



WISCONSIN LEGISLATIVE COUNCIL

Terry C. Anderson, Director

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TO: REPRESENTATIVE KATRINA SHANKLAND
FROM: Anna Henning, Senior Staff Attorney
RE: Environmental Provisions in 2017 Wisconsin Act 58
DATE: July 11, 2018

You requested an overview of environmental permitting provisions in 2017 Wisconsin Act 58. The Act authorized the Wisconsin Economic Development Corporation (WEDC) to create an electronics and information technology manufacturing zone ("EITM zone"), in which businesses may be certified to claim certain tax credits. WEDC designated such a zone in an agreement entered into with SIO Intl. Wisconsin, Inc., and AFE, Inc. ("the Wisconsin Foxconn companies") on November 10, 2017.

Under the Act, certain special provisions and exemptions apply to various activities within the EITM zone, including, for example, tax incremental financing activities conducted by a municipality, certain environmental impacts, and utility projects. This memorandum summarizes the provisions in the Act that provide exemptions from environmental permitting and approval requirements and provides relevant background information relevant to those exemptions.

ENVIRONMENTAL IMPACT STATEMENTS

Background

For any major action that significantly affects the quality of the human environment, the Wisconsin Environmental Policy Act (WEPA) generally requires state agencies to prepare a detailed statement on all of the following:

- The environmental impact of the proposed action.
- Any adverse environmental effects which cannot be avoided should the proposal be implemented.

- Alternatives to the proposed action.
- The relationship between local short-term uses of the human environment and the maintenance and enhancement of long-term productivity.
- Any irreversible and irretrievable commitments of resources that would be involved in the proposed action.
- Details of the beneficial aspects of the proposed project.

[s. 1.11 (2), Stats.]

The Department of Natural Resources (DNR) administers and implements WEPA through s. NR 150, Wis. Adm. Code, which lists activities for which WEPA review is required. If WEPA review is required for a given project, the DNR prepares an Environmental Assessment (EA), which is an analysis of a proposed action's effect on the environment that also includes alternatives to the proposal. The DNR then prepares a more formal environmental impact statement (EIS) if the DNR determines, based on the results of the EA, that critical resources are affected by the proposed action, or there may be substantial risk to human life, health, or safety. [s. NR 150 (1) (a), Wis. Adm. Code.] Among other requirements, the process for preparing an EIS includes a public comment period and public hearing regarding a draft EIS. [s. NR 150.30 (3), Wis. Adm. Code.]

The Act

The Act specifies that the issuance of a permit or approval for a new manufacturing facility within an EITM zone is not a major action for purposes of WEPA. The practical significance of that exemption depends on whether an EIS would otherwise have been prepared. Although the Act authorizes a significant state investment in the Foxconn project, because the state's direct involvement would generally have come in the form of permit issuance, it is possible that a decision not to conduct an EIS would have been upheld.

The Act also specifies that the DNR must ensure that the conditions of applicable permits, licenses, and approvals under the DNR's jurisdiction are met for all activities related to the construction, access, or operation of a new manufacturing facility in an EITM zone, except as otherwise specifically provided.

IMPACTS TO NAVIGABLE WATERS

Background

Wisconsin law generally requires a person to obtain an individual permit (or, in some cases, be authorized under a general permit) before conducting any of the following activities impacting navigable waters:

- Placing a structure or deposit in a navigable body of water.

- Constructing or maintaining a bridge over a navigable water.
- Constructing, maintaining, or placing a culvert in a navigable water.
- Constructing, dredging, or enlarging any artificial water body connected with a navigable waterway.
- Constructing or enlarging any part of an artificial water body that is or will be located within 500 feet of the ordinary high-water mark of a navigable water body.
- Grading or removing more than 10,000 square feet of topsoil from the bank of a navigable waterway.
- Changing the course of a stream.

[ss. 30.12 (1), 30.123 (2), 30.19 (1g), and 30.195 (1), Stats.]

Certain exceptions apply with respect to each of those permitting requirements. However, in some circumstances, the DNR may nevertheless require a person proposing an otherwise exempt activity to obtain a permit, if the department makes certain determinations. [ss. 30.12 (1g) and (2m) and 30.123 (6m), Stats.]

The Act

The Act provides an exemption from the permit requirements listed above for activities that are related to the construction, access, or operation of a new manufacturing facility in navigable bodies of water located in an EITM zone. The Act retains the DNR's authority to nevertheless require a permit, under the same criteria and requirements as apply for other exemptions.

IMPACTS TO WETLANDS

Background

Generally, under Wisconsin law, a person may not discharge dredged material or fill material into a wetland unless the person obtains an individual permit (or the activity is authorized under a general permit). Before issuing a wetland permit, the DNR must determine that the permitted discharge complies with all applicable water quality standards. [s. 281.36 (3b) (b), Stats.]

Wisconsin law provides exemptions from state wetland permitting requirements for several types of activities, such as the maintenance of drainage ditches and the construction of certain farm ponds or roads. However, the exemptions do not apply if the otherwise exempt activity is incidental to an activity with a purpose of bringing a wetland, or part of a wetland, into a use for which it was not previously subject and if the activity may either: (1) impair the flow or circulation of a wetland; or (2) reduce the reach of any wetland. [s. 281.36 (4) and (5), Stats.]

The DNR generally must require mitigation for wetland individual permits through its mitigation program. The mitigation program must allow mitigation to be accomplished by any of the following methods:

- Purchasing or applying credits from a mitigation bank in this state. 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.
- Participating in an in lieu fee subprogram, 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.
- Completing mitigation within the same watershed or within one-half mile of the site of the discharge.

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 generally be at least 1.2 acres for each acre affected by a discharge. [s. 281.36 (3n) (d) and (3r), Stats.]

If a wetland is a "federal wetland," an applicant must obtain a permit from the U.S. Army Corps of Engineers in addition to the state wetland permit. When determining impacts to water quality for federal permits, the U.S. Army Corps of Engineers relies, in part, on a state water quality certification provided by the DNR.

The Act

The Act provides two exceptions relating to wetland impacts in an EITM zone. First, it provides an exemption from state wetland permitting requirements for a discharge into a wetland located in an EITM zone. The exemption applies, without exception, if both of the following criteria are satisfied:

- The discharge is related to the construction, access, or operation of a new manufacturing facility in the zone.
- All adverse impacts to functional values of wetlands are compensated at a ratio of two-to-one, using one of the three mitigation methods: (1) purchasing credits from a mitigation bank located in Wisconsin; (2) participating in the in lieu fee subprogram;¹ or (3) completing mitigation within the state.

¹ For mitigation through the in lieu fee subprogram, the Act requires the DNR to identify and consider mitigation that could be conducted within the same watershed, and it authorizes mitigation outside of the watershed only upon agreement between the DNR and the person conducting the wetlands-related activity that gave rise to the mitigation requirement.

Second, the Act requires the DNR to waive the state water quality certification for federal wetlands, if a proposed wetland impact satisfies the same criteria outlined above. The effect of that change would be that the U.S. Army Corps of Engineers would make its own determination regarding water quality impacts to those wetlands.

GREAT LAKES COMPACT

Background

The Great Lakes Compact, and the statute implementing the Great Lakes Compact, generally prohibit new or increased diversions of water from the Great Lakes basin to areas outside the basin. However, the Compact provides two exceptions to that general prohibition. The first exception applies to transfers within "straddling communities," and the second exception applies to "communities within straddling counties."² A "straddling community" is a city, village, or town that is partly within the Great Lakes basin, whereas a "community within a straddling county" is a city, village, or town that is located entirely outside of the basin but wholly within a county that lies partly within the Great Lakes basin.

In addition to various other requirements and criteria, diversions to communities within straddling counties must be approved by the Great Lakes-St. Lawrence River Basin Water Resources Council, comprised of the governors of the Great Lakes states. Each of the eight governors on the council must agree before such a diversion may proceed.

In contrast, diversions within straddling communities do not require approval by all members of the council. However, proposals for very large diversions in straddling communities must be reviewed by all Great Lakes governors, as well as the premiers of Ontario and Quebec. That review does not require unanimous agreement before the DNR may approve a diversion.

Diversions within straddling communities generally must satisfy various statutory criteria, set forth in s. 281.346 (4) (c), Stats. One such criterion is that the proposed diversion must be consistent with an approved water supply service area plan.

The Act

The Act provides an exemption from the requirement to demonstrate consistency with an approved water supply service area plan as a criterion for obtaining approval for a diversion of water to a straddling community that includes an EITM zone. The Act retains other statutory requirements applicable to such diversions.

If you have any questions, please feel free to contact me directly at the Legislative Council staff offices.

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² A third exception applies to diversions of water from one watershed to another within the basin.