

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

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May 3, 2005

Ryan Gruber:

This is a preliminary version of the draft placing limits on changing or revoking certain approvals.

Proposed s. 281.38 relates to water quality certifications. It allows the Department of Natural Resources (DNR) to revoke or modify a general water quality certification for nonfederal wetlands (which applies to numerous, similar activities) as authorized by current law. See s. 281.36 (8) (bn) 2. and (c). Is that OK?

Water quality certifications other than those for nonfederal wetlands are issued by DNR to implement a provision of the federal Clean Water Act (33 USC 1341 (a)). To avoid conflict with the Clean Water Act, proposed s. 281.38 (2) (b) provides that DNR may not grant a waiver if the waiver would violate the Clean Water Act provision on water quality certifications.

This raises the question of whether there should be any general limits on the waivers that regulatory authorities may grant. Should the waivers be limited to those that an authority may grant under current law? If not, should there be any limits on the waivers to protect public health or safety or the environment or any other limits?

The request for this draft indicated that if an approval was issued in error, the regulatory authority must either grant a waiver or must compensate the person for the costs incurred in reliance on the approval. If an approval is modified, rather than revoked, the person may be able to continue the activity for which the approval is granted (although the person would have to adjust to the modification). How should the amount of compensation be determined in that case? Should the compensation be equal to the additional costs incurred because of the modification of the approval or should it be some other amount? What if the person could continue the activity but chooses not to (even if the modification is relatively minor)?

Proposed s. 283.53 (2r) deals with storm water discharge permits for construction sites. The Clean Water Act requires the issuance of permits for discharges to surface waters. This can be done by the federal Environmental Protection Agency (EPA) or by a state, if the state complies with the Clean Water Act. EPA has established requirements related to when a state may modify, suspend, or revoke a discharge permit. Current s. 283.53 (2) (a) complies with the EPA requirements. I did not narrow the situations in which DNR is authorized to modify, suspend, or revoke a discharge permit because

that would put the state out of compliance. The draft also provides that any waiver provided by DNR in lieu of compensation must not violate the Clean Water Act.

The draft does require DNR to compensate a permittee if DNR changes a storm water construction site permit without the permittee's consent, unless the permittee is violating the permit or if the permittee obtained the permit by misrepresentation. It is possible that EPA would determine that the conditioning DNR's ability to revoke, suspend, or modify a permit on the payment of compensation would put this state out of compliance with the Clean Water Act, especially if the legislation does not provide funds to pay the compensation.

The situation with respect to stormwater discharge permits for construction sites is complicated in practice. Many construction sites are, I believe, covered by a general permit issued by DNR. Under DNR's rules, a landowner must file a notice of intent 14 working days before beginning construction. If the landowner does not hear from DNR before the end of the 14 days, the landowner is authorized to discharge storm water without receiving written approval from DNR. As required by the Clean Water Act, current law (s. 283.35 (3)) authorizes DNR to withdraw a source from coverage of a general permit and issue an individualized permit for the source in specified circumstances.

DNR allows local governments to operate programs to regulate stormwater discharges from construction sites. If a local government operates a program that complies with DNR's requirements, a landowner of a construction site that is regulated by the local program is considered to be covered under a DNR permit. DNR retains the authority to take enforcement action against landowners regulated by approved local programs. I do not know how many, if any, local governments have approved programs. DNR's rules also provide that storm water discharges from commercial building sites that are regulated by the Department of Commerce under s. 101.1205 are considered to hold a DNR permit. Given this complexity, I am uncertain whether this draft carries out your intent as it relates to storm water discharge permits for construction sites. Please let me know if you want any changes or have any questions about this aspect of the draft.

You indicated that the draft should cover review of subdivision plats under ch. 236, but I am uncertain how the draft should do this. The Department of Administration reviews subdivision plats for compliance with requirements set forth in ss. 236.15, 236.16, 236.20, and 236.21 (1) and (2), which relate to surveying requirements, layout requirements, the form and contents required on a final plat, and the surveyor's and owner's certificates required to accompany a final plat. The Department of Transportation reviews subdivision plats for compliance with its rules relating to access to highways. The statutes also authorize the Department of Commerce to review plats of subdivisions not served by public sewers, but my understanding is that the Department of Commerce is not currently exercising that authority. Subdivision plats are also subject to local review by certain bodies depending on the location of the proposed subdivision, as provided in s. 236.10.

The statutes authorize a landowner to apply for approval of a preliminary plat. If a preliminary plat is approved and the final plat conforms substantially to the preliminary plat, the final plat is entitled to approval unless the final plat is submitted

more than 24 months after the preliminary plat is approved. The register of deeds must accept a plat for recording if it complies with requirements as to size and materials, has received all of the required approvals, and is offered within six months of the last approval and within 24 months of the first approval. I do not see any provisions for state or local bodies to “change their minds” after a plat has been recorded. If there is a problem with state or local bodies rescinding or modifying their approvals of subdivision plats and you (or someone that you authorize) explains it to me, we should be able to determine how to deal with that problem in a later version of this draft.

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In created s. 59.69 (16) (c) I limited county authority to grant a special exception, variance, or waiver to a county’s current statutory authority under s. 59.694. A similar provision applies to cities and villages. See created s. 62.23 (7) (j) 3. Is this OK? I assumed that providing a standard for granting a special exception, variance, or waiver would be OK because a city, village, or county could simply pay compensation if they chose not to act under s. 59.69 (16) (c) or 62.23 (7) (j) 3. If you want to grant broader waiver authority, current statutes that may limit a municipality’s or county’s authority to grant waivers must be amended. Please tell me what statutes you’d like me to “notwithstanding” if you want to authorize broader local authority to grant special exceptions, variances, or waivers.

In created s. 60.61 (7) (c), which applies to towns that are not authorized to exercise village powers, I limited the authority to grant special exceptions, variances, and waivers to the standards described in s. 59.694 (7), the county statute, because under current law such towns are not granted any authority to grant special exceptions, variances, and waivers. I did this because it seems incongruous to grant special exception, variance, and waiver authority to towns which currently have no such authority at all, that would be broader and more expansive than the current law authority of cities, villages, towns authorized to exercise village powers, and counties. Is this OK?

Based on the instructions I’ve seen, I’m not sure what other permits issued by a municipality or county you’d like the bill to affect. If you want the local government part of the bill to extend beyond zoning issues, please let me know what other statutes you would like to affect.

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