March 7, 2022

Department of Natural Resources
Attn: Amanda Minks
P.O. Box 7921
101 S. Webster Street
Madison, WI 53707-7921

Sent via e-mail to amanda.minks@wisconsin.gov

RE: Comments on proposed NR 300 (WT-22-19), relating to the administration, procedures and enforcement of the Wisconsin Wetland and Waterway regulatory program

Dear Ms. Minks,

Wisconsin Manufacturers & Commerce (WMC) appreciates the opportunity to submit written comments to the Department of Natural Resources ("DNR" or "Department") in reference to its proposed rule to repeal and recreate NR 300 and repeal NR 301, 305, and 310 (Board Order WT-22-19). This draft rule relates to administrative processes and fees for waterway and wetland permitting.

WMC is the largest general business association in Wisconsin, representing approximately 3,800 member companies of all sizes, and from every sector of the economy. Since 1911, our mission has been to make Wisconsin the most competitive state in the nation to do business. This mission includes ensuring a regulatory environment that does not unduly burden Wisconsin businesses.

WMC is concerned that this rule goes beyond its stated purpose of simply clarifying administrative processes and procedures under a revised NR 300. Instead, the rule appears to undermine important statutory changes under 2011 WI Act 118, which made substantial reforms to wetland regulations in Wisconsin. This proposed rule grants the Department additional authority to regulate wetland permitting and wetland exemptions above and beyond what is explicitly authorized by statute. In addition, the proposed rule substantially increases fees for wetland permitting, and the size and purpose of these fee increases are inconsistent with what is authorized in the rule's scope statement.

1. **The proposed rule unlawfully limits eligibility for a waterway exemption. This section of the rule should be revised to be no more stringent than the existing applicable administrative code [see the proposed NR 300.04].**

The existing administrative code [see the current NR 310.04] references section 30 of the statutes as well as NR 1.06 in determining if a business's activity may be exempt from the

requirement that an individual or general permit is needed. Conversely, the proposed NR 300.04 ("Waterway exemptions") is broadly written to greatly limit eligibility for these exemptions. Under NR 300.04(2), "a person may only undertake a waterway activity that is exempt from permitting under ch. 30, Stats., if that person can confirm that a proposed activity complies with **all [emphasis added]** of the following requirements:

> (a) The waterbody in which the proposed activity is to occur does not have a classification or designated use that precludes the activity from being exempt.
> (b) Reasonable installation practices will be used that minimize environmental impacts.
> (c) Reasonable construction and design requirements will be met.
> (d) Proper disinfection protocols will be complied with to avoid the spread of invasive species.
> (e) The proposed activity will not cause a significant adverse impact to the public rights and interests.
> (f) The proposed activity will not cause environmental pollution.
> (g) The proposed activity will not cause a material injury to the riparian rights of any riparian owners.
> (h) The proposed activity is reasonable for the site and use of the property.
> (i) Appropriate safety measures will be put in place to ensure recreational safety such as appropriate lighting.
> (j) The proposed activity design and construction methods and timing will not adversely impact fish spawning or fish spawning habitat.
> (k) For waterway structure exemptions authorized under s. 30.12, Stats., the project proponent must be a riparian owner.
> (L) All other exemption requirements specified in ch. 30, Stats., and applicable administrative codes are satisfied."

There are several problems with this section. The first issue is the incredibly exhaustive list of broad conditions that an exempt party must meet in order to qualify for a permitting exemption. Clauses that force businesses or other parties to meet "reasonable construction and design requirements" or verify that a "proposed activity is reasonable for the site and use of the property" are incredibly subjective, and does not provide the regulated community with proper notice as to what is actually required. In addition, section (L) of the proposed rule allows the Department to point to "applicable administrative codes," without even specifying which sections of code need to be met.

The second problem is that this section is an unlawful violation of ch. 227 rulemaking requirements. Under s. 227.10(2m), no statement of general policy can be imposed unless it is "explicitly required or explicitly permitted" by statute. Wisconsin statutes do not authorize the Department to deny a wetland exemption from an applicant based on an undefined standard of "reasonable installation practices," "reasonable construction and design," or similarly vague standards of "reasonable"-ness.

Finally, the third key problem is that the proposed NR 300.04(2) requires the person to "confirm" that a proposed activity complies with all of these requirements. It is unclear how the applicant must confirm this, but there is no such requirement in the existing NR 310.04. Moreover, it seems very difficult to confirm an activity meets the myriad of vague requirements found in the proposed NR 300.04 without going through the review process specified in the proposed NR 300.05.

In short, this section of the draft rule goes well beyond what is explicitly authorized by statute, and appears designed to force businesses and others to submit a "review request" under NR 300.05 before proceeding with a relevant construction project. Such a requirement will lead to more project delays and unnecessary costs for Wisconsin businesses. WMC urges the Department to revise the proposed NR 300.04 and remove any provisions not explicitly authorized by statute. This could include restoring the language found in the existing NR 310.04 in lieu of this proposed section, as this section is more consistent with the DNR's statutory authority.

2. The proposed rule is more restrictive than the wetland exemptions specified in statute [see the proposed NR 300.05(1)].

This section appears to be undermining the wetland exemptions found in statute. In NR 300.05(1), the DNR states "A person **may only** undertake an activity that is exempt from wetland permitting if…" (emphasis added). However, the statute does not have such conditional language. Section 281.36(3b)(a) states, in part, "No person may discharge dredged material or fill material into a wetland unless…the discharge is exempt under sub. (4), (4m) (a), (4n), or (4r)."

The exemptions in statute, (4), (4m) (a), (4n), and (4r), are separate exemptions for separate purposes, but the proposed NR 300.05(1) treats them as the same and appears to attempt to cross-apply requirements that may or may not be applicable (or even exist) for each exemption upon one another. For example, s. 281.26(4)(a) provides that (subject to certain restrictions) permitting requirements do not apply to any discharge that is a the result of "normal farming, silviculture, or ranching activities." Conversely, s. 281.26(4n) provides criteria for a permitting exception for qualifying artificial wetlands. Section 281.36(3b)(a), through its use of the word "or," clearly requires each of these exceptions to be considered separately and not together.

In addition, the proposed NR 300.05(e) requires that, in order to qualify for a wetland exemption, "the discharge will not negatively impact a rare or high quality wetland as defined s. 281.36(4n)(a)3." However, the statutory requirement on "rare and high quality wetlands" impacts exemptions under (4n) for qualifying nonfederal wetlands and artificial wetlands. This section of statute does not impact statutory exemptions found under (4), (4m)(a), or (4r). Thus, under the statute, the "rare and high quality wetlands" exemption does not impact the exemption for "normal farming, silviculture, or ranching activities" [under (4)(a)], "construction or maintenance of farm ponds, stock ponds, or irrigation ditches" [under (4)(c)], the

maintenance of drainage district drains [under (4r)], or other permitting exemptions found in statute.

Moreover, ch. 227 rulemaking requirements do not allow the Department to impose a standard that is more restrictive than the standard found in statute. Specifically, under s. 227.11(2)(a)3., statutory provisions containing "a specific standard, requirement, or threshold" do not "confer on the agency the authority to promulgate, enforce, or administer a rule that contains a standard, requirement, or threshold that is more restrictive than the standard, requirement, or threshold contained in the statutory provision." With the proposed NR 300.05(1), the Department is clearly attempting to limit impacts to "rare or high quality wetlands" beyond the specific standard found in statute.

WMC urges the Department to modify the proposed NR 300.05(1) to ensure it is no more restrictive on the regulated community than what is authorized by statute. As currently written, this proposed section of the rule unlawfully restricts permitting exemptions that are provided by statute to businesses and other parties.

3. The definition of "rare or high quality wetland" must be revised to "rare and high quality wetland" [see the proposed NR 300.05(1)].

As noted previously, the proposed NR 300.05(1)(e) states that the permitting exemption cannot negatively impact "rare or high quality wetland" as defined in s. 281.36. However, the definition under s. 281.36 is for a "rare and high quality wetland," not a "rare or high quality wetland." There is a distinct difference between a rare wetland and a high quality wetland: It is possible to have a rare wetland that is not high quality because it is so degraded. It is also certainly possible to have a high quality wetland that is not rare.

This seemingly minor change by the Department could have a very significant impact on applicants, and the definition under the rule is in clear conflict with the applicable statute. Thus, WMC urges the Department to revise the proposed NR 300.05(1) to have it state "rare and high quality wetland," as required by statute.

4. The provision authorizing the DNR to seek "other technical information specified by the Department" should be removed [see the proposed NR 300.05(6)(e)].

The proposed NR 300.05(6)(e) authorizes the Department to require "other technical information specified by the department to ensure that all statutory requirements of the exemption are satisfied." Any technical information sought by the Department must be explicitly authorized by statute, and the statutes do no authorize the Department to seek undefined additional information in order for it to make its own determination that statutory requirements are met. Moreover, the Department is already authorized to seek "all definitive evidence" in sub(c), and "definitive evidence" has a statutory meaning found in s. 281.36(4n)(a)2.

WMC urges the Department to remove the proposed NR 300.05(6)(e), as it is overly broad and not explicitly authorized by statute.

5. The proposed fee increases exceed what was explicitly authorized by the scope statement. These increases are therefore unlawful and should be removed.

The proposed rule includes substantial fee increases for waterway and wetland permitting. In particular, the proposed fee for a wetland individual permit more than doubles, and far exceeds an inflationary adjustment as compared to the current fee. The table below highlights a few permitting fee changes under the rule:

Table 1: Select Fee Increases in Proposed NR 300*

Fee Type	Current Fee	Current Fee, Adjusted for Inflation	Proposed Fee	Percentage Increase over Current Fee
Wetland General Permit	$500	$619.83	$600	20%
Wetland Individual Permit	$800	$991.73	$1,700	112.5%
Structures General Permit	$300	$371.90	$350	16.67%
Structures Individual Permit	$600	$743.80	$750	25%
Dredging General Permit	$300	$371.90	$350	16.67%
Dredging Individual Permit	$600	$743.80	$900	50%

**Source: WI DNR Presentation to Wetland Study Council, 2021.9.16*

The Department addresses the fee increases in the first paragraph of the draft rule, specifically the last sentence:

"1-3. Statute Authority, Interpretation and Explanation: This rule seeks to clarify administrative processes, procedures and fees specified in chs. 30, 31, 227 and ss. 281.36, 23.32 and 23.321, Wis. Stats. The department is responsible to implement waterway and wetland permitting, exemption and other determinations for a number of activities including wetland fill, dam construction/reconstruction, waterway structure placement, dredging, water withdrawals, etc. This rule aligns administrative processes and procedures with statutory expectations and reflect current protocols. **This rule also seeks to update the fee structure for various activities to reflect inflation and increased travel and administrative costs [emphasis added]."**

However, the Department did not identify this purpose for the rule in its scope statement [see SS 122-19]. The scope statement notes that the rule effort may include "updates to permit fees," as part of a broader effort to do "procedural revisions" and other changes to the rule.

The Department's scope statement simply failed to inform the regulated community and the public of the dramatic fee increases being contemplated by the Department in this rule. There is simply no mention in the scope statement of doubling fees to cover "travel and administrative costs," or similar changes.

Under s. 227.135(4), if a scope statement changes in "any meaningful or measurable way," the Department is required to stop work on the rule and instead prepare a revised scope statement. At some point, the scope of the rule changed from procedural revisions and updates to allowing the Department to seek dramatically higher fees from applicants to cover administrative costs. Such a provision is a significant change from what was authorized in the scope statement, and is thus unlawful without a revised scope statement.

Finally, as a practical matter, whenever a government agency proposes a fee increase, WMC urges the agency to identify the increased services that will be offered to the regulated community as a result of the increase. In its review of the draft rule, WMC was unable to identify any improved services as a result of these higher fees. Instead, unfortunately, WMC has identified several provisions that will lead to more regulations and a longer approval timeline for Wisconsin businesses. In other words, the Department is asking businesses to pay more for fewer services.

WMC urges the Department to either removed the proposed fee increases or stop work on the rule and instead submit a revised scope statement under the regular ch. 227 rulemaking process. The proposed fee increases will impose a significant burden on Wisconsin businesses, and exceed what was authorized in the rule's scope statement.

6. The proposed rule requires the applicant to submit electronic applications for an individual or general permit. Use of electronic applications should be *optional*, not *mandatory*, under the rule.

Throughout the rule, the Department requires applicants to submit documentation through its own electronic permitting system or other permitting system "specified by the Department." In effect, the rule appears to eliminate the option for paper or non-electronic applications. At the same time, the rule simply provides that the Department "may" provide electronic notification to an applicant.

First, it is simply unfair for the Department under the rule to require Wisconsin businesses to submit forms electronically, but Wisconsin businesses are not required to receive the same courtesy. If this system is expected to save businesses on compliance costs, it would stand to reason that the Department would also have administrative savings by using its own system.

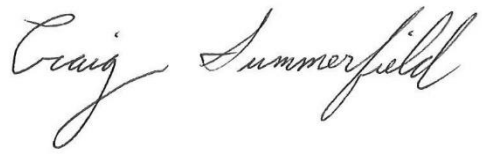
Instead, this system should be optional, not mandatory, for the regulated community. There are myriad of reasons why a paper application may be necessary: An applicant could experience technical difficulties or poor service, the system could go offline, the user may lack the

necessary software, or many other issues. Thus, an electronic system could lead to unnecessary delays for an applicant.

Finally, mandatory electronic permitting is a policy decision that is best left to the Legislature. The Department lacks the explicit statutory authority to require electronic applications. Thus, these provisions should be altered to clarify that an applicant can still submit paper applications under the rule.

Thank you for the opportunity to provide comments. Please do not hesitate to contact me with any questions.

Sincerely,



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