

2013 DRAFTING REQUEST

Senate Amendment (SA-SB302)

Received: 1/23/2014 Received By: rkite
Wanted: As time permits Same as LRB:
For: Neal Kedzie (608) 266-2635 By/Representing: Dan Johnson
May Contact: Drafter: rkite
Subject: Environment - water quality Addl. Drafters:
Extra Copies:

Submit via email: YES
Requester's email: Sen.Kedzie@legis.wisconsin.gov
Carbon copy (CC) to:

Pre Topic:

No specific pre topic given

Topic:

Liability for interference with the use of another's groundwater

Instructions:

See attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	rkite 1/25/2014			_____			
/P1	rkite 1/28/2014	wjackson 1/27/2014	rschluet 1/27/2014	_____	sbasford 1/27/2014		
/1		wjackson 1/28/2014	rschluet 1/28/2014	_____	srose 1/28/2014	srose 1/28/2014	

FE Sent For:

<END>

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FE Sent For:		1 WJ 1/28					

SEND>

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/?	rkite			_____	_____		

FE Sent For:

<END>

Drafting Instructions:

Amendment to SB 302 - Codify a Portion of the Holding from
State v. Michels Pipeline Const. Co., 217 N.W.2d 339, 63 Wis.2d 278 (1974)

- Create a separate section in Chapter 281 that codifies a portion of the holding from *State v. Michels Pipeline Const. Co.*, 217 N.W.2d at 350-51, which applies a modified reasonable use doctrine to groundwater withdrawals that create a nuisance through interference with other groundwater withdrawals.
- The goal is to address a concern raised regarding remedies available if a high capacity well interferes with other wells.
- This is not an amendment to the high capacity well approval statute (Wis. Stat. s. 281.34) but rather is the creation of a separate statute that codifies a basis for a private cause of action if there is interference with groundwater use.
- The draft should include a note that makes it clear that this new section is a codification of existing Wisconsin case law.
- This amendment does not change the applicability of Wis. Stat. s. 823.08, the Right to Farm Law, to nuisance actions against agricultural uses or agricultural practices.

Wis. Stat. s. 281.xx is created to read:

LIABILITY FOR NUISANCE. A possessor of land or his grantee who withdraws groundwater from the land and uses it for a beneficial purpose may be liable for interference with the use of the groundwater of another if the withdrawal of groundwater is determined by a court of competent jurisdiction to be a nuisance, due to unreasonable harm caused by lowering the water table or reducing artesian pressure. Any legal action under this section against any agricultural use or agricultural practice defined in s. 823.08 (2) (a) or (b) shall be subject to s. 823.08.

Note: This new section is a codification of Wisconsin case law. See State v. Michels Pipeline Const. Co., 217 N.W.2d 339, 63 Wis.2d 278 (1974), subject to the limitations of Wis. Stat. s. 823.08.

Kite, Robin

From: Johnson, Dan
Sent: Thursday, January 23, 2014 3:19 PM
To: Kite, Robin
Subject: RE: SB 302 amendment request

Hi again,

In addition to this request, please make the following change to Senate Bill 302. This could be included in the same amendment:

Section 6: page 3 line 24, delete "65 business" and insert "120"...and again on page 4, line 5, delete "65 business" and insert "120".

Thanks!

Dan Johnson
Senator Neal Kedzie
11th Senate District
608.266.2635

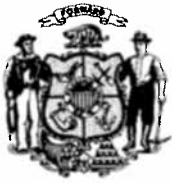
From: Johnson, Dan
Sent: Thursday, January 23, 2014 12:16 PM
To: Kite, Robin
Subject: SB 302 amendment request

Hi Robin,

Senator Kedzie would like to request an amendment to Senate Bill 302, as outlined in the attached one-page document. This could be done as a preliminary draft.

Thank you, and please contact me with any questions or concerns.

Dan Johnson
Chief of Staff
Senator Neal Kedzie
11th Senate District
608.266.2635



PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION
SENATE AMENDMENT,
TO SENATE BILL 302

In
1/25

D-Note

- 1 At the locations indicated, amend the bill as follows:
- 2 ↓ **1.** Page 1, line 6: after “approvals” insert “and nuisance actions for certain
- 3 groundwater withdrawals”.
- 4 ↓ **2.** Page 3, line 24: delete “65” and substitute “120”.
- 5 ↓ **3.** Page 4, line 5: delete “65” and substitute “120”.
- 6 ↓ **4.** Page 8, line 7: after that line insert:
- 7 “**SECTION 19m.** 281.945 of the statutes is created to read:
- 8 **281.945 Nuisance actions.** (1) A groundwater withdrawal may constitute
- 9 a nuisance if all of the following apply:
- 10 (a) The groundwater is withdrawn by a person who possesses the land from
- 11 which the groundwater is withdrawn or by a person who is authorized by the
- 12 possessor of land to withdraw groundwater from the land.

1 (b) The groundwater is withdrawn for a beneficial purpose.

2 (c) The groundwater withdrawal lowers the water table or reduces artesian
3 pressure resulting in interference with the use of another person's groundwater and
4 unreasonable harm to that person.

5 (2) An action for nuisance under sub. (1) for a groundwater withdrawal is
6 subject to s. 823.08 if the groundwater is withdrawn for an agricultural practice, as
7 defined in s. 823.08 (2) (a),¹ or for an agricultural use, as defined in s. 823.08 (2) (b).¹

8 (END)

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRBa1513/?dn
RNK:.....

This amendment is in preliminary form.

The drafting instructions for this amendment are based, in part, on language from the case of State v. Michels Pipeline Const. Co., 63 Wis. 2d 278 (1974). The language in that case is somewhat archaic and is not typical of language used in modern statutes. For example, the language refers to a “possessor of land or his grantee”. It is not clear from the language what is intended by the term “grantee”. I have assumed that a grantee is someone who the landowner allows to withdraw groundwater from the landowner’s land. Is my assumption correct? Also, the language refers to groundwater withdrawn for a “beneficial purpose”. The amendment does not specify what type of purpose is a beneficial purpose. Furthermore, the language implies that a person may be liable for damages in a nuisance action **only** if the groundwater is withdrawn for a beneficial purpose. That is, the language in the amendment may lead a court to infer that a person who withdraws groundwater for a malicious purpose may not be subject to damages for nuisance. Is this intended?

I have redrafted the language so that it comports with current drafting style. Please let me know if the resulting language is inconsistent with your intent.

Robin N. Kite
Senior Legislative Attorney
Phone: (608) 266-7291
E-mail: robin.kite@legis.wisconsin.gov

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRBa1513/P1dn
RNK:wlj:rs

January 27, 2014

This amendment is in preliminary form.

The drafting instructions for this amendment are based, in part, on language from the case of State v. Michels Pipeline Const. Co., 63 Wis. 2d 278 (1974). The language in that case is somewhat archaic and is not typical of language used in modern statutes. For example, the language refers to a “possessor of land or his grantee.” It is not clear from the language what is intended by the term “grantee.” I have assumed that a grantee is someone whom the landowner allows to withdraw groundwater from the landowner’s land. Is my assumption correct? Also, the language refers to groundwater withdrawn for a “beneficial purpose.” The amendment does not specify what type of purpose is a beneficial purpose. Furthermore, the language implies that a person may be liable for damages in a nuisance action **only** if the groundwater is withdrawn for a beneficial purpose. That is, the language in the amendment may lead a court to infer that a person who withdraws groundwater for a malicious purpose may not be subject to damages for nuisance. Is this intended?

I have redrafted the language so that it comports with current drafting style. Please let me know if the resulting language is inconsistent with your intent.

Robin N. Kite
Senior Legislative Attorney
Phone: (608) 266-7291
E-mail: robin.kite@legis.wisconsin.gov

Kite, Robin

From: Johnson, Dan
Sent: Monday, January 27, 2014 11:14 AM
To: Kite, Robin
Subject: RE: SB 302 amendment request

Hi Robin,

Thank you for the quick turn-around on the amendment! I will look over the drafter's note and get back to you regarding your questions.

I did notice one immediate revision, though. As noted below, we also wanted to delete the word "business" after "65". Thus, instead of "65 business days", we would like it to simply read "120 days".

Thanks again!

Dan

From: Johnson, Dan
Sent: Thursday, January 23, 2014 3:19 PM
To: Kite, Robin
Subject: RE: SB 302 amendment request

Hi again,

In addition to this request, please make the following change to Senate Bill 302. This could be included in the same amendment:

Section 6: page 3 line 24, delete "65 business" and insert "120"...and again on page 4, line 5, delete "65 business" and insert "120".

Thanks!

Dan Johnson
Senator Neal Kedzie
11th Senate District
608.266.2635

Kite, Robin

From: Johnson, Dan
Sent: Tuesday, January 28, 2014 10:54 AM
To: Kite, Robin
Subject: RE: SB 302 amendment request

Hi Robin,

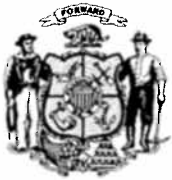
In regards to your drafter's note for the most recent amendment to SB 302, we believe the language as written meets the intent, with the exception of the aforementioned request to delete the word "business" after "65", and simply replace with "120 days".

Your assumption regarding the change of "grantee" to something more current is correct. We do not wish to define "beneficial purpose", as the Court offered no such definition, and it would be a rather daunting task to do so. Further, we wish to stay true to the language provided in the Michels Pipeline decision. In that regard, since the decision does not discuss a "malicious use" of groundwater, we do not want to add that to the amendment. Again, we wish to stay true to the wording of Michels Pipeline and not deviate from it. And, it's quite possible that such a malicious act may be covered by some other section of state law.

So, in short, leave the language in Section 19m as is, make the requested change of "65 business days" to "120 days", and then draft the amendment in an introducible form.

Thank you!

Dan Johnson
Chief of Staff
Senator Neal Kedzie
11th Senate District
608.266.2635



RM
RWT
1

LRBa1513/10

RNK:wjhrs

Stays

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION
SENATE AMENDMENT,
TO SENATE BILL 302

1 At the locations indicated, amend the bill as follows:

2 **1.** Page 1, line 6: after “approvals” insert “and nuisance actions for certain
3 groundwater withdrawals”.

4 **2.** Page 3, line 24: delete “65” and substitute “120”. ^{business}

5 **3.** Page 4, line 5: delete “65” and substitute “120”. ^{business}

6 **4.** Page 8, line 7: after that line insert:

7 **SECTION 19m.** 281.945 of the statutes is created to read:

8 **281.945 Nuisance actions.** (1) A groundwater withdrawal may constitute
9 a nuisance if all of the following apply:

10 (a) The groundwater is withdrawn by a person who possesses the land from
11 which the groundwater is withdrawn or by a person who is authorized by the
12 possessor of land to withdraw groundwater from the land.

