



Legislative Fiscal Bureau

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April 7, 2010

TO: Members
Joint Committee on Finance

FROM: Bob Lang, Director

SUBJECT: Senate Bill 557/Assembly Bill 818: Information About, Identification of, and Construction Near Wetlands

Senate Bill 557 and Assembly Bill 818 are identical bills, hereafter referred to as "the bill," that would require notices on building permits about construction near wetlands, as well as require the Department of Natural Resources (DNR), at the request of a land owner or lessee, to review wetland maps or inspect parcels for the presence of wetlands. SB 557 was introduced on February 24, 2010, and referred to the Senate Committee on Environment. Senate Amendment 1 was introduced on March 26. On April 1, 2010, the Senate Committee recommended passage of the bill and amendment on a vote of 5 to 0. AB 818 was introduced on March 9, 2010, and referred to the Assembly Committee on Natural Resources. Assembly Amendment 1 was introduced on March 30. On March 31, 2010, the Assembly Committee recommended passage of the bill and amendment on a vote of 14 to 0.

CURRENT LAW

The Department of Natural Resources (DNR) has been required to map the state's wetland areas of five acres or more since 1978. Wetlands are defined in the statutes as areas where water is near, at or above the land surface long enough to be capable of supporting aquatic or hydrophytic vegetation. Wetlands also have soils indicative of wet conditions. Based on the most current aerial photography surveys for each county throughout the state, which DNR uses to assess areas likely to contain wetlands, the state has 5.3 million acres of wetlands. However, this only counts wetland areas greater than either two or five acres, depending on the resolution available at the time of the survey. The Department currently offers Web users the ability to look at much of the state's wetland inventory maps showing verified and potential wetlands areas. Wetland water quality is generally protected under the statutes and several DNR administrative rules from dredging, filling and placement of structures without a state permit. However, permits affecting wetland water quality

generally require the holder to avoid and minimize impacts on wetlands where feasible. Since 2008, DNR has had in effect a general permit approving certain activities in Wisconsin's nonfederal wetlands, which are not subject to federal wetland permitting.

The Department of Commerce (Commerce) administers building codes in the state. A person is required to obtain a building permit for residential, commercial, and other construction activity. Commerce administers or delegates authority to administer the residential one- and two-family dwelling code to municipalities. Commerce provides a prescribed, standard building permit form for residential construction, which is used by municipalities that issue permits. Commerce administers the commercial building code (including multi-family dwellings) and issues commercial building permits. The Department delegates commercial plan review and inspection to some municipalities. Commerce does not provide a standard building permit form to municipalities for commercial construction.

SUMMARY OF BILLS

DNR Wetlands Services

Wetlands Services and Fees. The bill would require DNR to provide, upon request by any owners or lessees of land, any of the following services: (a) a review of DNR wetland maps or other available information, and a written evaluation that both explains the methods of review and states whether the reviewed parcel is likely to contain a wetland; (b) a wetland identification, consisting of both an on-site inspection and a written evaluation of whether a parcel of up to five acres contains a wetland; and (c) a wetland confirmation, which would be a review of a third-party assessment, consisting of both an on-site inspection and a written statement of whether the Department concurs with boundaries delineated by the third party. Also, for wetland identifications, the bill would require the Department to negotiate with the U.S. Army Corps of Engineers a memorandum of agreement that states the Corps will concur with any written evaluation of whether a parcel contains a wetland. DNR would not be authorized to provide any wetland identifications prior to the memorandum being in effect.

The bill would require DNR to provide their written conclusions within a specified number of days from the day a person makes a request. These periods are shown in Table 1. However, if adverse weather conditions or other circumstances at the site prevented an accurate on-site inspection as part of a wetland identification or confirmation, the bill would require the Department to notify the requesting party within 30 days of determining such an impediment exists. The Department would be required to complete the inspection as soon as conditions allow. Further, the bill would establish fees for each of the services provided. These fees are shown in Table 1.

TABLE 1

Wetlands Services -- SB 557/AB 818

<u>Service</u>	<u>Deadline</u>	<u>Fee</u>
Wetland Map Review	15 days	\$50
Wetland Identification	30 days	\$300 per acre (five acres maximum)
Wetland Confirmation	30 days	\$300 per 20 acres

Wetland identifications and confirmations would be valid for five years from the date they are provided by DNR. If DNR determines that a parcel is likely to contain a wetland, or if DNR concurs with wetland boundaries delineated by a third party, the Department would be required to include that information in wetlands maps it maintains.

The bill would also require DNR to create an informational brochure describing laws applicable to wetlands. The bill would further require the brochure to be furnished to cities, villages, towns and counties for public distribution.

Appropriations and Authorized Positions. The bill would authorize the following positions in DNR for purposes of providing the required services: (a) 3.0 program revenue (PR) project positions, to expire June 30, 2014; and (b) 1.0 PR permanent position. The positions would be funded from a PR continuing appropriation that receives fees from various permits, approvals and other services related to wetlands and navigable waters. The appropriation would also be amended to receive fees for wetlands services created by the bill.

Effective Date. The bill would take effect on the first day of the seventh month beginning after publication.

Building Permit Notices

The bill would require each county, city, village, and town (municipality) that issues a building permit or other approval for construction activity, to give the applicant a written notice that contains a specified statement telling the applicant that he or she is responsible for complying with state and federal laws concerning construction near or on wetlands, lakes and streams. The bill would also require Commerce to include the notice on every standard building permit form that it prescribes. The municipality would not be required to provide the notice if the municipality issues a building permit on a standard building permit form prescribed by Commerce. These provisions would first apply to applications for building permits that are submitted on or after the first day of the seventh month beginning after publication.

Commerce and municipalities would be required to include the following language in the

notice:

“YOU ARE RESPONSIBLE FOR COMPLYING WITH STATE AND FEDERAL LAWS CONCERNING CONSTRUCTION NEAR OR ON WETLANDS, LAKES, AND STREAMS. WETLANDS THAT ARE NOT ASSOCIATED WITH OPEN WATER CAN BE DIFFICULT TO IDENTIFY. FAILURE TO COMPLY MAY RESULT IN REMOVAL OR MODIFICATION OF CONSTRUCTION THAT VIOLATES THE LAW OR OTHER PENALTIES OR COSTS. FOR MORE INFORMATION, VISIT THE DEPARTMENT OF NATURAL RESOURCES WETLANDS IDENTIFICATION WEB PAGE OR CONTACT A DEPARTMENT OF NATURAL RESOURCES SERVICE CENTER.”

Commerce and municipalities would be required to include the direct DNR electronic Web site address in the standard notice. The municipality that issues the notice would also have to require the applicant for the building permit to sign a statement acknowledging that the person received the notice.

Senate Amendment 1/Assembly Amendment 1

The identical Senate Amendment 1 and Assembly Amendment 1, hereafter referred to as "the amendment", would change the requirements relating to the required memorandum of agreement with the U.S. Army Corps of Engineers. Specifically, the amendment would delete the requirement that DNR not issue wetland identifications prior to entering into the agreement. Instead, the amendment would apply the memorandum to wetland confirmations, and would specify that wetland confirmations could not be provided before the earlier of: (a) the date on which DNR enters into the memorandum; or (b) the first day of the 13th month beginning after the effective date of the provision, which would be approximately six months following publication.

The amendment also includes a correction submitted by the Legislative Reference Bureau to clarify that the city, village, or town, as appropriate, issues its own building permit rather than the county doing it for the city, village, or town.

FISCAL EFFECT

DNR estimates that there will be few, if any, requests for wetland map reviews. The Department assumes this because since 2008 DNR's wetland inventories and wetland indicator maps have been available on the Department's Web site. The Department indicates in its fiscal estimate that this has lowered demand for written copies of wetland inventories.

DNR estimates it would receive approximately 500 requests annually for on-site inspections, or about 250 requests each for wetland identifications and wetland confirmations. The Department indicates the estimate for total requests is based on 2009 departmental data; the relative share of each type of request is based on the experiences the state of Michigan has reported to DNR about its similar program. Further, DNR assumes that most wetland identifications would be about one acre,

and that most wetland confirmations would be about 20 acres. Under these assumptions, the Department estimates that fees associated with these services would generate revenues of \$150,000 annually. Revenues could be greater if wetland identifications average more than one acre per requested review, or if wetland confirmations average more than 20 acres per requested review.

DNR estimates total ongoing costs through June 30, 2014, for the four positions included in the bill would be \$313,300 PR annually for salaries, fringe benefits and supplies costs. The Department also estimates one-time program costs of \$94,700. Identified costs are shown in Table 2. However, given agency vacancy levels, it is possible some one-time equipment costs could be avoided.

TABLE 2

DNR Estimated Costs under Senate Bill 557/Assembly Bill 818

<u>Expenditure</u>	<u>Cost</u>
<i>Annual</i>	
Salary and Fringe – Project Positions (3)	\$180,900
Salary and Fringe – Permanent Position	72,800
Total Supplies	30,400
LTE – GIS Data Management	<u>29,200</u>
Subtotal	\$313,300
<i>One-Time</i>	
Survey Equipment	\$45,000
Computers (5) and Software	44,700
Printers	<u>5,000</u>
Subtotal	\$94,700

Both one-time and ongoing costs would likely be incurred beginning in 2010-11, although it is unclear what portion of each would be realized. Annual costs for the three fiscal years 2011-12 through 2013-14 could total approximately \$313,000. Ongoing costs beginning in 2014-15 may be only those associated with the 1.0 permanent position, although DNR reports that it may seek conversion of one or more project positions to permanent, if demand for services warrants continued staffing.

The Department is uncertain whether the positions authorized under the bill would be able to fulfill the 500 requests expected annually, although this would likely depend on the nature and frequency of requests. The Department expects wetland identifications, on average, to cover one-acre parcels and require 20 hours per request. DNR staff reports this estimate is based on data collection that would be required for these reviews, including the cataloging of: (a) soil characteristics; (b) plant identification, and the relative incidence of wetland versus non-wetland

plants; (c) hydrologic data; and (d) site topography. Staff also anticipates that evaluations for wetland identifications would likely require the most time of any tier of review, as staff would detail their reasoning for determining whether the parcel contains a wetland. Conversely, the DNR expects wetland confirmations, on average, to cover 20-acre parcels and require about eight hours per request. Although wetland confirmations would require an on-site inspection, DNR staff reports that the inspection would not require the level of sampling and analysis required of wetland identifications. Staff also expects that written evaluations for this review would be significantly less detailed than those for wetland identifications. Given these assumptions, total departmental workload may vary with the relative frequency of each type of request. Further, the nature of each individual parcel inspected will dictate demand on staffing resources. Parcels on which wetlands are difficult to identify may require more time for observation and evaluation. DNR indicates, based on reports from other states with similar programs, that private consultants in some cases have referred these sorts of parcels to state programs, which can increase program costs. Required travel to inspection sites will also impact staff time required for the program.

However, DNR also notes that the Department has not directly charged for activities similar to wetland identifications or confirmations in the past. (The Department this year began granting requests for wetland identifications and wetland confirmations only if they are accompanied by an application for an individual permit appropriate to the proposed activity.) Also, the U.S. Army Corps of Engineers reports it will continue to provide wetland confirmations for no charge. These considerations may mean that actual requests under the bill are lower than requests made in previous years. However, it should be noted that lower numbers of requests would also lower expected fee revenues.

The PR appropriation that would support the 4.0 new positions had a June 30, 2009, balance of \$460,900, and it currently supports 8.0 permanent positions. Although the balance in the appropriation has increased from \$103,400 at the beginning of the 2005-06 fiscal year, DNR reports the appropriation may be at risk of a structural deficit as early as this year. The Department estimates that revenues to the appropriation, most of which are permits relating to structures and activities in waterways under Chapters 30 and 31 of the statutes, will be lower in 2009-10 due to economic conditions, including a slowing in construction. Further, of 2.5 positions that have been vacant for most of 2009-10, DNR anticipates filling 2.0 positions before June 30, 2010. The Department reports that in past years, it has also been able to shift some costs customarily supported by the appropriation to GPR; it is unclear whether such shifting would be possible during this biennium. The Department also reports it does not plan on increasing waterway permit fees in the near future. (Waterway permit fees have not been adjusted since the current fee structure took effect in November, 1998.)

The estimated condition of the appropriation under current law is shown in Table 3. Lapses shown are those expected under 2009 Act 28 for employee furloughs, the rollback of wage adjustments, and across-the-board expenditure reductions. These approximate amounts are assumed to be restored as salary and fringe benefits in the next biennium, and are reflected in the 2011-12 expenditure estimate. Revenue estimates for 2009-10 and 2010-11 are those reported by DNR,

while revenues for 2011-12 anticipate a modest increase in construction activity.

TABLE 3

Estimated Condition of Water Regulation and Zoning Appropriation – Current Law

	Actual <u>2008-09</u>	Estimated <u>2009-10</u>	Estimated <u>2010-11</u>	Estimated <u>2011-12</u>
Opening Balance	\$302,600	\$460,900	\$347,800	\$169,700
Revenues	736,200	560,000	660,000	700,000
Expenditures	577,900	600,000	765,000	835,000
Lapses to General Fund	<u>0</u>	<u>73,100</u>	<u>73,100</u>	<u>0</u>
Closing Balance	\$460,900	\$347,800	\$169,700	\$34,700

The estimated condition of the appropriation under the bill is shown in Table 4. These estimates assume: (a) approximately half of both revenues (\$75,000) and costs associated with authorized positions (\$150,000) are incurred in 2010-11; and (b) \$45,000 in one-time costs for survey equipment is incurred in 2010-11. Estimates for 2011-12 reflect a full year of revenues and costs estimated for the bill. Based on DNR estimates, annual costs associated with the bill are estimated to exceed increased revenues by approximately \$160,000 each year through at least 2013-14.

TABLE 4

Estimated Condition of Water Regulation and Zoning Appropriation – Bill

	Actual <u>2008-09</u>	Estimated <u>2009-10</u>	Estimated <u>2010-11</u>	Estimated <u>2011-12</u>
Opening Balance	\$302,600	\$460,900	\$347,800	\$49,700
Revenues	736,200	560,000	735,000	850,000
Expenditures	577,900	600,000	960,000	1,148,300
Lapses to General Fund	<u>0</u>	<u>73,100</u>	<u>73,100</u>	<u>0</u>
Closing Balance	\$460,900	\$347,800	\$49,700	-\$248,600

To avoid a negative balance estimated under the bill, DNR would have to manage expenditures or increase revenues. Revenues under the bill would be expected to cover costs associated with approximately two staff. Although DNR indicates it does not plan to increase permit fees, and the bill does not provide authority to adjust wetland-related service fees by administrative rule, the Department reports it would likely fill the positions authorized under the bill as dictated by program demands and the condition of the continuing appropriation. Revenues

may also exceed current agency expectations if recovery in the building sector increases revenues from waterway permit fees. Also, because the bill would not take immediate effect, and because on-site inspections will tend to occur outside of winter months, it is possible that DNR may not require additional staff to conduct on-site inspections until early 2011. One option would be to provide 2.0 PR positions at this time, the number expected to be supported by revenues under the bill, rather than the 4.0 included in the bill. If revenues were available, and program responsibilities required additional staffing, DNR could request additional positions under the 14-day passive review provisions of s. 16.505 or through future budget legislation.

It should also be noted that although the bill and amendment would both require DNR to seek a memorandum of agreement with the U.S. Army Corps of Engineers, Corps officials indicate that such an agreement may constitute a delegation of authority, which the Corps of Engineers is not authorized to do. The amendment would allow for the issuance of wetland confirmations, after approximately one year from the effective date of the bill, even in the case that DNR is unable to reach agreement with the Corps of Engineers.

Commerce would have workload associated with updating the prescribed standard building permit form used by municipalities for residential construction to include the required notice regarding wetlands laws. The Commerce fiscal estimate indicates the Department would be able to absorb this workload within existing resources. Commerce anticipates that municipalities would likely be able to absorb the workload associated with obtaining written acknowledgement of receipt of the notice.

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