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## WISCONSIN LEGISLATIVE COUNCIL AMENDMENT MEMO

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**2017 Assembly Bill 388**

**Assembly  
Amendment 1**

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### **2017 ASSEMBLY BILL 388**

**Current law** requires a person to obtain an individual wetland permit or to be authorized under a wetland general permit<sup>1</sup> before conducting an activity that will result in a discharge of dredged material or fill material into wetlands, unless the activity is exempt from that requirement. [s. 281.36 (3b) and (3g), Stats.] If the wetland is a “federal wetland” the applicant must also obtain a permit from the U.S. Army Corps of Engineers.<sup>2</sup>

Current law exempts several categories of discharges from wetlands permitting requirements. However, current law authorizes the Department of Natural Resources (DNR) to nonetheless require a permit in certain circumstances.<sup>3</sup> [s. 281.36 (4) and (5), Stats.]

**2017 Assembly Bill 388** provides a general exemption from wetlands permitting requirements for discharges made to an “artificial wetland.” The bill defines “artificial wetland” to mean a wetland that was inadvertently created by human modifications to the landscape or

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<sup>1</sup> A general permit is a permit that does not apply to a specific project. Instead, it applies statewide to any person authorized to engage in the activity covered by the permit.

<sup>2</sup> Federal wetlands are wetlands that are subject to federal jurisdiction under 33 U.S.C. s. 1344. Nonfederal wetlands are “nonnavigable, isolated, intrastate wetlands,” which were removed from the ACE’s jurisdiction by the U.S. Supreme Court in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

<sup>3</sup> Specifically, exempt activities are nonetheless subject to wetlands permitting requirements if a discharge is incidental to an activity that has as its purpose bringing a wetland, or part of a wetland, into a use for which it was not previously subject and the activity may either: (1) impair the flow or circulation of any wetland; or (2) reduce the reach of any wetland.

hydrology and for which there is no prior wetland or stream history. The definition excludes both of the following:

- Federal wetlands.
- Wetlands that serve as fish spawning areas or passages to fish spawning areas.

The exemption under the bill is not subject to the authority of the DNR to nonetheless require a permit in certain circumstances.

### **ASSEMBLY AMENDMENT 1**

Assembly Amendment 1 modifies the definition of “artificial wetland” under the bill and creates a timeline and process for determinations regarding whether a given waterbody constitutes an artificial wetland. The amendment also authorizes the DNR to deny an exemption if it makes certain findings.

#### **Definition of “Artificial Wetland”**

The amendment removes the phrase “inadvertently created by human modifications to the landscape or hydrology” from the definition of “artificial wetland.” Instead, the amendment defines that term to mean “a landscape feature where hydrophytic vegetation may be present as a result of human modification to the landscape or hydrology and for which there is no prior wetland or stream history.” The amendment also removes the exclusion for federal wetlands, and adds a new exclusion for wetlands created as part of a mitigation requirement under another wetland permit.

#### **Process, Timeline, and Limitations**

The amendment requires a person to notify the DNR no later than 15 working days before initiating a project that may affect an artificial wetland. The notice may include evidence that the landscape feature is an artificial wetland, such as a statement issued by a professional who has investigated the wetland and who is qualified to give such an opinion.<sup>4</sup>

The amendment generally requires the DNR to issue a determination regarding whether the landscape feature is an artificial wetland within 15 working days after receiving the notification. However, the amendment does not require the DNR to issue a determination within that timeframe if the department instead notifies a person that either of the following conditions applies:

- The DNR does not have sufficient information about a parcel of land to determine whether it contains an artificial wetland.

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<sup>4</sup> The amendment requires the DNR to publish information on its website describing the types of evidence needed for the department to make its determination.

- 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 the person that it lacks sufficient information (the first condition above), the person must cooperate with the department's efforts to obtain information about the relevant parcel of land, and may only proceed with the project under the exemption if the DNR notifies the person that it has determined that the landscape feature is an artificial wetland.

If the DNR notifies the person that the landscape feature is providing significant functions (the second condition above), then the person may not proceed with the project unless the person is authorized to do so under a general or individual wetlands permit.

### **BILL HISTORY**

Representative Jacque offered Assembly Amendment 1 on October 13, 2017. On October 19, 2017, the Assembly Committee on Environment and Forestry voted to recommend the adoption of the amendment and passage of the bill, as amended, with all members present voting in favor.

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