



WISCONSIN LEGISLATIVE COUNCIL AMENDMENT MEMO

2011 Assembly Bill 177

**Assembly Substitute
Amendment 1 and Assembly
Amendment 1 to Assembly
Substitute Amendment 1**

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Unless the activity is exempt by statute, a person must obtain either a general permit or an individual permit or contract, issued by the Department of Natural Resources (DNR), in order to do any of the following waterway and wetland activities: (1) place a structure or deposit in navigable water; (2) withdraw water from navigable water; or (3) conduct other activities in or near navigable water that require a general permit or individual permit or contract under ch. 30, Stats. **2011 Assembly Bill 177** (the bill) amends the application process for obtaining an individual permit or contract.

PROVISIONS RELATED TO APPLICATIONS FOR INDIVIDUAL PERMITS OR CONTRACTS

Determination of Completeness

Under current law, DNR has 30 days to review an individual permit or contract application to determine whether the application is complete. If DNR determines that the application is incomplete, there is no limit as to how many times an applicant may resubmit the application to DNR. The date that DNR determines the application is complete is referred to as the *date of completeness*. Until the application is complete, DNR may not give public notice, hold a public hearing, or issue a decision to approve or deny the application.

The bill amends the process for reviewing and completing an individual permit or contract application if DNR determines that the application is incomplete during the 30-day review process. The bill makes two changes to this review process. First, if DNR determines the application to be incomplete, then DNR is limited to one request for additional information. Second, the bill replaces the *date of completeness* with the *date of closure* as the starting point for determining when DNR is to give public notice, hold a public hearing, or issue a decision approving or denying the application. Under the bill, DNR may give public notice, hold a public hearing, and issue a decision to approve or deny the application regardless of whether the application is complete.

When the *date of closure* is depends upon either of the following:

- If DNR determines during the 30-day review process that the application is complete, then *the date that DNR sends notice that the application is complete* is the date of closure.
- If DNR determines during the 30-day review process that the application is incomplete, then DNR may make one request for additional information. After the requested information has been received, *the date that DNR sends notice as to whether the application is complete or not* is the date of closure.

Assembly Substitute Amendment 1 (ASA1) includes the same provisions as the bill.

Time Limits for Requesting or Deciding to Hold a Public Hearing

Under current law, DNR has 15 days after the date of completeness (the date it issues notice that the application is complete) to provide public notice that the application is complete. The notice is given to interested and potentially interested members of the public, as determined by DNR. If the application included a request for a public hearing, then a notice for a public hearing must accompany the notice of the complete application. If the application does not include a request for a public hearing, then any person may submit a written request for a hearing within **30 days** of DNR's public notice of the complete application. DNR may also determine whether or not to hold a public hearing during this 30-day period.

The bill decreases the time limit in which a person may request a public hearing and for DNR to decide whether or not to hold a public hearing. Under the bill, DNR still has 15 days after the date of closure to provide public notice. However, a person has 10 days from the public notice to submit a written request for a public hearing. Likewise, DNR has **10 days** from the public notice to decide on whether to hold a public hearing.

Under ASAI, the time for a person to submit a written request for a public hearing or for DNR to determine whether or not to hold a public hearing is **15 days** from the public notice.

Assembly Amendment 1 to ASAI (AA1 to ASA1) amends this time limit to **20 days** from the public notice.

DNR Failure to Comply With Time Periods

The bill provides that a decision by DNR to issue or modify the permit, or approve the contract, shall be rendered if DNR fails to comply with the time periods relating to: (1) reviewing an application for an individual permit or contract; (2) determining whether it is complete; (3) requesting additional information; (4) providing public notice of the pending application; (5) deciding whether to hold a public hearing; or (6) providing for public comment.

Under ASAI, if DNR fails to comply with the time periods, the decision to issue or modify the permit, or approve the contract, shall be rendered, but DNR may impose terms and conditions on the permit or contract that are consistent with the applicant's basic proposal.

Administrative Process for Providing Notices

Under current law, DNR shall establish procedures for providing the following notices: (1) complete applications; (2) public hearings; and (3) administrative hearings. One of the procedures that must be included is that the notice shall be published as a class 1 notice under ch. 985, Stats.

ASAI directs that DNR either publish the notice as a class 1 notice under ch. 985, Stats., **or by an electronic notification system established by DNR**.

Administrative Hearings for Individual Permits and Contracts

Under current law, any person may file a petition with DNR for administrative review of DNR's issuance, denial, or modification of an individual permit or contract. Any interested person may also file a petition for administrative review of DNR's decision to impose or failure to impose a term or condition on an individual permit or contract. The person who files the petition has the burden of proof and presents evidence first before the hearing examiner.

The bill directs that if the applicant for the individual permit or contract files the petition for administrative review, then DNR has the burden of proof and must present evidence first.

ASAI amends these provisions of the bill so that the statutes reflect current law.

PROVISIONS RELATED TO APPLICATIONS FOR GENERAL PERMITS

Under current law, DNR is required to issue **by rule** the statewide general permits for certain waterway and wetland activities including: (1) placing structures or deposits in navigable waters; (2) constructing, placing, or maintaining bridges or culverts; (3) enlarging and protecting waterways; (4) removing material from beds of navigable waters; and (5) constructing certain public utilities.

ASAI repeals this requirement and instead requires DNR to issue these general permits through an **administrative process**. This administrative process includes the following requirements:

- DNR must circulate to interested and potentially interested persons its intention to issue a general permit. This must be done either by publishing a class 1 notice under ch. 985, Stats., or circulating a notice by use of an electronic notification system established by DNR.
- DNR must provide not less than 30 days after the public notice for interested persons to submit their written views on DNR's intention to issue the general permits. The notice shall include a description of the activities proposed to be authorized under the general permit.
- DNR shall provide a 30-day opportunity for any interested state agency, federal agency, person, or group of persons, to request a public hearing regarding DNR's intention to issue a general permit. DNR must hold a public hearing if it determines that there is significant public interest in holding a hearing.

Time Limit for DNR to Render a Decision Approving, Denying, or Modifying the Application

Under current law, DNR must render a decision approving, denying, or modifying the application within **30 days of the public hearing**. If no public hearing is held, then it must render its decision within 30 days of the comment period.

The bill decreases the time that DNR must render its decision to **20 days after the public hearing**. If no public hearing is held, then DNR retains the 30 days of the comment period to render its decision.

Under ASA1, DNR effectively retains **30 days after the public hearing** to render a decision. This is because after the public hearing, there is a 10-day comment period, and ASA1 gives DNR 20 days after this 10-day comment period to render the decision.

ASA1 also includes a transitional period to allow general permits valid on the effective date of the bill to remain valid until: (1) DNR creates general permits according to the new administrative process to authorize the same activity; and (2) these new general permits become effective.

INITIAL APPLICABILITY AND EFFECTIVE DATE

The bill includes an initial applicability date for changes made to the individual permit or contract process. The bill does not include an effective date. Under the bill, the initial applicability date states that the changes made to the individual permit or contract process first apply to applications for individual permits or contracts submitted on the effective date of the bill. Because the bill does not specify an effective date, the standard effective date applies, which is the first day after the date of publication.

ASA1 delays the effective date to the first day of the **4th month** after publication.

LEGISLATIVE HISTORY

On September 13, 2011, ASA1 was introduced by Representative Steineke and AA1 to ASA1 was introduced by both Representatives Steineke and Molepske, Jr. On the same day, the Assembly adopted both amendments by a voice vote. The Assembly passed the bill, as amended, by a vote of Ayes, 65; and Noes, 32.

MS:jb;wu