



## WISCONSIN LEGISLATIVE COUNCIL INFORMATION MEMORANDUM

### “Foxconn Legislation”: August 2017 Special Session Assembly Bill 1

On behalf of the State of Wisconsin, Governor Walker executed a memorandum of understanding with Hon Hai Precision Industry Company, Ltd., also known as “Foxconn Technology Group” (and commonly referred to as “Foxconn”), on July 27, 2017, to outline terms and responsibilities “which, if achieved, would result in a definitive agreement and [Foxconn] locating” a new fabrication facility in Wisconsin.

Among other terms, the Governor agreed that the state would immediately pursue legislation to create a special tax credit zone for the project and make specified other changes to current law. As part of a special session on economic development, the Assembly Committee on Organization subsequently introduced a bill that makes changes relating to the terms outlined in the memorandum of understanding, together with other changes to current law.

This Information Memorandum summarizes the legislation and provides relevant background information. For other summaries of the legislation, see the analysis of the bill by the Legislative Reference Bureau and a memorandum on LRB-4050/1, prepared by the Legislative Fiscal Bureau.

The Assembly Committee on Organization introduced August 2017 Special Session Assembly Bill 1 (“the bill”) on August 1, 2017. Many of the modifications to current law in the bill are specific to the Foxconn project or are arguably necessary to facilitate the agreement with Foxconn. In addition, the bill includes certain changes – primarily relating to the enterprise zone tax credit program and disregarded entities – that do not relate to the Foxconn project.

The bill provides for a new type of tax credit “zone” called an electronics and information technology manufacturing zone (“EITM zone”). The designation of an EITM zone, particularly the designation of the geographic boundaries of the zone, functions as a key threshold decision under the bill. That decision will have significant effects on other policy aspects of the bill, because many provisions in the bill apply only within the zone, or within a community in which the zone is located.

#### **EITM ZONE: DESIGNATION AND TAX CREDITS**

The bill authorizes the Wisconsin Economic Development Corporation (WEDC) to designate one EITM zone in the state. Many aspects of the zone, including, for example, criteria for designation and payment recoupment provisions, are similar to requirements of the existing enterprise zone

tax credit program.<sup>1</sup> Other aspects, including the requirements and scale of associated income tax credits, are unique. Under the bill, the designation of an EITM zone may remain in effect for a period of no more than 15 years.

### ***CRITERIA FOR DESIGNATION***

As with enterprise zones under current law, WEDC has significant discretion under the bill regarding the designation of an EITM zone. The bill requires WEDC to consider the following criteria when determining whether to designate an area as an EITM zone:

- Indicators of the area’s economic need, which may include data regarding household income, average wages, the condition of property, housing values, population decline, job losses, infrastructure and energy support, the rate of business development, and the existing resources available to the area.
- The effect of designation on other initiatives and programs to promote economic and community development in the area, including job retention, job creation, job training, and creating high-paying jobs.

The bill also requires WEDC, to the extent possible, to give preference to the greatest economic need.

### ***TAX BENEFITS***

The bill authorizes WEDC to certify a business that begins operations in an EITM zone as eligible to receive special income tax credits. The following types of tax credits are available to a certified business in the zone:

- **17% of qualified wages paid.** A credit equal to 17% of payroll attributable to certain wages<sup>2</sup> paid to full-time employees<sup>3</sup> in the taxable year, subject to an aggregate limit of \$1.5 billion.

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<sup>1</sup> The enterprise zone tax credit program, described in greater detail below, provides refundable tax credits for certain activities, including the creation or retention of jobs, employee training, and significant capital expenditures, to eligible businesses located in enterprise zones. [s. 238.399, Stats.] Although they are named “zones,” as implemented through negotiated contracts, each of the currently designated enterprise zones consists of an individual, large-scale business venture.

<sup>2</sup> To qualify, wages must be paid to employees with annual wages of at least \$22,620, or at least \$30,000, depending upon the classification of the county or municipality as a “tier I” or “tier II” county or municipality, as determined by WEDC based on factors such as the unemployment rate and median family income in the area. Wages exceeding \$100,000 paid to any employee do not qualify.

<sup>3</sup> In this context, “full-time employee” means an individual who is employed in a regular, nonseasonal job and who, as a condition of employment, is required to work at least 2,080 hours per year, including paid leave and holidays. However, WEDC may grant exceptions to those requirements in certain situations in which annual pay exceeds 2,080 times 150% of the federal minimum wage and an individual is offered retirement, health, and other benefits that are equivalent to the retirement, health, and other benefits offered to an individual who is required to work at least 2,080 hours per year.

- **15% of significant capital expenditures.** A credit equal to 15% of significant capital expenditures within the zone in the taxable year, allocated over a seven-year period, subject to an aggregate limit of \$1.35 billion.<sup>4</sup>

The tax credits are **refundable**, meaning that if a credit exceeds a claimant's income tax liability, the claimant receives that excess amount in the form of a check from the state. The tax liability of an EITM zone tax credit claimant will be determined, in part, by the claimant's eligibility for the Manufacturing and Agriculture Tax Credit provided under current law. [ss. 71.07 (5n) and 71.28 (5n), Stats.]

#### ***GROUNDS FOR REVOCATION AND REPAYMENT***

In the same manner as the enterprise zone tax credit program under current law, the bill **requires** WEDC to revoke a certification for a business in an EITM zone if the business does any of the following:

- Supplies false or misleading information to obtain tax benefits.
- Leaves the EITM zone to conduct substantially the same business outside the zone.
- Ceases operations in the zone and does not renew operation of the business or a similar business in the zone within 12 months.

The bill also **authorizes** WEDC to require a business to repay any tax benefits the business claims for a year in which the business failed to maintain employment levels or a significant capital investment in property required under an agreement between the business and WEDC.

In addition, a provision of current law, not affected by the bill, requires the WEDC Board to recoup payments and impose a financial penalty on a tax credit recipient who fails to comply with the terms of a contract with WEDC.<sup>5</sup> [s. 238.03 (3) (b), Stats.]

#### **SALES TAX EXEMPTION**

Generally, under **current law**, state sales and use tax applies to the retail sale of goods and specified services. The general applicability of the sales tax is subject to numerous exemptions, such as exemptions for food, fuel and electricity used by residences and in manufacturing, farming supplies, and manufacturing machinery and equipment. [ss. 77.52 and 77.54, Stats.]

In addition to the income tax credits described above, **the bill** creates an exemption from the state sales and use tax for the building materials, supplies, and equipment and taxable landscaping and lawn maintenance services acquired or used solely for the construction or development of facilities located in an EITM zone. The exemption applies only if the capital expenditures for the construction or development of such facilities may be claimed as an EITM

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<sup>4</sup> The bill includes an apparent discrepancy between the relevant provision in the income tax chapter, which provides a credit "**equal to 15%** of the claimant's **significant** capital expenditures," and the statutory provision authorizing WEDC to certify the tax benefit for capital expenditures, which authorizes WEDC to certify a business to receive a tax benefit "in an amount to be determined by [WEDC], but **not exceeding 15%**" of the business's capital expenditures."

<sup>5</sup> However, current law also authorizes the WEDC Board to execute contracts and does not appear to prohibit the Board from amending an existing contract. [s. 238.04 (7), Stats.]

credit, as certified by WEDC and first applies to purchases made after WEDC enters into a contract with a business to locate in an EITM zone. The value of this exemption is estimated by the administration to be approximately \$150 million.

### **ECONOMIC DEVELOPMENT LIAISON**

The bill creates one unclassified<sup>6</sup> full-time employee position to serve as an “economic development liaison,” organized within the general program operations of the Department of Administration (DOA). The bill allocates \$183,500 for the current (2017-18) fiscal year and \$177,500 for the following fiscal year for this position, to be funded from general purpose revenue. The person who fills this position is to be appointed by the Secretary of the DOA and is required to “perform services related to economic development.”

### **GRANTS TO LOCAL GOVERNMENTS AND MORAL OBLIGATION PLEDGE**

Under **current law**, the DOA provides grants to local units of governments through a variety of grant programs for a range of purposes, including, for example, for public facilities and planning and emergency assistance.

**The bill** appropriates \$10 million in the current (2017-18) fiscal year for grants that the DOA may issue to a local governmental unit for the local governmental unit’s expenditures for costs the DOA determines are associated with development occurring in an EITM zone. The bill specifies that these costs may include costs related to infrastructure and public safety.

The DOA may require a local governmental unit to match “in whole or in part” a grant provided under this provision. That provision appears to limit the local match that can be required of a local governmental unit to 50% of the applicable costs.

In addition, the bill includes a provision by which the Legislature formally recognizes that it has a “moral obligation” to appropriate funding for a percentage of the principal and interest for certain debt obligations that may be incurred by local governments related to an EITM zone. Specifically, the bill provides that the Legislature expresses its expectation and aspiration that it will appropriate funds to pay up to 40% of the principal and interest of a local governmental unit’s obligations undertaken to finance costs related to development occurring in or for the benefit of an EITM zone, if ever called upon to do so, if the DOA approves the obligation before it is issued by the local governmental unit.<sup>7</sup>

Under the bill, the DOA and a local governmental unit may contract to implement the provisions in the bill related to these types of grants and appropriations.

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<sup>6</sup> The state civil service system is divided into the classified service and unclassified service. Positions in the unclassified service are specifically listed in statutes and generally include positions held by elected officers, officers and employees appointed by the Governor, and many other high-level administrative positions and appointees. Employees not specified in the unclassified service are in the classified service. In general, the civil service laws apply to employees in the classified service, but not to employees in the unclassified service. [s. 230.08 (1), Stats.]

<sup>7</sup> The bill does not specify who may call on the Legislature to make such an appropriation.

## **DESIGN-BUILD CONTRACTING**

Under **current law**, a local government may be required to adhere to certain requirements with respect to whether and how it awards contracts for public construction projects. Specifically, with limited exceptions, any public construction<sup>8</sup> project conducted by a city or village for which the estimated cost exceeds \$25,000 must be awarded to the lowest responsible bidder. [ss. 61.54 and 62.15 (1), Stats.] With limited exceptions, villages and cities must seek bids for the performance of public construction projects based on a pre-established project design that includes plans and specifications, a description of the work to be performed, and the materials to be used. [s. 62.15 (2), Stats.]

With “design-build” bidding, the bidding phase of a project occurs before the project owner engages in the design phase of the project, instead of after the project is designed.<sup>9</sup> As noted above, state law generally prohibits the use of the design-build contracting process because under that process a project owner’s request for bids does not include the specific project design required by statute.<sup>10</sup>

Under **the bill**, a village or city in which an EITM zone is located may contract for the acquisition of any element of water systems, sewer systems, or wastewater treatment facilities using the design-build method of project delivery.

## **TAX INCREMENTAL FINANCING**

Generally, the **current tax incremental financing (TIF) law**, set forth under s. 66.1105, Stats., authorizes a municipality to designate a tax incremental district (TID) in order to rehabilitate a particularly blighted area or to encourage economic development where it would not occur but for the creation of a TID. The TIF designation freezes the taxable value of the district at its current “base value.” Public expenditures in the district, called “project costs,” are then financed by property taxes on the “increment” of property value, which is the amount by which the property value of the district exceeds the base value over time. [s. 66.1105, Stats.]

Project costs for which a municipality may utilize TIF include, for example, costs for the construction of public works, costs for the removal of environmental contaminants, and costs for certain infrastructure improvements. Project costs generally may not include cash grants for developers, unless a cash grant is authorized by a development agreement. [s. 66.1105 (2) (f), Stats.]

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<sup>8</sup> According to the League of Wisconsin Municipalities, the best practical definition of “public construction” is “activities concerned with the erection of buildings and bridges, the construction of streets and highways, and other similar public improvements which require the combining of materials, supplies and labor. Mere maintenance and other public works which do not involve the actual combining of materials and labor with a definable end result would unlikely constitute public construction.” [See *League of Wisconsin Municipalities*, <http://www.lwm-info.org/864/Contracts-FAQ-2> (quoting Natkins, Smith, and Van Swearingen, *Public Construction in Wisconsin*, at 50 (1985)).]

<sup>9</sup> The Design-Build Institute of America describes design-build as “a method of project delivery in which one entity – the design-build team – works under a single contract with the project owner to provide design and construction services.” See [www.dbia.org/about/Pages/What-is-Design-Build.aspx](http://www.dbia.org/about/Pages/What-is-Design-Build.aspx).

<sup>10</sup> Under current law, there is a statutory exception to this prohibition for acquisition of recycling or resource recovery facilities. [ss. 61.57 and 62.155, Stats.]

TID project costs must be expended within the TID's boundaries or the territory located within one-half mile of the district's boundaries and within the city or village that creates the district.<sup>11</sup> General operating expenses, unrelated to planning or development of a TID, do not qualify as project costs. Additionally, project costs generally may not include the costs of construction or expansion of municipal or other public buildings. [s. 66.1105 (2) (f), Stats.]

The lifespan of a TID is generally limited by statute, with the specific duration dependent on the purpose of the TID's creation. Industrial and mixed-use TIDs are limited to a maximum lifespan of 20 years. Additionally, in order to create a TID, a municipality must satisfy the "12% test," which specifies that the sum of the value increments of all existing TIDs in the municipality, plus the base value of the proposed TID, may not exceed 12% of the total value of taxable property in the municipality. [s. 66.1105 (4) (gm) 4. c. and (7), Stats.] Current law contains numerous specific exceptions to requirements relating to TID creation, such as TID lifespan, filing requirements, and compliance with the 12% test.

Because the increment of property value would otherwise be divided among underlying taxing jurisdictions, TID creation is dependent upon approval by a joint review board, consisting of representatives of the municipality creating the TID as well as the county, school district, and technical college district in which the TID is located, and one public member selected by a majority of the other members. [s. 66.1105 (4m), Stats.]

**The bill** prescribes certain specific procedures regarding creation of a TID in an EITM zone. First, the bill specifies that the TID may only be an industrial or mixed-use TID, and provides specific guidance regarding the creation date of such a TID. Second, the bill specifies that the equalized value of taxable property of a TID created in an EITM zone does not count in the calculation of the 12% test. Third, the bill specifies that expenditures of project costs for a TID in an EITM zone may be incurred in any territory that is located in the same county as the TID, provided the expenditure benefits the district. Finally, a TID created under the authority provided by the bill would have a maximum lifespan of 30 years.

### **CHANGES TO UTILITIES LAW**

**Current law** generally requires a public utility to obtain authorization from the Public Service Commission (PSC) before starting a construction project. Authorization for most types of construction projects must be obtained through a process commonly referred to as the "Certificate of Authority" process. Authorization to construct high-voltage transmission lines must be obtained through a more extensive process commonly referred to as the "Certificate of Public Convenience and Necessity" process.

**The bill** provides certain exceptions, described below, to those requirements for projects within an EITM zone. The bill also modifies current law to provide for the use of market-based pricing in an EITM zone.

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<sup>11</sup> Companion bills introduced in the 2017-18 Legislative Session – 2017 Assembly Bill 291 and 2017 Senate Bill 223 – would allow the project costs of a TID to include expenditures in adjacent municipalities that are within one-half mile of a TID boundary, if the governing body of the adjacent municipality adopts a resolution to consent to the expenditure.

***PUBLIC UTILITY CONSTRUCTION PROJECTS REQUIRING A “CERTIFICATE OF AUTHORITY”***

**Current law** provides that the PSC may require a public utility — including a water, electric, or natural gas utility — to obtain authorization, called a “certificate of authority,” before commencing any type of construction project.<sup>12</sup> For each type of utility service, the PSC’s administrative rules specify the types of projects for which authorization is required, the information that must be submitted to the PSC, and the circumstances under which a public hearing will be held. [s. 196.49 (3), Stats.]

The PSC may refuse to authorize a project that it finds would: (1) substantially impair the efficiency of the public utility; (2) provide facilities unreasonably in excess of future needs; or (3) add to the cost of service without proportionately increasing the value or quantity of service. Alternatively, the PSC may condition its approval on a public utility complying with terms imposed by the PSC. [s. 196.49 (3), Stats.]

Current law provides exemptions for projects that: (1) do not exceed certain cost thresholds in relation to a public utility’s revenues; or (2) entail rebuilding existing facilities and which meet certain environmental, size, and design requirements. [s. 196.49 (5g) (ar), Stats.]

**The bill** also exempts any project within an EITM zone from the general requirement to obtain a certificate of authority.

***HIGH-VOLTAGE TRANSMISSION LINE PROJECTS REQUIRING A “CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY”***

**Current law** requires a public utility<sup>13</sup> to obtain authorization, called a “certificate of public convenience and necessity (CPCN),” from the PSC before constructing certain large electric facilities, including high-voltage transmission lines.<sup>14</sup> A public hearing must be held on each proposal for authorization.

The PSC may not grant its authorization unless it finds that a proposal satisfies all of the requirements from the “Certificate of Authority” process listed above, as well as numerous other criteria including: (1) the proposed facility satisfies the energy needs of the public; (2) the design, location, and route of the facility is in the public interest, considering alternatives as well as economic, safety, and environmental factors; and (3) the proposed facility will not have an undue adverse ecological, public health, or aesthetic impact. [s. 196.491 (3), Stats.]

Current law provides an exemption for certain high-voltage transmission lines that are operated below a certain voltage and which are constructed within 60 feet of an existing line. Additionally, transmission line relocations that the PSC determines are necessary to facilitate highway or airport projects are excluded from the requirements. [s. 196.491 (1) (f) and (4) (c), Stats.]

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<sup>12</sup> “Project” means construction of any new plant, equipment, property or facility, or extension, improvement, or addition to existing plant, equipment, property, apparatus, or facilities. [s. 196.49 (3) (a), Stats.]

<sup>13</sup> The requirement also applies to electric cooperatives and certain other persons. [s. 196.491 (3) (a) 1. and (4) (b), Stats.]

<sup>14</sup> “High-voltage transmission line” generally means “a conductor of electric energy exceeding one mile in length designed for operation at a nominal voltage of 100 kilovolts or more, together with associated facilities.” [s. 196.491 (1) (f), Stats.]

Also, under current law, a high-voltage transmission line that receives authorization or that is exempt from the authorization requirement is also exempt from any local ordinance that would preclude or inhibit the construction or utilization of the line. [s. 196.491 (3) (i) and (4) (c), Stats.]

**The bill** excludes transmission line relocations that are within an EITM zone from the requirement to obtain the PSC's authorization. The bill does not specify whether a transmission line that qualifies for the exclusion under the bill would be eligible for the exemption from local ordinance requirements.

### ***MARKET-BASED PUBLIC UTILITY RATES***

**The bill** requires an electric public utility providing service to an EITM zone to file with the PSC tariffs (i.e., rate plans) that include market-based pricing and options that allow a new retail customer within the zone to receive market benefits and take market risks.

Generally, market-based pricing is intended to encourage industrial development by setting rates in a way that: (1) provides large energy users the opportunity to pay lower rates for electric service than they would otherwise be required to pay; and (2) avoids causing other customers to pay higher rates as a result.

Broadly speaking, the PSC sets electric rates at an amount that it projects will enable a utility to collect revenues sufficient to cover the utility's costs and provide it with a reasonable return (i.e., profit). The PSC's projections are based on the amount of energy use that is expected in the near future. Energy use that was not included in the projections, such as by a new customer, then may be able to be priced lower, without reducing the amount of revenue that was expected.

The rate charged to a qualifying new customer for energy is generally set close to the price available at a given time in the market from which public utilities purchase energy. Therefore, a qualifying customer incurs the risk that the price available from this market at a particular time may be greater than the conventional rate.

The bill specifies certain conditions that a market-based rate plan must satisfy, and it requires the PSC to approve a plan that is "consistent with" those conditions. The conditions include requirements regarding notice requirements, minimum durations for the plans, and eligibility criteria, including that a customer must be eligible for an EITM zone credit to qualify for the pricing.

The conditions also require a customer to pay the difference, if any, between the conventional rate and the market-based rate, if the customer does any of the following: (1) supplies false or misleading information regarding its eligibility for market-based rates; (2) leaves the EITM zone to conduct substantially the same business outside the zone; or (3) ceases operations in the zone and does not renew operation of a similar business within the zone within 12 months. The bill does not specify the period of time for which the difference must be calculated.

### **CHANGES TO ENVIRONMENTAL LAW**

The bill provides various exemptions, described below, from permitting requirements for specified environmental impacts within an EITM zone.



### ***ENVIRONMENTAL IMPACT STATEMENTS***

**The Wisconsin Environmental Policy Act (WEPA)** requires state agencies to prepare a detailed statement, known as an “environmental impact statement,” for any major action that significantly affects the quality of the human environment.<sup>15</sup> [s. 1.11, Stats.]

**The bill** 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.<sup>16</sup>

### ***IMPACTS TO NAVIGABLE WATERS***

The bill provides exemptions for four types of permits relating to impacts to navigable waters (i.e., lakes and streams). As described below, each of the exemptions applies to activities that are either “related to” or “required for” either the “construction, access, **or** operation” of a new manufacturing facility located in an EITM zone, or the “construction, access, **and** operation” of such a facility.

In certain circumstances, the Department of Natural Resources (DNR) would be authorized to “override” the first two of the exemptions described below. No such “override” mechanism exists for the third and fourth exemption described below.

#### ***Placement of Structures or Deposits***

**Current law** generally prohibits the placement of structures and deposits in navigable bodies of water, except as authorized by an individual permit or a general permit.<sup>17</sup> Current law provides exemptions to that prohibition for various activities, such as the placement of certain seasonal structures and limited amounts of riprap. [s. 30.12 (1) and (1g), Stats.]

However, under current law, the exemptions do not apply if either of the following apply to the proposed structure or deposit: (1) the proposed structure or deposit is located in an area of special natural resource interest<sup>18</sup>; or (2) the proposed structure or deposit would interfere with certain other owners’ property rights. [s. 30.12 (1g) (intro.), Stats.] Current law authorizes a limited exemption “override”; specifically, the DNR may decide to require a person engaged in an otherwise exempt activity to apply for an individual permit (or seek authorization under a general permit) if the department determines that conditions specific to the site require restrictions on the activity in order to prevent significant adverse impacts to the public rights

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<sup>15</sup> In past cases, state and federal courts have applied a relatively deferential “reasonableness” test when reviewing challenges to agency decisions regarding whether an agency action is a “major action” and, in some past cases, have upheld state agency determinations that a permit associated with a project does not constitute a “major action” for purposes of WEPA. [See, e.g., *Wisconsin Environmental Decade, Inc. v. Wisconsin Department of Natural Resources*, 340 N.W.2d 722 (Wis. 1983).]

<sup>16</sup> The bill does not affect an analogous requirement for major federal actions under the National Environmental Policy Act.

<sup>17</sup> An individual permit is a permit issued for a specific activity at a particular place. A general permit does not apply to any one specific project; instead, it applies statewide to any person authorized to engage in the activity covered by the permit.

<sup>18</sup> Areas of special natural resource interest are areas or waterbodies that have been identified as having special characteristics, including, for example, certain state natural areas, trout streams, outstanding resource waters, wild rivers, and unique and significant wetlands. [s. 30.01 (1am), Stats.]

and interests, environmental pollution, or injury to certain property owners' rights. [s. 30.12 (2m), Stats.]

**The bill** provides an exemption from the general permit requirement for structures and deposits in navigable waters for a structure or deposit that is related to the construction, access, or operation of a new manufacturing facility in a navigable stream located in an EITM zone. The "override" authority and other limitations on exceptions under current law would continue to apply under the bill.

### ***Bridges and Culverts***

Generally, under **current law**, a person must obtain an individual permit (or be authorized under a general permit) before constructing or maintaining a bridge or constructing, maintaining, or placing a culvert in, on, or over a navigable water in this state. Current law provides for two exemptions to that general permit requirement, which apply to certain bridges constructed by the Department of Transportation (DOT) and to the construction, placement, or maintenance of certain culverts to replace existing culverts. [s. 30.123 (2) and (6), Stats.]

However, current law authorizes the DNR to require a person whose project would otherwise be exempt under the culvert replacement exemption to obtain approval under a permit if the DNR, after an investigation and site visit, determines that conditions specific to the site require restrictions in order to prevent significant adverse impact to the public rights and interests, environmental pollution, or material injury to certain property owners' rights. [s. 30.123 (6m), Stats.]

**The bill** provides a general exemption from the general permit requirement for bridges and culverts that are required for the construction, access, or operation of a new manufacturing facility and that affect a portion of a navigable stream within an EITM zone. However, the bill authorizes the DNR to nonetheless require a permit for such bridges and culverts under the same criteria and requirements as apply to the "override" authority for replacement culverts under current law.

### ***Enlargement of Certain Artificial Waterbodies***

With certain exceptions, **current law** requires a person to obtain a permit to: (1) construct, dredge, or enlarge any artificial water body connected with a navigable waterway; (2) construct or enlarge 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; or (3) grade or remove more than 10,000 square feet of topsoil from the bank of a navigable waterway. [s. 30.19 (1g), Stats.]

**The bill** provides an exemption from that general permit requirement for any activity that affects a portion of a navigable stream and that is required for the construction, access, and operation of a new manufacturing facility within an EITM zone.

### ***Changing the Course of a Stream***

Unless the Legislature enacts a special authorization, **current law** generally requires a person to obtain an individual permit before changing the course of a stream. [s. 30.195 (1), Stats.] Current law provides one exemption to that general requirement. The exemption is specific to municipal or county-owned lands in Milwaukee County.

**The bill** provides a second exemption to that general permit requirement for activity related to the construction, access, or operation of a new manufacturing facility located in an EITM zone.

## ***IMPACTS TO WETLANDS***

Generally, under **current 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.<sup>19</sup> [s. 281.36 (3b) (b), Stats.]

Current 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.]

Current law requires the DNR to 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. The DNR must establish an escrow subprogram as part of the in lieu fee program.
- Completing mitigation within the same watershed or within one-half mile of the site of the discharge.

The statutes provide that purchasing credits from a mitigation bank and participation in the in lieu fee subprogram 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 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.<sup>20</sup> 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.

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<sup>19</sup> Water quality standards for wetlands are narrative standards that describe “beneficial uses” or “functional values” of a wetland, such as flood water retention, groundwater recharge or discharge, and fish and wildlife habitat. [ss. 281.15 and 281.36, Stats.; s. NR 1.95 (3) and chs. NR 102-105 and 299, Wis. Adm. Code.]

<sup>20</sup> Federal wetlands are wetlands that are subject to federal jurisdiction under 33 U.S.C. s. 1344. Nonfederal wetlands are “nonnavigable, isolated, intrastate wetlands,” which were removed from the U.S. Army Corps of Engineers’ 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).

**The bill** makes two changes relating to impacts to wetlands. First, it provides an exemption from state wetlands permitting requirements for a discharge into a wetland located in an EITM zone. The exemption applies only if all 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 four mitigation methods: (1) purchasing credits from a mitigation bank located in Wisconsin; (2) participating in the in lieu fee subprogram, described above; (3) completing mitigation within the state; or (4) participating in an escrow program.

That exemption would be inapplicable in the same circumstances in which exemptions are inapplicable under current law.

Second, the bill 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.

#### ***PREPARATION OF A WATER SUPPLY SERVICE AREA PLAN***

**Current law**, consisting of the Great Lakes Compact,<sup>21</sup> and the statute implementing the Great Lakes Compact, generally prohibits new or increased diversions of Great Lakes water, with limited exceptions. One such exception authorizes the provision of water to a “straddling community,”<sup>22</sup> if various criteria are satisfied. Under the state’s implementing statute, one such criterion is that a diversion proposal must be consistent with an approved water supply service area plan.<sup>23</sup> [s. 281.346 (4) (c), Stats.] That specific criterion does not appear to be required under the Compact itself.

**The bill** exempts a proposal to provide water to a straddling community that includes an EITM zone designated under the bill 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 under the Great Lakes Compact.

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<sup>21</sup> The Great Lakes Compact took effect on December 8, 2008, after it was ratified by Wisconsin and the seven other Great Lakes states and consented to by the U.S. Congress. The compact, and the statutes implementing the compact, set forth requirements for sustainable water use, including regulations of withdrawals and diversions of water from the Great Lakes basin.

<sup>22</sup> A “straddling community” is a city, village, or town that, based on its boundary existing as of the date the Compact took effect, is partly within the Great Lakes basin or partly within the watersheds to two of the Great Lakes and that is wholly within any county that lies partly or completely within the Great Lakes basin. [s. 281.346 (1) (t), Stats.]

<sup>23</sup> A person operating a public water supply system that serves a population of 10,000 or more and that withdraws water from the waters of the state must have an approved water supply service area plan no later than December 31, 2025. [s. 281.348 (3) (a) 2., Stats.]

## **TRANSPORTATION INFRASTRUCTURE FUNDING**

Under **current law**, there are a number of large highway infrastructure projects that are designated by statute as “southeast Wisconsin freeway megaprojects” for which special funding sources are designated. [s. 84.0145, Stats.] One of these projects is named the “I 94 north-south corridor.”<sup>24</sup>

**The bill** authorizes the issuance of an additional \$252.4 million in general obligation bonds for funding for the I 94 north-south corridor project. The DOT may not utilize the proceeds of these bonds unless the federal government provides funding for this project. The bill does not specify the amount of federal funding that must be provided. The bill uses general fund moneys to pay for the costs of repaying the principal and paying the interest on these bonds.

## **DISREGARDED ENTITIES**

Under **current law** governing business organization, businesses may choose to utilize methods of organization that involve ownership of subsidiaries and other separated but related business entities in order to achieve particular organizational, liability, and administrative goals. Current federal and state tax law contemplates that, in some circumstances, these methods of business organization may be disregarded for tax purposes.

For a single-owner entity that is disregarded as a separate entity under section 7701 of the Internal Revenue Code, **the bill** specifies that notices sent by the Department of Revenue to either the owner or entity are considered sent to both and both are liable for any amounts due. A similar provision appears in the Governor’s 2017-19 Biennial Budget Bill.<sup>25</sup>

## **ENTERPRISE ZONE TAX CREDITS**

The Enterprise Zone Program was first authorized by 2005 Wisconsin Act 361 and has expanded over time. Under **current law**, WEDC may designate no more than 30 enterprise zones, each of which may remain in effect for no more than 12 years. The remaining number of zones eligible for designation by WEDC decreases as each zone expires. Three enterprise zones must be in areas comprising political subdivisions with populations of less than 5,000 people, and two enterprise zones must be in areas comprising political subdivisions with populations of at least 5,000, but fewer than 30,000 people. [s. 238.399 (3) and (4), Stats.]

Except with respect to the five enterprise zones subject to population restrictions, WEDC must consider the following criteria when determining whether to designate an area as an enterprise zone:

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<sup>24</sup> “I 94 north-south corridor” means the Mitchell interchange of I 43, I 94, and I 894 in Milwaukee County, I 94 from the Illinois-Wisconsin state line in Kenosha County proceeding northerly through the Mitchell interchange to Howard Avenue in Milwaukee County, I 43/894 from the Mitchell interchange proceeding westerly to 35th Street in Milwaukee County, the STH 119 Airport Spur Parkway between I 94 and General Mitchell International Airport in Milwaukee County, and all freeways, roadways, shoulders, interchange ramps, frontage roads, and collector road systems adjacent or related to these routes or interchanges. [s. 84.014 (5m) (ag) 1., Stats.]

<sup>25</sup> For more information, see the Legislative Fiscal Bureau’s Budget Paper No. 301: [https://docs.legis.wisconsin.gov/misc/lfb/budget/2017\\_19\\_biennial\\_budget/008\\_budget\\_papers/301\\_general\\_fund\\_taxes\\_income\\_and\\_franchise\\_taxes\\_disregarded\\_entity\\_notification.pdf](https://docs.legis.wisconsin.gov/misc/lfb/budget/2017_19_biennial_budget/008_budget_papers/301_general_fund_taxes_income_and_franchise_taxes_disregarded_entity_notification.pdf).

- Indicators of the area’s economic need, which may include data regarding household income, average wages, the condition of property, housing values, population decline, job losses, infrastructure and energy support, the rate of business development, and the existing resources available to the area.
- The effect of designation on other initiatives and programs to promote economic and community development in the area, including job retention, job creation, job training, and creating high-paying jobs.

In addition, WEDC is generally required to give preference, to the extent possible, to the greatest economic need when making such designations.

Although they are named “zones,” enterprise zones are typically designated for individual, large-scale business ventures. Examples of business enterprises that have been designated as enterprise zones include Mercury Marine in Fond du Lac and Bucyrus International, Inc., and Quad/Graphics in the Milwaukee area.

Businesses located within an enterprise zone may be certified to receive enterprise zone tax credits if they take certain actions, such as beginning or expanding operations in the zone, relocating to an enterprise zone from outside the state, retaining jobs within the zone, purchasing specified products or services from Wisconsin vendors, or making a significant capital expenditure within the zone. [s. 238.399 (5) and (5m), Stats.]

Several types of refundable tax credits are available to certified businesses. These include:

- **New jobs.** A credit for a percentage, determined by WEDC but no more than 7%, of certain wages paid to new, full-time employees hired to work within the enterprise zone.
- **Job retention.** A credit for a percentage, determined by WEDC but no more than 7%, of wages for full-time employees within the zone who earned certain minimum wages (depending on the county or municipal classification), if the number of employees within the zone is equal to or greater than the number of people employed within the zone during the previous taxable year.
- **Training.** A credit for a percentage, determined by WEDC but no more than 100%, of expenses related to training full-time employees within the zone on the use of job related new technologies, or to provide job-related training to any full-time employee whose employment represents the employee’s first full-time job.
- **Significant capital expenditures.** A credit for up to 10% of significant capital expenditures, as determined by WEDC.
- **Purchases from Wisconsin suppliers.** A credit for up to 1% of expenditures for qualified goods or services purchased from Wisconsin suppliers.

[ss. 71.07 (3w), 71.28 (3w), and 71.47 (3w), Stats.]

**The bill** makes several changes to the Enterprise Zone Program. First, the bill would allow WEDC to designate up to 35 enterprise zones, rather than the 30 zones authorized under current law.

Additionally, the bill grants WEDC the authority to revoke all certifications for tax benefits within a designated zone and cancel the designation of that zone. Under the bill, when an enterprise zone designation is cancelled or expires, WEDC may re-designate a new zone.<sup>26</sup> Thus, under the bill, up to 35 enterprise zones may be in existence at any given time.

Lastly, the bill authorizes WEDC to certify enterprise zone tax benefits for one financial services technology business that completes a competitive relocation process, retains its headquarters in Wisconsin, and retains at least 93% of its full-time employees in the state. In addition to enterprise zone tax credits available under current law, a financial services technology business that is certified by WEDC and meets certain employment and payroll requirements would be able to claim a new enterprise zone tax credit based on the claimant's payroll in the 12 months prior to its certification date. The amount that may be claimed under the new credit may not exceed \$2,000,000 per taxable year, and the claimant may claim the credit for no more than five consecutive taxable years.

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

This memorandum was prepared by Scott Grosz and Larry Konopacki, Principal Attorneys, Anna Henning, Senior Staff Attorney, and Zach Ramirez, Staff Attorney, on August 3, 2017.

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<sup>26</sup> Similar provisions relating to revocation, expiration, and re-designation of enterprise zones were included in the Governor's 2017-19 Biennial Budget Bill. These provisions are eliminated in budget proposals advanced by the Senate Republicans, as described by the Legislative Fiscal Bureau: [https://docs.legis.wisconsin.gov/misc/lfb/budget/2017\\_19\\_biennial\\_budget/005\\_senate\\_republicans\\_budget\\_proposal\\_7\\_18\\_17.pdf](https://docs.legis.wisconsin.gov/misc/lfb/budget/2017_19_biennial_budget/005_senate_republicans_budget_proposal_7_18_17.pdf).