



WISCONSIN LEGISLATIVE COUNCIL ACT MEMO

2017 Wisconsin Act 183
[2017 Assembly Bill 547]

Regulation of State Wetlands

2017 Wisconsin Act 183 creates a wetland study council; exempts certain wetland impacts from state permit requirements; modifies state law regarding the identification, confirmation, and delineation of wetlands; creates grant programs for certain mitigation projects; and authorizes the Department of Natural Resources (DNR) to administer permits for federal wetlands, if authorized to do so by the U.S. Army Corps of Engineers (USACE). Those and other changes are summarized below.

WETLAND STUDY COUNCIL

The Act creates a new wetland study council consisting of nine members, appointed for staggered six-year terms. Eight members are appointed by the Governor: six must be representatives of specified statewide organizations; one must be a statewide wetland delineator; and one must be a statewide wetland consultant. The ninth member is appointed by the DNR Secretary and must be a DNR biologist or hydrologist who is a wetland expert. The Act directs the council to research and develop recommendations on a variety of issues related to wetlands.

WETLAND PERMIT EXEMPTIONS; PROCEDURE AND MITIGATION REQUIREMENTS

Background

Wisconsin law requires a person to obtain an individual wetland permit or to be authorized under a wetland general permit before conducting an activity that will result in a discharge of dredged material or fill material into state wetlands (also referred to as “nonfederal wetlands”), unless the activity is exempt from that requirement. If the wetland is a “federal wetland” that is subject to federal jurisdiction, the applicant must obtain a permit from USACE, or qualify for an exemption.

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>.

Wisconsin law, unaffected by the Act, provides exemptions from state wetland permitting requirements for several types of activities. However, the DNR may “override” those exemptions in certain circumstances.¹ [s. 281.36 (4) and (5), Stats.] In addition to the statutory exemptions, DNR administrative rules exempt the discharge of dredged or fill material into certain artificial wetlands, unless the DNR determines that the artificial wetland has significant functional values or uses. [ss. NR 103.02 (1m), 103.03 (1) (e) to (g), and 103.06 (4), Wis. Adm. Code.]

Wisconsin law generally requires the DNR to require mitigation for wetland individual permits through its mitigation program. Mitigation may be accomplished by any of the following methods:

- Purchasing or applying credits from a mitigation bank in this state.²
- Participating in an in lieu fee subprogram, under which payments are made to the DNR or another entity for the purposes of restoring, enhancing, creating, or preserving wetlands or other water resource features.
- Completing mitigation within the same watershed or within one-half mile of the site of the discharge.

Exemptions

The Act exempts three types of discharges from state wetland permit requirements. First, the Act exempts a discharge into a state wetland that occurs in an urban area,³ if all of the following criteria are satisfied:

- The discharge does not affect more than one acre of wetland per parcel.
- The discharge does not affect a rare and high quality wetland.⁴
- The development related to the discharge is done in compliance with any applicable storm water management zoning ordinance or storm water discharge permit.

Second, the Act exempts from state permitting requirements a discharge into a state wetland that occurs outside an urban area, if all of the following criteria are satisfied:

- The discharge does not affect more than three acres of wetland per parcel.

¹ As amended by 2017 Wisconsin Act 58, current law provides a general exemption, not subject to the “override” authority, for certain wetlands within an electronics and manufacturing zone designated by the Wisconsin Economic Development Corporation.

² The DNR is required to establish a system of service areas for the mitigation banks under the mitigation program that is geographically based on the locations of the major watersheds in the state.

³ The Act defines “urban area” to mean any of the following: (a) an incorporated area; (b) an area within one-half mile of an incorporated area; (c) or an area in a town that is served by a sewerage system.

⁴ The Act defines “rare and high quality wetland” to mean a wetland that is directly adjacent or contiguous to a Class I or Class II trout stream or that consists of 75% or more of any of the following wetland types: alder thicket; calcareous fen; coniferous swamp; coniferous bog; floodplain forest; hardwood swamp; interdunal wetland; open bog; ridge and swail complex; deep marsh; or sedge meadow.

- The discharge does not affect a rare and high quality wetland.
- The development related to the discharge is a structure, such as a building, driveway, or road, with an agricultural purpose.

Finally, the Act exempts artificial wetlands from state permit requirements. The Act defines “artificial wetland” to mean a landscape feature where hydrophitic vegetation may be present as a result of human modification to the landscape or hydrology and for which the DNR has no definitive evidence⁵ showing prior wetland or stream history that existed before August 1, 1991. The definition excludes wetlands that serve as a fish spawning area or a passage to a fish spawning area and wetlands created as a result of a mitigation program.

Notification Procedure

Under the Act, a person is required to notify the DNR no fewer than 15 working days before initiating a project that may affect a wetland to which an exemption described above applies. The notice must include either a statement by a professional who is qualified to give an opinion and who has investigated the wetland, or a wetland delineation prepared by a qualified professional showing the exact location and boundaries of a wetland.

If the DNR is unable to determine whether eligibility requirements for an exemption are met, the DNR may, within 15 working days after receiving the notification, request additional information one time about the parcel of land. The person proposing the project must cooperate with the DNR’s efforts to obtain this information and may proceed with the project only after receiving notification from the DNR that the landscape feature is eligible for the exemption based on the definitive evidence.

The Act generally requires the DNR to presume that the wetland or landscape feature is eligible for an exemption after receiving the notification. However, the Act does not require the DNR to make this presumption if the DNR instead notifies a person that one of the following conditions apply:

- The eligibility requirements for the exemption are not met.
- The location and boundaries of the wetland delineation are not accurate.
- For artificial wetlands only, the DNR determines that the landscape feature is providing significant functions that either protect adjacent or downstream property or infrastructure from flooding or significantly improve the water quality of an adjacent or downstream water body.

If the DNR notifies a person within 15 working days after receiving the notice that one of the three conditions above applies, the person may not proceed with the project unless authorized to do so under an exemption or wetland general or individual permit.

⁵ “Definitive evidence” is defined to mean documentary evidence such as any of the following: maps; aerial photographs; surveys that use a scale of not more than 10 feet per inch; or wetland delineations.

Mitigation Requirements

Under the Act, if an activity outside an urban area that is exempt from state wetland permitting requirements affects more than 1.5 acres of wetland, mitigation is required for the portion of the affected wetland that exceeds 1.5 acres. In addition, the Act requires the portion of impacts in urban areas that exceed 10,000 square feet per parcel to be mitigated. The Act specifies that any off-site mitigation, including any mitigation conducted by a mitigation bank or under the in lieu fee program, must be completed within the same compensation search area, as defined by DNR rule, as the discharge.⁶ The Act does not require mitigation for activities in artificial wetlands.

In addition, the Act authorizes the DNR to submit a request to USACE to accelerate deadlines relating to its review and approval of wetland mitigation project proposals under the in lieu fee subprogram.

Preemption of Local Regulation

The Act prohibits a local government from enacting an ordinance or adopting a resolution regulating a matter regulated by the wetland permitting exemptions and mitigation requirements created under the Act.

WETLAND IDENTIFICATION, CONFIRMATION, AND DELINEATION

Under Wisconsin law, a person who owns or leases land may request a wetland identification (a written evaluation based upon an on-site inspection by the DNR of whether a parcel of land contains a wetland) or a wetland confirmation (a written statement based upon an on-site inspection by the DNR of whether the department concurs with the boundaries of a wetland as delineated by a third person). [s. 23.321 (2) (b) and (c), Stats.] Under prior law, both a wetland identification and a wetland confirmation provided by the DNR remained effective for five years. [s. 23.321 (4) (a) and (5), Stats.]

The Act creates a wetland confirmation for state wetlands. Under this process, a person who owns or leases land may ask the DNR to provide a wetland confirmation, based on the DNR's review of the wetland boundaries as delineated by a qualified third person⁷ and not based upon an on-site inspection by the DNR, of whether the DNR concurs with the delineation. The delineation prepared by the qualified third person must include the exact location and boundaries of the state wetland. The Act directs the DNR to concur with the delineation unless it determines that the location and boundaries of the state wetland identified in the delineation are not accurate, based on maps, aerial photographs, surveys, wetland delineations, or hydrophitic soil conditions. The DNR must provide this type of wetland confirmation no later than 15 days after receiving a request.

⁶ "Compensation search area" is defined in s. NR 350.03 (5), Wis. Adm. Code, to mean an area that includes the geographic management unit of the impacted wetland, the county of the impacted wetland, and a circle with a 20-mile radius from the impacted wetland.

⁷ "Qualified third person" is defined to mean an individual who has completed basic and advanced wetland training and has a minimum of one year of field experience in wetland delineation.

The Act modifies the length of time certain wetland identifications and wetland confirmations are effective. Specifically, the Act requires that wetland identifications and wetland confirmations remain effective for 15 years from the date provided by the DNR if all of the following apply:

- The wetland is a state wetland.
- The parcel of land is subject to a storm water management zoning ordinance or storm water discharge permit.

The Act prohibits the DNR from invalidating or amending an existing wetland delineation or requiring a new wetland delineation that meet both of the criteria above until it expires.

Under the Act, wetland identifications and wetland confirmations that were provided by the DNR for state wetlands on or after January 1, 2003, are effective for 15 years, instead of five years. The 15-year validity applies even if the wetland identification or wetland confirmation expired prior to the effective date of the Act, unless a more recent wetland identification or confirmation was provided by the DNR showing that a discharge to a wetland on a parcel was conducted in compliance with a wetlands permit issued prior to the Act's effective date.

GRANT PROGRAMS FOR MITIGATION PROJECTS

The Act creates two new grant programs and authorizes the DNR to submit a request to USACE to modify the in lieu fee program to allow the use of funds for purposes of the programs. First, it requires DNR to award grants to nonprofit organizations to conduct projects to create, restore, or enhance wetlands under the in lieu fee subprogram on DNR land.

Within six months of the Act's effective date, the Act requires the DNR to identify at least 25% of department land, including land in every watershed in the state, to include in this program. No later than three months after completing this land identification, or at the beginning of the following fiscal year, whichever is earlier, the DNR must issue a request for proposals from nonprofit organizations for grants to conduct wetland mitigation projects on DNR-identified land.

The Act specifies the information DNR must request in grant applications, including a project timeline and a specification of the functional values or uses that the proposed project would create, restore, or enhance. The DNR must accept applications on a rolling basis over the course of a fiscal year and must select and announce grant recipients at the end of each quarter as funds are available. If grant recipients require DNR permits to conduct the project, the DNR must waive all permit fees for the project and apply expedited timelines for issuing, denying, or modifying those permits. The DNR must disburse grant payments on a quarterly basis, or more frequently as necessary. At least six months after the fifth anniversary of the DNR's first issuance of a request for proposals for grants under this program, the DNR must submit a report to the Legislature analyzing the effectiveness of the program and making recommendations for program changes.

Second, the Act requires the DNR to establish a separate program to make grants to nonprofit organizations for property development activities relating to wetlands created,

restored, or enhanced under a wetland mitigation grant on DNR land. A nonprofit organization must submit an application under this program at the same time it submits an application for a wetland mitigation grant. The DNR may only award a property development grant to a nonprofit organization if the DNR also awards the organization a grant under the wetland mitigation grant program. A property development grant may not exceed 10% of the amount of a wetland mitigation grant.

AUTHORITY TO SEEK DELEGATED AUTHORITY OVER FEDERAL WETLANDS

As mentioned, federal wetlands are subject to permitting requirements administered by USACE. Currently, three states have been delegated authority to administer federal wetland permitting requirements. The Act authorizes the DNR to submit an application to USACE seeking the delegation of authority to administer permits for federal wetlands.

Effective date: Provisions of the Act relating to wetlands permit exemptions take effect on July 1, 2018. All other provisions of the Act took effect on March 30, 2018.

Prepared by: Anna Henning, Senior Staff Attorney, and Rachel Letzing, Principal Attorney

April 10, 2018

AH:REL:mcm;ksm