

2007 SENATE BILL 235

July 18, 2007 – Introduced by JOINT LEGISLATIVE COUNCIL. Referred to Committee on Environment and Natural Resources.

1 **AN ACT** *to repeal* 30.10 (4) (c); *to renumber and amend* 452.05 (1) (b); *to*
2 *amend* 30.10 (2) and 227.53 (1) (a) 3.; and *to create* 30.10 (5), 30.10 (6), 30.22,
3 101.02 (23) and 452.05 (1) (b) 1. and 2. of the statutes; **relating to:** appeals from
4 the determination that a body of water is navigable, mapping of navigable
5 streams, the exemption for certain drainage ditches from certain permit
6 requirements, notices in forms for building permit applications and for offers
7 to purchase real property regarding wetlands and navigable streams, and
8 requiring the exercise of rule-making authority.

Analysis by the Legislative Reference Bureau

This bill is explained in the NOTES provided by the Joint Legislative Council in the bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

JOINT LEGISLATIVE COUNCIL PREFATORY NOTE: This bill was developed by the Joint Legislative Council's special committee on navigability and drainage ditches. It is based

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on drafting instructions given by the committee at its January 19, 2007, meeting. The bill does the following:

1. Specifies the administrative procedure that the Department of Natural Resources (DNR) must use in making determinations that a waterway is navigable.
2. Directs DNR to promulgate rules regarding the making of such determinations.
3. Specifies that appeals of such determinations are made directly to the circuit court for the county in which the affected land is located.
4. Renumbers and clarifies the current statute that exempts farm drainage ditches with no prior history of navigability from certain permit requirements under subch. II of ch. 30 of the statutes.
5. Requires that forms for building permit applications and offers to purchase real property include notices regarding potential implications of any wetlands or navigable waters that may be present on the building site or real property.
6. Directs DNR to develop, maintain, and make available to the public maps and a database of streams that DNR has determined are navigable.

1 **SECTION 1.** 30.10 (2) of the statutes is amended to read:

2 **30.10 (2) STREAMS.** Except as provided under sub. (4) ~~(c) and~~ (d), all streams,
3 sloughs, bayous, and marsh outlets, which are navigable in fact for any purpose
4 whatsoever, are declared navigable to the extent that no dam, bridge, or other
5 obstruction shall be made in or over the same without the permission of the state.

6 **SECTION 2.** 30.10 (4) (c) of the statutes is repealed.

NOTE: The current law provision regarding navigability of farm drainage ditches is relocated to s. 30.22 and modified by this SECTION and SECTION 5 of this bill.

7 **SECTION 3.** 30.10 (5) of the statutes is created to read:

8 **30.10 (5) ADMINISTRATIVE PROCEDURES.** In making a determination that any
9 individual body of water is navigable, the department shall use the declaratory
10 rulings procedures under s. 227.41.

NOTE: This provision requires that DNR use a particular administrative procedure for making determinations of navigability. Appeals of rulings under that procedure are made directly to circuit court, rather than to a contested case hearing before an administrative law judge.

11 **SECTION 4.** 30.10 (6) of the statutes is created to read:

12 **30.10 (6) MAPS AND DATA.** (a) The department shall develop, and make publicly
13 available, maps and data that show the results of determinations of navigability that
14 are made by the department. At a minimum, the maps and data shall include

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1 navigability determinations made on or after the effective date of this subsection
2 [revisor inserts date]. To the extent practicable, within the constraints of available
3 staff and funds, the department shall incorporate past determinations of
4 navigability into the maps and data.

5 (b) The department shall prepare and periodically update a digital navigable
6 streams database and make the database available to the general public on the
7 Internet.

8 (c) The department shall promulgate rules that describe all of the following:

9 1. The standards in common law and statutes for determining whether a body
10 of water is a lake or stream.

11 2. The methods used by the department for making determinations of whether
12 a lake or stream is navigable.

13 3. The kinds of scientific evidence that may be used to show that a farm
14 drainage ditch was a navigable stream before ditching for purposes of s. 30.22.

NOTE: This provision requires DNR to prepare maps of navigable streams. It requires DNR to add streams to a mapping database as it makes navigability determinations, and to incorporate information from earlier determinations of navigability as resources allow. It also requires DNR to promulgate rules to specify procedures and standards for determinations of navigability.

15 **SECTION 5.** 30.22 of the statutes is created to read:

16 **30.22 Farm drainage ditches.** Except as provided in s. 30.20 (1g) (a), a project
17 that is for an agricultural purpose and is located in or adjacent to a farm drainage
18 ditch is exempt from the requirement for a permit, contract, or approval under this
19 subchapter unless it is shown, by means of a U.S. geological survey map or other
20 reliable scientific evidence, that the farm drainage ditch was a stream that was a
21 navigable water prior to ditching.

NOTE: The current statute related to farm drainage ditches is as follows:

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“30.10 (4) (c) Notwithstanding any other provision of law, farm drainage ditches are not navigable within the meaning of this section unless it is shown that the ditches were navigable streams before ditching. For purposes of this paragraph, “farm drainage ditch” means any artificial channel which drains water from lands which are used for agricultural purposes.”

The proposed language in new s. 30.22 differs in 2 key respects from the current statute. The primary difference is that the exemption clearly applies to a project for an agricultural purpose, not to the farm drainage ditch itself. Thus, a project for other than agricultural purposes would require a permit, even though the drainage ditch was originally constructed as and continues to be used as a farm drainage ditch.

The other difference is that the statute specifies the kind of evidence that may be used to show stream history.

1 **SECTION 6.** 101.02 (23) of the statutes is created to read:

2 101.02 **(23)** The department shall include on the standard application form
3 prescribed by the department under this chapter for a building permit for the
4 construction or modification of a public building, place of employment, or one-family
5 or 2-family dwelling, a statement that advises the applicant of all of the following:

6 (a) That, if a wetland or a navigable body of water is on or adjacent to the site
7 of the building construction or modification, the applicant may be required to obtain
8 additional authorization from the department of natural resources for the proposed
9 construction or modification.

10 (b) That the applicant should consult the department of natural resources or
11 a private professional consultant and should consult the local zoning authority to
12 determine whether there is a wetland or a navigable body of water located on or
13 adjacent to the site of the building construction or modification.

NOTE: SECTION 6 directs the Department of Commerce to ensure that building permit application forms include a cautionary statement regarding the possibility that wetlands or navigable waterways on or adjacent to the construction site could result in the need for the applicant to obtain DNR approval for the construction project.

14 **SECTION 7.** 227.53 (1) (a) 3. of the statutes is amended to read:

15 227.53 **(1)** (a) 3. If the petitioner is a resident, the proceedings shall be held in
16 the circuit court for the county where the petitioner resides, except that if the
17 petitioner is an agency, the proceedings shall be in the circuit court for the county

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1 where the respondent resides and except as provided in ss. 73.0301 (2) (b) 2., 77.59
2 (6) (b), 182.70 (6), and 182.71 (5) (g). If the petitioner is a nonresident, the
3 proceedings shall be held in the county where the property affected by the decision
4 is located or, if no property is affected, in the county where the dispute arose. If the
5 petition is for the review of a determination by the department of natural resources
6 that a body of water is navigable and if the petitioner is a resident or nonresident,
7 the proceedings shall be held in the county where the property affected by the
8 determination is located. If all parties stipulate and the court to which the parties
9 desire to transfer the proceedings agrees, the proceedings may be held in the county
10 designated by the parties. If 2 or more petitions for review of the same decision are
11 filed in different counties, the circuit judge for the county in which a petition for
12 review of the decision was first filed shall determine the venue for judicial review of
13 the decision, and shall order transfer or consolidation where appropriate.

NOTE: This provision specifies that the appeal of a DNR determination that a body
of water is navigable is made in the circuit court of the county in which the affected land
is located.

14 **SECTION 8.** 452.05 (1) (b) of the statutes is renumbered 452.05 (1) (b) (intro.)
15 and amended to read:

16 452.05 (1) (b) (intro.) Approve forms for use in real estate practice. The
17 department may not approve a form for an offer to purchase real property unless the
18 form includes a statement that advises the purchaser of all of the following:

19 **SECTION 9.** 452.05 (1) (b) 1. and 2. of the statutes are created to read:

20 452.05 (1) (b) 1. That, if a wetland or a navigable body of water is on or adjacent
21 to the real property, the purchaser's use of the real property may be affected.

22 2. That the purchaser should consult the department of natural resources or
23 a private professional consultant and should consult the local zoning authority to

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1 determine whether there is a wetland or a navigable body of water located on or
2 adjacent to the real property.

NOTE: This provision directs the Department of Regulation and Licensing to ensure that standard forms for an offer to purchase real estate include cautionary statements regarding the possibility that wetlands or navigable bodies of water on or adjacent to the property could result in the need of the buyer to obtain DNR approval if the buyer undertakes a construction project on the property.

3 **SECTION 10. Nonstatutory provisions.**

4 (1) DEPARTMENT OF COMMERCE. Before requiring any municipality or municipal
5 agency to use application forms, for a permit for the construction or modification of
6 a public building, place of employment, or one-family or 2-family dwelling, that have
7 been revised to comply with the requirements of section 101.02 (23) of the statutes,
8 as created by this act, the department of commerce shall allow the municipality or
9 municipal agency a reasonable time to exhaust its supply of forms that do not comply
10 with section 101.02 (23) of the statutes.

11 (END)