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FILE REF: NA

TO: Wetland Study Council

FROM: Tom Nedland and Tom Pearce

SUBJECT: Waterways Program Experience with Act 183 Wetland Exemptions

### Statutory Background

Wisconsin 2017 Act 183 created two new wetland exemptions under s. 281.36 (4n), Wis. Stats., which became law on July 1, 2018:

#### *Artificial Wetland Exemption*

Proposed projects resulting in a discharge of dredged or fill material in certain artificial wetlands that are shown to not have wetland history prior to August 1, 1991, and that are the result of human modification to the landscape may be eligible for an exemption from permitting.

#### *Nonfederal Wetland Exemption*

Proposed projects in wetlands which the U.S. Army Corps of Engineers determined to be non-jurisdictional under the Section 404 of the Clean Water Act (33 USC 1344) and which do not impact rare and high-quality wetland types may be eligible for an exemption from permitting. Eligibility criteria and requirements for this nonfederal wetland exemption in urban areas include impacts up to one acre of wetland per parcel and include impacts up to 3 acres of impact per parcel for the development a structure with an agricultural purpose in rural areas.

Act 183 also required that project proponents notify the DNR when they believe their projects meet either the artificial or nonfederal exemption criteria. A project purpose statement and a professionally completed wetland delineation are required for both exemption types. With an artificial exemption request, evidence that the wetland(s) are the result of human modification to the landscape and do not have history prior to August 1, 1991, must also be submitted with the proper documentation to demonstrate that the project meets eligibility criteria. For a nonfederal exemption request, the project proponent must have a jurisdictional determination from USACE. Nonfederal wetland exemptions also require wetland mitigation for impacts in urban areas of more than 10,000 sq. ft. and for impacts in rural areas greater than 1.5 acres.

For both types of exemption requests, the DNR has 15 days to approve or deny the request and has the opportunity just once to request to the applicant for additional information. If 15 days passes without a decision or communication from DNR, the exemption is deemed valid under state statute, and no wetland permit is needed to complete the project. The purpose of DNR review is to determine the project meets exemption eligibility criteria, including, among others, that the wetland is not providing significant functions that protect property from flooding or significantly improve water quality for both types and that the wetland is not a rare and high quality community type for a nonfederal wetland exemption. DNR review also ensures that the project is in compliance with all provisions under s. 281.36.

## Data Review

A dataset of wetland exemption requests from 2019-2022 shows that over the 4-year period, project proponents submitted 1,109 artificial wetland exemption requests and 434 nonfederal exemption requests, or an average of 385 exemption requests annually. Prior to Act 183, these requests would have been submitted to DNR as individual permits or general permits (most likely under wetland general permit 1 for residential, industrial, or commercial purposes) or applicants would have had to consider avoiding wetland impacts for their projects altogether. Act 183 did not include statutory authority or rulemaking authority for DNR to collect fees for exemption reviews. Program experience with administering the new exemptions has shown that wetland exemption reviews require a level of staff time comparable to general permit and individual permit reviews, depending on the complexity of the project site and proposed impacts. These reviews can be challenging given the 15-day timeline and the lack of fee revenues to support staff positions for the wetland program.

**Table 1 – Wetland Exemption Requests by Type, 2019-2022**

Year	Artificial Exemption Requests	Nonfederal Exemption Requests	Total
2019	336	80	416
2020	283	130	413
2021	267	118	385
2022	223	106	329
<b>TOTAL</b>	<b>1109</b>	<b>434</b>	<b>1543</b>
<b>ANNUAL</b>	<b>277.3</b>	<b>108.5</b>	<b>385.8</b>

**Table 2 – Differences in Application Type and Fees for Wetland Exemption Requests, 2019-2022**

Application Type if Exemptions not Available	Artificial Exemption Requests	Nonfederal Exemption Requests	Total
IP Applications	454	89	543
GP1 Applications	638	341	979
<b>TOTAL</b>	<b>1092</b>	<b>430</b>	<b>1522</b>

Of the 1,109 artificial wetland exemption requests submitted from 2019-2022, 474 requests were for impacts between 0.00-0.23 acres, which would have otherwise been submitted under wetland General Permit 1 (GP1) with an application fee of \$500; and 454 requests were for wetland impacts greater than 0.23 acres (or 10,000 square feet) and would have otherwise required a wetland individual permit with an application fee of \$800. The total fee difference for artificial exemptions is estimated at \$682,200 over 2019-22, or \$170,550 annually.<sup>1</sup>

<sup>1</sup> Applications submitted under GP1 require a restoration surcharge fee which must be used to restore wetlands. These fees are not used for Waterways Program staff time.

Of the nonfederal wetland exemption requests submitted from 2019-2022, 341 requests were for impacts between 0.00-0.23 acres, which would have otherwise been submitted under wetland General Permit 1 (GP1) with an application fee of \$500; and 89 requests were for wetland impacts greater than 0.23 acres (or 10,000 square feet) and would have otherwise required a wetland individual permit with an application fee of \$800. The total fee difference for nonfederal exemptions is estimated at \$241,700 over 2019-22, or \$60,425 annually.

The differences in collected fees since the Act 183 exemptions were implemented is estimated at \$230,975 annually. or funding for approximately 2.5 FTE Waterways staff positions.

**Table 3 – Differences in Collected Fees for Wetland Exemption Requests, 2019-2022**

<b>Difference in Collected Fees</b>	<b>Artificial Exemption Requests</b>	<b>Nonfederal Exemption Requests</b>	<b>Total</b>
For requests that would have fallen under an IP	\$363,200.00	\$71,200.00	\$434,400.00
For requests that would have fallen under a GP1	\$319,000.00	\$170,500.00	\$489,500.00
<b>TOTAL DIFFERENCE</b>	<b>\$682,200.00</b>	<b>\$241,700.00</b>	<b>\$923,900.00</b>
<b>ANNUAL DIFFERENCE</b>	<b>\$170,550.00</b>	<b>\$60,425.00</b>	<b>\$230,975.00</b>