOCUMENT TITLE ARTIFICIAL WATERBODY JURISDICTION**

**PROGRAM/BUREAU WATERWAYS PROGRAM**

**STATUTORY AUTHORITY OR LEGAL CITATION WIS STAT CH 30**

**DATE SENT TO LEGISLATIVE REFERENCE BUREAU (FOR PUBLIC COMMENTS) 9/9/19**

**DATE FINALIZED 10/21/19**

### DNR CERTIFICATION

*I have reviewed this guidance document or proposed guidance document and I certify that it complies with sections 227.10 and 227.11 of the Wisconsin Statutes. I further certify that the guidance document or proposed guidance document contains no standard, requirement, or threshold that is not explicitly required or explicitly permitted by a statute or a rule that has been lawfully promulgated. I further certify that the guidance document or proposed guidance document contains no standard, requirement, or threshold that is more restrictive than a standard, requirement, or threshold contained in the Wisconsin Statutes.*

10/11/19

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Signature

Date



## **BUREAU OF WATERSHED MANAGEMENT PROGRAM GUIDANCE**

### **Waterway and Wetland Protection**

### **Artificial Waterbody Jurisdiction**

Effective Date: April 20, 2017  
Guidance #: WW-2016-010

*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:

  
Pam Biersach, Director  
Bureau of Watershed Management

  
Date

## A. Statement of Problem Being Addressed

Why did we have to do this guidance?

The guidance is expected to improve consistency when implementing artificial waterbody requirements and decisions under s. 30.19, Wis. Stats., to construct, dredge, or enlarge an artificial waterbody. This includes decisions on artificial waterbodies on privately owned property as well as projects involving artificial waterbodies as part of a Department led project under MC 1755.1. It will also be used to ensure that consistent messaging is being conveyed through website information, e-permit submittals, and statewide general permit creation and modification.

The guidance will help property owners and their consultants, and DNR staff, by clarifying when the Department has jurisdiction over artificial waterbodies.

## B. Background

2015 Act 387 created a new statutory section in Ch. 30, Wis Stats.,s. 30.053, which describes the applicability of Ch. 30, Wis. Stats., to artificial waterbodies, as defined in 30.19(1b)(a)<sup>1</sup>. The section creates new standards for state jurisdiction over artificial waterbodies.

*30.053 Applicability of chapter to artificial water bodies. Except in subch. V and except as specifically provided otherwise in this chapter, nothing in this chapter applies to an artificial water body, as defined in s. 30.19 (1b) (a), that is not hydrologically connected to a natural navigable waterway and that does not discharge into a natural navigable waterway except as a result of storm events.*

## C. Discussion & Guidance

To assist in determining Ch. 30 statutory jurisdiction with regards to artificial waterbodies, the Department understands that the terms “hydrologically connected”, “natural navigable” and “storm event” in the newly created section 30.053 need to be applied consistently.

Natural navigable waterway:

The term navigable waterway is already defined in s. 30.01(4m)

*30.01(4m) (4m) "Navigable waters" or "navigable waterway" means any body of water which is navigable under the laws of this state.*

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<sup>1</sup> 30.19(1b)(a) "Artificial water body" means a body of water that does not have a history of being a lake or stream or of being part of a lake or stream.

To be consistent with other applications of Ch. 30, the department will consider any waterbody that meets the statutory definition of navigable waterway and has waterway history as being a ‘natural navigable waterway’.

### Storm event

The term ‘storm event’ already is used in Ch. 30 relating to artificial waterbodies, specifically with regards to artificial waterbody jurisdiction and permit requirements. (e.g. [30.19\(1g\)\(am\)](#) ). S. NR 343, Wis. Adm. Code defines storm event as:

*[NR 343.03\(9\)](#) (9) "Storm event" means any amount of precipitation equal to or greater than 0.01 inches with a minimum time between storms of 6 hours*

In addition to the creation of s. 30.053, Wis Stats which uses the term ‘storm event’, Act 387 has also added a new exemption from permitting to the statutes: s. 30.19(1m)(dm) that also uses the term ‘storm event’:

***30.19(1m)(dm)** The dredging of any part of an artificial water [body] that does not connect with a navigable waterway. An artificial water body that meets the requirements of this paragraph includes a stormwater management pond that does not discharge into a navigable waterway except as a result of storm events.*

In determining artificial waterbody jurisdiction under s. 30.053 *and* the applicability of the exemption in s. 30.19(1m)(dm), Wis. Stats., the department will use the current administrative rule definition for storm event<sup>2</sup>.

### Hydrologically connected

The term ‘hydrologically connected’ is not defined in the statute or administrative rule. If the statute and rules do not define a term, standard statutory construction precepts allow the Department to use and apply any ‘term of art’ definition used in industry, projects, etc. or a standard dictionary definition. Some of the standard definitions of hydrologically connected are:

“connected to downstream waters via channels that convey surface and subsurface water either year-round (i.e., perennial flow), weekly to seasonally (i.e., intermittent flow), or only in direct response to precipitation (i.e., ephemeral flow)”.

“through natural or constructed channels, nonchannelized surface flows, or subsurface flows”

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<sup>2</sup> The word ‘precipitation’ as used on the definition of storm event is not limited to rain, but can include other types of precipitation including but not limited to snow and hail.

“connections via surface water (both channelized and nonchannelized) or groundwater, can be continuous, seasonal, or ephemeral, depending on the overall hydrologic conditions in the watershed”

All these definitions, while descriptive and all encompassing, may be difficult to implement when determining the state’s jurisdiction over artificial waterbodies. For example identifying a consistent method to determine sub surface flow and groundwater connections might be impractical when dealing with a man-made pond. For this reason and to avoid an interpretation of this term that could be in conflict with existing case law or federal interpretation of this term used in the Federal Clean Water Act, the Department has chosen to use the definition found in NR 343.03(3) to describe artificial waterbodies that are ‘hydrologically connected’ but will limit the definition applicability to ‘natural navigable waterway’ (as defined earlier in this guidance) instead of the broader ‘navigable waterway’.

*NR 343.03(3) (3) "Connects with a navigable waterway" means any artificial waterbody that is attached by means of enlargement or by a natural or artificial channel or drainage course, or an open or closed conduit, any of which tend to confine and direct flow into the existing navigable waterway.*

Since the advent of NR 343.03(3) definition in 2004 the Department has applied this definition to include intermittent waterways that connects with a navigable waterway and will continue to do so .

### **How does the creating of s. 30.053, Wis Stats, affect the Departments jurisdiction over artificial waterbodies?**

If artificial waterbodies that meet the definition of 30.19(1b)(a) and that do not connect with ‘natural navigable’ waterbodies as described in the definition above (and do not discharge to natural navigable waterbodies except in as a result of storm events) meet the criteria listed under 30.19(1g)(a) or (am) permits will be required.

*Construct, dredge, or enlarge any artificial water body that connects with an existing navigable waterway.*

*Construct or enlarge any part of an artificial water body that is or will be located within 500 feet of the ordinary high-water mark of, but that does not or will not connect with, an existing navigable waterway. An artificial water body that meets the requirements of this paragraph includes a stormwater management pond that does not discharge into a navigable waterway except as a result of storm events.*

This is because while s. 30.053 describes artificial waterbodies that are not applicable under Chapter 30, s.30.053 also lists some exceptions to this inapplicability of Ch, 30. One of these exceptions states “except as specifically provided otherwise in this chapter” which allows the permit requirements of 30.19(1g)(a) and (am) to still apply to artificial waterbodies.

*30.053 Applicability of chapter to artificial water bodies. Except in subch. V and except as specifically provided otherwise in this chapter, nothing in this chapter applies to an artificial water body, as defined in s. 30.19 (1b) (a), that is not hydrologically connected to a natural navigable waterway and that does not discharge into a natural navigable waterway except as a result of storm events.*

It should be noted that although an artificial waterbody that meets the criteria (as interpreted by this guidance) listed under s. 30.053, Wis. Stats., could be considered non-jurisdictional if the artificial waterbody also doesn't meet 30.19(1g)(a) or (am), any discharge of fill associated with that artificial waterbody that occurs in a wetland will trigger wetland jurisdiction under s. 281.36, Wis Stats., (including an artificial waterbody located in a wetland, even though the artificial waterbody in itself may not regulated under Ch. 30, Wis. Stats.).

CREATED:

Statewide Policy Team	8/22/2016
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APPROVED:

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Policy Management Team approved on 8/22/2016 (date).