

MEMORANDUM

To: Wisconsin planners, zoning administrators, and conservation professionals
From: Brian W. Ohm, J.D., Dept. of Urban & Regional Planning, University of Wisconsin-Madison/Extension
Subject: Authority to Adopt the Model Wetland Conservation Ordinance
Date: November 20, 2015

Introduction:

The purpose of this memo is to summarize local government authority to adopt the Model Wetland Conservation Ordinance (“MWCO”) following the recent changes to Wisconsin law resulting from 2015 Wisconsin Act 41 and 2015 Wisconsin Act 55.

What’s the authority to adopt the MWCO?

The MWCO can be adopted as a section of a local government’s general zoning ordinance enabled under the following sections of the Wisconsin Statutes: 59.69 for counties, 62.23 for cities, 61.35 and 62.23 for villages, 60.62, 61.35 and 62.23 for towns with village powers, or 60.01 for towns without village powers in counties that do not have county zoning. The Indian Nations can adopt the ordinance following their own respective tribal laws.

Local governments should adapt this ordinance to their local situation and may decide to incorporate parts of this ordinance in other local ordinances such as local subdivision ordinances adopted under Wisconsin Statutes section 236.45, county shoreland zoning ordinances adopted under Wisconsin Statutes section, shoreland-wetland zoning ordinances adopted under Wisconsin Statutes section 61.351 (villages) or Wisconsin Statutes section 62.231 (cities), and construction site erosion control and storm water management ordinances adopted under Wisconsin Statutes section 59.693 (counties), Wisconsin Statutes section 60.627 (towns), Wisconsin Statutes section 61.354 (villages), and Wisconsin Statutes section 62.234 (cities).

How does 2015 Wisconsin Act 55 impact the incorporation of the MWCO in county shoreland zoning ordinances?

2015 Wisconsin Act 55 changed the status of county shoreland zoning ordinances adopted to comply with the requirements of Wisconsin Statutes section 59.692. Prior to Act 55, the Department of Natural Resources (“DNR”) rules governing Wisconsin’s Shoreland Protection Program established *minimum* standards that counties were required to adopt for the shoreland area¹ in the unincorporated areas of the county. Counties were free to be more restrictive than the DNR rules. The rules are found in Wisconsin Administrative Code, Chapter NR 115. Act 55 changed this by prohibiting counties from

¹ Under state law, the shoreland area is defined as the areas within 1000 feet from the ordinary high water mark of navigable lakes, ponds, or flowages, or 300 feet from the ordinary high water mark of a navigable river or stream to the landward side of the floodplain, whichever distance is greater [Wisconsin Statutes section 59.691(1)(b)]. In many parts of the state, wetlands are located outside the shoreland area. As a result, including the MWCO in the general county zoning ordinance may be more effective than incorporating it into the county shoreland zoning ordinance.

regulating matters more restrictively than the standards in NR 115. However, Act 55 also states that *counties are not prohibited from enacting shoreland zoning ordinances that regulate matters that are not regulated by NR 115.*

The MWCO includes standards and procedures that are not established in NR 115, and therefore, unaffected by changes enacted by Act 55. For example:

- NR 115 does not establish standards and procedures for regulating wetlands located in the shoreland area based on field conditions. *See MWCO Sections 1.3(7) and 3.1.*
- NR 115 does not establish standards and procedures for reviewing impacts to wetland hydrology (i.e., indirect impacts). *See MWCO Parts 3 and 4.*
- NR 115 does not require wetland setbacks (i.e., protective areas). *See MWCO Section 3.3.*
- NR 115.04 does not establish approval criteria specific to wetlands, such as the MWCO Wetland Conservation Standards, in the review of land disturbing activities affecting wetlands located in the shoreland area. *See MWCO Section 2.2 and Part 4.*

Act 55 directly prohibits county shoreland zoning ordinances from requiring the establishment of a vegetated buffer zone on previously developed land and the expansion of an existing vegetative buffer zone. This may impact the Long-Term Maintenance and Reestablishment Plan under the MWCO if the wetland protective area established under the MWCO includes previously developed land.

Town authority to adopt MWCO after 2015 Wisconsin Act 41.

Towns that are not under county zoning have the authority to adopt general zoning ordinances under Wisconsin Statutes section 60.61 (for towns located in counties that do not have a county general zoning ordinance) or Wisconsin Statutes section 60.62 (for towns exercising village powers). 2015 Wisconsin Act 41 clarified the authority of a town's general zoning ordinance to apply in the shoreland area as long as the town's general zoning ordinance does not impose restrictions or requirements in shorelands on matters regulated by a county shoreland zoning ordinance.

As discussed in the previous section summarizing Act 55, the MWCO includes standards and procedures that are not part of the state requirements for county shoreland zoning ordinances. Towns should be able to adopt the MWCO as part of their general zoning requirements that apply in the shoreland area. *However*, if the county incorporates provisions from the MWCO in the county's shoreland zoning ordinance, Act 41 may prohibit the towns from incorporating those same provisions in the town's general zoning ordinance for wetlands located in the shoreland area. In this situation, the town could still adopt the MWCO as part of the town's general zoning ordinance to cover wetlands located outside the shoreland area.

Act 41 only relates to the application of town general zoning ordinances in the shoreland area. It does not address other authorities towns have to adopt other types of ordinances that may apply in the shoreland area such as driveway ordinances, nuisance ordinances, subdivision ordinances, and licensing ordinances. These other tools are alternative means that towns may use to address wetland issues in the shoreland area.