



WATERWAYS BUREAU

PROGRAM GUIDANCE

Wisconsin Department of Natural Resources  
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### **Chapter 30 and 31 Jurisdiction at Cranberry Operations Involving Non-Metallic Mining**

Effective Date: 10/21/2019

Guidance Number: 3500-2016-69

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. 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.

APPROVED:

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Waterways Bureau Director

1/14/2021

Date

## SUMMARY

*The narrowly defined exemption in s. 94.26, Wis. Stats., from certain permitting requirements of chs. 30 and 31, Wis. Stats., for cranberry culture does not apply to nonmetallic mining sites (including frac sand mining) where a ch. NR 216, Wis. Admin. Code, WPDES storm water permit is required. For nonmetallic mining operations where the mined material is sold or is not being used for the culture of cranberries by the property owner doing the mining, chs. 30 and 31, Wis. Stats., jurisdiction shall apply, including the standards set forth in applicable administrative codes (e.g., chs. NR 103, 340, & 343, Wis. Admin. Code).*

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### **A. Statement of Problem Being Addressed**

Nonmetallic mining for frac sand has become a significant economic as well as environmental factor on the landscape. The department has been processing an increasing number of nonmetallic mining permit applications under ch. NR 216, Admin. Code, and ch. 30, Wis. Stats. Many are for frac sand mining. As frac sand mines increase in number, many projects propose to conduct nonmetallic mining activities in areas currently used for cranberry culture. Those proposals raise the issue of whether the permit exemptions in the “cranberry law” (s. 94.26, Wis. Stats.) apply to nonmetallic mining activities conducted in areas where cranberry culture is occurring.

### **B. Background**

Cranberry culture in Wisconsin is an industry that has been granted a defined set of exemptions from state laws since 1867. To further the vitality of the cranberry culture industry, section 94.26, Wis. Stats. (the “cranberry law”), exempts the cranberry industry from the requirement to obtain permits for the construction and maintenance of dams, drains and ditches that may have impacts to navigable waterways if those dams, drains, and ditches are used for purposes specified in s. 94.26. Wisconsin Supreme Court cases decided since the original law was enacted have affirmed that the cranberry industry may undertake certain activities to divert water without ch. 30 or 31 permits.

As a result, in the 1970’s the Department of Natural Resources worked with the cranberry industry to develop a memorandum of understanding (“MOU”) to define a process by which issues and environmental impacts from cranberry culture operations are addressed collaboratively. Both parties recently revisited this MOU to address permitting processes and enforcement issues. This collaboration led to a need for the Department to state its positions on other issues associated with cranberry culture, e.g. does nonmetallic mining conducted on lands used for cranberry culture require WPDES storm water or ch. 30 or 31 permits?

Under NR 216.21(2)(b), Wis. Adm. Code, a WPDES storm water permit is required for nonmetallic mining activities. An exclusion from this permit requirement is provided for agricultural storm water discharges under NR 216.21(5)(a), Wis. Adm. Code.

### **C. Discussion**

The current issue associated with the cranberry industry and non metallic mining concerns frac sand mining. Frac sand mining in Wisconsin is a fast growing industry. Frac sand is found in specific geologic formations and geographic areas, including the cranberry regions of western and central Wisconsin.

Where frac sand exists in areas currently used for cranberry production, the issue arises: Is frac sand mining in cranberry culture areas an activity eligible for the narrowly defined permit exemptions in section 94.26, Wis. Stats., or does frac sand mining in such areas require appropriate WPDES and chapter 30, Wis. Stats., permits?

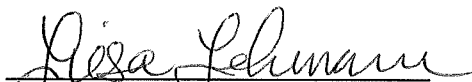
One situation where guidance is required is where a cranberry grower intends to mine frac sand for years on a property currently not used for cranberry culture, then complete the mining operations and reclaim the mined area to use as new cranberry beds and flowages in his existing cranberry culture operation. The mining operation would undertake one or more activities that would be regulated for non-cranberry culture operations under chapters 30 and 31, Stats., including dredging, stream realignment, creating ponds within 500 feet of navigable waterways, grading on the banks of navigable waterways, and constructing in-line ponds and dams within navigable waterways. Do the "cranberry law" permit exemptions apply to such activities?

#### D. Guidance

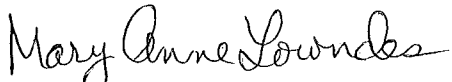
The extraction and on-site use of non-metallic material solely for the cranberry growing operation on the property that involves cranberry culture is an agricultural storm water discharge that does not require a WPDES storm water permit under ch. NR 216, Wis. Adm. Code. However, where mined non-metallic material is being extracted, sold or used for some other purpose than the culture of cranberries by the property owner, then that activity is a non-metallic mining operation under ch. NR 216, Wis. Adm. Code, and requires a WPDES storm water permit. The cranberry industry has agreed and worked cooperatively with the department to ensure permits are being acquired and permit standards are being met.

The permit exemptions in section 94.26, Wis. Stats., do not apply to projects in cranberry culture areas where nonmetallic mining requires a WPDES storm water permit under ch. NR 216, Wis. Admin. Code, and ch. 283, Wis. Stats. Accordingly, the permitting requirements of chs. 30 and 31, Wis. Stats., apply to such projects. These projects include ponds located within 500 feet of navigable waterways, dredging, stream realignment, in-line ponds and dams, and grading on the bank of navigable streams. In addition, nonmetallic mines regulated under ch. 30, Wis. Stats., also must comply with the standards and processes prescribed in chs. NR 340 and 103, Wis. Admin. Code. This conclusion ensures that the Department will consistently apply the permit exemptions in section 94.26, Wis. Stats., for certain cranberry culture activities only to activities undertaken in the course of cranberry culture operations and will continue to protect the public trust in navigable waterways as defined by Wisconsin's legislature and courts.

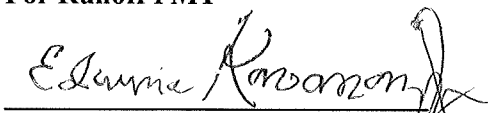
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