



WISCONSIN LEGISLATIVE COUNCIL ACT MEMO

2017 Wisconsin Act 21
[2017 Assembly Bill 160]

**Regulation of Aquaculture and
Fish Farms**

2017 Wisconsin Act 21 makes various changes, summarized below, regarding state regulation of aquaculture and fish farms.

AGREEMENTS TO FURNISH FISH AND FISH EGGS TO PRIVATE ENTITIES

Prior law prohibited the Department of Natural Resources (DNR) from furnishing fish from state hatcheries to private entities. [s. 29.705 (2) (a), Stats.]

The Act authorizes the DNR to furnish fish and fish eggs to a private fish farm that is located in Wisconsin and registered with the Department of Agriculture, Trade, and Consumer Protection (DATCP), with certain conditions. Specifically, the fish farm must enter into an agreement with the DNR, and the fish or fish grown from fish eggs must ultimately be stocked into waters of the state where the general public is allowed, except that if a private entity creates more fish than are required under its agreement with the DNR, it is not required to stock those excess fish into waters of the state.

RULE PROMULGATION REGARDING GENETICS AND VIRAL HEMORRHAGIC SEPTICEMIA

Currently, DNR and DATCP's administrative rules regulate viral hemorrhagic septicemia and establish a fish hatchery classification system. DNR rules do not specify the role of genetics in fish stocking or the department's fish donation procedures.

The Act requires the DNR to promulgate rules defining the role and extent that genetics is involved in the DNR's fish stocking strategies and standardizing the DNR's fish donation procedures. The Act also requires the DNR and DATCP to: (1) review certain rules relating to viral hemorrhagic septicemia; (2) assess the efficiency and utility of the fish hatchery

This memo provides a brief description of the Act. For more detailed information, consult the text of the law and related legislative documents at the Legislature's Web site at: <http://www.legis.wisconsin.gov>.

classification system under current rules; and (3) assess the viability and use of bait fish and forage fish and of the continued classification of bait fish and forage fish as established nonnative fish species. A final rule promulgation must be submitted to the Legislature by June 28, 2019, and the Act also authorizes the promulgation of emergency rules. When promulgating those rules, the Act requires the DNR to consider economic factors, healthy fish populations, and fishing opportunities, and to consult with specified interested parties.

FISH FARMS IN NATURAL BODIES OF WATER

Prior law, generally retained by the Act, prohibits a person from using a natural body of water as a fish farm, unless all of the following criteria are satisfied:

- The body of water is one of the following:
 - A freeze-out pond.
 - A private fish hatchery licensed on or before January 1, 1998.
 - A body of water for which one of the following types of permits has been obtained: (1) a permit for the enlargement and protection of waterways; (2) a permit to change the course of a stream; (3) a permit to construct, operate, or maintain a dam; or (4) a permit specifically authorizing the use of a natural water as a fish farm.¹
- The land that is riparian to the body of water is owned, leased, or controlled by the owners of the fish farm.
- Generally, none of the owners of the fish farm or of the riparian land provides access to the body of water to the public.

[s. 29.733 (1), Stats.]

The Act makes two changes relating to the general prohibition regarding using a natural body of water as a fish farm. First, the Act provides a general exemption that allows specified fish farm facilities to be maintained in a natural body of water for which a person holds a permit specifically authorizing the use of the natural body of water as a fish farm (or part of a fish farm).

Second, the Act grandfathers certain existing fish farms that might in some circumstances be characterized as using a natural water body. Specifically, the Act adds the following type of water body to the types of natural bodies of water that may be used as a fish farm if the other criteria listed above are satisfied: an artificial water body that is a fish farm (or part of a fish farm) that is registered with DATCP as of the effective date of the Act, regardless of the artificial water body's source, including an artificial water body that is fed by a spring.

¹ The DNR may issue permits specifically authorizing use as a fish farm only for freeze-out ponds or hatcheries licensed on or before January 1, 1998. For freeze-out ponds, the DNR must determine that no substantial public interest exists in the pond and no public or private rights in the pond will be damaged. Those standards do not apply to permits for hatcheries licensed by January 1, 1998. [s. 29.733 (2), Stats.]

CERTAIN ACTIVITIES IN ARTIFICIAL WATER BODIES

With certain exceptions, **prior law**, generally retained by the Act, 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 Act provides an exemption from the first and second of those permit requirements for the maintenance and repair of an artificial water body or fish farm that is registered with DATCP.

AGRICULTURAL EXEMPTIONS IN THE LOWER WISCONSIN RIVERWAY

Wisconsin law imposes general requirements on the development and use of land located within the Lower Wisconsin Riverway.² However, agricultural uses are exempt from some of those requirements. Specifically, Wisconsin law exempts a structure for agricultural use from a general requirement that structures visible from the river must minimize visual impact by the use of exterior colors that harmonize with the natural surroundings during the time when the leaves are on the deciduous trees and by the limited use of glass or other reflective materials. In addition, the spreading of certain nonhazardous sludges or manure for agricultural use are exempted from a general prohibition on storing or disposing of solid waste in the Riverway. Finally, Wisconsin law provides an exemption from general restrictions on new development and use of land in the Riverway for agricultural uses that satisfy certain criteria. [ss. 30.44 (1) (b) 3., 30.45 (4m), and 30.46, Stats.]

The Act expressly includes aquaculture in the definition of “agricultural use” for purposes of those exemptions.

LIMITED EXEMPTION FROM MINIMUM STREAM FLOW REQUIREMENTS

Wisconsin law generally requires a person maintaining a dam on a navigable stream to pass at least 25% of the natural low flow of water of such stream through the dam at all times.³ [s. 31.34 (1), Stats.]

The Act provides an exception from minimum stream flow requirements for a dam that is located in Langlade County and registered with DATCP on the effective date of the Act.

² The Lower Wisconsin Riverway includes certain land on either side of the Wisconsin River downstream from the dam at Prairie du Sac. A map of the Lower Wisconsin Riverway is available in Appendix A of ch. NR 45, Wis. Adm. Code.

³ However, that requirement does not apply if the DNR has determined that that minimum stream flow requirement is not necessary for the protection of fish life. [s. 31.34 (3) (b), Stats.]

ELIGIBILITY FOR LOAN GUARANTEE PROGRAM

Prior law authorized the Wisconsin Housing and Economic Development Authority (WHEDA) to administer a loan guarantee program, called the Farm Asset Reinvestment Management (FARM) program, to finance the acquisition of agricultural assets or the cost of improvements to facilities or land for agricultural purposes. [s. 234.91, Stats.]

The Act expands the FARM program to include acquisitions and improvements for aquacultural purposes.

WITHDRAWAL UNDER THE GREAT LAKES COMPACT

Under **prior law**, unchanged by the Act, the statute implementing the Great Lakes Compact⁴ generally requires a person who uses a water supply system with the capacity to withdraw an average of 100,000 gallons per day or more in any 30-day period to register a withdrawal with the DNR. Under the compact, a “withdrawal” means the taking of water from surface water or groundwater. [s. 281.346 (1) (z) and (3), Stats.]

The Act specifies that, if a fish farm withdraws water and places it in an aquacultural pond that is registered with DATCP, any subsequent use of that water from that pond is not a “withdrawal” for purposes of the Great Lakes Compact.

CHANGES RELATING TO WETLANDS

Under **prior law**, retained by the Act, a person must obtain a permit from the DNR before discharging dredged or fill material into a wetland. Individual permits are issued to individuals, and general permits are issued to authorize a general category of activities. Federal approval must also be obtained for certain discharges into wetlands that fall within federal jurisdiction.

Existing Wetland General Permit for Certain Agricultural Developments

Prior law, as affected by 2011 Wisconsin Act 118, directed the DNR to issue a wetlands general permit authorizing discharges that are part of developments for agricultural purposes, if the discharges do not affect more than 10,000 square feet of wetland. [s. 281.36 (3g) (a) 7., Stats.]

The Act adds aquacultural purposes to that existing wetlands general permit.

Scope of Practicable Alternatives for Individual Wetlands Permits

In certain circumstances, **prior law**, as affected by 2015 Wisconsin Act 387, narrowed the scope of the DNR’s review of practicable alternatives to the project site and adjacent sites for individual wetlands permits. One such circumstance is if a proposed project is necessary for the

⁴ 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.

expansion of an existing industrial, commercial, or agricultural facility. [s. 281.36 (3n) (a) 1., Stats.]

The Act adds existing aquacultural facilities to the list of facilities for which the DNR must limit its practicable alternatives analysis to the project site and adjacent sites.

General Exemption for Aquacultural Activities in Certain Artificial Wetlands

The Act provides a general exemption from the requirement to obtain a general or individual wetland permit for a discharge to a wetland, if the discharge is for “normal aquacultural activities”⁵ and the wetland was created for aquacultural purposes in an area without any prior wetland history.

Construction and Maintenance of Roads in Accordance With Best Management Practices

Prior law, retained by the Act, generally exempts the construction or maintenance of farm roads, forest roads, and temporary mining roads from the individual wetland permit requirement, if the construction or maintenance is performed in accordance with best management practices, as determined by the DNR, to ensure that: (1) the flow and circulation patterns and chemical and biological characteristics of the affected wetland are not impaired; (2) the reach of the affected wetland is not reduced; and (3) any adverse effect on the aquatic environment of the affected wetland is minimized. [s. 281.36 (4) (e), Stats.]

The Act extends the scope of that exemption to apply to roads used in fish farms.

WATER DISCHARGE PERMIT REQUIREMENTS

Under **Wisconsin law** implementing the federal Clean Water Act, discharges to navigable waters from a point source are subject to permit requirements established through the Wisconsin Pollutant Discharge Elimination System (WPDES) program. [s. 283.31, Stats.]

Variances

The Act requires the DNR, when determining whether to grant a variance from a WPDES permit requirement for a fish farm, to rely on the same guidance documents and other information that would be used by the U.S. Environmental Protection Agency to review or disapprove a variance under specified Clean Water Act regulations.

Permit Conditions

The Act specifies that, when issuing a WPDES permit to a concentrated aquatic animal production facility⁶, DNR must include best management practices (BMPs) that apply to fish

⁵ For the purpose of the exemption, the Act defines “normal aquacultural activities” to include all of the following: (a) construction, maintenance, or repair of ponds, raceways, or other similar retention structures used in fish farms; (b) the filling in or drawing down of ponds, raceways, or other similar retention structures used in fish farms; (c) maintenance or improvement of swales or other drainage areas into or out of ponds used in fish farms; and (d) maintenance, repair, or replacement of drains, pipes, or other flowage controls used in fish farms.

⁶ A concentrated aquatic animal production facility is a relatively large hatchery, fish farm or other facility that discharges from a point source at least 30 days per year and produces a minimum amount of aquatic animals

farms as required in federal law. The Act further specifies that the DNR may not include additional conditions in the permit except as necessary for the fish farm to meet applicable limitations, standards, and other provisions, including effluent limits, effluent standards, prohibitions and pretreatment standards, and any more stringent limitations, including those necessary to meet federal or state water quality standards or to comply with any applicable federal law or regulation. The Act provides that any conditions in a WPDES permit issued for a fish farm must be limited to site-specific BMPs to the greatest extent allowed under federal law.

DEPARTMENT OF TRANSPORTATION WEIGHT LIMITATIONS

Under **prior law**, retained by the Act, the Department of Transportation (DOT) may issue annual or consecutive-month permits for the transportation of agricultural products in certain vehicles that exceed maximum statutory gross weight limitations. For purposes of that authority, “agricultural products” means any of the following: (1) fruit; (2) vegetables; (3) grain, including distillers’ grain; or (4) certain livestock, feed for livestock, or nutritional supplements for livestock. [s. 348.27 (18), Stats.]

The Act adds fish and minnows to the list of agricultural products for which DOT may issue permits for transportation in vehicles that exceed statutory weight limitations.

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