

# Subgroup 3 OHWM/Transition Zone Issues

Contaminated Sediments External Advisory Group Meeting  
September 19, 2016

# Summary

- Whatever approach is developed (i.e. numbers or process) it needs to:
  - Be legally defensible
  - Meet the 80/20 rule
  - Provide consistency
  - Result in reproducible numbers/process (i.e. same inputs will equal similar outputs)
  - Ensure selected approach is achievable
- CSEAG charter is to develop recommendations, not rules

# Act 204 - Definition of Sediment

- Sediment:

Particles in the bed of a navigable water up to the ordinary high water mark that are derived from the erosion of rock, minerals, soil, and biological materials and from chemical precipitation from the water column and that are transported or deposited by water

- Does DNR have the authority to apply soil numbers in the “transition zone”?
  - Per the Act 204 definition of sediment, the material below the OHWM is sediment.
  - Evaluate exposure pathways of concern per NR 722.07(3)

# Sediment vs. Soil w/ Respect to the OHWM



## UPLAND – SOIL

*(Above OHWM)*

Use NR 720 unless NR 716.07(8)(a), (b) and/or (c) apply  
Site specific number(s) may be necessary for sites that meet NR 716.07(8) criteria.

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## Ordinary High Water Mark (OHWM)

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## TRANSITION AREA

*(Exposed\* sediment between the Edge of Waterway/Waterbody and OHWM)*

Use Default Number(s) or Pursue Site Specific Number(s)

Evaluate all exposure pathways

\* "Below OHWM Sediment" – Sediment that is permanently or periodically out of water

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## EDGE OF WATERWAY/WATERBODY - SEDIMENT

*(Permanently under water)*

Use Default Number(s) or Pursue Site Specific Number(s)

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## TRANSITION AREA

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## Ordinary High Water Mark

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## UPLAND - SOIL

# What scenarios should require an OHWM determination?

- Act 204
  - Demarcation between sediment and soil as related to cleanup numbers
- Shoreland zoning setbacks
- Forest water quality BMP setbacks
- Ch. 30 jurisdiction
  - Placement of structures or deposits in public water
- Ch. 31 water level order
- Ch. 31 public interest stage

# At what point in the NR 700 process is an OHWM determination needed?

- Site Scoping/Discovery
- Site Investigation Work Plan/Report
- Remedial Action Options Report
- Remedial Action Design Report
- Remedial Action Documentation Report

# When should an OHWM determination be updated?

- Trained department field staff determine the OHWM through on-site investigation and analysis of physical and biological indicators on a case-by-case basis
- There is no statute of limitations on OHWM determinations and no set cycle where they need to be redone
- Example scenarios where an OHWM was already done and may be redone:
  - Creation of Public Rights Stage
  - Water Level Order Change
  - New Dam Construction
  - Dam Removal
  - Catastrophic Flooding Event
- Typically the department does not redo OHWM determinations except in situations where someone wants to challenge the accuracy of the current OHWM
  - 30.102 gives the public the ability to undertake this challenge
  - s. 227.41 is the mechanism for the public to challenge OHWM determinations

# What is the Ordinary High Water Mark (OHWM)?

Public waters subject to state public trust responsibilities are those lakes, ponds, flowages, rivers, streams and associated enlargements declared navigable under s. 30.10, Wis. Stats.

These public waters are by the Wisconsin Constitution Article IX, section 1, held in trust by the state for the benefit of all of its citizens.

The limits within which these water bodies are held in trust by the state extend from the open water, landward to the OHWM



# OHWM Definition: State of Wisconsin

*Diana Shooting Club v. Husting, 156 Wis. 261 (1914); Polebitzke v. John Week Lbr. Co., 163 Wis. 322 (1916)]*

*NR 300 Wis. Admin. Code series*

"By ordinary high-water mark is meant the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic.

And where the bank or shore at any particular place is of such a character that it is impossible or difficult to ascertain where the point of ordinary high-water mark is, recourse may be had to other places on the bank or shore of the same stream or lake to determine whether a given stage of water is above or below ordinary high-water mark."

# OHWM Definition: USACE

“The OHWM is the line on the shore or bank established by the fluctuations of water and indicated by physical characteristics such as a clear natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris and other physical characteristics.”

# OHWM Definition: Comparison

Both definitions of the term “ordinary high water mark” begin by discussing physical characteristics that indicate the location of the OHWM on the shore of a water body.

Both OHWM definitions conclude with the statement the OHWM can be determined using other characteristics.

# Next Steps

- End Products/Deliverables
- Volunteer Assignments
- Next Meeting for Subgroup 3
  - Proposed dates:
    - October 24<sup>th</sup>, 3:00 – 4:00
    - November 22<sup>nd</sup>, 3:00 – 4:00
    - December 5<sup>th</sup>, 3:00 – 4:00 or December 13<sup>th</sup>, 3:00 – 4:00
  - Madison meeting location