GODFREY & KAHN S.C.

Environmental Strategies Flash

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New law and proposed legislation would affect wetland permitting in Wisconsin

A new state law (signed by Gov. Walker on Nov. 30, 2017) and two proposed state bills aim to greatly influence wetland permitting laws in Wisconsin. This newsletter provides an overview of the new law and proposed bills, as well as their impacts on existing state law.

Changes from Assembly Bill 497, enacted into law as 2017 Wisconsin Act 118

This law will loosen wetland mitigation requirements for public utilities.

Under current state law, no person may discharge dredged material or fill material into a wetland area unless one of two conditions applies: the discharge is authorized by a wetland general permit or individual permit, or the discharge is exempt from permitting requirements. State law requires the Wisconsin Department of Natural Resources (DNR) to issue wetland general permits for discharges to wetlands that are necessary for temporary access or waste disposal if not more than two acres of wetlands are affected, discharges for certain development if not more than 10,000 square feet of wetlands are affected, and for discharges related to laying utilities and highway construction and maintenance.

For a discharge into a wetland that is not authorized under a wetland general permit, current law requires a person to apply for and obtain a wetland individual permit. Before the DNR may issue a wetland individual permit, it must require the restoration, enhancement, creation or preservation of other wetlands to compensate for adverse impacts to a wetland resulting from the discharge, a process known as mitigation.

Under this new law, if the DNR issues a wetland individual permit to a public utility, the DNR may not require mitigation unless the discharge authorized by the wetland individual permit will result in a permanent fill of more than 10,000 square feet of wetland.

Changes from the proposed bills (Assembly Bill 547 and Senate Bill 600)

First, the bill exempts isolated wetlands from state permitting requirements if mitigation is followed.

Under existing federal law, a person must generally obtain a permit from the federal government for discharges to wetlands falling under the jurisdiction of the federal government. An applicant must submit with a permit application a certification from the state that any proposed discharge will follow state water quality standards. However, if the proposed discharge does not follow state water quality standards, the state may choose to waive such certification. In Wisconsin, the DNR grants this certification by issuing a state wetland permit.

Under current Wisconsin law, the DNR must issue general wetland permits for discharges of fill or dredged material into certain wetlands. The DNR may also require a person to apply for and obtain an individual wetland permit if the DNR determines that conditions

specific to the wetland site require further restrictions on the discharge in order to provide reasonable assurance that no significant adverse impacts to wetland functional values will transpire.

The proposed bills exempt nonfederal wetlands (known as isolated wetlands, because they are not connected to navigable waters) from state wetland permitting requirements. Although in many states only wetlands adjacent to navigable waters are subject to permitting requirements, Wisconsin has more stringent requirements since it chooses to regulate wetlands beyond what is subject to federal jurisdiction. According to DNR estimates, nonfederal (or isolated) wetlands account for 10 to 20 percent of wetlands located in Wisconsin. Despite the proposed change to exempt nonfederal wetlands from state permitting requirements, the bills leave the requirement for mitigation of impacts from a discharge to a nonfederal wetland. Under existing state law, this mitigation is required before the DNR may issue an individual wetland permit.

Second, the proposed bills exclude isolated artificial wetlands from state permitting and mitigation requirements.

Under the proposed bills, artificial wetlands are exempt from the permitting and mitigation requirements that would otherwise apply to the discharge of dredged or fill material into a wetland. Under the proposed bills, an artificial wetland is defined as "a nonfederal wetland created by human modifications to the landscape or hydrology and for which the DNR has no definitive evidence showing a prior wetland or stream history." The new definition excludes any wetlands created under a mitigation requirement.

Under existing DNR regulations, only certain artificial wetlands are exempt from the wetland permitting requirements. Only the following four categories of artificial wetlands are currently exempt from the provisions of Wis. Admin. Code NR 103:

- Sedimentation and stormwater detention basins and associated conveyance features operated and maintained only for sediment detention and flood storage purposes;
- Active sewage lagoons, cooling ponds, waste disposal pits, fish rearing ponds and landscape ponds;
- Actively maintained farm drainage and roadside ditches; and
- Artificial wetlands within active nonmetallic mining operations.

These four wetland categories are exempt from NR 103 unless the DNR notifies an applicant within 15 working days from when the DNR receives notice of the proposed project from the applicant that the artificial wetland has significant functional values. The proposed bills would remove the DNR's regulatory authority by exempting all artificially created wetlands from the existing wetland permitting requirement.

If all artificially created wetlands in the state are exempted from the existing wetland permitting requirement, and also do not fall under the definition of wetland, there theoretically would not be any regulatory authority by the DNR to prevent fills, discharges and other uses of artificial wetlands.

Additionally, it should be noted that the proposed bills do not address the situation where a dispute arises over whether a nonfederal wetland is "artificial." Unlike the current law, there is no requirement for prior notification by the regulated party of the artificial status of the wetland with an opportunity for the DNR to object during the 15-day notice period. Thus, there may be more risk if the current bills are enacted for the regulated party if a fill occurs and the DNR were to contest the "artificial" character of the filled wetland.

Third, the bills encourage the state to assume delegated wetland permitting authority from the Environmental Protection Agency (EPA).

Under existing federal law, a governor may apply to the EPA requesting that the state be granted the authority to administer its own individual and general permitting program for the discharge of dredged or fill material into navigable waters, which include federal wetlands. If so granted by the EPA, the state permitting program would function in place of the federal regulatory program. These proposed bills authorize the DNR to submit such an application on the governor's behalf and at the governor's direction. Furthermore, it authorizes the DNR to assume that authority if the EPA granted it to the state.

Fourth, the proposed bills require the DNR to spend all funds received prior to the effective date for the in lieu fee subprogram no later than June 30, 2019, and, effective Jan. 7, 2019, to expend all funds received for the in lieu fee subprogram within 24 months of being credited for such funds.

Under current state law, as part of the mitigation program, the DNR may establish an in lieu fee subprogram, through which payments are made to the DNR for the purposes of restoring, enhancing, creating or preserving wetlands or other water resource features. This change impacts the DNR's regulatory abilities by forcing the department to spend all allocated funds within a certain timeframe, which, in turn, affects the department's ability to expend money for wetland-related expenses as it deems appropriate. The bills also provide that, no later than the third month of each legislative session, the DNR is required to provide a report to the governor and the appropriate legislative standing committees detailing how the department expended the funds and, if necessary, why the department failed to expend all the funds.

Responses to the proposed bills

Supporters and opponents have expressed strong opinions regarding AB 547 and SB 600. Business owners and local administrators state that current rules – passed with bipartisan majorities in 2001 – are needlessly hampering growth and development. However, conservationist groups state the proposed legislation is too broad and would lead to losses in prime habitat and important ecosystem functions. These groups also state the proposed legislation would damage the hunting, fishing and trapping industries in Wisconsin.

Although the proposed bills keep the requirement for builders to mitigate each acre of wetland filled by creating 1.2 acres of new wetlands, bill opponents argue that simply developing new wetlands does not remedy proposed harm. New wetlands in the wrong places, opponents state, would support few game species, which would lead to shorter food chains, which would have disastrous impacts to wildlife. For example, according to Nels Swenson, a Ducks Unlimited representative, nearly 70 percent of the mallards harvested by the Wisconsin duck hunting industry are produced in the state using the type of wetland habitats subject to regulation by the proposed legislation.

Concluding comment

The new state law and proposed state bills have the potential to impact the regulatory climate in Wisconsin for wetlands for years to come. Parties who deal with wetlands and wetlands-related issues need to stay abreast of changes in this area of the law. Members of the Environmental Strategies and Energy Strategies Practice Groups at Godfrey & Kahn actively monitor and publish on these developments. Please free to reach out to any member of the team for more information on legal developments in this area.

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