



Legislative Fiscal Bureau

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May 26, 2011

Joint Committee on Finance

Paper #488

Transfer Commercial Construction Site Erosion Control Regulatory Authority to the Department of Safety and Professional Services (DNR -- Water Quality)

[LFB 2011-13 Budget Summary: Page 322, #8]

CURRENT LAW

The Department of Natural Resources (DNR) has statutory authority to issue Wisconsin pollutant discharge elimination system (WPDES) storm water permits for all construction sites with land-disturbing activity of one acre or larger. The statutes also require DNR to establish minimum erosion control standards for activities at construction sites involving either: (a) no building construction; (b) construction of sites involving roads, bridges or highways, which standards are to be set in cooperation with the Department of Transportation; and (c) construction of a public building or place of employment. Public buildings include multifamily dwellings, consumer retail establishments, industrial buildings and schools, but not federal buildings, buildings on American Indian reservations, agricultural activities and buildings, or forestry activities. DNR authority also does not extend to construction of one- or two-family dwellings, which is regulated by Commerce under current law and would be regulated by the Department of Safety and Professional Services (DSPS) under the bill. DNR is allowed under current law to delegate to a local government regulatory authority for construction sites involving public buildings or places of employment. A local delegated authority may enforce by ordinance any standards more stringent than those established by DNR if the local government had the ordinance in effect on January 1, 1994.

GOVERNOR

Transfer to DSPS statutory authority for statewide standards for erosion control at construction sites of public buildings and buildings that are places of employment. Specify that all DNR rules and orders remain in effect until amended, repealed or rescinded by DSPS, or through any previously specified expiration date. Also, specify that all materials submitted,

actions taken, and any matters pending primarily related to erosion control at commercial building sites on the effective date of the bill become the responsibility of DSPS.

DISCUSSION POINTS

1. The administration indicates the transfer of authority for commercial construction site erosion control is intended to place this program with other building-related regulatory programs housed in the Department of Commerce Division of Safety and Buildings (DSPS under the bill). Authority for commercial construction site erosion control was under Commerce prior to 2009 Act 28, but was transferred to DNR under that act.

2. Current law includes multiple means by which construction site erosion control can be regulated by municipalities. DNR may delegate to municipalities the regulatory authority for construction site erosion control at public buildings and places of employment. As of May, 2011, 220 municipalities held such authority; these municipalities are listed in the attachment. Additionally, administrative rule NR 216 (WPDES storm water discharge permits) requires all municipalities holding permits for municipal separate storm sewer systems (MS4s) to administer programs for erosion and sediment control for any construction sites that contribute runoff to the local storm sewer system. Further, the general permit for MS4s requires municipalities to pursue the delegation of authority for public buildings and places of employment. Also, DNR may delegate to local governments its authority under NR 216 to issue storm water discharge permits for all construction sites with land-disturbing activity of one acre or larger. However, only Waukesha County has been granted this designation, known as an authorized local program, which allows a municipality to conduct permitting for any construction sites one acre or larger. Despite any delegation in authority that may occur, construction sites required to be permitted are forwarded to DNR for review.

3. Under the bill, DNR would retain all authority for erosion control at construction sites that do not include construction of a public building or place of employment. This may generally include construction of golf courses, parks, parking lots and pre-building development sites. DNR also would have regulatory authority for WPDES-permitted construction sites and the ability to designate authorized local programs for WPDES permitting of these sites. This is the same authority DNR had prior to 2009 Act 28. DSPS would receive regulatory authority for construction sites involving buildings or places of employment, and would have the ability to delegate that authority to municipalities. This is the same authority held by Commerce prior to 2009 Act 28. However, because DNR has been delegated authority by the U.S. Environmental Protection Agency (EPA) for wastewater permitting for point sources, which construction sites of one acre or larger are considered to be, DSPS would be required at a minimum to treat the approval of commercial sites of one acre or larger in a manner consistent with DNR permitting procedures under NR 216. This is discussed later in greater detail.

4. Construction sites of one acre or larger seeking storm water permit coverage must submit a notice of intent (NOI) to seek coverage under a permit; DNR at this time confers coverage to one-acre construction sites or larger through a statewide general permit. NOIs submitted to DNR constitute certification by the site owner that all applicable performance standards are being met by

the erosion control plan. DNR reviews NOIs to determine whether that self-certification is plausible. Additionally, commercial building sites, regardless of size, are to submit to DNR, or a delegated municipality, erosion control plans for the site during the construction phase. Although DNR or a delegated municipality is statutorily required to review all erosion control plans submitted for commercial building sites, the Department reports it typically does not review all erosion control plans for sites with land-disturbing activity less than one acre. Rather, DNR gives greater review to sites that may indicate risks to nearby waters due to proximity, slopes or soil types at the site, or the sensitivity or significance of the waterway. In cases of concern, DNR may require modifications to proposed erosion control plans, and may conduct site inspections of erosion control structures and practices. Inspections may be prompted by complaints to the Department. DNR also has authority to require sites of less than one acre to be covered under a WPDES construction site storm water permit if the site is a significant contributor to pollution of state waters.

5. Prior to 2009 Act 28, Commerce processed applications for commercial construction sites using an electronic registration and screening system. Municipalities with authority delegated from Commerce were authorized to review applications, including erosion control plans, for commercial buildings of up to 50,000 cubic feet of volume. Larger buildings had plans reviewed directly by Commerce. For sites of one acre or larger, Comm 60 required submission of an NOI, a site-specific erosion and sediment control plan and a storm water management plan for the site after construction is complete. The manager of the site was also required to keep these plans on site, and to make them available upon request of an inspector; these requirements are generally consistent with requirements under NR 216 for construction sites of one acre or larger. Additionally, persons submitting plans for commercial building sites were required by Commerce to complete a calculation estimating soil loss at the site and proving the erosion controls on site would limit soil loss to allowed levels, which were either five tons per acre per year or seven and a half tons per acre per year, depending on the nature of the soil exposed. The system screened plans for how site plans would meet Comm 60 and NR 216 requirements. It is likely this system could be used by DSPS.

6. It is unclear at this time how construction sites for public buildings or places of employment that are one acre or larger in size would seek WPDES permit coverage from DSPS. Commerce and DNR also operated under a 1993 memorandum of understanding under which Commerce created a regulatory structure with requirements generally equivalent to DNR's permitting program. Such equivalency would be required under federal law; DNR is responsible for permitting of all point sources of pollution, which construction sites larger than one acre and MS4s are considered to be, under delegation from EPA. In the future, if a DSPS regulatory structure for commercial construction sites of one acre or larger was not equivalent to DNR's program requirements, and if DNR was not authorized under state law to take action against discharging sites, EPA could have authority to remove Wisconsin's delegation of the WPDES program. This would be because certain sites required to be subject to wastewater permitting would not be properly covered by the state permitting program.

7. EPA has delegated sole responsibility for WPDES permitting to DNR under authority provided by the Clean Water Act. EPA reports it is possible, but uncommon, for a state to split the regulatory authority for a portion of their point source permitting programs. EPA has stated that it only reviews a division of point source permitting by looking at program responsibilities as established by statute and administrative rule, as well as staffing allocated by any administering

agency, to determine whether an administering agency is sufficiently capable of executing permitting authority consistent with Clean Water Act requirements. If the division of regulatory authority for construction sites under the bill would not be recognized by EPA, a party responsible for erosion control at a commercial construction site, despite being permitted by DSPPS, could be liable for penalties under federal law for making non-permitted discharges from a site, if the permit was not granted by the EPA designee (DNR). On the other hand, Commerce (DSPPS under the bill) currently regulates erosion control at one- and two-family dwelling sites and prior to 2010 at commercial building sites, each category of which could include sites of one acre or larger that would require permits.

8. Although it could be argued that with the transfer of regulatory authority, it would be appropriate to transfer positions from DNR to DSPPS sufficient to administer additional program responsibilities, 2009 Act 28 did not transfer any positions from Commerce to DNR with commercial construction site erosion control regulatory authority. Further, DNR reports it has absorbed the additional workload into its existing program for storm water permitting. Since 2008-09, the year prior to DNR assuming the authority for commercial construction sites on January 1, 2010, the proportion of the storm water program staffing spent on permits for all construction sites has remained relatively stable, increasing from about 50% of staff hours in 2008-09 to 56% of staff hours in 2010-11 through April, 2011. The number of total staff hours spent on permitting of construction sites, however, has declined modestly, from 26,400 staff hours in 2008-09 to 25,100 staff hours in 2009-10. Staff hours in 2010-11 are on pace to total approximately 24,600.

9. Opponents have argued that splitting regulatory authority for construction sites between two agencies may result in uneven application of erosion control standards or uneven effects resulting from erosion control plans. For instance, Commerce screened construction site applications for compliance with site-specific standards contained in Comm 60; it would be expected this practice would continue under DSPPS. However, DNR would generally have greater expertise and knowledge of water resources in the area that could be vulnerable to impacts of the sediment loading not otherwise contained by any planned erosion controls. Therefore, it may be possible that if the regulatory authority was shared by two agencies, a construction site not involving the construction of a building would have an erosion control plan adjusted to account for area water resources, while erosion control plans for sites involving public buildings or places of employment may not. A split regulatory authority may also be confusing to the general public, should persons residing or working near a project have questions or complaints about practices they wish to report to the agency responsible for enforcing the site's erosion control plans.

10. Further, certain development sites may be under DNR jurisdiction for certain pre-building activity such as street, sewer and water extensions, but shift to DSPPS for regulation of erosion control during the commercial building phase. In such instances, it may be unclear as to which agency is responsible for regulating storm water management on the site after construction has been completed. This disparity also may currently occur with residential development.

11. Proponents argue the oversight of commercial construction sites is best suited to an agency that also administers the commercial building code. They have argued such a structure centralizes reviews and approvals required of builders and developers, which may assist the furtherance of building projects. The Committee could consider adopting the Governor's

recommendation [Alternative 1].

12. The Committee could consider deleting the provision [Alternative 3]. This would result in DNR retaining statutory authority to regulate erosion control at most construction sites. Regulation of one- and two-family dwellings would remain with Commerce/DSPS.

13. The Committee could consider adopting the Governor's recommendation, but add a requirement that DNR and DSPS enter into a memorandum of understanding by a specific date to facilitate the incorporation of federally-required provisions of the storm water program. A date of October 1, 2011, could be considered [Alternative 2]. This would ensure the Departments were in agreement as to how regulatory responsibilities would be arranged such that there would not be overlap or gaps in regulatory coverage of construction sites. Such an agreement could be specified to include responsibility for storm water management on the site once construction is completed, particularly for cases in which the departments have each exercised regulatory authority during a portion of the construction phase.

ALTERNATIVES

1. Adopt the Governor's recommendation. (DSPS would receive regulatory authority for erosion control at construction sites involving construction of a public building or place of employment, in addition to existing authority for construction sites of one- and two-family dwellings. DNR would have authority for erosion control at construction sites not involving construction of a building, sites involving construction of roads, bridges or highways, as well as for issuing storm water permits for construction sites of one acre or larger.)

2. Adopt provision. In addition, specify the Department of Natural Resources and the Department of Safety and Professional Services, by October 1, 2011, enter a memorandum of understanding delineating the administrative responsibilities of each department in administering erosion control activities at construction sites, both during and after construction, and providing a means by which the Department of Safety and Professional Services will adopt administrative rules requiring construction sites of one acre or larger, and involving construction of a public building or place of employment, to submit to the Department of Safety and Professional Services notices of intent to seek permit coverage consistent with provisions of Chapter 283 and administrative rule NR 216.

3. Delete the Governor's recommendation. (DNR would retain regulatory authority for construction sites of one acre or larger, as well as for construction sites involving the construction of public buildings or places of employment, construction sites involving road, bridge or highway construction, and sites not involving the construction of a building. DSPS would retain regulatory authority for erosion control at construction sites for most one- and two-family dwellings.)

Prepared by: Paul Ferguson
Attachment

ATTACHMENT

Municipalities with Delegated Regulatory Authority for Commercial Construction Site Erosion Control

<u>County</u>	<u>Municipality</u>
Ashland	Town of La Pointe
Barron	Town of Chetek
Barron	Village of Cameron
Barron	Village of Turtle Lake
Barron	City of Chetek
Barron	City of Cumberland
Brown	Town of Lawrence
Brown	Town of Rockland
Brown	City of De Pere
Brown	City of Green Bay
Calumet	Town of Harrison
Calumet	City of Brillion
Clark	Town of Grant
Columbia	Village of Cambria
Columbia	Village of Poynette
Columbia	City of Portage
Dane	Town of Berry
Dane	Town of Blooming Grove
Dane	Town of Blue Mounds
Dane	Town of Burke
Dane	Town of Cottage Grove
Dane	Town of Madison
Dane	Town of Springdale
Dane	Town of Windsor
Dane	Village of Blue Mounds
Dane	Village of Cambridge
Dane	Village of McFarland
Dane	Village of Oregon
Dane	Village of Shorewood Hills
Dane	Village of Waunakee
Dane	City of Fitchburg
Dane	City of Madison
Dane	City of Middleton
Dane	City of Monona
Dane	City of Sun Prairie
Dane	City of Verona
Dodge	Town of Theresa
Dodge	Village of Brownsville
Dodge	City of Waupun

County

Municipality

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Town of Baileys Harbor
Town of Egg Harbor
Town of Gibraltar
Town of Jacksonport
Town of Liberty Grove
Town of Sevastopol
Village of Ephraim
Village of Sister Bay
City of Sturgeon Bay

Douglas

City of Superior

Dunn

City of Menomonie

Eau Claire
Eau Claire
Eau Claire
Eau Claire
Eau Claire

Eau Claire County
Village of Fall Creek
City of Altoona
City of Augusta
City of Eau Claire

Fond du Lac
Fond du Lac
Fond du Lac
Fond du Lac
Fond du Lac

Town of Fond du Lac
Town of Metomen
Village of North Fond du Lac
City of Fond Du Lac
City of Ripon

Grant

Village of Montfort

Green
Green
Green

Town of Jefferson
Village of New Glarus
City of Monroe

Green Lake
Green Lake
Green Lake
Green Lake
Green Lake
Green Lake
Green Lake

Town of Brooklyn
Town of Green Lake
Town of Manchester
Town of Seneca
Village of Marquette
City of Berlin
City of Princeton

Iowa
Iowa
Iowa

Town of Brigham
Town of Dodgeville
Village of Barneveld

Jefferson
Jefferson
Jefferson
Jefferson
Jefferson
Jefferson

Town of Hebron
Town of Oakland
Village of Johnson Creek
Village of Palmyra
City of Fort Atkinson
City of Watertown

Kenosha
Kenosha
Kenosha
Kenosha
Kenosha

Town of Bristol
Town of Somers
Town of Wheatland
Village of Paddock Lake
Village of Pleasant Prairie

County

Municipality

Kenosha	Village of Silver Lake
Kenosha	Village of Twin Lakes
Kenosha	City of Kenosha
Kewaunee	City of Algoma
La Crosse	City of La Crosse
Lafayette	Village of Blanchardville
Langlade	City of Antigo
Manitowoc	City of Manitowoc
Manitowoc	City of Two Rivers
Marathon	City of Wausau
Milwaukee	Village of Greendale
Milwaukee	Village of Hales Corners
Milwaukee	Village of West Milwaukee
Milwaukee	Village of Whitefish Bay
Milwaukee	City of Cudahy
Milwaukee	City of Franklin
Milwaukee	City of Glendale
Milwaukee	City of Greenfield
Milwaukee	City of Oak Creek
Milwaukee	City of South Milwaukee
Milwaukee	City of Wauwatosa
Milwaukee	City of West Allis
Monroe	Village of Warrens
Monroe	City of Sparta
Monroe	City of Tomah
Outagamie	Town of Buchanon
Outagamie	Town of Grand Chute
Outagamie	Town of Greenville
Outagamie	Village of Combined Locks
Outagamie	Village of Hortonville
Outagamie	Village of Little Chute
Outagamie	City of Appleton
Outagamie	City of Kaukauna
Ozaukee	Town of Cedarburg
Ozaukee	Town of Grafton
Ozaukee	Town of Port Washington
Ozaukee	Town of Saukville
Ozaukee	Village of Belgium
Ozaukee	Village of Fredonia
Ozaukee	Village of Grafton
Ozaukee	Village of Thiensville
Ozaukee	City of Cedarburg
Ozaukee	City of Mequon
Ozaukee	City of Port Washington

County

Municipality

Pierce
Pierce
Pierce

Town of Ellsworth
Town of Martell
Town of Salem

Polk
Polk
Polk
Polk
Polk
Polk

Town of Balsam Lake
Town of Farmington
Town of Lincoln
Village of Clayton
Village of Dresser
Village of Osceola

Portage
Portage
Portage
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Portage

Town of Amherst
Town of Hull
Town of Plover
Village of Plover
City of Stevens Point

Racine
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Town of Dover
Town of Norway
Town of Raymond
Town of Waterford
Village of Rochester
Village of Sturtevant
Village of Waterford
City of Burlington
City of Racine

Rock
Rock
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Rock

Rock County
Town of Lima
City of Beloit
City of Janesville
City of Milton

Sauk
Sauk

Town of Spring Green
City of Baraboo

Shawano

Village of Tigerton

Sheboygan
Sheboygan

City of Sheboygan
City of Sheboygan Falls

St. Croix

City of New Richmond

Walworth
Walworth

Town of Delavan
Town of Geneva
Town of La Grange
Town of Linn
Town of Lyons
Town of Richmond
Town of Sugar Creek
Town of Walworth
Village of Darien
Village of East Troy
Village of Fontana
Village of Walworth
Village of Williams Bay
City of Elkhorn

