

# **Wetland Study Council Presentation**

## **Wetland & Navigable Water Determinations**

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# Today's Goals

1. Refresher on Jurisdictional Requirements for Navigable Waters
2. Refresher on Jurisdictional Requirements for Wetlands
3. Differences in Jurisdiction

# NAVIGABILITY AND ORDINARY HIGH WATER MARK DETERMINATIONS

## DNR AND LOCAL GOVERNMENT JURISDICTION

**Navigable Waterway** - A navigable waterway is defined through case law as any waterway that has a defined bed and bank, and on which it is possible to float a canoe or small watercraft on a recurring basis.

**Ordinary High Water Mark** - The Ordinary High Water Mark (OHWM) is defined through case law as the point on the bank or shore of a waterway 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.

**DNR Jurisdiction (Below the OHWM)** - The DNR Waterways Program, under the public trust doctrine and state statute, has jurisdiction over permitting for projects that propose impacts in navigable waterways below the OHWM. This includes pier placement, shoreline erosion control structures, dredging, and other projects.

# Jurisdictional Requirements - Navigable Waters

## 30.10 Declarations of navigability.

**(1) LAKES.** All lakes wholly or partly within this state which are navigable in fact are declared to be navigable and public waters, and all persons have the same rights therein and thereto as they have in and to any other navigable or public waters.

**(2) STREAMS.**

**(a)** Subject to par. [\(b\)](#) and except as provided under sub. [\(4\)](#) [\(c\)](#) and [\(d\)](#), all streams, sloughs, bayous, and marsh outlets, which are navigable in fact for any purpose whatsoever, are declared navigable to the extent that no dam, bridge, or other obstruction shall be made in or over the same without the permission of the state.

# Jurisdictional Requirements - Navigable Waters

## Streams:

1. Are there discernable bed and banks/an ordinary high water mark?
2. Would the stream be able to float a canoe or skiff on a recurring basis (during the wet time of the year)?

## Ditches:

Notwithstanding any other provision of law, farm drainage ditches are not navigable within the meaning of this section unless it is shown that the ditches were navigable streams before ditching. For purposes of this paragraph, “farm drainage ditch” means any artificial channel which drains water from lands which are used for agricultural purposes.

- If adjacent land reverts from agricultural use, Chapter 30 provisions apply.
- If activity is not serving an ag purpose, Chapter 30 provisions apply.

Artificial waterbodies not connected to navigable water are exempt from Chapter 30 provisions

# Jurisdictional Requirements - Navigable Waters

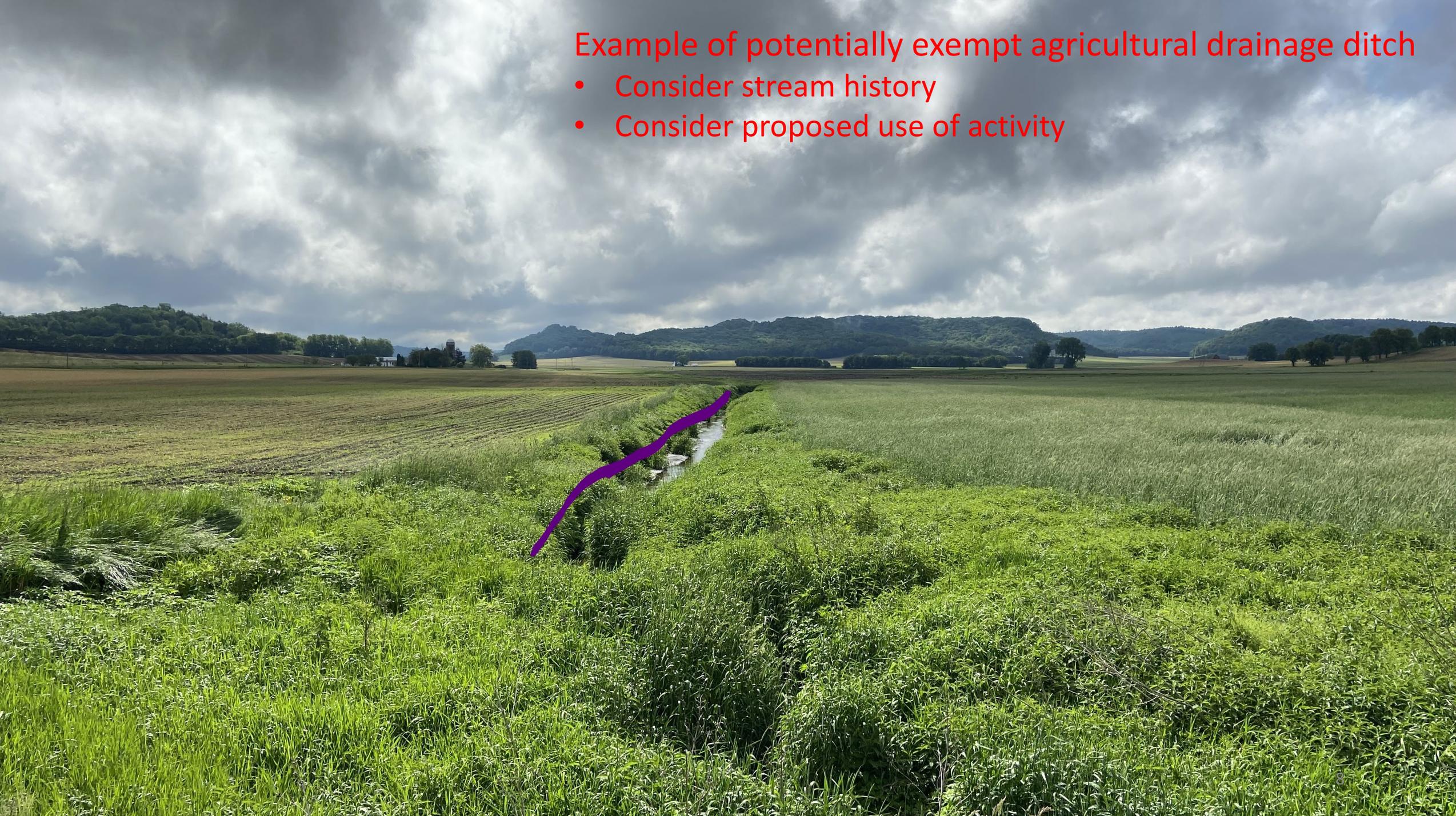
## Ponds – can be complex

1. Artificial and not a connected enlargement = generally private and not navigable
2. Artificial and has a navigable connection to a navigable water = generally navigable if
  1. Defined bed and bank/ordinary high-water mark
  2. Able to float a canoe or skiff on a recurring basis (during the wet time of the year)
3. Natural = navigable if
  1. Defined bed and bank/ordinary high-water mark
  2. Able to float a canoe or skiff on a recurring basis (during the wet time of the year)

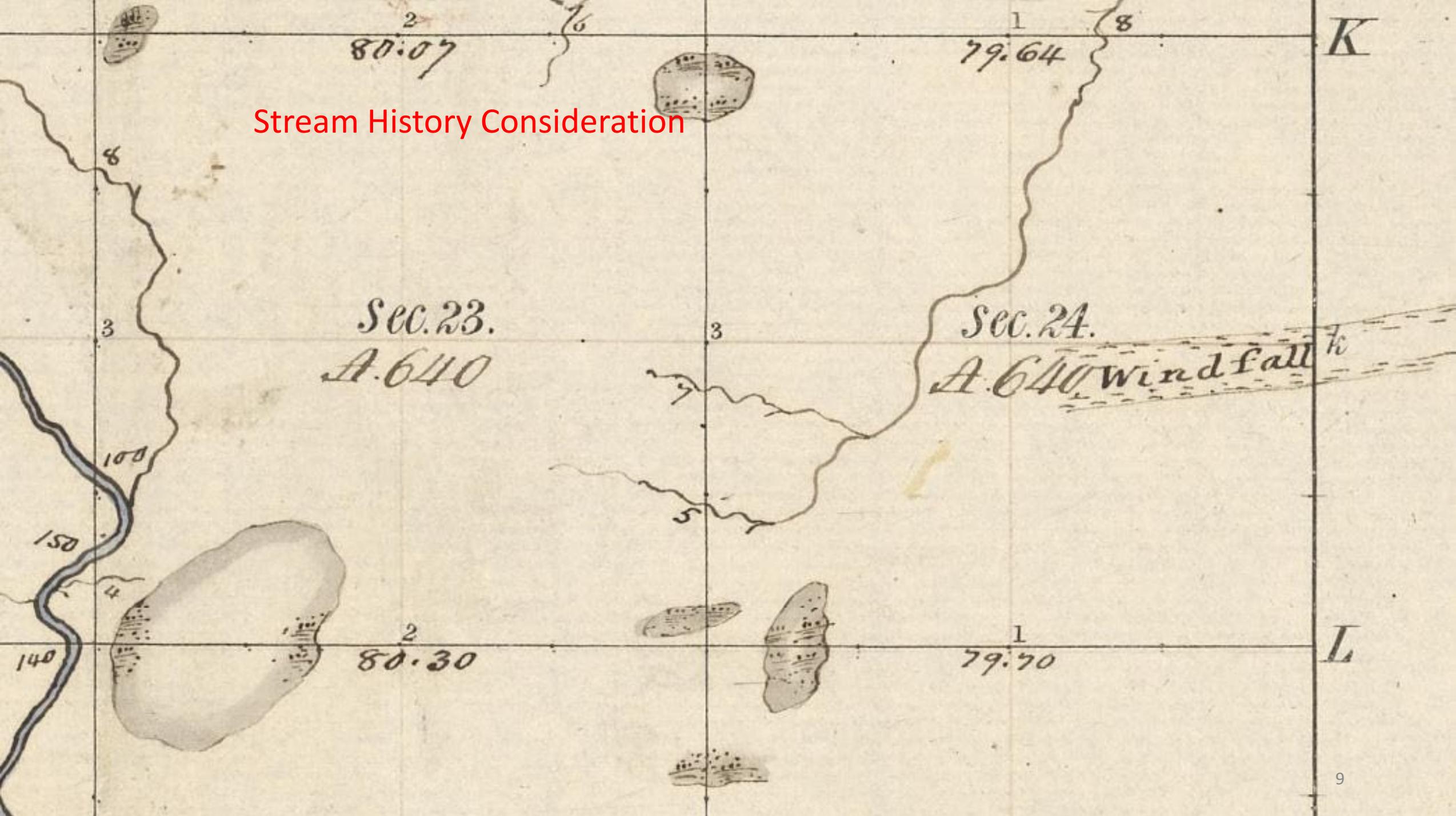


## Example of potentially exempt agricultural drainage ditch

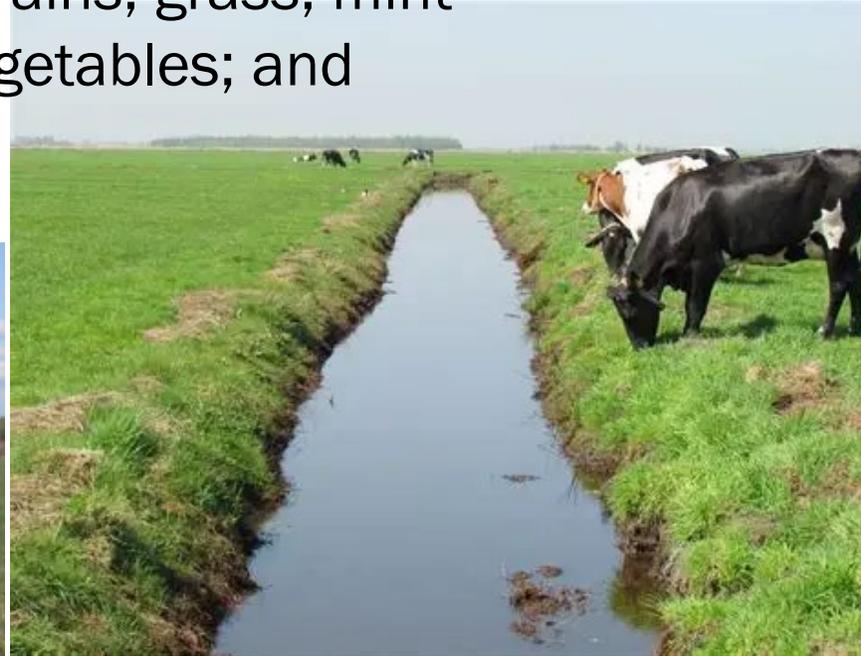
- Consider stream history
- Consider proposed use of activity



Stream History Consideration



“Agricultural use” means aquaculture; beekeeping; dairying; egg production; feedlots; grazing; floriculture; raising of livestock; raising of poultry; raising of fruits, nuts and berries; raising of grains, grass, mint and seed crops; raising of vegetables; and sod farming.





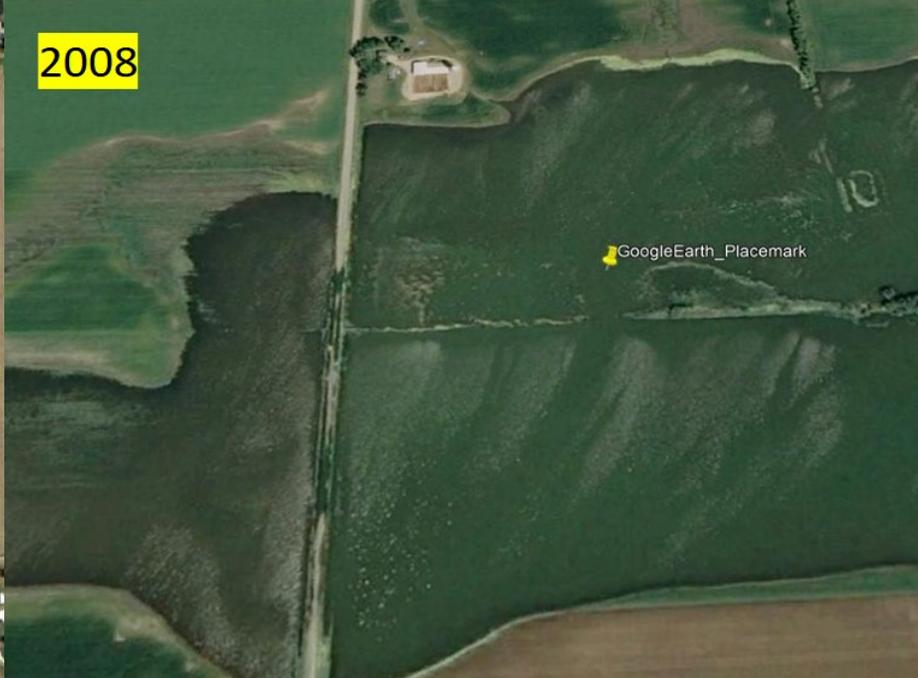
Is there a defined bed and bank?



1995



2005



2008



Is there a defined bed and bank?

# Jurisdictional Requirements - Wetlands

Wisconsin: an area where water is at, near, or above the land surface long enough to be capable of supporting aquatic or hydrophytic vegetation and which has soils indicative of wet conditions.

Federal: those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

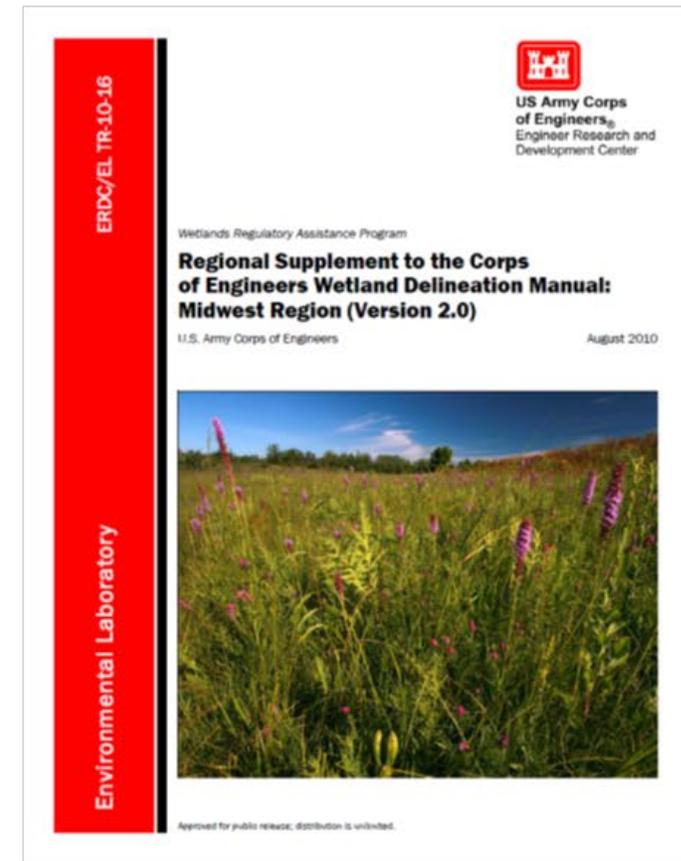
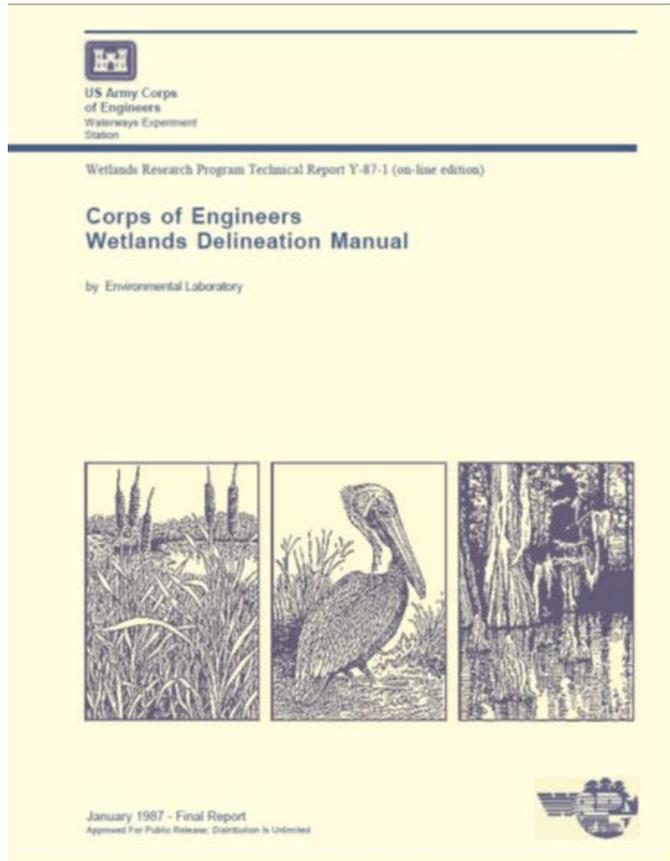
# Jurisdictional Requirements - Wetlands

s. 281.36(2m), Wis. Stats.

Delineation procedures. For purposes of delineating the boundary of a wetland under this section, the procedures contained in the wetlands delineation manual published by the U.S. army corps of engineers shall be used. The edition of the manual that shall be used shall be the 1987 edition of the manual and any document that the U.S. army corps of engineers issues interpreting that manual, unless the U.S. Army Corps of Engineers publishes an edition of the manual after January 9, 2001, and the department designates that edition as the one to be used under this subsection.

# Jurisdictional Requirements - Wetlands

1. 1987 Corps of Engineers Wetland Delineation Manual
2. Appropriate Regional Supplements



# Jurisdictional Differences

## Wetlands vs. Navigable Waters

### Wetland:

- Unique suite of exemptions
- Projects must consider avoid/minimize/mitigate options
- Not subject to shoreland zoning setbacks (counties may develop setbacks not associated with shoreland zoning)
- Public does not have the right to navigate/access (unless a wetland is below the OHWM of a navigable water)

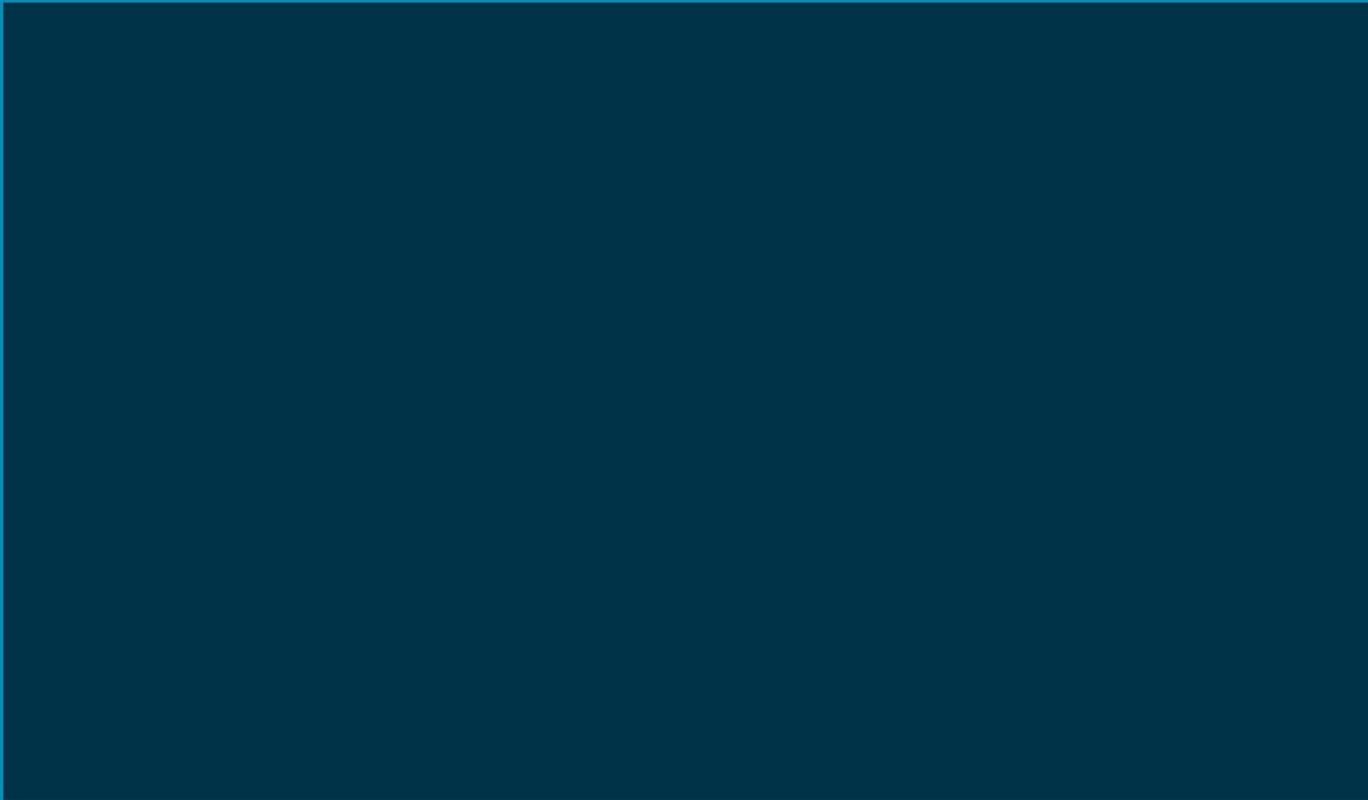
### Navigable Water:

- Unique suite of exemptions
- Projects designed to minimize adverse impacts to aquatic resources, but avoid/minimize/mitigate is not a requirement
- Subject to shoreland zoning setbacks
- Public has the right to navigate in navigable waters

# Questions?

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OFF THE RECORD"