



## WISCONSIN LEGISLATIVE COUNCIL INFORMATION MEMORANDUM

### 2011 Wisconsin Act 118, Relating to Regulation of Activities Related to Wetlands and Fees for Approvals Relating to Activities In or Near Navigable Waters

2011 Wisconsin Act 118 (the Act) revises current law as it relates to permits for discharges into wetlands, wetland mitigation, wetland mapping and delineation, penalties associated with violations of wetlands laws, fees for permits related to wetlands, and fees associated with approvals for activities in or near navigable waters and for other determinations by the Department of Natural Resources (DNR).

The Act was approved by the Governor on February 29, 2012, and becomes effective on July 1, 2012.

#### **CURRENT LAW--WETLANDS REGULATION**

##### **BACKGROUND**

A person who proposes to place fill in wetlands in Wisconsin generally must obtain a permit. If the wetland is a “federal wetland,” the applicant must obtain a permit from the U.S. Army Corps of Engineers (ACE) and the DNR must certify that the activity will not violate the state’s water quality standards for wetlands, called a “water quality certification.” Placing fill in non-federal wetlands<sup>1</sup> in Wisconsin also requires water quality certification from the DNR but is not subject to the ACE permit requirements. Numerous activities other than filling may also be evaluated based on their effects on wetlands as part of the review of any separate permit requirement for such an activity.

Water quality standards for wetlands are narrative standards that describe “beneficial uses” or “functional values” of a wetland such as floodwater retention, groundwater recharge or discharge, and fish and wildlife habitat. [ss. 281.15 and 281.36, Stats.; s. NR 1.95 (3), chs. NR 102-105 and 299, Wis. Adm. Code.] The DNR issues a water quality certification for a project only if it finds that the applicant has shown that no practicable alternative exists which would avoid adverse impacts to wetlands, all practicable measures to minimize adverse impacts to the

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<sup>1</sup> Non-federal wetlands are “nonnavigable, isolated, intrastate wetlands,” which were removed from the ACE’s jurisdiction by the U.S. Supreme Court in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

functional values of the affected wetlands have been taken, and the activity will not result in significant adverse impacts to wetland functional values, significant adverse impacts to water quality, or other significant adverse environmental consequences. [s. 281.37 (2) (b), Stats.; s. NR 103.08 (4) (a), Wis. Adm. Code.]

## ***EXEMPTIONS***

### ***Exempt Activities in Wetlands***

Certain existing activities in non-federal wetlands are currently exempt from the wetland water quality certification requirements unless the activity may impair the flow or circulation of any non-federal wetland, the activity will reduce the reach of any non-federal wetland, or the purpose of the activity is to put all or part of the wetland into a new use. [s. 281.36 (4), Stats.] These activities include all of the following:

- Normal farming, silviculture, or ranching activities.
- Maintenance, emergency repair, or reconstruction of damaged parts of structures that are in use in a non-federal wetland.
- Construction or maintenance of farm ponds, stock ponds, or irrigation ditches.
- Maintenance of drainage ditches.
- Construction or maintenance of farm roads, forest roads, or temporary mining roads that is performed in accordance with best management practices, as determined by the DNR, to ensure all of the following:
  - That the flow and circulation patterns and chemical and biological characteristics of the affected non-federal wetland are not impaired.
  - That the reach of the affected non-federal wetland is not reduced.
  - That any adverse effect on the aquatic environment of the affected non-federal wetland is minimized to the degree required by the DNR.

### ***Artificial Wetlands***

Artificial wetlands are currently exempt from wetland water quality standards unless the DNR determines that significant functional values are present. [s. NR 103.06 (4), Wis. Adm. Code.]

## ***WETLAND MITIGATION***

The terms “wetland mitigation” or “compensatory mitigation” refer to actions taken to offset the negative impacts of a project on wetlands. These activities may consist of the restoration or enhancement of previously destroyed or degraded wetlands, the creation of new wetlands, or the purchase of credits from a wetland mitigation bank. [s. 281.37 (1) (b), Stats.]

Wetland mitigation may be part of a proposal that will adversely impact wetlands under both the ACE and the state processes. In issuing a permit for an activity that will have adverse

impacts on a wetland, the ACE generally *requires* mitigation as a condition of the permit. The DNR is *authorized* under state law to consider mitigation in deciding whether to issue a permit or water quality certification. [s. 281.37 (2), Stats.]

As noted above, a water quality certification analysis for wetlands includes the evaluation of the overall impact of a proposal on wetland functional values. [s. NR 103.08 (2) and (4) (a), Wis. Adm. Code.] If mitigation is included in a proposal, the DNR may consider the positive affect of mitigation as part of its evaluation of wetland functional values. [s. NR 103.08 (4) (a) 3., Wis. Adm. Code.]

The authority of the DNR to consider mitigation projects does not *entitle* the applicant to a permit or other approval in exchange for conducting a mitigation project; rather, mitigation is intended to allow the DNR to approve permit applications that it might disapprove absent the opportunity to use mitigation to offset the negative impacts of a proposed project.

With limited exception, 1.5 acres of wetlands must be enhanced, restored, or created for every acre that is adversely impacted. [s. NR 350.06, Wis. Adm. Code.] In determining the credit a mitigation bank will receive for its activities, each acre restored is treated as one acre, each acre enhanced is treated as zero to one acre, and each acre created is treated as 0.5 acre, with a limited exception. [s. NR 350.07, Wis. Adm. Code.]

Mitigation must occur within one-half mile of an impacted wetland, which is considered “on-site” mitigation, unless the DNR determines that it is not practicable or ecologically preferable that the mitigation occur on-site, in which case the DNR is required to allow mitigation to be performed as near as practicable to the location of the adversely impacted wetland. [s. NR 350.04, Wis. Adm. Code.]

The DNR may not consider a mitigation proposal unless the applicant demonstrates that all appropriate and practicable measures will be taken to avoid and minimize adverse impacts on wetlands. [s. 281.37 (2) (b), Stats.; s. NR 103.08 (4) (a), Wis. Adm. Code.]

### ***ASNRI WETLANDS***

An “area of special natural resource interest,” or “ASNRI,” is defined as an area that possesses significant ecological, cultural, aesthetic, educational, recreational, or scientific values. Sites designated as ASNRI include all of the following:

- A cold water community, including a trout stream and its tributaries, and a trout lake.
- Lake Michigan, Lake Superior, and the Mississippi River.
- A wild and scenic river, a wild river, and a scenic urban waterway.
- A unique and significant wetland identified in specified ways.
- A calcareous fen.
- A habitat used by state or federally designated threatened or endangered species.

- A state park, forest, trail, and recreation area.
- A state or federal fish and wildlife refuge or fish and wildlife management area.
- A state or federal designated wilderness area.
- A state natural area.
- Wild rice waters.
- Surface waters identified by the DNR as outstanding or exceptional resource waters.
- Any other surface water identified as an outstanding or exceptional resource water in ch. NR 102, Wis. Adm. Code.

[s. 281.37 (1) (a), Stats.; s. NR 103.04, Wis. Adm. Code; see also, s. NR 103.02 (1), Wis. Adm. Code.]

“Wetlands in areas of special natural resource interest” (“ASNRI wetlands”) are further defined as wetlands both within the boundary of designated ASNRI and those wetlands which are in proximity to, or have a direct hydrologic connection to, such designated areas. [s. NR 103.04, Wis. Adm. Code.] The DNR is required to consider any potential adverse impacts to ASNRI wetlands when making determinations concerning wetlands impacts. [s. NR 103.08 (3) (f), Wis. Adm. Code.] However, nothing in current law *prohibits* the DNR from issuing a water quality certification for a project that will have an adverse impact on an ASNRI wetland.

#### ***MITIGATION AND ASNRI WETLANDS***

Even though the DNR may approve a project that will have an adverse impact on ASNRI wetlands, approval for such a project may be more difficult to obtain than approval for a project that would not impact ASNRI wetlands. In part, this is because Wisconsin statutes and administrative rules prohibit the DNR from considering proposed mitigation as part of the review of an application for water quality certification for any part of a project that will adversely impact an ASNRI wetland. [s. 281.37 (2) (c), Stats.; s. NR 103.08 (4) (b), Wis. Adm. Code.]

### **2011 WISCONSIN ACT 118--WETLANDS REGULATION CHANGES**

The Act eliminates water quality certification for wetlands and replaces this procedure with wetland general permits and wetland individual permits.

#### ***WETLAND GENERAL PERMITS***

A general permit is a permit that does not apply to a specific project. Instead, it applies statewide to any person authorized to engage in the activity covered by the permit.

#### ***Types of Wetland General Permits***

Under current law, the DNR is required by statute to issue general permits for specified types of activities, and is authorized to issue general permits for other types of activities.

The Act requires the DNR to establish wetland general permits for all of the following types of discharges:

- A discharge that is necessary for the treatment or disposal of hazardous waste or toxic pollutants, if the discharge does not contain hazardous waste or toxic pollutants and does not affect more than two acres of wetland.
- A discharge that is necessary for temporary access and dewatering, if the discharge does not affect more than two acres of wetland.
- A temporary or permanent discharge for routine utility construction and maintenance projects and activities.
- A discharge that is part of a development for industrial purposes, including development of a waste disposal site, if the discharge does not affect more than 10,000 square feet of wetland.
- A discharge that is part of a development for commercial purposes, if the discharge does not affect more than 10,000 square feet of wetland.
- A discharge that is part of a development for residential purposes, if the discharge does not affect more than 10,000 square feet of wetland.
- A discharge that is part of a development for agricultural purposes, if the discharge does not affect more than 10,000 square feet of wetland.
- A discharge that is part of a development for municipal purposes, if the discharge does not affect more than 10,000 square feet of wetland.
- A discharge that is part of a development for recreational purposes, if the discharge does not affect more than 10,000 square feet of wetland.
- A discharge that is necessary for the construction, reconstruction, or maintenance of a bridge or culvert that is part of a transportation project that is being carried out under the direction and supervision of a city, village, town, or county.

The Act also generally authorizes the DNR to issue other wetland general permits to regulate other discharges that affect wetlands located in this state, and to issue wetland general permits that are consistent with federal general permits.

### ***Procedure for Issuing a Wetland General Permit***

A wetland general permit is not required to be promulgated by administrative rule by the DNR. The DNR is required to impose requirements, conditions, and exceptions to general permits to ensure that the discharges will cause only minimal adverse environmental effects. A general permit may apply only to a single and complete project.

Under the Act, the DNR is authorized to prohibit discharges under general permits into wetlands identified by the DNR as any of the following:

- Great Lakes ridge and swale complexes.
- Interdunal wetlands.
- Coastal plain marshes.
- Emergent marshes containing wild rice.
- Sphagnum bogs that are located in the area located south of a horizontal line drawn across the state based on the routes of STH 16 and STH 21 west of Lake Winnebago and on USH 151 east of Lake Winnebago.
- Boreal rich fens.
- Calcareous fens.

The Act does not require the DNR to issue general permits by rule. Instead, the DNR is required to follow specified procedures, including procedures related to public notification, comment, and hearing to issue, renew, modify, or revoke a general permit.

#### ***Authorization to Proceed Under a General Permit***

Under the Act, a person who would like to discharge material into a wetland under a general permit must notify the DNR at least 30 days before starting the activity (unless DNR waives this requirement), pay a fee, and pay a surcharge fee, if applicable. The person is required to provide information to the DNR describing the discharge, provide consent for DNR inspection, and provide an explanation of why the impact to the wetland cannot be avoided and how it will be minimized to the greatest extent practicable.

The DNR may request additional information from the person one time during this 30-day period. If the DNR does not request additional information during this time, inform the applicant that a wetland individual permit will be required, or extend the deadline because of weather,<sup>2</sup> the discharge is authorized and must be carried out in compliance with the general permit. If the DNR does request additional information, the 30-day period is tolled until the DNR receives all of the additional information. An authorization to proceed with a discharge into a wetland under a general permit is valid for five years or when the discharge is completed, whichever occurs first.

The DNR may require a person seeking authorization for an activity under a general permit to apply for a wetland individual permit if the DNR has inspected the site and determined that conditions specific to the site require additional restrictions on the discharge in order to

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<sup>2</sup> The DNR is allowed to extend the time limit under the Act for evaluating a request for authorization for a discharge under a general permit if adverse weather conditions prevent the DNR from conducting an on-site inspection.

provide reasonable assurance that no significant adverse impacts to wetland functional values will occur.

In addition to the general permit application fee required under the Act and explained below, a person seeking to engage in a discharge under a general permit for certain types of activities must pay a surcharge fee, set on an annual basis by the DNR, that may not be more than 50% of the market price for the equivalent purchase of credits from a mitigation bank. These fees are to be used for the restoration and creation of wetlands.<sup>3</sup> This surcharge fee applies to the general permits that the DNR is required to issue for discharges that are part of development for industrial purposes, commercial purposes, and residential purposes, and that do not affect more than 10,000 square feet of wetland.

### ***WETLAND INDIVIDUAL PERMITS***

Under the Act, a wetland individual permit is required for a person to discharge dredged material or fill material into any wetland unless the discharge is authorized under a general permit or is exempt from permitting requirements. An individual permit is issued for an individual activity at a specific place.

#### ***Procedure for Issuing a Wetland Individual Permit***

The Act creates a process for a person to apply for an individual permit. The DNR is required to hold a meeting with a prospective applicant prior to application to discuss the details of the proposed discharge, the application requirements, and the requirements for delineating the wetland. An application must be accompanied by the applicable fee and must include an analysis of the practicable<sup>4</sup> alternatives that will avoid and minimize the adverse impacts of the discharge on wetland functional values and that will not result in any other significant adverse environmental consequences.

The DNR has 30 days to determine whether the application is complete. If the DNR determines that the application is incomplete, the DNR may make only one request for additional information.<sup>5</sup> The public information and application review period for the application begins on the day that the DNR provides notice to the applicant that the application is complete, or 30 days after the date of application if the application is initially complete or 10 days after DNR receives all additional requested information, whichever is earlier. This is referred to as the “date of closure” under the Act.

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<sup>3</sup> Any wetland that is restored or created using these fees must be open to the public for hunting, fishing, trapping, cross-country skiing, or hiking or any combination thereof, but the department may establish reasonable restrictions on the use of the land by the public in order to protect public safety or to protect a unique plant or animal community.

<sup>4</sup> “Practicable” means reasonably available and capable of being implemented after taking into consideration cost, site availability, available technology, logistics, and proximity to the proposed project site, in light of the overall purpose and scope of the project.

<sup>5</sup> The DNR may make additional requests for information from the applicant if the information is within the scope of the original request, and may request information outside the scope of the original request with the consent of the applicant, but a request for any such additional information does not toll the DNR’s application review period.

The public information and application review period begins with public notice that is to be provided by the DNR within 15 days of the date of closure and an opportunity for a public informational hearing to be requested within 20 days of the date of closure (if the applicant did not request a hearing with his or her application). The DNR may also decide to hold a public informational hearing within this 20-day period if it determines that there is a significant public interest in holding a hearing.

The DNR is required to provide a period for public comment on the application for 30 days after the DNR has provided a notice of pending application if no public informational hearing is held. If a hearing is held, the public comment period ends on the 10th day after the hearing. The DNR must issue its decision on the individual permit application within 20 days after the period for public comment ends if a hearing is held, or within 30 days after the public comment period ends if a hearing is not held.

In reviewing an application, the DNR is required to limit its review of practicable alternatives to those that are located at or adjacent to the site of the discharge if the applicant has demonstrated that the proposed project will result in a demonstrable economic public benefit, that the proposed project is necessary for the expansion of an existing industrial, commercial, or agricultural facility that is in existence at the time the application is submitted, or that the proposed project will occur in an industrial park that is in existence at the time the application is submitted. The DNR must consider all of the following factors when it assesses the impacts to wetland functional values:

- The direct impacts of the proposed project to wetland functional values.
- The cumulative impacts attributable to the proposed project that may occur to wetland functional values based on past impacts or reasonably anticipated impacts caused by similar projects in the area affected by the project.
- Potential secondary impacts of the proposed project to wetland functional values.
- The impact on functional values resulting from mitigation.
- The net positive or negative environmental impact of the proposed project.

The DNR is required to make a finding that a proposed project is in compliance with water quality standards and that a wetland individual permit may be issued if it determines that all of the following apply:

- The proposed project represents the least environmentally damaging practicable alternative taking into consideration practicable alternatives that avoid wetland impacts.
- All practicable measures to minimize the adverse impacts to wetland functional values will be taken.
- The proposed project will not result in significant adverse impact to wetland functional values, in significant adverse impact to water quality, or in other significant adverse environmental consequences.

The Act provides for administrative and judicial review of DNR decisions related to wetland individual permits and a procedure for temporarily prohibiting a discharge under a wetland individual permit while a review is pending.

### ***Wetland Mitigation***

Under the Act, the DNR must establish a mitigation program that applies only to the issuance of wetland individual permits. The Act defines “mitigation” as the restoration, enhancement, creation, or preservation of wetlands to compensate for adverse impacts to other wetlands. The mitigation program is required to allow mitigation to be accomplished by any of the following methods:

- Purchasing or applying credits from a mitigation bank<sup>6</sup> in this state.
- Participating in the in lieu fee subprogram,<sup>7</sup> if established.
- Completing mitigation within the same watershed or within one-half mile of the site of the discharge.

The Act provides that purchasing credits from a mitigation bank located in this state and participation in the in lieu fee subprogram, if established, are the preferred types of mitigation. The DNR is required to establish mitigation ratios that are consistent with the federal regulations that apply to mitigation and mitigation banks, but the minimum ratio must be at least 1.2 acres for each acre affected by a discharge. Mitigation that occurs within the same watershed as the discharge or within one-half mile of the discharge need be only 90% of the ratio that would be required if the mitigation were to occur further from the site of the discharge.

### ***WETLAND EXEMPTIONS***

The Act adopts the exemptions provided under current law, as specified on page 2, for existing activities that apply to non-federal wetlands.

### ***APPLICATION FEES***

Under current law, the DNR is allowed to charge a fee of \$100 for issuing water quality certification, unless this amount is increased by administrative rule. The Act creates a \$500

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<sup>6</sup> The DNR is required to establish a system of service areas for the mitigation banks under the mitigation program that is geographically based on the locations of the major watersheds in the state. The Act also requires the DNR to provide notice of the potential creation of a mitigation bank to each city, village, town, and county in which the mitigation bank would be located, and provides an opportunity for each of these governmental entities to submit comments regarding the establishment of the mitigation bank.

<sup>7</sup> Under the Act, the DNR may establish an “in lieu fee subprogram” as part of the mitigation program, in consultation with the Army Corps of Engineers, under which payments are made to the DNR or another entity for the purposes of restoring, enhancing, creating, or preserving wetlands or other water resource features. Under the in lieu fee subprogram, the wetlands that benefit from the program must be open to the public for hunting, fishing, trapping, cross-country skiing, or hiking or any combination thereof, although the DNR may establish reasonable restrictions on the use of the land by the public in order to protect public safety or to protect a unique plant or animal community. The subprogram is required to be consistent with federal regulations.

application fee for wetland general permits and a \$800 application fee for wetland individual permits. The Act also appears to be intended to allow the DNR to increase these fees if necessary to meet its costs in performing the activities for which the fee is charged. The Act also authorizes the DNR to charge a fee to cover the costs to the DNR for reviewing mitigation that is conducted by mitigation banks. The Act contains other provisions relating to application fees for general and individual permits that are similar to the requirements for water quality certification fees under current law.

### ***PENALTIES***

Under current law, any person who violates the statutory sections governing water quality certification for non-federal wetlands or compensatory mitigation, or any rule promulgated or any plan approval, license, special order, or water quality certification issued thereunder, must forfeit no less than \$10 or more than \$5,000 for each violation. Each day of continued violation is a separate offense except that while an order is suspended, stayed, or enjoined, this penalty does not accrue. The court may also award the Department of Justice the reasonable and necessary expenses of the investigation and prosecution of a violation, including attorney fees.

Under the Act, any person who violates any provision governing permits for discharges into wetlands and wetland mitigation, other than a wetland general permit, must forfeit no less than \$100 or more than \$10,000 for the first offense and no less than \$500 or more than \$10,000 upon being found in violation of the same offense a second or subsequent time. Any person who violates a wetland general permit must forfeit no less than \$10 or more than \$500 for the first offense and must forfeit no less than \$50 or more than \$500 upon being found in violation of the same offense a second or subsequent time.

The Act specifies that anyone “concerned in the commission” of a violation of the Act’s wetlands permits and mitigation provisions for which a forfeiture is imposed is a principal and may be charged and found in violation even if he or she did not directly commit the violation and even if the person who directly committed it has not been found in violation. A person is concerned in the commission of a violation if the person directly commits the violation, aids and abets the commission of the violation, or is a party to a conspiracy with another to commit the violation or advises, hires, counsels, or otherwise procures any person to commit it.

Under both current law and the Act, the court may order the defendant to abate any nuisance, restore a natural resource, or take, or refrain from taking, any other action as necessary to eliminate or minimize any environmental damage caused by the defendant.

### ***INFRINGEMENT OF PUBLIC RIGHTS***

Under current law, the DNR has broad authority to proceed against any possible violation of the statutes related to navigable waters or a possible infringement of the public rights relating to navigable waters if the DNR determines that the public interest may not be adequately served by imposition of a penalty or forfeiture. Such a proceeding may result in an order directing the responsible parties to perform, or refrain from performing, acts in order to fully protect the public interest and this type of order may be civilly enforced.

The Act extends this authority to possible violations of the statutes regulating discharges into wetlands, as amended by the Act, for which the DNR determines that the public interest may not be adequately served by imposition of a penalty or forfeiture.

### ***ASNRI WETLANDS***

The Act removes the restriction that mitigation may not be considered in issuing permits for discharges into ASNRI wetlands and removes other statutory references to ASNRI wetlands.

### ***WETLAND MAP REVIEW***

Under current law, a person who owns or leases land may, for a fee, request that the DNR provide various services related to wetlands. These services include review of wetland maps to determine whether a parcel of land is likely to contain a wetland (\$50), wetland identification (\$300 per acre; maximum five acres), and confirmation of the boundaries of a wetland delineation prepared by a third person (\$300 per 20 acres). These services must be provided within specified time limits.

The Act eliminates the wetland map review service. The Act also authorizes the DNR to charge a supplemental fee for the two remaining services, in addition to the fees noted above, if the applicant asks for an expedited service and the DNR agrees with the request. Finally, the Act extends the time limit under current law for the DNR to provide wetland identification or wetland confirmation, from 30 to 60 days.

### ***FEES FOR APPROVALS RELATED TO NAVIGABLE WATERS***

Under current law, the DNR is authorized to collect an individual permit application fee for an activity related to navigable waters that is equal to the estimated time that the DNR will spend processing the application. No fee applies to authorizations to act under general permits related to navigable waters under current law. The Act imposes set fees for these types of general permits (\$300) and individual permits (\$600). The Act also allows the DNR to charge fees sufficient to cover costs incurred by the DNR for identifying ordinary high-water marks, for making determinations of navigability, and for other determinations.

This memorandum is not a policy statement of the Joint Legislative Council or its staff.

This memorandum was prepared by Larry Konopacki and Rachel Letzing, Senior Staff Attorneys, on March 22, 2012.