



WISCONSIN LEGISLATIVE COUNCIL LEGAL MEMORANDUM

Water Quality Certification for Nonfederal Wetlands (2001 Wisconsin Act 6)

INTRODUCTION

This Legal Memorandum describes 2001 Wisconsin Act 6, which generally:

- Requires water quality certification for discharges into nonnavigable, isolated, intrastate wetlands (or “nonfederal,” wetlands); and
- Provides time limits and procedures for processing applications for water quality certifications that are applicable to discharges into all wetlands, including nonfederal wetlands.

The new law was developed in response to a recent U.S. Supreme Court decision. The decision, *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers (Corps)*¹, limited the authority of the Corps to require permits for discharges into certain types of wetlands. The decision effectively precludes the Department of Natural Resources’ (DNR) review and approval of discharges into those wetlands no longer subject to the Corps’ jurisdiction because the Wisconsin DNR authority to review discharges into wetlands is linked to the federal regulatory process. In response, Act 6 restores the regulatory review that the state had prior to the *SWANCC* decision by creating a state permitting process.

BACKGROUND

CLEAN WATER ACT

Under s. 404 of the Federal Clean Water Act (CWA), a person who wishes to place or discharge dredged or fill material into navigable waters must obtain a permit from the Corps. In addition, s. 401 (a) (1) of the CWA provides states a measure of control over activities that affect wetlands. Under this section, a Corps permit under s. 404 is not valid unless the state in which the permitted activity occurs certifies that the activity will meet state water quality standards. Denial of a s. 401 water quality certification by a state, in effect, invalidates a Corps permit. In order for a state to exercise jurisdiction under s. 401, the state must have water quality standards that are applicable to wetlands. These rules are found in ch. NR 103, Wis. Adm. Code, and rules regarding the water quality certification process are found in ch. NR 299, Wis. Adm. Code.

CURRENT DNR WATER QUALITY CERTIFICATION AUTHORITY

Chapter NR 103, Wis. Adm. Code, contains standards that the DNR uses to make regulatory, planning, resource management and financial aid determinations that affect wetlands. These wetland water quality standards provide review criteria used by DNR to determine whether a

proposed activity or project may adversely affect wetlands. If the DNR determines that the activity or project meets the water quality standards, an applicant will receive a water quality certification. Generally, upon receiving a water quality certification, the applicant's proposed activity or project may proceed.

Under ch. NR 299, the water quality certification process, an applicant is required to submit specified information regarding a proposed project. The application must include a description of practicable alternatives to the proposed activity and a description of the investigation conducted to determine the viability of the alternatives. The term "practicable alternative" is defined as an alternative that is "available and capable of being implemented after taking into consideration cost, available technology and logistics in light of overall project purpose."²

In making its decision regarding a wetland water quality certification, the DNR must review the proposed activity and consider whether practicable alternatives to the proposed project exist that will not adversely impact wetlands or result in other significant adverse environmental consequences.³

If the DNR determines that such an alternative exists, the DNR must deny the application.⁴

A discharge into an "artificial wetland," a man-made wetland which has no prior wetland or stream history,⁵ may be exempt from the ch. NR 103 water quality certification requirement unless the DNR determines that the artificial wetland has a significant functional value as a wetland. Under s. NR 103.06 (4), a proposed project that may affect the following types of artificial wetlands may be exempt from the water quality certification process:

- Sedimentation and storm water detention basins and associated conveyance features

operated and maintained only for sediment detention and flood storage purposes;

- Active sewage lagoons, cooling ponds, waste disposal pits, fish rearing ponds and landscape ponds;
- Actively maintained farm drainage and roadside ditches; and
- Artificial wetlands within active nonmetallic mining operations.

SWANCC DECISION

In *SWANCC*, the Corps required a group of municipalities planning to build a landfill on an abandoned sand and gravel pit to first obtain a permit under the CWA. The Corps claimed regulatory authority because migratory birds used man-made ponds at the proposed landfill site. The CWA authorizes the Corps to regulate the discharge of dredged or fill materials into "navigable waters" of the United States. In 1986, the Corps promulgated a rule defining "navigable waters" to include intrastate waters used as habitat for migratory birds. The Corps relied upon the migratory bird rule for asserting regulatory jurisdiction over the proposed landfill site.

The U.S. Supreme Court held that the Corps had exceeded its statutory authority by requiring a permit for an action affecting isolated wetlands that were not connected to any navigable water of the United States. Consequently, in the future, the Corps may not require permits for activities in "nonnavigable, isolated, intrastate waters." In the absence of a Corps permit, the state lost its opportunity to apply its water quality certification process to regulate activities on the affected wetlands under s. 401 of the CWA.

DESCRIPTION OF THE NEW LAW

DEFINITION OF “NONFEDERAL WETLAND”

The Act applies to “nonfederal wetlands,” essentially those wetlands over which the Corps no longer has permit jurisdiction under the SWANCC decision. A wetland is defined as a “nonfederal wetland” if either:

- A discharge into the wetland is determined not to be subject to regulation under the CWA due to the SWANCC decision or any subsequent interpretations of the decision by a federal agency or federal court that applies to wetlands in Wisconsin; or
- The wetland is determined to be a nonnavigable, isolated and intrastate wetland under the SWANCC decision or any subsequent interpretations of the decision by a federal agency or federal court that applies to wetlands in Wisconsin.

If the Corps issues a determination as to whether a wetland is a nonfederal wetland, the DNR must adopt that determination. If the Corps does not issue a determination, the DNR must determine whether a wetland is a nonfederal wetland.

STATE WATER QUALITY CERTIFICATION, PROCESS AND TIME LIMITS

The Act extends the applicability of the state’s water quality certification requirement to discharges into nonfederal wetlands, and provides that no person may violate any condition of a water quality certification issued by the DNR under the Act. The Act also prohibits DNR from issuing a water quality certification for a discharge unless it determines that the discharge will comply with all applicable water quality standards.

Under the Act, the DNR must initially determine whether an application for water

quality certification is complete within 30 days after the application has been submitted. If the DNR determines that the application is incomplete, the DNR must state the reason for its decision and the specific information necessary to make the application complete. An applicant is not restricted from resubmitting the application, and the DNR is generally prohibited from demanding from the applicant additional information not specified in the DNR’s notice of completeness.

The Act also requires the DNR to approve or deny an application for a specific water quality certification for a discharge into a nonfederal wetland within, in general, 120 days after the DNR determines that a complete application has been submitted. If the DNR fails to approve or deny the complete application within this period, an applicant is authorized to bring an action of mandamus to compel the DNR to act on the application. If the mandamus is granted, the DNR must act within 30 days, and the court must award the applicant reasonable attorney fees and court costs.

DELINEATION PROCEDURES

When delineating the boundaries of a nonfederal wetland, the DNR and the water quality certification applicant are required under the Act to use the 1987 edition of the Corps Wetlands Delineation Manual, plus any Corps guidance documents interpreting the manual. The 1987 manual and interpretive guidance documents must be used unless the Corps publishes an edition of the manual after the effective date of the Act (May 8, 2001) and DNR, by rule, designates that edition for use.

If the Corps issues new guidance interpreting the 1987 manual, the DNR must notify the appropriate standing committee of each house of the Legislature about whether DNR intends to promulgate the new guidance as an administrative rule.

EXEMPTION FROM PRACTICABLE ALTERNATIVES REQUIREMENTS

Under the DNR's current water quality certification process, an applicant must conduct a practicable alternatives analysis to show that no practicable alternative exists to the proposed action that will not adversely impact wetlands.

Under the Act, the DNR may not require an applicant for a water quality certification for the discharge of dredged or fill material into a nonfederal wetland to submit a description of practicable alternatives to the discharge or a description of any investigation conducted to determine the viability of such alternatives if:

- The wetland is less than one acre in size;
- The wetland is not in an area of special natural resource interest; and
- The application for water quality certification includes a copy of a determination by the state Department of Transportation (DOT), the State Office of the Commissioner of Railroads (OCR), the Federal Aviation Administration, Federal Highway Administration or the Federal Railroad Administration, or the governing body of a city, village, town or county that the discharge is necessary for public safety.

If an applicant for a water quality certification asks a political subdivision to make a determination about whether a discharge into a nonfederal wetland is necessary for public safety, the political subdivision must issue a decision regarding the public safety determination.

The Act allows the DNR or any person whose substantial interests are adversely affected by a public safety determination issued by DOT, OCR or the governing body of a political subdivision to petition for judicial review of the determination.

The DNR may choose to conduct an examination of the practicable alternatives to a proposed discharge after the discharge has been determined to be necessary for public safety. The Act establishes the following process for this examination:

- Step one. The DNR must determine, after consulting with the applicant, whether an alternative to the discharge exists on the parcel of land on which the nonfederal wetland is located that would not conflict with the public safety determination;
- Step two. If the DNR determines that no practicable alternative exists, the DNR may determine, after consulting with the applicant, whether an alternative to the discharge exists on a parcel of land on which the nonfederal wetland is not located that would not conflict with the public safety determination; and
- Step three. If the DNR determines that no practicable alternative exists under steps one and two, the DNR may require the applicant to implement a wetland mitigation project.

The Act requires the DNR to consider the functional value, or physical, chemical and biological attributes and associated benefits provided to humans and the environment, of the nonfederal wetland at the same time that it is conducting the practicable alternatives examination in step one or two. If the DNR determines that a practicable alternative exists under step one or two, the DNR may deny the water quality certification.

CWA-BASED EXEMPTIONS AND RULE-MAKING

The Act provides a set of exemptions from its water quality certification requirement. The exemptions are based upon discharge permit exemptions contained in the CWA [33 U.S.C. s. 1344 (f)] and apply, subject to exceptions, to a

discharge that is the result of any of the following activities:

- Normal farming, silviculture (forestry) and ranching activities;
- Maintenance, emergency repair or reconstruction of existing structures;
- Construction and maintenance of farm ponds, stock ponds or irrigation ditches;
- Maintenance of drainage ditches; or
- 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.

The CWA-based exemptions do not apply under the Act if the discharge meets the following criteria (based on exception criteria in the CWA [33 U.S.C. s. 1344 (f) (2)]):

- The discharge is incidental to an activity that brings a nonfederal wetland, or part of one, into a use for which it was not previously used; and
- The activity may impair the flow or circulation of any nonfederal wetland or reduce the reach of any nonfederal wetland.

The Act requires the DNR to create rules to interpret and implement the CWA-based exemptions and exceptions, consistent with the CWA, as amended on the effective date of the Act (May 8, 2001). The rules must be consistent with any other “existing federal law or interpretation”⁶ that is created or adopted under the CWA or that is used to implement the CWA, and that is in effect on the effective date of the Act. If the CWA exemptions or other federal law is amended after the effective date of the Act, the DNR is authorized to incorporate any “additional federal law or interpretation”⁷

into these rules. The Act prohibits the DNR from otherwise amending the rules.

Although not specifically included in the Act, the water quality certification exemptions and exemption process for artificial wetlands in s. NR 103.06 (4), Wis. Adm. Code, also apply to the discharge of dredged or fill material into a nonfederal wetland.

TEMPORARY PROCESS DURING RULE-MAKING

The Act prohibits the discharge of dredged or fill material into a nonfederal wetland during the period that the DNR is developing rules to implement the CWA-based exemptions to the water quality certification program created by the Act unless:

- The discharge would qualify for an exemption under existing federal law or interpretation;
- The person receives a water quality certification under the program; or
- The discharge is exempt from the DNR’s wetlands water quality standards under ch. NR 103, Wis. Adm. Code.

GENERAL WATER QUALITY CERTIFICATION

The Act authorizes the DNR to issue a general water quality certification for discharges into nonfederal wetlands for types of activities that the DNR determines are similar in nature and that, individually or collectively, will have minimal adverse effects on the environment. This authority is based on the general federal permit authorization in s. 404 (e) of the CWA. [33 U.S.C. s. 1344 (e).] A general water quality certification may be effective for no more than five years after the department issues one.

The DNR is directed to issue general water quality certifications that are consistent with all general permits issued by the Corps under s. 404

(e) that applied on January 8, 2001, to nonfederal wetlands in Wisconsin. If the Corps general permit is modified by the Corps after January 8, 2001, the DNR is required to incorporate the modifications into its general water quality certifications and may not otherwise amend them. In addition, the 120-day time limit for DNR to approve or deny a complete application for a water quality certification does not apply to general water quality certification applications.

INSPECTION AUTHORITY

The Act establishes DNR inspection authority relating to activities affecting nonfederal wetlands.

Under the Act, a representative of the DNR, upon presenting his or her credentials, is authorized to enter and inspect property on which a nonfederal wetland, or part of one, is located in the following situations:

1. An application for a water quality certification has been submitted to the DNR. If the application is approved, the DNR may enter and inspect until the 30th day following completion of the permitted discharge, or the completion date of any conditions imposed under the water quality certification, whichever date is later. If the application is withdrawn or denied, the DNR may not enter and inspect the property after the date of the withdrawal or denial.

A DNR employee or representative may only enter and inspect property under these circumstances during reasonable hours and after the DNR has provided reasonable advance notice to the proprietor of the property.

2. If the DNR has a reason to believe that a discharge of dredged or fill material has occurred or is occurring in violation of the water quality certification requirement.

Before entering the property under these circumstances, the DNR must:

- Request consent from the proprietor to enter and inspect the property; or
- Request an explanation concerning the activity that the DNR has reason to believe may violate the prohibition against discharging dredged or fill material into a nonfederal wetland without a department water quality certification.

If the proprietor permits the DNR to inspect the property, the DNR, with reasonable advance notice, may enter and inspect within the terms of the consent. If the proprietor refuses to allow the DNR to enter and inspect the property, the DNR may seek a special inspection warrant under s. 66.0119, Stats., or refer the matter directly to the Department of Justice (DOJ). The DNR may also seek a special inspection warrant or refer the case to DOJ if the DNR determines that the proprietor's explanation regarding the suspected illegal activity or the terms of the proprietor's consent to enter and inspect are unacceptable.

If the proprietor fails to respond to an oral or written request from the DNR regarding the suspected illegal activity on the property, the DNR may apply for, obtain and execute a special inspection warrant.

The new law allows the DNR to inspect any records the department requires a water quality certification holder to keep. The DNR may not inspect the records unless the certification holder or the holder's designee is present (unless waived by the holder). The DNR must provide reasonable advance notice before inspecting the records and may inspect only during reasonable hours.

EFFECT ON OTHER DNR REGULATORY PROGRAMS

The Act provides that the nonfederal wetland water quality certification requirements do not affect the authority of the DNR to:

- Regulate the discharge of dredged or fill material in a nonfederal wetland under specified regulatory programs (these programs are essentially the programs subject to interdepartmental coordination of environmental protection measures between the DNR and DOT under s. 30.12 (4), Stats.); and
- Issue a water quality certification pursuant to rules promulgated under ch. 281, Stats. (ch. NR 103, Wis. Adm. Code), to implement the federal water quality certification program under s. 401 of the CWA that is applicable to wetlands other than nonfederal wetlands.

PENALTIES AND ENFORCEMENT

The new law provides that a person who violates a water quality certification issued under ch. 281, Stats., including a water quality certification for a discharge into a nonfederal wetland, is subject to penalties under s. 281.98 (1), Stats. These penalties include a forfeiture of \$10 to \$5,000 for each violation, with each day of continued violation a separate offense. Under the Act, DOJ may enforce water quality certifications issued by DNR.

TIME LIMITS FOR OTHER WETLAND WATER QUALITY CERTIFICATIONS

The Act directs the DNR to establish time limits, by rule, for steps involved in processing water quality certification applications for wetlands other than nonfederal wetlands, and for issuing determinations that approve or deny such applications.

LEGISLATIVE COUNCIL STUDY

The Act requests that the Joint Legislative Council establish a committee to study the regulation of wetlands, including nonfederal wetlands. This will be considered with other study requests when the Council meets next spring.

This Legal Memorandum was prepared on August 7, 2001, by *Rachel E. Letzing, Staff Attorney*.

Copies of 2001 Wisconsin Act 6 may be obtained from the Documents Room, Lower Level, One East Main Street, Madison, Wisconsin 53702; telephone: (608) 266-2400. The Act is also available on the Legislature's Web site at <http://www.legis.state.wi.us>.

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

¹ 531 U.S. 159 (2001).

² Section NR 103.07 (1), Wis. Adm. Code.

³ Section NR 103.08 (3) (b), Wis. Adm. Code.

⁴ Section NR 103.08 (4) (a) 2., Wis. Adm. Code.

⁵ Section NR 103.02 (1m).

⁶ For purposes of the Act, "existing federal law or interpretation" includes: (1) 33 U.S.C. s. 1344 (f), as amended on January 8, 2001 (the date before the SWANCC decision was issued); (2) a regulation, rule, memorandum of agreement, guidance letter, interpretive document or other federal agency provision promulgated or adopted pursuant to 33 U.S.C. s. 1344 (f) or used to interpret or implement 33 U.S.C. s. 1344 (f), that applies to wetlands in Wisconsin and is in effect on January 8, 2001; or (3) a decision by a federal district or appellate court that affects the application of a federal amendment

or provision in the preceding point that applies to wetlands in Wisconsin that was issued on or before January 8, 2001.

⁷ For purposes of the Act, “additional federal law or interpretation” includes: (1) an amendment to 33 U.S.C. s. 1344 (f) that becomes effective after January 9, 2001 (the date the *SWANCC* decision was issued); (2) any other federal statutory provision that affects the exemptions under 33 U.S.C. s. 1344 (f) that becomes effective after

January 9, 2001; (3) a regulation, rule, memorandum of agreement, guidance letter, interpretive document or other federal agency provision promulgated or adopted pursuant to 33 U.S.C. s. 1344 (f) or used to interpret or implement 33 U.S.C. s. 1344 (f), that applies to wetlands in Wisconsin and becomes effective after January 9, 2001; or (4) a decision by a federal district or appellate court that affects the application of a federal amendment or provision in the preceding point that applies to wetlands in Wisconsin that was issued after January 9, 2001.

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