

THE NATIONAL LAW REVIEW

Governor Signs Wetlands Reform Bill: 2011 Wisconsin Act 118

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The much-heralded and controversial Wetlands Reform Bill was signed into law by Governor Scott Walker on February 29, 2012 as 2011 Wisconsin Act 118 (the Act). It first applies to permit applications submitted on or after July 1, 2012.

Like any other legislative proposal that tries to find the balance between environmental protection and economic development, this law has its supporters and detractors.

What are they saying about it?

From the Governor, upon signing the bill:

“Preserving and protecting Wisconsin’s valuable natural resources while encouraging sustainable economic growth is an important task,” said Governor Scott Walker. “The bill I signed into law today balances these two interests and reforms the way the state regulates wetlands. I am confident this pro-growth, pro-environmental law will allow the state to protect our resources while providing a pathway to economic development. I would like to thank State Senator Neal Kedzie and Representative Jeff Mursau for providing leadership on this issue.”

From the Wisconsin Wetlands Association (2/29/12 press release):

“This bill passed without the endorsement of a single leader from the wetland professional community or any major statewide sportsmen's or environmental group,” said Executive Director Tracy Hames. “People need jobs, but they need wetlands too,” he added, “that is if they want flood protection, clean water, and more and better ducks.” Hames also emphasized that Wisconsin citizens could no longer rely on the state to protect the wetlands in their community. “It’s now up to the people of the state to get involved, speak up, and look out for the wetlands where they live.”

From Wisconsin Manufacturers and Commerce (2/15/12 press release):

Wetland regulation reforms that passed the state Senate early today will protect the environment, foster expanded wetlands, and promote job creation, WMC said Wednesday. “The wetland reforms are common sense legislation that will protect our environment while promoting job creation,” said Scott Manley, WMC director of environmental policy.

From 77th Assembly District Democrat State Representative Brett Hulsey (2/29/12 press release):

The Governor signed Senate Bill 368, called the “Flood our Families Act” because it will increase flood risks to Wisconsin families, home and business owners.

“The Flood our Families Act means more Wisconsin homes and families will be at risk from flooding,” said State Rep. Brett Hulsey. “Allowing more people to build in wetlands today creates more flood victims and disaster costs tomorrow.”

From the Dairy Business Association (DBA) (2/29/12 press release):



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DBA praises Governor Scott Walker for signing Senate Bill 368, commonly referred to as the Wetlands Bill. This new law streamlines the wetland permitting process for dairy farmers expanding their operation by creating statutory timelines and allowing better use of wetland mitigation.

"This new law greatly enhances the wetlands permitting program by providing dairy producers consistency, and assures that the environment will remain protected while growing Wisconsin's \$26.5 billion dollar industry," commented Laurie Fischer, DBA Executive Director. "In the past, wetland permits have taken years to obtain, resulting in lost business opportunities and jobs for the State of Wisconsin."

What does it do?

In brief, the new law creates a single wetland permit program in Wis. Stat. s. 281.36 which:

- no longer distinguishes between federal and nonfederal wetlands – it applies to both;
- replaces the confusing "water quality certification" with a two-tier permit system of general wetland permits and individual wetland permits – this makes it consistent with other Department of Natural Resources (DNR) water and air permit programs;
- maintains the requirement to "avoid, minimize, mitigate" while expanding the opportunities for mitigation;
- establishes time frames for DNR action on permit applications;
- expands the definition of what is a "practicable alternative"; and
- limits the scope of DNR's review of alternatives in certain situations – by narrowing the geographic area that must be considered in determining if a practicable alternative exists.

1. General wetland permits

General permits are used frequently in other DNR regulatory programs, but are new to DNR's tool kit for regulation of wetland fill. In contrast to individual permits which are tailored specifically for a given project, general permits apply to a category of activities that meet certain criteria. A general permit is somewhat like a rule in that it imposes the same requirements on any project that meets the general permit criteria. The purposes of general permits are to establish standardized conditions applicable to similar types of projects for uniformity and to reduce paperwork to expedite permit processing.

a. Activities covered

DNR is allowed to issue a variety of general wetland permits for wetland fill,[\[1\]](#) but is required by the new law to issue general wetland permits for the following:[\[2\]](#)

- for wetland impacts of less than two acres, if the fill is necessary:
 - to treat or dispose of hazardous/toxic waste, if the fill is not hazardous/toxic;
 - or
 - for temporary access and dewatering
- for wetland impacts of less than 10,000 square feet, if the fill is for part of a development for any of the following:
 - industrial purposes
 - commercial purposes
 - residential purposes
 - agricultural purposes
 - municipal purposes
 - recreational purposes
- temporary or permanent fill for routine utility construction/maintenance;
- fill for construction/reconstruction/maintenance of bridge culvert that is part of transportation project under supervision of municipality; and
- any other general permits that are consistent with those issued by the Army Corps of Engineers (Corps).[\[3\]](#)

b. Prohibited fills

As part of a wetland general permit, DNR may prohibit fill into any of the following:[\[4\]](#)

- Great Lakes ridge and swale complexes
- Interdunal wetlands
- Coastal plain marshes
- Emergent marshes containing wild rice
- Sphagnum bogs in certain areas of the state
- Boreal rich ferns
- Calcareous fens

c. Procedures and timing

Wetland general permits are subject to public notice and comment and the opportunity for public hearing prior to issuance.[\[5\]](#) Once issued, a wetland general permit is valid for five years and may be renewed, modified or revoked by the Department.[\[6\]](#)

To proceed under the authorization of a general wetland permit, unless DNR waives this requirement in the general permit itself,[\[7\]](#) the permit applicant must give DNR at least 30 days notice of intent to proceed with an explanation of how the project qualifies for the wetland general permit. This is similar to the Corps "reporting general permits" for wetland fill – which require notice to the Corps before proceeding. DNR has 30 days to either advise the permit applicant that an individual permit is needed or that DNR needs additional information to be certain the project is eligible for the wetland general permit; if DNR does neither of those things, the wetland fill is considered to be authorized under the wetland general permit and the permittee is then obligated to conduct the project consistent with the general permit requirements. If adverse weather conditions prevent DNR from conducting its site inspection within the 30 day period, DNR may give the permit applicant notice that it needs additional time and must then complete the inspection as soon as weather conditions permit.[\[8\]](#)

2. Individual wetland permits

For individual wetland permits, the new law made several key changes. The requirement to "avoid, minimize and mitigate" wetland impacts is still the law and the process still calls for an analysis of practicable alternatives. However, the definition of "practicable" is revised and expanded, the scope of the analysis of practicable alternatives in certain circumstances is narrowed, the factors and standards DNR is to use are more clearly articulated, and increased opportunities for mitigation are provided.

a. Expanded definition of "practicable"

Section 40 CFR 230.10(a) (2) defines "practicable alternatives" as those alternatives that are "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." This is the definition the Corps uses and Wisconsin has used a nearly identical definition in Wis. Admin. Code NR 103 "Water Quality Standards for Wetlands" since its enactment in 1991:

NR 103.07(2) "Practicable alternatives" means available and capable of being implemented after taking into consideration cost, available technology and logistics in light of overall project purposes.

The Act revised and expanded that definition so that it now reads as follows (revisions are shown in *italics*):

Wis. Stat. s. 281.36(1)(cp) "Practicable" means *reasonably* available and capable of being implemented after taking into consideration cost, *site availability*, available technology, logistics, and *proximity of the proposed project site*, in light of the overall purpose and scope of the project.

These revisions to the definition of "practicable" are consistent with other elements of the Act, described below, which limit the review of alternatives to the site or adjacent property and take the scope of the project into consideration in evaluating environmental impacts.

b. Narrowed geographic scope of Practicable Alternatives Analysis (PAA)

Importantly, in connection with the expanded definition of "practicable", in certain circumstances the geographic scope of the PAA review has been narrowed. DNR's review is limited to practicable alternatives located at the site and adjacent to the site if the applicant demonstrates that the proposed project:

- will result in a demonstrable economic public benefit;
- is necessary for the expansion of an existing industrial or commercial facility that is in existence at the time the application is submitted; OR
- will occur in an industrial park that is in existence at the time the application is submitted.[\[9\]](#)

c. Factors and standards

DNR's overall obligation is to review the PAA to determine the alternative that

- will avoid and minimize the adverse impacts of the fill on wetland functional values; and
- will not result in any other significant adverse environmental consequences.[\[10\]](#)

DNR is to consider the following factors, in determining the impacts to wetland functional values:

- direct impacts of the project on wetland functional values;
- cumulative impacts attributable to the project that may occur based on past impacts or reasonably anticipated impacts from similar projects in the area;
- potential secondary impacts of the project on wetland functional values;
- the impact resulting from the required mitigation; and
- the net positive or negative environmental impact of the project itself.[\[11\]](#)

Based on that analysis, DNR is to make a finding that the project complies with water quality standards and the individual wetland permit may be issued if it finds all of the following apply:

- the project represents the least environmentally damaging practicable alternative taking into consideration practicable alternatives that avoid wetland impacts;
- all practicable measures to minimize the adverse impacts to wetland functional values will be taken; and
- the project will not result in significant adverse impact to wetland functional values, in significant adverse impact to water quality, or in other significant adverse environmental consequences.[\[12\]](#)

d. Mitigation

Also new with this Act, mitigation is now required as part of any individual wetland permit and is considered as part of the permit application.

During the development of the legislation, the role of mitigation in the permit process was the subject of much heated debate. Bill opponents characterized early drafts as essentially giving away permits in return for promises to buy mitigation credits. In partial response, language was added to the bill to specifically state that an applicant is not entitled to a permit in exchange for conducting mitigation.[\[13\]](#)

Under the law before the Act, permit applicants found it difficult, if not impossible, to engage DNR in consideration of mitigation as part of the permit evaluation. The "avoid, minimize, mitigate" analysis rarely reached the point of discussion about mitigation. As a result of the Act, mitigation

is a required element of any wetland fill proposal subject to an individual wetland permit.[\[14\]](#) All individual wetland permits must require mitigation on a ratio consistent with federal regulations but at a minimum of 1.2:1 acres. Mitigation may be through any of the following methods:[\[15\]](#)

- purchasing credits from a Wisconsin mitigation bank;
- participating in an “in lieu fee subprogram” if DNR creates one; such a program would provide for payments to DNR or other entities to restore, enhance, create or preserve wetlands or other water resources; and any wetlands that benefit from this program must be open to the public for hunting, fishing, trapping, cross-country skiing or hiking and subject to a conservation easement;
- completing mitigation within the same watershed or within ½ mile of the site.

The first and second methods are the preferred methods as designated by the Act.

e. *Procedures and timing*

To address timing concerns, the Act establishes the following mandatory time frames for DNR action on the permit application:[\[16\]](#)

- DNR must meet with the applicant before the application is submitted;
- within 30 days of receipt of the application, DNR must determine if the application is complete/incomplete;
- if complete, that date becomes the “date of closure”; if incomplete, DNR notifies the applicant of the deficiency within the same 30-day time period; DNR is limited to one request for additional information within the same 30-day time period; within 10 days of receipt of the requested information, DNR must notify the applicant if the application is complete/incomplete; it is still incomplete, DNR and the applicant can agree to additional information the applicant will provide; the date of this second notification becomes the “date of closure”;
- if DNR fails to meet this 30-day or 10-day time period, the “date of closure” becomes the last day of either 30-day or 10-day time period;
- within 15 days of the “date of closure”, DNR must issue the public notice which may include notice of a public hearing if the applicant requests it; if the applicant does not request a public hearing, within 20 days of the public notice a member of the public may request a hearing or DNR may decide to hold a hearing on its own motion; in either instance, DNR must notice the hearing within 15 days of receipt of the hearing request or its own determination and the public comment period closes 10 days after hearing is held;
- within 20 days after the public comment period has ended if a hearing is held, or within 30 days after the public comment period has ended if no hearing is held, DNR must issue its decision to either issue or deny the wetland permit.

DNR’s decision to either deny or issue an individual wetland permit is subject to challenge via administrative (contested case) hearing and judicial review in the Circuit Court.[\[17\]](#) The procedures and timeframes are consistent with those that apply to DNR permits issued under Wis. Stat. ch. 30 for individual permits that affect navigable waterways. See our [Client Alert](#) on those statutory revisions made as a part of 2003 Wisconsin Act 118.

What’s next?

The Governor signed the law on February 29, 2012 but it first applies to permit applications submitted on or after July 1, 2012.[\[18\]](#) The Legislature provided a delayed effective date to enable DNR to update application materials, develop guidance documents, train staff and conduct outreach to consultants and property owners.

A significant unanswered question at this point is how the Corps will respond. The Corps has jurisdiction over federal wetlands and testified to certain concerns about the legislation before the Senate and Assembly committees. Many of those concerns appear to have been addressed through amendments. However, the Corps’ concern about limiting the practicable alternatives review to the site and property adjacent to the site for certain projects did not lead to elimination of that element of the legislation; nor is it clear how the Corps will view the expanded definition of “practicable” or that the Corps’ concerns about the scope of the area considered for mitigation were fully addressed. While permit applicants may find the DNR permit process more straight-forward than in the past, if the Corps objects to individual wetland permits issued by DNR for fill in federal jurisdictional wetlands, a key goal of the legislation may not be realized.

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- [1] 281.36(3g) (c)
 - [2] 281.36(3g)
 - [3] 281.36(3g) (b)
 - [4] 281.36(3g) (d)
 - [5] 281.36(3g) (f); 281.36(3g) (fm); 281.36(3g) (g)
 - [6] 281.36(3g) (e)
 - [7] 281.36(3g) (h)4.
 - [8] 281.36(3g) (h)
 - [9] 281.36(3n) (a)
 - [10] 281.36(3m) (b); 281.36(3n) (a)
 - [11] 281.36(3n) (b)
 - [12] 281.36(3n) (c)
 - [13] 281.36(3n) (d)
 - [14] 281.36(3n) (d)
 - [15] 281.36(3r)
 - [16] 281.36(3m) (c)-(j)
 - [17] 281.36(3q)
 - [18] Initial applicability/effective date Sections 145 and 146

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