

## **New State Wetland Regulatory Reform Bill signed by Governor Walker.**

March 28, 2018 Governor Walker has signed into law Amendment 3 to Assembly Bill 547 now known as Wisconsin Act 183. This new law creates additional exemptions for artificial wetlands and certain nonfederal wetlands. There are also components of Act 183 that modify some requirements for wetland boundary delineations and DNR confirmations; creates wetland mitigation-related grant programs; and allows DNR to assume authority over the federal wetland program if the U.S. EPA agrees to delegate such authority to the State. This summary will focus on the wetland regulatory changes impacted by the new law.

### **Artificial Wetland Exemptions**

Wisconsin Act 183 expands the exemptions for artificial wetlands from current exemption criteria. Under previous law, only those artificial wetlands that were created for specified purposes (identified in WI Administrative Code NR103.06) such as stormwater management features were exempt. Artificial wetlands that were incidentally created through grading or other activities generally were regulated by the State under previous law. The new law exempts most artificial wetlands regardless of how they developed. An artificial wetland is defined as a landscape feature formed as a result of human modification to the landscape or hydrology AND there is no definitive evidence of wetland history prior to August 1991. Local governmental organizations are prohibited from regulating discharges into exempt artificial wetlands. Exceptions include those artificial wetlands that serve as fish spawning habitat or passage to fish spawning; compensatory wetland mitigation bank sites; or wetlands that provide significant functions that protect property or infrastructure from flooding or water quality protection of adjacent water bodies.

### **Nonfederal Wetland Exemptions**

Act 183 provides exemptions to permitting requirements for certain nonfederal wetlands. Nonfederal wetlands are wetlands that are not subject to Federal jurisdiction. Exemptions apply to projects in urban areas with wetland impacts up to 1-acre per parcel. An urban area is defined as an incorporated area; an area within ½ mile of an incorporated area; or an area served by a sewerage system. Exemptions for nonfederal wetlands also apply to projects in rural areas with wetland impacts up to 3-acres per parcel. Exemptions in rural areas only apply to structures with an agricultural purpose such as buildings, roads, and driveways. Exceptions limiting exempt nonfederal wetlands include wetland types that are rare or high quality which are specified within Act 183. Local government organizations are prohibited from regulating discharges into nonfederal wetlands that the new law exempts.

Wetland mitigation will be required for impacts to exempt nonfederal wetlands beyond specific threshold limits. In urban areas, wetland mitigation will be required for impacts greater than 10,000 sq. ft., while wetland mitigation in rural areas will be required for impacts greater than 1.5 acres. The mitigation requirements only apply to the acreage of wetland impacts that exceeds the threshold, not the entire impact amount.

### **Modifications to Wetland Delineation and DNR Confirmation**

Act 183 creates an additional DNR wetland boundary confirmation process for nonfederal wetlands. If wetlands are deemed nonfederal, the DNR must provide review and confirmation of delineations completed by a qualified, non-assured wetland delineator within 15 working days of the request without completing a field review. DNR-confirmed wetland delineations, or those completed by an assured wetland delineator, on nonfederal wetlands will be valid for 15 years and the DNR cannot invalidate, amend, or require a new delineation within that timeframe. Prior to this new law, wetland delineation reports completed by non-assured wetland delineators were submitted to the DNR for



confirmation and the DNR was given 60 days to complete a field review and provide written confirmation, which was valid for 5 years. The 60-day review process with field confirmation will still apply to federal wetlands.

### **Artificial and Nonfederal Wetland Exemption Confirmation Process**

While the DNR has not yet formally provided guidance for an exemption submittal and review process, Act 183 identifies some key requirements: 1) The DNR now has 15 working days to respond to an exemption request; 2) The request must include one of the following: a statement issued by a professional who has investigated the wetland and who is qualified to give such an opinion; or a wetland delineation prepared by a qualified professional showing the exact location and boundaries of the wetland.

### **Potential Complications in Implementing the Exemptions of Act 183**

Probably the most misunderstood component of Act 183 is how nonfederal vs federal wetlands are defined and determined. This is not a well understood or defined determination, even for those professionals that specialize in the field of wetland delineation. In fact, the jurisdictional authority currently lies with the U.S. Army Corps of Engineers (USACE) and not the DNR. Recent and historic federal Supreme Court rulings regarding federal jurisdiction of wetlands per the Clean Water Act, in some cases have further complicated the determination criteria and process. Although the new law does not specifically discuss the process for determining nonfederal vs federal wetlands, it is understood that the first step in the process will require the USACE to complete an Approved Jurisdictional Determination (AJD) before the DNR evaluates exemption requests for nonfederal wetlands. The USACE AJD process and timelines is not subject to the provisions of Wisconsin's Act 183, and oftentimes can take several months to complete depending on USACE staff workload and the complexity of the AJD. Additionally, there may be some instances where the new state exemptions for artificial wetlands do not align with existing federal exclusions for artificial wetlands, as Wisconsin's new exemptions may be broader than the federal exclusions. In those situations, wetland permits and possibly wetland mitigation may be required by the USACE even though state exemptions apply.

The wetland regulatory process and its applicability to your project should always be evaluated specifically to the site, the project components, and the ecological resources involved. Heartland Ecological Group can assist you in evaluating and navigating the process efficiently and appropriately for achieving your goal of a successful project. Please feel free to contact us with any questions.

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