DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–2921/P1dn
RNK:kmg:ch

March 24, 2001

I have prepared this draft in preliminary form to give you an opportunity to consider the issues raised in this note and to allow for redrafting based on that consideration.

I have prepared this draft based on your written redraft instructions and based on conversations with Dan Johnson of your office and John Stolzenberg of the legislative council. Please review this entire draft very closely to ensure that it meets your intent.

You will note that I have defined the term "federal law" in this draft in a manner that is somewhat different than the manner described in your instructions. I have done this because I am reluctant to try and list, in the definition, all of the types of federal law that might be applicable because there is a risk that we might inadvertently leave something out of the definition. I believe that the definition in the draft is broader and that this broad definition is consistent with your intent. If my assumption is incorrect, please let me know and I will redraft as necessary.

Please also look very carefully at the definition of "nonfederal wetland" in the draft to ensure that it captures your intent. The definition presumes that if the U.S. army corps of engineers determines that it does not have authority to regulate a wetland based on the "SWANCC decision," the corps will state that its lack of jurisdiction is based on that determination. I do not know if the corps always specifies the basis on which its determinations are made.

Section 281.365 (10) (a), as created in this draft, provides that the certification requirements under the draft do not affect the authority of DNR to regulate the discharge of dredged or fill material in a nonfederal wetland under certain provisions in current law. Please look very closely at this list of statutes in s. 281.365, as created in this draft, to ensure that it includes all of the provisions intended to be included. The list of statutes differs from a similar provision in SB–54. I made this change in the draft based on my discussions with John Stolzenberg.

As you requested, the draft specifies that the water quality certification provisions of the draft apply retroactively to January 9, 2001, except for s. 23.321 (2) which is not in existence until August 1, 2001. This retroactive application may give rise to a constitutional challenge on three separate grounds:

First, an argument could be made that the retroactive application of the proposed law violates article I, section 10, of the U.S. Constitution and article I, section 12, of the

Wisconsin Constitution which prohibit the passage of a law that impairs the obligation of contracts. Under those provisions, an act, despite its effective date, may not deprive a party of a valuable right under a contract entered into before the effective date. The contract clause is not, however, absolute. The Wisconsin supreme court has developed a three–part analysis to determine when the state may impair an existing contract:

1. Does the legislation substantially impair an existing contract?

2. If the impairment is substantial, is there a significant and legitimate public purpose for the legislation?

3. Is the legislation a reasonable and necessary means of achieving that public purpose?

The possibility that a person might prevail under this argument is particularly strong if the person started discharging dredged or fill material into a nonfederal wetland after January 8, 2001, and completed the activity before the enactment of the proposal.

Secondly, an argument could be made that the retroactive application of the proposed law violates the due process requirements of the 14th Amendment to the U.S. Constitution and article I, section 1, of the Wisconsin Constitution. These requirements are satisfied if the public interest served by the retroactive application outweighs the private interests that are overturned by it and if that retroactive application is not fundamentally unfair.

Finally, an argument could be made that the retroactive application of the proposed law violates the Wisconsin Constitution's prohibition against ex post facto laws.

While it is difficult to predict how a court might ultimately rule on any of these possible challenges, I believe that there is a substantial risk that a court might conclude that the retroactive application of this proposal is unconstitutional.

In addition to the constitutional issues raised by the retroactive application of certain provisions of this proposal, there are practical problems that arise as a result of that retroactivity. It is unclear to me how a person who fills a nonfederal wetland after January 9, 2001, but before the enactment of this proposal must go about "undoing" that activity.

As an alternative to making the proposed law retroactive and risking a constitutional challenge, you might consider a provision that would require a person who has begun filling a nonfederal wetland to cease that activity on the day that this proposal is enacted and to apply for certification to continue that activity. The draft could provide that if the person does not qualify for certification he or she must take specified action to mitigate the damage done by the filling of the wetland. If you would like to discuss these issues in greater depth or discuss other drafting alternatives, please feel free to contact me.

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