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November 24, 2003

TO: Members
Wisconsin Legislature

FROM: Bob Lang, Director

SUBJECT: Assembly Bill 655 and Senate Bill 313: Summary of Provisions

Assembly Bill 655 and Senate Bill 313 are identical bills that were introduced on November 11, 2003. The Joint Committee on Finance held a public hearing on the bills on November 12, 2003. The bills were subsequently withdrawn from Joint Finance and referred to the Assembly Special Committee on Job Growth and the Senate Select Committee on Job Creation. The following sections describe the provisions contained in AB 655 and SB 313, as introduced (referred to as the bill in the remainder of this memorandum).

This paper provides a summary of the provisions of the bill. Following is a Table of Contents. Next, each of the bill's provisions is summarized. At the end of each description is an identification of the bill section(s) which relate to the provision.

TABLE OF CONTENTS

SUMMARY OF PROVISIONS

1. DNR -- WATERWAY PERMITS

Currently, with limited exemptions, an owner of waterfront property may not engage in an activity that would affect a navigable waterway unless the activity is authorized under a general permit issued by DNR, or unless the owner first obtains a specific permit or approval from DNR. Exemptions include the ability of a riparian landowner to construct a pier or wharf beyond the ordinary high water mark or an established bulkhead line without a placement permit if the wharf or pier meet certain criteria.

Under a general permit, certain types of activities are currently assumed to be generally permissible when conducted under appropriate conditions. When seeking authorization to undertake an activity covered under a general permit, the landowner must notify DNR of their intent to complete the activity for which a general permit is required at least 20 business days prior to initiating the practice. The Department then has the opportunity to review the notice and determine whether mitigating factors exist that may make the activity inappropriate or harmful in each specific case. If DNR determines that this is the case, the Department must notify the individual seeking authorization under a general permit of its determination within 20 business days. The landowner then has the option of applying for an individual permit to undertake the activity. If the Department does not notify the landowner within the 20 business days that an individual permit is required, the landowner may assume that the activity would be considered to be authorized under the general permit.

Other activities that are not covered by an exemption or a general permit require individual permits under current law. For example, an individual enlargement permit must be issued to construct, dredge, or enlarge any artificial waterway in order to connect it to an existing navigable waterway; to connect an artificial or natural waterway with an existing navigable waterway; to construct, dredge, or enlarge any part of an artificial waterway that is located within 500 feet of an

existing navigable stream; or to grade or remove topsoil from the bank of a navigable waterway if the exposed area will exceed 10,000 square feet.

In general, the bill would make changes to the permitting, decision, notice, hearing, and court procedures that apply to permits provided by DNR that serve to regulate the type and nature of structures, deposits, and activities that occur in or near navigable waterways. The bill would create additional exemptions from current permitting requirements (described below by permit type). In addition, more practices would be included under general (rather than individual) permits. The types of practices that would be affected by the restructuring of permits under the bill include permits to place piers, boat shelters, and other structures or deposit materials in a navigable waterway (placement permits); permits to construct or maintain bridges; permits to dredge, enlarge, or connect waterways, or to grade or remove topsoil from banks along navigable rivers or streams (enlargement permits); permits to change the course of streams or rivers (stream course permits); and permits or contracts to dredge or remove materials from the beds of navigable waterways (removal permits).

Notice and Hearing Provisions for Individual Permits. Under current law, DNR must either order a public hearing to be held within 60 days of receiving a completed application for an individual placement, bridge, removal, stream course, or enlargement permit, or provide notice that the Department will proceed on the application without a public hearing unless a substantive written objection is received within 30 days after the notice is published. Current law requires DNR to provide the notice of application to anyone the Department considers an interested party and the applicant, who in turn must publish the notice in a newspaper that is likely to give notice in the area where the waterway activity will be located.

If DNR does not receive a substantive written objection within the 30-day period, the Department may proceed to act on the permit application under current law. If DNR receives an objection, the public hearing must be held within 60 days of being ordered. At least 10 days before the hearing, the Division of Hearings and Appeals within the Department of Administration must mail a notice of the public hearing to the applicant, all of the parties who received the notice of application, and anyone who submitted a substantive written objection. The applicant must publish the notice of public hearing in an area newspaper. Any individual who wishes to challenge the Department's preliminary determination of the approval or denial of an individual permit may do so by requesting a administrative (contested case) hearing rather than a public hearing. If a preliminary determination is challenged in this manner, the individual permit is approved, denied, or modified based on the evidence at the administrative hearing.

Under current law, DNR may also use this notice and hearing procedure when it is not specifically required if the Department determines that substantial interests of any party may be adversely affected by the granting of the permit.

Under the bill, DNR must initially determine whether an application or contract is complete within 30 days of its submission (as opposed to 60 days under current law) and notify the applicant

of its determination in writing. If DNR determines that the application is incomplete, the written notice must include the reason for this determination, and the specific items of information necessary to make the application complete.

Once DNR determines that an application is complete, the Department must provide notice of a complete application to interested members of the public within 15 days under the bill. The Department must then provide a period for public comment. If no public hearing is requested, the public comment period ends after 30 days and DNR may act on the permit application. If a public hearing is requested the comment period ends 10 days after the conclusion of the hearing. DNR may specify through administrative rule the content of notices. However, the bill would require that (at a minimum) the notice must include: (a) the name and address of each applicant or permit holder; (b) a brief description of the activity or project that requires a permit; and (c) the name of the waterway in or for which the project is planned. In addition, a notice of completed application and a public hearing would contain: (a) a statement of the tentative determination to issue, modify, or deny a permit for the activity or project must be included; and (b) a brief description of the procedures for the formulation of final determinations, including a description of the comment period required.

Under the bill, the permit applicant or any other person may request a public hearing. The Department may also decide to hold a hearing if it determines that there is a significant public interest in the permit. The hearing would not be a contested case hearing. Any request for a public hearing would have to be submitted to DNR within 30 days of the notice that the application is complete. A substantive written objection would not be required. The Department would have to provide notice within 15 days, and the hearing would have to be held within 30 days after issuance of the notice of a complete application. Under the bill, the Department must issue its decision within 30 days after the hearing. If no hearing is requested, then DNR must issue a decision within 30 days after the close of the comment period. Failure by the Department to issue a decision within these specified timeframes would result in the refund of any application fees by DNR to the applicant.

Under the bill, individuals would no longer be able to request a contested case hearing prior to the decision on an individual permit application. However, the bill would provide an opportunity to challenge DNR determinations after permit applications have been approved or denied in some instances (provisions relating to this are discussed in the following section). Individuals would still have the opportunity to request a public hearing for any individual permit prior to its approval under the bill. However, the bill would repeal the Department's general authority to use these notice and hearing procedures when they were not required to do so in making determinations that affected navigable waters and navigation.

[AB 655/SB 313 Sections: 12, 13, 76, 144 thru 147, and 208]

Review of DNR Decisions on Individual Permits. Under current law, if a substantial interest of a person is injured by an agency action and there is a dispute of material fact, that person

has the right to an administrative hearing before an impartial hearing officer. Under the bill, within 30 days of the DNR decision on an individual permit an applicant for or holder of the permit, or five or more persons, may ask DNR for an administrative (contested case) hearing regarding the issuance, denial, or modification of an individual permit, or regarding a term or condition of an individual permit. The petition must state the grounds for review, and why administrative review is warranted. Unless DNR determines that the request for a hearing has no basis, DNR would be required to hold an administrative hearing. The bill would require that the hearing be conducted as a contested case hearing and be subject to general administrative hearing requirements. Unlike current law, the administrative hearing may only be requested after the application for an individual permit has been acted upon by DNR.

Instead of requesting an administrative hearing to review the DNR decision, the permit applicant or the Department would have the right to bring a court action to review the Department's decision. In addition, administrative decisions which adversely affect the substantial interests of any person, whether by action or inaction, whether affirmative or negative in form, would also be subject to review under the bill. Therefore, a person who was harmed by DNR's decision relating to an individual permit could bring a court action to review the Department's decision as well. Under current law, this individual would have the right to request an administrative hearing instead of a circuit court review.

The bill would require the court to review the evidence and to examine witnesses, rather than review the record of the Department's actions. In addition, the bill would allow either the applicant for the permit or the Department to stop the administrative hearing and instead have the court take jurisdiction over the issues raised. If an administrative hearing is removed to a court, that court would be required to review the evidence and examine witnesses, independent of the Department's evidence review and witness examination. The review would be filed with the circuit court for the county where the riparian property is located. Under current law, judicial reviews are conducted in Dane County Circuit Court.

[AB 655/SB 313 Sections: 11 and 148 thru 150]

Placement Permits. Under current law, DNR may approve or deny an application for certain placement permits without giving notice or conducting a hearing. Examples of activities covered under the requirement for this type of permit include applications to place sand to improve recreational use or applications to place devices to improve fish habitat.

Under the bill, this abbreviated procedure for approving or denying placement permit applications would be repealed. Instead, most of the activities that were previously subject to this procedure would instead be covered under a requirement for statewide general permits. The bill would require general permits to be issued for depositing material or placing a structure on the bed of any navigable water where no bulkhead line has been established, or beyond a lawfully established bulkhead line. Under current law, these activities would generally require an individual

permit. The current law exemption for projects authorized by the Legislature would be maintained under the bill.

Exemptions. Under current law, a riparian owner may construct a wharf or pier in a navigable waterway extending beyond the ordinary high-water mark or an established bulkhead line in aid of navigation without obtaining a placement permit if all of the following conditions are met: (a) it does not interfere with public rights in navigable waters; (b) it does not interfere with rights of other riparian owners; (c) it does not extend beyond any established pierhead line; (d) it does not violate any municipal ordinances; and (e) it is constructed to allow the free movement of water underneath and in a manner which will not cause the formation of land upon the bed of the waterway. The bill would repeal this provision. Instead, wharfs or piers meeting certain size requirements (as described below) would be exempted from placement permit requirements without having to meet the above criteria, and would no longer be subject to additional municipal regulations.

The bill would also clarify that riparian owners may place water ski platforms and jumps without a permit if current law requirements are met. These requirements include that the platform or jump does not interfere with public rights in navigable waters, does not interfere with rights of other riparian owners, and is located at a site that ensures adequate water depth and clearance for safe water skiing. If these requirements are not met, an individual placement permit is required, and would be subject to the modified public notice and hearing requirements included in the bill.

The bill would also exempt certain waterway activities from both general and individual placement permits if the activities do not interfere with the rights of other riparian owners and if they are located outside an area of special natural resource interest. An "area of special natural resource interest" is defined under the bill as any area that is a state natural area, or an area that has been identified by DNR as possessing scientific value or as being an outstanding or exceptional resource water. Examples of such waters include wild and scenic rivers and certain trout streams. Activities that would be exempt under the bill include: (a) a deposit of sand, gravel, or stone that totals less than two cubic yards in any five-year period; (b) a structure, other than a pier or a wharf, that is placed on a seasonal basis and that is less than 200 square feet in size and less than 38 inches in height (such as a water trampoline); (c) a boat shelter, hoist, or lift that is placed on a seasonal basis adjacent to the riparian owner's pier or wharf or to the shoreline on the riparian owner's property; (d) a pier that is no more than six feet wide, that extends no further than to a point where the water is three feet at its maximum depth, or to the point where there is adequate depth for mooring a boat or using a boat hoist or lift, whichever is closer to the shoreline, and which has no more than two boat slips for the first 50 feet of riparian owner's shoreline footage and no more than one additional boat slip for each additional 50 feet of the riparian owner's shoreline; (e) a wharf that extends no more than 30 feet; (f) an intake or outfall structure that is authorized by a storm water discharge permit or a facility plan approved by DNR; (g) riprap in an amount not to exceed 75 linear feet (if the riprap is located outside of an area where riprap had previously been placed); or (h) riprap in an amount not to exceed 300 linear feet (if the riprap is located in an area where riprap had been previously placed).

General Permits. Under current law, some activities are subject to an abbreviated review procedure, while under the bill the activities would be subject to general permit requirements. These activities include: (a) placing a layer of sand for the purpose of improving recreational use; (b) placing a fish crib, spawning reef, or similar item for the purpose of improving fish habitat; (c) placing a bird nesting platform, wood duck house, or similar structure for the purpose of improving wildlife habitat; (d) placing riprap or similar material on the bed and bank of navigable waters adjacent to an owner's property for the purpose of protecting the bank and adjacent land from erosion; (e) placing crushed rock or gravel, reinforced concrete planks, adequately secured treated timbers, cast in place concrete or similar material on the bed of a navigable stream for the purpose of developing a ford if an equal amount of material is removed from the stream bed; (f) placing crushed rock or gravel, reinforced concrete planks, cast in place concrete or similar material on the bed of navigable waters adjacent to the owner's property for the purpose of building a boat landing; (g) placing a permanent boat shelter (a covered structure without walls) adjacent to the owner's property for the purpose of storing or protecting watercraft and associated materials, except that no permit may be granted for a permanent boat shelter which is constructed after May 3, 1988, if the property on which the permanent boat shelter is to be located also contains a boathouse (a structure with both a roof and walls) within 75 feet of the ordinary high-water mark or if there is a boathouse over navigable waters adjacent to the owner's property; (h) placing an intake structure and pipe on the bed of a navigable water for the purpose of constructing a dry fire hydrant to supply water for fire protection; and (i) drive a piling into the bed of a navigable water adjacent to the owner's property for the purpose of deflecting ice, protecting an existing or proposed structure, or providing a pivot point for turning watercraft.

Additional activities that would be subject to general permit requirements include: (a) placing an intake or outfall structure that is less than six feet from the water side of the ordinary high water mark and that is less than 25 percent of the width of the channel in which it is placed; (b) placing a pier to replace a pier that has been in existence at least ten years before the effective date of the bill, that does not exceed ten feet in width or 500 square feet in area; (c) placing a pier that does not exceed 500 square feet in area in a lake that is 500 acres or more in area; and (d) placing a vessel for commercial storage on Lake Michigan or Lake Superior or in any of their tributaries that is determined to be navigable by the federal government. The bill would also remove the general prohibition against the use of vessels for commercial storage in Wisconsin harbors or on the Great Lakes. Instead, an individual or general permit would be required for these activities.

General placement permits authorized by DNR for these activities would be valid for at least five years but no more than 10 years under the bill (actual length within these guidelines would be determined by DNR). Further, general placement permits could be renewed for a period of at least five years but no more than 10 years, with the actual timeframe determined by the Department. Under current law, placement permits are generally valid for two or three years.

The Department would be authorized to impose conditions on general placement permits under the bill in order to govern the architectural features of boat shelters as well as the number of boat shelters that may be constructed adjacent to a parcel of land. Under current law, DNR is

authorized to establish minimum standards for these issues in administrative rule. That authority would be repealed under the bill.

Under current law, a riparian landowner may construct a pier or wharf beyond the ordinary high water mark or an established bulkhead line with a general placement permit (subject to public notice requirements) if the wharf or pier would not obstruct navigation, impede water flow, and would not be detrimental to the public interest. The bill would eliminate this provision.

In general, under the bill, if a waterway activity is not an exempted activity, the individual permitting process applies unless the activity is covered by a general permit. The bill would allow DNR to specify other types of structures and deposits, in addition to those noted above, that may be authorized by statewide general permits. Whether a waterway activity is subject to the individual permit process, a general permit or is exempt would depend on the placement or deposit meeting certain size and other criteria (as noted above). Structures and deposits that would be subject to these criteria include sand, crushed rock, gravel, riprap, boat shelters and hoists, intake and outlet structures, piers, and wharves.

Individual Permits. Individual placement permit applications are subject to the modified public hearing and notice requirements included in the bill (and described in a previous section). Under the bill, DNR would be required to issue an individual permit if all of the following apply: (a) the structure or deposit will not materially obstruct navigation; (b) the structure or deposit will not be detrimental to the public interest; (c) the structure or deposit will not materially reduce the flood flow capacity of a stream. Under current law, guidelines are provided under which DNR may deny permits. However, current law does not contain specific requirements under which the Department must issue an individual placement permit.

Under current law, DNR may, but is not required to, issue placement permits for waterway activities that meet the requirements for the permit. Under the bill, DNR must issue placement permits for applications that meet the specified requirements.

The bill would repeal specific penalty provisions for individuals who violate placement permit regulations. Under current law, any person who violates regulations relating to placement permits, or any term or condition of a permit issued, is subject to a misdemeanor and can be fined up to $1,000 or imprisoned for up to six months, or both. Under the bill, any individual violating a general permit would be subject to a civil forfeiture of between $10 and $500 for the first violation, and between $50 and $500 for a second or subsequent violation. Under the bill, violating an individual permit could result in a civil forfeiture between $100 and $10,000 for the first violation, and between $500 and $10,000 for any second or subsequent violation.

[AB 655/SB 313 Sections: 8, 9, 10, 17 thru 51, 62 thru 75, 128 thru 130, and 151]

Enlargement Permits. Under current law, an individual enlargement permit is required to construct, dredge, or enlarge any artificial waterway where the ultimate purpose is to connect it to

an existing navigable waterway (connection permit requirement). The bill would limit the permit requirement to apply to artificial waterways that are already connected to a navigable waterway, or that will connect to a navigable waterway upon completion of construction. Under this section, an "artificial waterway" is defined as a proposed or existing body of water that does not have a history of being a lake or stream or of being part of a lake or stream. Further, DNR would be required to issue a general permit to meet the connection permit requirement for instances where the activity was part of an approved storm water-sewerage project and for activities that are designed to enhance wildlife habitat, wetlands, or that affect a body of water less than one acre in size.

Exemptions. In addition, under current law a permit must be issued to connect an artificial or natural waterway (regardless of navigability) with an existing navigable waterway. The bill would repeal this provision. The bill would also create an exemption to the current law permit requirement for constructing, dredging, or enlarging any part of an artificial waterway that is located within 500 feet of an existing navigable stream. Under the bill, if the artificial waterway's only surface connection to a navigable waterway was an overflow device, and the construction, dredging, or enlargement activity were authorized under a storm water discharge permit or a water or sewage facility plan authorized by DNR, the activity would be exempted from requiring an enlargement permit.

The bill would exempt from any dredging or enlargement permit requirements any activity that affects a portion of Lake Michigan or of Lake Superior that is located within a county having a population of 750,000 or more (Milwaukee County).

In addition, the bill would create an exemption to the current law permit requirement for grading or removing topsoil from the bank of a navigable waterway if the exposed area would exceed 10,000 square feet. Under the bill, a permit would not be required as long as the area to be graded was not located in an area of special natural resource interest and was authorized by a storm water discharge permit, a shoreland or wetland zoning ordinance, or by a construction site erosion control plan.

General Permits. DNR would be required to issue a general permit for enlargement projects that do not meet the 500-foot permit exemption requirement, for instances where the activity was part of an approved storm water-sewerage project and for activities that are designed to enhance wildlife habitat, wetlands, or that affect a body of water less than one acre in size.

The bill would further require DNR to issue a general permit to meet the grading permit requirement for any grading project or removal of topsoil that exceeds 10,000 square feet and is not eligible for the exemption. The Department would be authorized under the bill to specify additional types of activities that may be included under a statewide general permit.

Individual Permits. When issuing individual permits for activities relating to the enlargement of waterways, the bill would impose the requirement that the activity not be detrimental to the public interest (rather than not injure public rights or interest, including fish and game habitat,

currently). If an individual permit is required, the Department would be directed to issue the individual permit as long as: (a) the activity would not cause environmental pollution; (b) any enlargement connected to a navigable waterway complies with laws relating to platting of land and sanitation; and (c) no material injury would result to the rights of any riparian owners of any real property that abuts any water body that is affected by the activity. The modified public notice and hearing requirements included in the bill would apply to these applications for individual permits.

[AB 655/SB 313 Sections: 83 thru 104]

Bridge and Culvert Permits. The bill would revoke the current law permit exemption for bridges crossing a navigable stream that is less than 35 feet wide. Instead, such bridges would be subject to general permit requirements.

The bill would also specifically address permits for the placement of culverts. Under the bill, if a culvert has a diameter less than 60 inches, it would be subject to a general permit. However, culverts with a diameter less than 48 inches that are part of private roads or driveways are exempt from all bridge permit requirements under the bill. The bill would also repeal the requirement that the holder of a bridge permit construct and maintain a bridge in safe condition (if the bridge is used by the public). The Department would be authorized under the bill to promulgate rules that specify additional bridge or culvert projects that may be subject to statewide general permit requirements.

When considering individual permits, DNR would be required to issue a permit under the bill if the Department found that the bridge or culvert would not materially obstruct navigation, would not materially reduce the effective flood flow capacity of a stream, and would not be detrimental to the public interest. The modified public hearing and notice requirements included in the bill would apply to any individual bridge or culvert permit application.

[AB 655/SB 313 Sections: 53 thru 61]

Stream Course Permits. Current law requires landowners seeking to change the course of a stream or river to apply for an individual permit. The bill would change this provision to instead require a general permit if the relocation is less than a total of 500 feet, or if the stream being relocated has an average flow of less than two cubic feet per second. DNR officials indicate that their initial review shows that portions of perhaps two-thirds of streams (roughly 14,700) statewide could meet this criteria. The Department would be allowed to specify other stream course changes that would be subject to general permits.

Further, the bill would allow the Legislature (rather than state statutes, currently) to authorize the changing or straightening of stream or river courses. The bill also adds similar language that would allow the Legislature to authorize various waterway activities. The meaning, or effect, of this language is unclear.

If an individual stream course modification permit is required, the Department would be required to issue the individual permit as long as: (a) the applicant is the owner of any land upon which the change in course or straightening of the navigable stream will occur; (b) the proposed change of course of the navigable stream will improve the economic or aesthetic value of the applicant's land; (c) the proposed change of course of the navigable stream will not adversely affect the flood flow capacity of the stream or otherwise be detrimental to the public interest; and (d) the proposed change of course of the navigable stream will not be detrimental to the rights of other riparian land owners located on the stream, or all of these owners have consented to the issuance of the permit.

The bill would repeal the current law provision clarifying the state and permit holder's liability for negligence in the changing of a stream's course, as well as the exemption from permit requirements for municipal or county-owned lands in counties having a population of 750,000 or more. The bill would also clarify that any municipality seeking to enclose navigable waters would be subject to an individual permit, and specify that the permit would be subject to the modified public notice and hearing procedures included in the bill.

The bill would also clarify that the permit required for diverting water from a stream or lake under current law would be an individual permit. Individual permits would be subject to the modified public notice and hearing requirements included in the bill.

[AB 655/SB 313 Sections: 77 thru 82 and 105 thru 112]

Removal Approvals. Under the bill the scope of the general requirement for a removal contract would be limited to natural navigable lakes and navigable streams. Under current law, artificial lakes and non-navigable streams are subject to removal permit requirements. The bill would create an exemption for the removal of certain amounts of material if the removals were not from an area of natural resource interest, did not contain hazardous substances, and would be placed in an upland area. Amounts would be limited to 1,000 cubic yards or less from an area from which material had been previously removed and the removal was for maintenance purposes, or limited to 100 cubic yards or less for an area from which material had not been previously removed.

The bill would require DNR to issue general permits for other removals within specified amounts not covered by the exemption. This would include the removal of material from an area from which material had been previously removed, for which the removal is for maintenance purposes, and the removal is more than 1,000 cubic yards; and the removal of material from an area from which no material had been previously removed, and the material to be removed is in between 100 cubic yards and 1,000 cubic yards. The Department would be authorized under the bill to specify additional removal projects that may be subject to statewide general permit requirements.

If an individual removal permit is required, DNR would be directed under the bill to issue the individual permit as long as the Department finds that the issuance of the permit will be consistent

with the public interest. Any application for an individual removal permit would be subject to the modified public notice and hearing procedures included in the bill.

[AB 655/SB 313 Sections: 113 thru 126]

Boathouses. In general, current law prohibits placing boathouses (structures with a roof and walls) beyond the ordinary high water mark of a navigable waterway. The bill would create an exemption for the construction, repair, or maintenance of a boathouse that is in compliance with all individual or general permit requirements, that is used exclusively for commercial purposes, that is on land zoned exclusively for commercial or industrial purposes, or is in a brownfield or blighted area, and that is located in a commercial harbor or on a tributary of Lake Michigan or Lake Superior.

[AB 655/SB 313 Section: 52]

Statewide General Permit Requirements. While current law specifies that general permits are to be issued by promulgating an administrative rule, the bill would repeal this specification. Under the bill, DNR would be directed to issue statewide general permits for placement projects, bridge projects, enlargement projects, connection activities, and removal projects within 540 days after the effective date of the bill. Existing general permits would remain valid until statewide general permits (as created or modified under the bill) are issued. Vessels for commercial storage that are on Lake Michigan, Lake Superior, or on a tributary of either lake determined to be navigable by the federal government on the effective date of the bill would be considered in compliance with general permit requirements until statewide general permits are issued.

When seeking a general permit, the landowner must notify DNR in writing of their intent to complete the activity for which a general permit is required at least 30 days prior to initiating the practice (rather than 20 business days currently). Under the bill, the notification must include information describing the activity in order to allow DNR to determine whether the activity would be authorized by a general permit. If the Department does not notify the landowner within 30 days that an individual permit is required, the activity would be considered to be authorized. The Department may only require an individual permit if it determines that the proposed activity is not authorized by the general permit. Upon completing the activity that was authorized under the general permit, the applicant would be required to provide a statement to DNR certifying that the activity was completed in compliance with the permit, and a photograph of the activity.

The bill would require DNR to conduct an environmental analysis and provide public notice and hearing before issuing statewide general permits. In order to ensure that the cumulative adverse environmental impact of the activities authorized by a general permit are insignificant, and that the issuance of the general permit will not injure public rights or interests, cause environmental pollution, or result in material injury to the rights of any riparian owner, the bill would authorize DNR to impose the following conditions on the statewide general permit: (a) construction and design requirements that are consistent with the purpose of the activity authorized under the permit;

(b) location requirements that ensure that the activity would not materially interfere with navigation or have adverse impact on the riparian property rights of adjacent owners; and (c) restrictions to protect areas of special natural resource interest. The bill would repeal DNR's authority to impose conditions on a general permit to include any conditions determined by the Department to be reasonably necessary to prevent environmental pollution and to protect the public interest and public rights in navigable waters and the rights of other riparian owners.

[AB 655/SB 313 Sections: 14 thru 16, 131 thru 143, 152, 157, 210, and 283]

Effective Dates. Under the bill, DNR would be directed to issue statewide general permits for placement projects, bridge projects, enlargement projects, connection activities, and removal projects within 540 days after the effective date of the bill. Existing general permits would remain valid until statewide general permits (as created or modified under the bill) are issued. Applicants for activities that would qualify for general permits under the bill would be required to apply for individual permits until the statewide general permits are issued. The modified timelines and procedures for issuing individual permits and the hearing and notice procedures related to the issuance of individual permits would become effective for applications submitted beginning with the day after publication of the act.

Vessels for commercial storage that are on Lake Michigan, Lake Superior, or on a tributary of either lake determined to be navigable by the federal government on the effective date of the bill would be considered in compliance with general permit requirements until statewide general permits are issued.

[AB 655/SB 313 Sections: 132 and 291(6)]

2. DNR -- AIR EMISSIONS PERMITS

Ambient Air Quality Standards for Hazardous Pollutants. Under current federal Clean Air Act requirements, the U.S. Environmental Protection Agency (EPA) establishes national ambient air quality standards (NAAQS) based on scientific determinations of the threshold levels of air contaminants below which no adverse effects will be experienced by humans or the environment. Ambient air standards relate to the quality of the air we breathe. EPA has established NAAQS for each of six air pollutants, including ozone, sulfur dioxide, nitrogen dioxide, particulate matter (solid or liquid matter suspended in the atmosphere) that is less than 10 microns in diameter (PM10) or less than 2.5 microns in diameter (PM2.5), carbon monoxide and lead.

Currently, DNR is required to promulgate by rule a standard for each of the pollutants for which EPA has established NAAQS, which may not be more restrictive than the federal standard. The bill would eliminate DNR's authority to promulgate a rule containing an ambient air quality standard for a substance for which EPA has not established a NAAQS.

Current state law provides that if EPA relaxes a federal air quality standard and DNR determines that additional restrictions are needed to protect the public health or welfare, a standard more restrictive than the federal standard may be adopted, or a standard for an air contaminant not regulated by EPA may be adopted. The bill would require that if EPA modifies (instead of relaxes, currently) a NAAQS, DNR must alter the corresponding state standard accordingly. The bill would delete the authority of DNR to promulgate a more restrictive standard than the federal standard.

[AB 655/SB 313 Sections: 218 thru 222]

Emission Standards for Hazardous Air Pollutants. Emission standards relate to the quality of the air emitted from a pollution source. The federal Clean Air Act requires EPA to establish national emission standards for hazardous air pollutants (NESHAPs). Current state law requires that if EPA establishes a standard of performance for new stationary sources under Section 111 of the federal Clean Air Act, DNR must promulgate an administrative rule that contains a similar emission standard, which may not be more restrictive than the federal standard in terms of emission limitations. Section 111 relates to guidelines for control of emissions at municipal solid waste landfills. Under the bill, if EPA establishes a standard of performance under any part of the federal Clean Air Act (instead of only under Section 111), DNR would be required to promulgate a rule that incorporates the federal emission standard and related administrative requirements. The bill would require that, in addition to the current requirement that the DNR rule may not be more restrictive than the federal requirements in terms of emission limitations, the rule could not be more burdensome to persons operating sources affected by the emission standard than the federal standard and related requirements.

Current state law requires that if EPA establishes an emission standard for a hazardous air contaminant under Section 112 of the federal Clean Air Act, DNR must promulgate an administrative rule that contains a similar standard, which may not be more restrictive than the federal standard in terms of emission limitations. Section 112 relates to emission standards for 188 hazardous air pollutants at some categories of stationary sources. The federal standards take different forms, for example they could: (a) set specific emission standards for a specific hazardous air pollutant; (b) specify the amount of a hazardous air pollutant that can be contained in a specific process such as in an industrial or paint coating; (c) specify a type of treatment or technology such as routing emissions through a refrigerated condenser; (d) set a required percentage reduction of hazardous air contaminants; (e) establish a maximum concentration of a hazardous air contaminant in an exhaust stream; or (f) set a work practice such as using a machine in a certain way. Under the bill, if EPA establishes an emission standard under any part of the federal Clean Air Act (instead of only under Section 112), DNR would be required to promulgate a rule that incorporates the federal emission standard and related administrative requirements. The bill would require that, in addition to the current requirement that the DNR rule may not be more restrictive than the federal requirements in terms of emission limitations, the rule could not be more burdensome to persons operating sources affected by the emission standard than the federal standard and related requirements.

Current statutes allow DNR to promulgate a rule with an emission standard for a hazardous air pollutant for which EPA has not established an emission standard under section 112 of the federal Clean Air Act, if DNR finds that the standard is needed to provide adequate protection for public health or welfare. Under the bill, DNR would not be allowed to promulgate an emission standard for a hazardous air pollutant for which EPA has not established an emission standard under any part of the Clean Air Act (instead of just under section 112) unless DNR makes a finding for a hazardous air contaminant that is supported with written documentation that includes all of the following: (1) a public health risk assessment that characterizes the stationary sources in the state that are known to emit the hazardous air contaminant and the individuals who are potentially at risk from the emissions; (2) an analysis showing that identified individuals are subjected to inhalation levels of the hazardous air contaminant that are above recognized environmental health standards; and (3) an evaluation of options for managing the risks caused by the hazardous air contaminant considering risks, costs, economic impacts, feasibility, energy, safety, and other relevant factors, and a finding that the chosen compliance alternative reduces risks in the most cost-effective manner practicable.

Under the bill, emission limitations promulgated by DNR under the three findings and related control requirements would not apply to hazardous air contaminants emitted by emissions units, operations, or activities that are regulated by an emission standard promulgated under the federal Clean Air Act, including a hazardous air contaminant that is regulated under the Clean Air Act by virtue of regulation of a species or category of hazardous air contaminants that includes the hazardous air contaminant. For example, a federal emission standard might require a type of emission control for a contaminant such as benzene, and implementing that control might also reduce the emissions of other contaminants that are on the federal list or on the state list.

Currently, if the federal standards for a hazardous air contaminant are relaxed, DNR is required to alter the corresponding state standards unless the Department finds that the relaxed standards would not provide adequate protection for public health and welfare. The bill would provide that DNR could not make this finding unless the finding is supported with the written documentation and three findings described earlier.

[AB 655/SB 313 Sections: 226 thru 231]

Mercury Emission Standards. Currently, DNR is authorized to prepare and adopt minimum standards for the emission of mercury compounds or metallic mercury into the air. DNR proposed draft rules that would have required reduced mercury emissions from major electric utilities, set procedures for calculating annual mercury emissions from other large stationary sources over a period of years, and required new or modified stationary sources of mercury emissions to install emission control technology. Much of DNR's methodology was based on the effects of human ingestion of fish with mercury in them. DNR's goal was to reduce mercury deposition to the environment, thus eventually reducing the associated concentration of mercury in fish and wildlife that may be consumed by humans. In August, 2003, the Assembly Natural Resources Committee and Senate Environment and Natural Resources Committee requested that

DNR make modifications to the rule. To date, DNR has not sent a revised rule back to the Legislature.

Under the bill, the standards would have to be consistent with the finding created under the hazardous emission standards provision, including the supporting written documentation and three findings described above (risk assessment, hazardous inhalation levels and cost-effective options for managing risk). This would mean that DNR could no longer base the calculation of emission limitations on the ingestion of mercury-tainted fish, but would rather have to base emission limits on inhalation risk.

[AB 655/SB 313 Section: 214]

State Implementation Plans. Under current federal Clean Air Act requirements, EPA designates an area as a nonattainment area if the area has levels of a pollutant that are higher than the national ambient air quality standards. The state must submit implementation plans to EPA that show how the state will reduce the levels of pollutants in its nonattainment areas. Current statutes require DNR to prepare plans for the prevention, abatement and control of air pollution in the state. Currently, plans submitted to EPA for the control of atmospheric ozone must conform with the federal Clean Air Act, except that measures beyond that required by the Clean Air Act may be included if the Governor determines they are necessary to show that the state will make required reductions in the levels of ozone in ozone nonattainment areas or if the measures are part of an interstate ozone control strategy or interstate ozone control agreement between Wisconsin and Illinois.

The bill would repeal the authority for the Department to include provisions in the plans that are beyond those required by the Clean Air Act. The bill would allow DNR to only include in a state implementation plan rules or requirements that are necessary to obtain approval of the plan by EPA, including provisions that are necessary to show that the state will make necessary reductions in the levels of that pollutant in the state's nonattainment areas.

The bill would require that, at least 90 days before DNR is required to submit a state implementation plan to EPA, the Department would have to prepare and submit a report to the Legislative Joint Committee for Review of Administrative Rules (JCRAR) that describes the proposed plan and contains all of the supporting documents that DNR intends to submit to EPA with the plan. The bill would provide JCRAR with 30 days to review the report. If, within 30 days after DNR submits the report, the cochairpersons of JCRAR do not return the report to DNR with a written explanation of why the Committee is returning the report, the Department could submit the plan. If, within 30 days after DNR submits the report, the cochairpersons of JCRAR return the report to the Department with a written explanation of why the Committee is returning the report, DNR would not be allowed to submit the plan to EPA until the Committee agrees that the Department has adequately addressed the issues raised. If the Secretary of DNR disagrees with the Committee's reasons for returning the report, the Secretary would be required to notify the Committee in writing. However, as noted, the Department would not be allowed to submit the plan

to EPA until JCRAR agrees that the Department has adequately addressed the issues raised by the Committee. This provision would not apply to a modification to a state implementation plan relating to an individual source.

[AB 655/SB 313 Sections: 212, 213 and 216]

Identification of Nonattainment Areas. Currently, DNR is required to promulgate by rule procedures and criteria to identify a nonattainment area and to reclassify a nonattainment area as an attainment area. DNR is required to issue documents from time to time that define or list specific nonattainment areas. These documents are not rules. Before the Department issues such a document, it is required to hold a public hearing after a 30 day notice, accept written comments for at least 10 days after the close of the hearing, and issue the document no sooner than 30 days after the close of the hearing.

Currently, before EPA designates nonattainment areas, the Department makes a recommendation about areas to be designated to the Governor and the Governor makes a recommendation to EPA. EPA designates nonattainment areas based on EPA criteria after considering any recommendations made by the Governor. After EPA designates nonattainment areas, DNR formally identifies designated nonattainment areas.

The bill would prohibit DNR from identifying a county as part of a nonattainment area if the concentration of an air contaminant in the atmosphere does not exceed an ambient air quality standard, unless the Clean Air Act requires the Department to identify the county as part of a nonattainment area. As a result, DNR might not include one or more counties in a metropolitan area in a recommendation of designated areas if the county does not exceed the standard. However, EPA might still designate them as part of a nonattainment area. Sources in any counties designated as nonattainment by EPA would have to meet federal requirements for nonattainment areas.

The bill would require that, before DNR issues documents that list nonattainment areas, and, at least 90 days before the Governor makes a submission to EPA on a nonattainment designation, DNR would have to prepare and submit a report to JCRAR that contains a description of any area proposed to be identified as a nonattainment area and supporting documentation. If DNR complies with the current law public notice and hearing requirements, and if, within 30 days after the Department submits the report, the cochairpersons of JCRAR do not return the report to DNR with a written explanation of why the Committee is returning the report, DNR may issue a list of nonattainment areas and the Governor may submit the list to EPA. If, within 30 days after DNR submits the report to JCRAR, the cochairpersons return the report to the Department with a written explanation of why the Committee is returning the report, the Department would not be allowed to issue the documents regarding nonattainment designations, and the Governor would not be allowed to submit the designation list to EPA until the JCRAR agrees that DNR has adequately addressed the issues raised by the Committee.

When EPA replaced NAAQS based on the concentration of particulate matter in the atmosphere measured as total suspended particulates with a standard based on the size of the particulate matter, DNR retained the state emission standard based on total suspended particulates and also adopted the federal standards based on the size of the particulate matter (PM10 and PM2.5). Currently, a portion of the City of Milwaukee is the only area of the state designated as being in nonattainment of total suspended particulate matter standards. The bill would prohibit DNR from identifying an area as a nonattainment area based on the concentration in the atmosphere of particulate matter measured as total suspended particulates. The bill would require DNR to redesignate as an attainment area any area identified as a nonattainment area if the only basis on which the area could be identified as a nonattainment area is the concentration in the atmosphere of particulate matter measured as total suspended particulates. Under the bill, DNR would redesignate the area in the City of Milwaukee from nonattainment to attainment.

[AB 655/SB 313 Sections: 223 thru 225]

Construction Permits (New Source Review). The federal Clean Air Act includes a program called "new source review" under which a person is required to obtain a construction permit before beginning construction, reconstruction, replacement or modification of a stationary source of air pollution, also known as a major source. If a source is required to obtain a construction permit, the Clean Air Act imposes air pollution control requirements that are more stringent than those imposed on sources that are not required to obtain a construction permit, including those sources to which changes are made that do not amount to modifications. DNR issues construction permits under the federal authority. DNR also administers state regulations for minor sources, which include less stringent requirements than the federal requirements for major sources. A construction permit contains information about which pollutants are being released, establishes detailed limits on the emissions of air contaminants, establishes a maximum increase over a baseline of emissions and includes related requirements such as monitoring, record-keeping and reporting.

EPA recently promulgated regulations that revise the way in which it is determined under federal law whether changes to a major source are considered to be modifications that require a construction permit or maintenance that does not require a permit. The EPA regulations would modify the situations in which major sources must obtain construction permits. Under the revised EPA regulations, it is possible that sources that would have previously been required to install emissions controls will no longer be required to install the controls. A coalition of 12 states (including Wisconsin), the District of Columbia, and some local governments, filed suit against EPA. The pending lawsuit alleges that EPA exceeded its statutory authority in promulgating the regulations, and that the rules do not comply with the federal Clean Air Act.

Currently, DNR is authorized to promulgate rules, consistent with the federal Clean Air Act, that modify the meaning of the term "modification" as it relates to specified categories of stationary sources, to specific air contaminants and to amounts of emissions or increases in emissions. The bill would repeal the provision, and would instead require DNR to promulgate administrative rules

incorporating the recent EPA revisions that were published in the Federal Register on December 31, 2002, and October 27, 2003. DNR would not be permitted to include any requirements in the rules that are inconsistent with or more stringent than the federal regulations. The Department would also be required to incorporate, to the extent possible, similar changes for minor sources if the changes reduce administrative requirements. The bill would require DNR to submit draft administrative rules including these changes to the Legislative Council staff under Chapter 227 no later than the first day of the seventh month after the regulations making the changes on which the rules are based take effect. For federal regulations that are published before the effective date of the bill, DNR would be required to submit draft administrative rules including these changes to the Legislative Council staff no later than August 31, 2004.

The Wisconsin Department of Justice has taken the position that the Attorney General could not defend the provisions in the bill, if legally challenged. This is based on the fact that the Attorney General has filed suit alleging that the EPA rules that the bill would require Wisconsin to adopt are illegal under the federal Clean Air Act. The state would, therefore, be required to retain special counsel if these provisions of the bill were challenged.

[AB 655/SB 313 Sections: 215 and 290(2)]

Exemptions From Construction and Operation Permits. Currently, state statutes allow DNR to promulgate administrative rules to exempt types of stationary sources from construction permit or operation permit requirements if the potential emissions from the sources do not present a significant hazard to public health, safety or welfare or to the environment. Under the bill, DNR would be required, (rather than authorized), to exempt minor sources (rather than types of stationary sources) from the requirement to obtain a construction permit and an operation permit if the emissions (rather than potential emissions) from the source do not present a significant hazard to public health, safety or welfare or to the environment.

The bill would create an exemption from the requirement to obtain a construction permit or an operation permit for the following agricultural uses, unless a permit is required by the federal Clean Air Act: (a) an agricultural facility, defined as a structure associated with an agricultural practice; (b) a livestock operation, defined as a feedlot or other facility or a pasture where animals are fed, confined, maintained or stabled; and (c) an agricultural practice, defined as beekeeping; commercial feedlots; dairying; egg production; floriculture; fish or fur farming; grazing; livestock raising; orchards; poultry raising; raising of grain, grass, mint and seed crops; raising of fruits, nuts and berries; sod farming; placing land in federal programs in return for payments in kind; owning land, at least 35 acres of which is enrolled in a federal conservation reserve program, and vegetable raising. DNR indicates that examples of agricultural sources might be facilities powered by diesel generators or those with ammonia emissions above state hazardous air pollutant emission limits.

The bill would exempt a person from the requirement to obtain a construction permit for a source that is a component of a process, of equipment, or of an activity that is otherwise covered by a preexisting operation permit or an activity that is otherwise covered by a preexisting operation

permit. A source would also be exempt from the construction permit requirement if it is a component of a process, of equipment, or of an activity that is included in a completed application for an operation permit. These two exemptions would not apply if a person is required to obtain a construction permit for the source under the Clean Air Act.

Currently, the owner or operator of a stationary source is required to obtain a construction permit prior to construction, reconstruction, replacement or modification of a stationary source. The bill would require DNR to grant a waiver, unless it conflicts with federal law, from the requirement to obtain a construction permit prior to construction, reconstruction, replacement, or modification of a stationary source if the owner or operator of the stationary source shows that obtaining the permit would cause undue hardship. However, it would not be a waiver from the requirement to eventually obtain a construction permit. The Department would be required to act on a waiver request within 15 days after it receives the request. DNR officials anticipate that the waiver might be applied in limited situations such as where there are weather-related issues that may delay the beginning of construction if a permit is delayed, it appears likely that the permit would be approvable, and the project would be for a minor source or minor modification.

[AB 655/SB 313 Sections: 232 thru 242]

General Permits. Currently, the statutes authorize DNR to promulgate administrative rules specifying types of sources that may obtain general construction permits and general operation permits, which may cover numerous similar stationary sources. A general construction permit or general operation permit is required to comply with statutory provisions related to applicant submittal of plans and specifications, departmental analysis and preliminary determination of eligibility, public notice, public comment period, provision for an optional public hearing, compliance with emission limitations and other conditions, permit duration, and payment of annual emission tonnage fees by the owner or operator of a stationary source for which an operation permit is required. DNR plans to request the Natural Resources Board for authorization for public hearings for general construction permit rules in early 2004. DNR has issued approximately 40 general operation permits to crushers, and has also established general operation permits for heaters and sterilizers.

The bill would repeal the current authority for DNR to promulgate rules for general construction and operation permits. Instead, the bill would require the Department to promulgate rules for issuance of general permits for similar stationary sources. DNR would be required to specify in the rules criteria for identifying categories of sources for which the Department could issue general permits and general requirements applicable to sources that qualify for general permits. A person would not be required to obtain a construction permit prior to construction, reconstruction, replacement or modification of a stationary source that qualifies for a general permit unless a construction permit is required under the federal Clean Air Act.

The bill would require that, within 15 days after receiving an application for coverage under a general permit, DNR would be required to provide one of the following to the applicant: (a) written

notice of the Department's determination that the source qualifies for a general permit and that the applicant may operate the source consistent with the terms and conditions of the general permit; (b) a written description of any additional information DNR needs to determine whether the source qualifies for coverage; or (c) written notice of the Department's determination that the source does not qualify for coverage under the general permit, specifically describing the reasons for that determination. The general permit applicant would not be required to comply with statutory provisions related to applicant submittal of plans and specifications, departmental analysis and preliminary determination of eligibility, public notice, public comment period, and provision for an optional public hearing, that currently apply to applicants for general construction and operation permits.

The bill would prohibit DNR from specifying an expiration date for a general permit, except that the Department could: (a) specify an expiration date for coverage under a general permit at the request of an owner or operator; (b) specify a term of five years or longer if DNR finds that the expiring coverage would significantly improve the likelihood of continuing compliance with applicable requirements compared to coverage that does not expire; or (c) specify a term of five years or less if required by the federal Clean Air Act.

[AB 655/SB 313 Sections: 236, 237, 274, and 275]

Registration Permits. The bill would require DNR to promulgate rules, which would have to be consistent with the Clean Air Act, to provide a simplified process under which the Department would issue a registration permit for a stationary source with low actual emissions. In comparison, a general permit could cover numerous similar stationary sources. The requirements for registration permits would be similar to those for general permits. The owner or operator of the source would be required to provide to the Department, on a form prescribed by DNR, sufficient information to show that the source qualifies for a registration permit. DNR would be required to include in the rules criteria for identifying categories of sources the owners or operators of which may elect to obtain registration permits and general requirements applicable to sources that qualify for registration permits. A person would not be required to obtain a construction permit prior to construction, reconstruction, replacement or modification of a stationary source that qualifies for a registration permit unless a construction permit is required under the federal Clean Air Act.

The bill would require that within 15 days after receiving an application for coverage under a registration permit, DNR would be required to provide one of the following to the applicant: (a) written notice of the Department's determination that the source qualifies for a registration permit and that the applicant may operate the source consistent with the terms and conditions of the registration permit; (b) a written description of any additional information DNR needs to determine whether the source qualifies for coverage; or (c) written notice of the Department's determination that the source does not qualify for coverage under the registration permit, specifically describing the reasons for that determination. The registration permit applicant would not be required to comply with statutory provisions related to applicant submittal of plans and specifications, departmental analysis and preliminary determination of eligibility, public notice, public comment

period, and provision for an optional public hearing, that applicants for general construction and operation permits are currently required to comply with.

While the bill specifies that general permits may not have an expiration date unless certain conditions are met, the bill does not specify whether registration permits would have an expiration date.

[AB 655/SB 313 Section: 235]

Other Construction Permit Requirements. The bill specifies that DNR may not promulgate a rule or take any other action related to construction or operation permits which conflicts with the federal Clean Air Act.

The bill would authorize a person to petition DNR to make a determination that a type of stationary source meets the criteria for a registration permit, a general permit, or an exemption as a minor source. The Department would be required to provide a written response to a petition within 30 days after receiving the petition indicating whether the type of stationary source meets the applicable criteria for a registration permit, a general permit or an exemption. If the type of source meets the applicable criteria, DNR would be required to, within 365 days after receiving the petition, issue the registration permit or general permit. For an exemption from a construction permit, DNR would be required to submit, within 365 days after receiving the petition, draft administrative rules to the Legislative Council staff under Chapter 227 or to take any other action necessary to provide the exemption.

Under the bill, DNR would be required to continually assess permit obligations and to implement measures that are consistent with state air pollution control statutes and the federal Clean Air Act to allow for timely installation and operation of equipment and processes and the pursuit of related economic activity by lessening permit obligations. DNR actions to lessen permit obligations would include consolidating the permits for sources at a facility into one permit, expanding exemptions for minor sources, and expanding the availability of registration permits, general permits and construction permit waivers.

[AB 655/SB 313 Section: 242 thru 244]

Construction Permit Process. Currently, statutes specify a process for DNR review of air construction permit applications. Within 20 days after DNR receives an initial air construction permit application, DNR is required to notify the applicant whether any plans, specifications or other information is needed to complete the application. After DNR receives a complete application, the Department evaluates the application to quantify the proposed emissions, identify applicable emission limitations, analyze the effect of the project on ambient air quality and ensure that the proposed construction, reconstruction, replacement or modification will comply with applicable laws.

Currently, DNR must make a preliminary determination on the approvability of the construction permit within 120 days after receipt of plans and specifications for a major source or within 30 days for a minor source. The bill would modify those time periods to 60 days after receipt of a complete application for a major source and 15 days for a minor source. An application would be considered to be complete when the applicant provides all of the plans, specifications and any other information the Department includes in a written notice, within 20 days after receipt of the application, as being necessary to determine whether the application will meet statutory requirements. The bill would also require that if additional information is not requested in writing within 20 days after the application is received, DNR would be allowed to request additional information after the 20 days, but the 60-day or 15-day time period would begin after the 20 days.

Under current law, DNR is required to receive public comments on a construction permit application for 30 days after publishing the newspaper notice. DNR is authorized to hold a public hearing if requested by a person, an affected state, or EPA within 30 days after publishing the notice and is required to hold a public hearing if the Department determines there is significant public interest in holding a hearing. DNR must hold the public hearing within 60 days after the end of the public comment period. Under the bill, DNR would be required to publish the newspaper notice of a public comment period within 10 days after the analysis and preliminary determination are prepared, or if the analysis and preliminary determination are prepared by a certified contractor (see a following section), within 10 days after the Department receives them from the certified contractor. The bill would authorize DNR to hold a public hearing on the construction permit application if requested by a person who may be directly aggrieved by the issuance of the permit (rather than if requested by a person under current law), in addition to an affected state or EPA currently. The Department would be required to hold the public hearing within 30 days after the end of the public comment period, instead of 60 days currently, if DNR determines there is significant public interest in holding a hearing. The public comment period would remain at 30 days.

Currently, DNR is required to act on a construction permit application within 60 days after the close of the public comment period or the public hearing, whichever is later, unless compliance with environmental impact statement provisions requires a longer time. The bill would require the Department to act within 60 days after it publishes the newspaper notice of the public comment period, which would be 30 days after the close of the public comment period, unless compliance with environmental impact statement provisions would require a longer time.

Under the bill, if DNR would fail to act on a construction permit application within 60 days after it publishes a notice of the public comment period, the Department would be required to include in a report: (a) the reasons for the delay in acting on the application; (b) the names of the Department's employees responsible for review of the application; and (c) recommendations for how to avoid similar delays in the future. DNR would be required to make the report available to the public, place a prominent notice of the reports on the DNR Internet site, and submit the reports to the Legislative Joint Committee for Review of Administrative Rules on a quarterly basis.

The bill would authorize DNR to extend any timeline applicable to the Department related to construction permits at the request of the applicant.

The provisions related to timelines for approval of construction permits would apply to applications submitted on or after the effective date of the bill.

[AB 655/SB 313 Sections: 246 thru 248, 252, 253, 256 thru 258, 272, 277 and 291(4)]

Operation Permits. Currently, DNR must act on an application for an operation permit for a new or modified source within 180 days after the applicant submits to DNR the results of equipment testing and emission monitoring required by the construction permit. Under the bill, the Department would have 30 days, instead of 180 days, after this date to act on an application.

The bill would make changes related to processing of operation permits that parallel the changes that would be made related to construction permits. However, while under the construction permit process, the bill would require DNR to hold a public hearing within 30 days (instead of 60) after the deadline for requesting a public hearing, the bill would maintain the current operation permit provision that DNR would be required to hold a public hearing within 60 days after the deadline for requesting a hearing.

The provisions related to timelines for approval of operation permits would apply to applications submitted on or after the effective date of the bill.

Currently, DNR is authorized to include, in rule or in an operation permit, a requirement that the owner or operator of an air contaminant source shall monitor the emissions of the air contaminant source or monitor the ambient air in the vicinity of the air contaminant source and report the results of the monitoring to DNR. DNR is authorized to specify methods for conducting the monitoring and for analyzing the results of the monitoring. The Department must require the owner or operator of a major source to report the results of any required monitoring of emissions from the major source to DNR no less often than every six months. The bill would add a provision that would prohibit DNR from including a monitoring requirement in an operation permit if the applicant demonstrates that the cost of compliance with the requirement would exceed the cost of compliance with monitoring requirements imposed on similar air contaminant sources by an adjacent state or if the monitoring is needed to provide assurance of compliance with requirements that apply to the air contaminant source, unless the monitoring is required under the federal Clean Air Act.

[AB 655/SB 313 Sections: 217, 259 thru 271, and 291(4)]

Certified Contractors. The bill would allow a person to submit a construction or operation permit application to a certified contractor instead of to DNR. The Department of Administration (DOA) would be required to certify private contractors to review applications for construction permits and operation permits to determine whether additional plans, specifications or other

information is needed from applicants and to make preliminary determinations of the approvability of applications. DOA would be required to, no later than the first day of the seventh month beginning after the effective date of the bill and in consultation with DNR, to specify minimum standards relating to staffing and professional expertise and other conditions applicable to private contractors certified under the provision. DOA would be required to maintain a directory containing the name, address, and contact person for each certified contractor, update the directory every three months, provide the directory to DNR and make the directory available to the public. DOA would be allowed to certify a contractor only if the contractor does all of the following: (a) submits an application on a form prescribed by DOA in consultation with DNR; (b) meets the minimum standards related to staffing and professional expertise and other conditions specified by DOA in consultation with DNR; and (c) submits a signed statement agreeing to conduct the review of air pollution control permits in accordance with applicable state and federal law.

If a person applies to a certified contractor, the person would be required to provide notice to DNR as prescribed by the Department. The 60-day and 15-day time periods for a preliminary determination of approvability of a construction permit and the 20-day time period to request additional information to complete an application would apply to the certified contractor as well as to DNR.

Currently, DNR is required to distribute the analysis and preliminary determination of approvability of a construction permit as soon as they are prepared. DNR is also required to publish a public notice of the opportunity for public comment and a notice of the opportunity to request a public hearing. Under the bill, if a certified contractor prepares the analysis and preliminary determination, DNR would distribute them as soon as the Department receives them from the certified contractor. The bill would require DNR to publish the notice announcing the public comment period and opportunity to request a public hearing within 10 days after the analysis and preliminary determination are prepared, or if prepared by a certified contractor, within 10 days after the Department receives them from the certified contractor.

The bill would authorize DNR to extend any timeline applicable to a certified contractor related to construction permits at the request of the applicant.

Currently, DNR is authorized to promulgate rules for the collection of reasonable fees for reviewing and acting upon any application for a construction permit. Under the bill, the Department would be required to specify lower fees to be paid to DNR for persons who submit applications to certified contractors than for those who submit applications to the Department. Certified contractors would be expected to establish fees to applicants to, at a minimum, recover the contractor's costs of reviewing applications.

While the bill would specify that applicants who submit construction permit applications to certified contractors would pay lower fees than applicants who submit applications to DNR, the bill would maintain the current law annual emission tonnage fees paid by persons who hold operation permits, whether they submit their application to the Department or to a certified contractor.

However, if a source that is currently required to obtain an operation permit becomes exempt as a result of implementation of the bill, the owner or operator of the source would no longer be required to pay annual emission tonnage fees.

Currently, DNR may approve an application for a construction permit or an operation permit if the Department finds that criteria specified in statutes are met. The bill would prohibit DNR from modifying a preliminary determination of approvability for a construction permit or operation permit that is made by a certified contractor unless: (a) modification would be necessary to comply with the federal Clean Air Act: (b) comments received during the public comment period or at the public hearing provide clear and convincing evidence that issuance of the permit would cause material harm to public health, safety, or welfare; or (c) consideration of an environmental impact statement, if one is required by statute, provide clear and convincing evidence that issuance of the permit would cause material harm to public health, safety, or welfare.

[AB 655/SB 313 Sections: 211, 245 thru 252, 254, 255, 257, 259 thru 262, and 278]

Criteria for Permit Approval. One of the criteria established in current law for approval of a construction permit or an operation permit for a major source (a stationary source that is capable of emitting an air contaminant in excess of an amount specified by DNR in rule) that is a new source or a modified source and that is in a nonattainment area is that, based on an analysis of alternative sites, sizes, production processes and environmental control techniques for any major source in a nonattainment area, DNR finds that the benefits of the construction or modification of the major source significantly outweigh the environmental and social costs imposed as a result of the major source's location, construction or modification. The bill would eliminate this criterion.

Currently, an air pollution control permit or part of a permit issued by DNR becomes effective unless the permit holder seeks a hearing on the permit or part of a permit. The bill would specify that if a permit holder or applicant seeks a hearing challenging part of the permit, the remainder of the permit would become effective and the permit holder or applicant would be allowed to begin the activity for which the permit was issued. The provision would first apply to persons who file a petition challenging part of the permit on or after the effective date of the bill.

[AB 655/SB 313 Sections: 254, 255, 267, 273, 279, 280, and 291(5)]

Permit Renewal. Currently, a person who holds an operation permit is required to apply for renewal of the permit at least 12 months before the operation permit expires. The bill would modify this to require a permittee to apply for renewal at least six months before the operation permit expires. The bill would specify that if a person submits an application for renewal of an operation permit before the date the permit expires, unless contrary to federal law, the stationary source could not be required to discontinue operation and the person holding the permit could not be prosecuted for lack of an operation permit until DNR acts to approve or deny the operation permit.

[AB 655/SB 313 Sections: 269 and 276]

Reports to Legislature. Under the bill, DNR would be required to develop a report, in consultation with owners and operators of stationary sources of air pollution, and submit the report to the Legislature no later than the first day after the seventh month beginning after the effective date of the bill. DNR would be required to include all of the following in the report: (a) a list of all existing exemptions from construction permits and operation permits under the bill; (b) a list of all general permits created under the bill; (c) recommendations and proposed administrative rule revisions for expanding exemptions from the requirement to obtain a construction permit or operation permit, establishing registration permits, issuing construction permit waivers, and taking other actions regarding streamlining the permit process as required by the bill, including consolidating the permits for sources at one facility into one permit; (d) a schedule for providing additional reports containing recommendations and related rule revisions for expanding exemptions from the requirement to obtain a permit, expanding the use of registration permits, expanding the use of general permits, expanding the issuance of construction waivers and taking other actions regarding streamlining the permit process, including consolidating the permits for sources at one facility into one permit; and (e) a description of the requirements of the federal Clean Air Act that limit the Department's ability to expand exemptions from permits, expand the use of registration permits, expand the use of general permits, expand the issuance of construction waivers and take other streamlining actions, and recommendations on how these limitations might be overcome.

The bill would also require DNR to submit a report to the Legislative Joint Committee for Review of Administrative Rules no later than the first day of the seventh month beginning after the effective date of the bill. The Department would be required to include all of the following in the report: (a) a description of all of the state's existing and pending state implementation plans under federal Clean Air Act provisions, along with an analysis of any rules or requirements included in the plans that may not have been necessary to obtain EPA approval but that are federally enforceable as a result of being included in the plans; and (b) recommendations for revisions of state implementation plans to remove rules and other requirements that may not have been necessary to obtain EPA approval.

As mentioned in the earlier section on state implementation plans, DNR would be required to submit any state implementation plan to the Joint Committee for Review of Administrative Rules for review and approval before DNR submits the plan to EPA. As mentioned in the earlier section on identification on nonattainment areas, before DNR could issue documents that list nonattainment areas, the Department would have to submit a description of the proposed areas to JCRAR for approval before DNR submits the proposed designations to EPA. As mentioned in the earlier section on the construction permit process, DNR would have to submit quarterly reports to JCRAR regarding certain delays in issuing construction permits or operating permits.

[AB 655/SB 313 Sections: 290(3)&(4)]

3. NONMETALLIC MINING -- FINANCIAL ASSURANCE

The bill would make changes related to financial assurance requirements for certain nonmetallic mining sites. Nonmetallic mining means the extraction of minerals such as stone, sand and gravel. Currently, counties are required to administer a nonmetallic mining reclamation program and ordinance that complies with chapter 295 of the Wisconsin Statutes and DNR administrative rules in chapter NR 135, and that includes permit requirements, requirements for fees, requirements for reclamation plans, and requirements for proof of financial responsibility for reclaiming nonmetallic mining sites. A city, village or town may enact and administer a nonmetallic mining reclamation ordinance and program that complies with state law. Chapter NR 135.40 requires that the operator of a nonmetallic mine file a financial assurance with the regulatory authority (city, town, village or county) following approval of the nonmetallic reclamation permit, and as a condition of the permit. The amount of financial assurance is required to equal as closely as possible the cost to the local government regulatory authority of hiring a contractor to complete either final reclamation or progressive reclamation according to the approved reclamation plan. The amount of financial assurance must be reviewed periodically by the regulatory authority to assure it equals outstanding reclamation costs. Further, for certain nonmetallic mining sites affecting navigable waters a DNR permit is required.

The bill would require that if a nonmetallic mining site is subject to a county nonmetallic mining ordinance and the city, village, or town in which the nonmetallic mining site is located requires the operator of the nonmetallic mining site to provide financial assurance, the county would be required to credit the value of the financial assurance provided to the city, village, or town against the amount of financial assurance that the county ordinance requires the operator to provide.

Further, the bill would specify that if DNR requires that financial assurance be provided as a condition for one of the following four navigable waters permits for nonmetallic mining or reclamation, alternative forms of financial assurance may be provided. The four permits include: (a) a permit under s. 30.19 to enlarge and protect a waterway, including to construct, dredge or enlarge any artificial water body that connects with a navigable waterway; (b) a permit under s. 30.195 to change the course of a navigable stream; (c) a permit under s. 30.20 to remove any material from the bed of any navigable lake or from the bed of any outlying waters of the state; or (d) a contract under s. 30.20 for nonmetallic mining or reclamation of materials removed from navigable waters. The bill would allow the financial assurance to include a bond or alternative financial assurance, which could include one of the following: (a) cash; (b) a certificate of deposit; (c) an irrevocable letter of credit; (d) an irrevocable trust; (e) an escrow account; (f) a government security; or (g) any other demonstration of financial responsibility. The bill specifies that any interest earned by the financial assurance would be paid to the person operating the nonmetallic mining or reclamation project. These methods of financial assurance would be similar to those currently required under administrative rule NR 135.40 for nonmetallic mining reclamation sites that are not in navigable waters.

[AB 655/SB 313 Sections: 127 and 282]

4. NONMETALLIC MINING -- NOTICING REQUIREMENTS UNDER COMPREHENSIVE PLANS

In developing written procedures relating to how a governing body of a local governmental unit will invite public input for the development of a comprehensive plan, the bill would specify that the written procedures required under current law must newly include procedures that would describe the methods the governing body will use to distribute proposed, alternative or amended elements of the comprehensive plan to certain persons with interests in nonmetallic mineral resources. The persons subject to this new distribution procedure would be landowners or leaseholders with an interest in property under which the persons may extract nonmetallic mineral resources where the allowable use or the intensity of use of the property would be affected by the comprehensive plan.

The bill would specify that at least 30 days before the current law public hearing is called by the governing body of a local governmental unit to discuss the adoption of a comprehensive plan, the governmental unit would be required to provide the following individuals written information where the allowable use or the intensity of use of the property would be affected:

1. Landowners or leaseholders with an interest in property under which the persons may extract nonmetallic mineral resources.

2. An operator who has obtained a nonmetallic mining reclamation permit.

3. A person who has registered a marketable nonmetallic mineral deposit.

4. Any other person who the local governmental unit knows has a property interest in nonmetallic mineral resources in the jurisdiction.

The bill would also specify that the agricultural, natural resources and cultural resources element of the comprehensive plan would have to recognize current law limitations on a jurisdiction's ability to place zoning limitations on a property that has been registered as a marketable nonmetallic mineral deposit.

Under current law, local units of government are required to create comprehensive plans by January 1, 2010, that include background and goals for local units of government, housing, transportation, agricultural, natural, and cultural resources, economic development, intergovernmental cooperation, land use, and implementation planning elements. The governing body of a local unit of government must adopt written procedures designed to foster public participation in every stage of developing a comprehensive plan. A comprehensive plan, or changes to the plan cannot be adopted unless at least one public hearing is held at which the proposal is discussed. Official notice of such a meeting must be provided (generally at least one notification in the municipality's official newspaper at least 30 days before the meeting).

[AB 655/SB 313 Sections: 154 thru 156]

5. PSC -- TELECOMMUNICATION DEREGULATION APPROVAL DEADLINE

Under the bill, the Public Service Commission (PSC) would be required to complete the review of petitions for the partial deregulation of telecommunications services within 120 days of the filing of a petition from a telecommunications utility or of a Commission review of the matter on its own motion. The PSC would be required to complete its proceedings on such a petition or motion involving a determination that a lesser degree of regulation would serve the public interest, based on the following current law factors:

1. The number and size of the telecommunications utilities or other persons providing the same, equivalent or substitutable service.

2. The extent to which the same, equivalent or substitutable service are available in the relevant market.

3. The ability of customers in the market area to obtain such services at comparable rates, terms and conditions.

4. The ability of the telecommunications utilities or other persons to make such services readily available in the market area at comparable rates, terms and conditions.

5. The relevant market power of each service provider and any apparent trends in how that market power may change.

6. The affiliation of any service provider in the market area that might affect competition.

7. The existence of any significant barrier to the entry or exit of a service provider in the market area.

Under current law, the PSC must issue findings of fact on each of the foregoing factors when making a determination as to whether effective competition exists in a market such that a lesser degree of regulation could be authorized. If the PSC determines that a lesser degree of regulation is warranted, it may suspend only those regulatory provisions enumerated in statute. The PSC may also place conditions upon the deregulation and may at any time revoke this deregulation, if necessary, to protect the public interest.

In the event the PSC failed to complete its review within the prescribed time period, the bill stipulates that the petition for partial deregulation would be considered granted without condition and any of the above factors specified in the petition would be considered suspended by the Commission. Under such an approval, the current law authority of the PSC to revoke its order and suspend any aspect of the partial deregulation would no longer apply. This provision would first

apply to petitions for partial deregulation of telecommunications services filed with the PSC after the general effective date of the legislation.

[AB 655/SB 313 Sections: 163, 164, and 291(2)]

6. PSC -- TIME HORIZON FOR INFORMATION INCLUDED IN STRATEGIC ENERGY ASSESSMENTS

The bill would increase from three years to seven years the time horizon for describing the large electric generating facilities and high-voltage transmission lines that utilities have plans to begin to construct. Under current law, the PSC must prepare biennial strategic energy assessments that evaluate the adequacy and reliability of the state's present and future energy supplies. Among other things these assessments must currently include a description of the large electric generating facilities and high-voltage transmission lines that each utility plans to start constructing within the next three years.

[AB 655/SB 313 Sections: 168 thru 171]

7. R&L -- REAL ESTATE RECIPROCAL LICENSES

The bill would authorize the Department of Regulation and Licensing (R&L), after consultation with the Real Estate Board, to enter into reciprocal agreements with other states or territories of the United States for licensing real estate brokers and salespersons. R&L would be authorized to grant reciprocal licenses to applicants who are already licensed as real estate brokers or salespersons in those other jurisdictions, subject to the terms and conditions specified in the reciprocal agreements.

Subject to the terms of the reciprocal agreement, a licensed applicant from a jurisdiction with such an agreement with Wisconsin could receive a real estate broker or salesperson reciprocal license without submitting evidence that the individual had successfully completed the specific educational programs and passed a broker or salesperson examination, as currently required of Wisconsin-licensed real estate broker and salesperson applicants.

[AB 655/SB 313 Sections: 286 thru 289]

8. ADMINISTRATIVE RULEMAKING AND PROCEDURES -- ECONOMIC IMPACT REPORTS

The bill would require an agency that has prepared a scope statement for a proposed administrative rule to prepare an economic impact report under certain circumstances prior to

submitting the draft rule to the Legislative Council Rules Clearinghouse. The economic impact report would have to be prepared if any municipality, association that represents a farm, labor, business, or professional group, or five or more persons having an interest in the proposed rule ("the interested parties") petition the agency for such a report and the agency determines that these interested parties may be economically affected by the proposed rule. The bill would also specifically accord these interested parties the right to petition state agencies for this purpose, including the authority to petition with respect to existing or proposed agency guidelines or policies and agencies' comments and policies in response to federal regulations.

Generally, an economic impact report would be required to include information on the effect of a proposed or existing rule, guideline, or policy on specific businesses, business sectors, and the state's economy. Agencies would be required to solicit information and advice from the Department of Commerce and any other governmental unit, association, business, and individual that may be affected by the matter. While the agency would be authorized to request information from other state agencies, governmental units, associations, businesses, and individuals, these entities would not be required to provide such information. The bill requires an agency's economic impact report to be submitted to the Legislative Council Rules Clearinghouse, the Department of Administration (DOA), and the petitioner.

An agency economic impact report would have to include all of the following elements:

1. An analysis and quantification of the problem, including any risks to public health or the environment that the matter is intending to address.

2. An analysis and quantification of the economic impact of the matter, including direct, indirect, and consequential costs reasonably expected to be incurred by the state, governmental units, associations, businesses, and affected individuals;

3. An analysis of the matter's impact on the state’s economy, including how it affects the state’s economic development policies;

4. An analysis of benefits of the matter, including how it would reduce the risks and address the problems that the matter is intended to address;

5. An analysis that compares the benefits of the matter to its costs;

6. An analysis of existing or anticipated federal programs that are intended to address the risks and problems that the agency is intending to address by the matter, including whether the matter and related administrative requirements are consistent with and not duplicative of those existing or anticipated federal programs;

7. An analysis of regulatory alternatives to the matter, including the alternative of no regulation, and a determination of whether the matter addresses the identified risks and problems the agency is intending to address in the most cost-efficient manner; and

8. A comparison of the costs of the matter for Wisconsin businesses compared to costs for similar businesses located in Illinois, Indiana, Iowa, Michigan, Minnesota, and Missouri.

The requirements for the preparation of an economic impact report would not apply to the promulgation of emergency rules.

[AB 655/SB 313 Section: 175]

9. DOA -- ADMINISTRATIVE RULEMAKING AND PROCEDURES -- REVIEW OF PROPOSED RULES

The bill would specify that if the Department of Administration (DOA) receives an economic impact report from a state agency in connection with the proposed promulgation of an administrative rule, DOA would be required to review the proposed rule and issue a report. Further, any municipality, association that represents a farm, labor, business, or professional group, or five or more persons having interest in the proposed rule would also be authorized to petition DOA to review the proposed rule. Finally, if DOA determines that the petitioner would be economically affected by the proposed rule, DOA would also be required to review the matter and issue a report. DOA would be required to notify the affected agency that a report is forthcoming and that the agency could not submit the proposed rule to the Legislative Council Rules Clearinghouse until DOA's report had been received.

DOA's report would have to include all of the following findings relating to the proposed administrative rule:

1. That the economic impact report completed by the agency is supported by related documentation contained in the report;

2. That the agency has clear statutory authority to promulgate the proposed rule;

3. That the proposed rule, including any administrative requirements, is consistent with and not duplicative of other state rules or federal regulations;

4. That the proposed rule is consistent with the Governor’s positions and priorities, including those related to economic development; and

5. That the data, studies, and other sources of information used in developing the proposed rule are complete, accurate, and derived from accepted scientific methodologies.

The bill would require DOA to make a similar series of findings with respect to any proposed guideline or policy that a state agency intended to promulgate. Under current law, guidelines or policies that an agency intends to apply generally are to be promulgated as administrative rules under Chapter 227 procedures. It is not clear what kinds of guidelines or policies would be affected by this parallel provision contained in the bill. Currently, the statutes do not provide for the promulgation of guidelines or policies, as distinct from administrative rules.

Before issuing its report, DOA would be authorized to return the proposed rule to the agency for further consideration and revision. A written explanation of why DOA was returning the proposed rule would also be required. The agency would be required either to address the issues raised by DOA or to submit notification in writing that the agency did not agree with DOA's reasons for returning the proposal. The DOA Secretary would be required to approve the proposed rule when the agency had adequately addressed the issues raised by DOA's review of the rule. Once DOA approves of the proposed rule, the bills would require DOA to submit a statement to the Governor indicating its approval, the correspondence between the agency and DOA related to the proposed rule, and a copy of DOA's report on the proposed rule. Similarly, DOA would be authorized to prohibit an agency from implementing a proposed guideline or policy until the DOA Secretary had determined that the matter met all of the types of findings that DOA must make with respect to a proposed rule.

[AB 655/SB 313 Section: 176]

10. ADMINISTRATIVE RULEMAKING AND PROCEDURES -- ADDITIONAL CHANGES

In addition to the requirements that agencies prepare an economic impact report for proposed rules under certain circumstances and that DOA review the proposed rules under certain conditions, the bill would make additional changes relating to administrative rulemaking and procedures.

Additional Information Included in the Agency's Scope Statement for a Proposed Administrative Rule. The bill would require an agency, when preparing the scope statement for a proposed rule as required under current law, to include all of the following in that statement, in addition to the currently required information:

1. A summary of any existing or anticipated federal program that is intended to address the activities to be regulated by the proposed rule and an analysis of the need for the proposed rule, if a federal program exists.

2. An assessment of whether the rule is inconsistent, duplicative, or more stringent than the regulations under any federal program cited above.

Additional Information Included in the Agency's Analysis of a Proposed Administrative Rule. The bill would require an agency, when preparing the analysis of a proposed rule as required under current law, to include all of the following in that analysis, in addition to the currently required summary of the rule and references to the statutes that authorize the rule and that the rule interprets:

1. A summary of the relevant legal interpretations and policy considerations underlying the rule.

2. A summary of existing federal regulatory programs that address similar matters.

3. A summary of the data, studies, and other sources of information on which the proposed rule is based, the methodology used to obtain that information, and a statement of how the information was chosen for inclusion in the proposed rule.

4. Any analysis and supporting documentation used when the agency considered the rule's effect on small businesses or used when preparing the economic impact report.

5. For proposed rules that the agency determines may have a significant fiscal effect on the private sector, a statement of the anticipated costs that will be incurred by the private sector in complying with the rule.

Approval of Proposed Rules by the Governor. The bill would require the agency to submit a proposed rule in final form to the Governor for review, modifications, or rejection. Approval by the Governor would not be required in the case of emergency rule promulgation.

Additional Information Submitted to the Legislature as Part of the Rules Promulgation Process. As part of the current law requirements for legislative review of the proposed rule, the bill would require the agency to submit to the Legislature the notice of the approval of the proposed rule by the Governor; a copy of any economic impact report; a copy of DOA's analysis of the proposed rule; a statement of how the proposed rule advances relevant statutory goals or purposes; an analysis of policy alternatives to the proposed rule (including reliance on federal regulatory programs) and an explanation for the rejection of those alternatives; a summary of public comments to the proposed rule and the agency's response to those comments; and a statement of any changes to the agency's original analysis and fiscal impact statement for the proposed rule.

Contested Case Procedures: Substitution of Hearing Examiners. The bill would authorize a person requesting a hearing before a hearing examiner to file one written request for a substitute hearing examiner no later than 10 days after the person receives notice of a contested case hearing. The original examiner would then have no further jurisdiction in the matter, other than determining whether the request was received in a timely manner and in proper form, in which case the matter would be transferred to another examiner. If the hearing examiner fails to make the determination within seven days, the matter must be referred to the administrator of DOA's Division of Hearings and Appeals, who would make the determination and the reassignment of the hearing, as necessary.

Upon transfer of the hearing to another examiner, the original hearing examiner would have to transmit all papers in the matter to the new examiner.

In addition, the bill would authorize the administrator of the Division of Hearings and Appeals to randomly assign hearing examiners to preside over hearings. Currently, hearing examiners are typically assigned to cases based on the examiner's subject matter expertise.

Contested Case Procedures: Deletion of Authority of Certain Hearing Examiners to Prepare Proposed Decisions. The bill would delete the current authority granted to certain state agencies to have the hearing examiner make a proposed decision and have designated officials of the agency review that proposed decision and issue a final decision. Under the bill, where the hearing examiner prepares the agency's decision, the hearing examiner's decision would instead be final. The bill would revise procedures under the Ethics Board and the Department of Regulation and Licensing's Medical Examining Board to reflect these changes. In the case of the Medical Examining Board, the role of the hearing examiner would be deleted, and the Board would render all decisions without utilizing a hearing examiner.

Contested Case Procedures: Assessment of Costs Arising from Frivolous Claims. The bill would authorize a hearing examiner, who determines that an administrative hearing commenced by either party is frivolous, to award the successful party his or her costs and reasonable attorney fees. Where the costs are awarded against a party that is not a public agency, the costs may be fully assessed against either the party or the attorney representing the party, or may be apportioned between them.

Specify that a claim would be deemed frivolous if the hearing examiner finds either that the matter was commenced, used or continued in bad faith, solely for the purpose of harassing or maliciously injuring another, or that the party or the party's attorney knew or should have known that the matter was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

Contested Case Procedures: Other Procedural Changes. The bill would make the following additional changes to procedures involving administrative law contested cases:

1. A hearing examiner would be prohibited from addressing or making a decision regarding possible constitutional issues.

2. Agencies would no longer be authorized to permit the taking and preservation of evidence in certain administrative hearings with respect to witnesses: (a) who were beyond the reach of an agency or hearing examiner's subpoena; (b) who were about to leave the state and not return in time for the hearing; (c) who were sick or disabled to the extent that they would not be able to attend the hearing; or (d) who were legislators where the Legislature or committee on which the legislator was a member was in session and the legislator had waived his or her privilege against appearing.

3. A notice of a contested hearing would have to include the name and the title of the individual who would conduct the hearing.

Judicial Review of Agency Rulemaking. The bill would specify that any judicial review of an administrative rule be conducted without a jury and that the court treat separately disputed issues of agency procedure, interpretations of law, and determinations of fact or policy within the agency's exercise of delegated discretion. The bill would expand the judicial review of the agency rulemaking process, as follows:

1. A court, when determining if a promulgated rule is valid, would be required to confine its review to the agency record, unless it is necessary to supplement that record with additional evidence.

2. The record subject to review by the court would be expanded to include any economic impact report and related analysis that the agency prepares in response to a petition from a group economically affected by the rule, the plain-language analysis of the rule printed at the time the rule is published, the report (including fiscal estimate) submitted to the Legislature when the proposed rule is in final draft form, and public comments.

3. A court, when reviewing whether a rule is valid, would be required to determine if the agency's decision-making process related to the adequacy of the factual basis to support the rule was arbitrary and capricious, if the agency's required analysis and determinations were arbitrary and capricious, or if the rulemaking process was impaired by a material error in the agency's procedure when promulgating the rule.

4. Where an agency's authority to promulgate a rule requires the rule to be comparable with federal programs or requirements or to exceed federal programs or requirements based on need, a court would be required to conduct a review of the agency record to determine if the agency's determination was supported by substantial evidence.

5. Where a court finds that an agency's analysis and determinations required as part of its economic impact report were arbitrary and capricious, the court would be required to find the rule invalid without compliance with the statutory rulemaking procedures spelled out under Chapter 227 of the statutes.

6. Where the decision of a hearing examiner is inconsistent with the position taken at a contested hearing by the agency, a court would be required to give no deference to the hearing examiner's decision when conducting its review.

Judicial Review of Agency Rulemaking: Change of Venue for Certain Proceedings Involving Nonresidents. The bill would authorize the venue for judicial review of a contested case where the petitioner is a nonresident to be in the county where the property involved is located or (if no

property is involved) in the county where the dispute arose. Under current law, the venue for such proceedings is the Circuit Court of Dane County.

[AB 655/SB 313 Sections: 5, 6, 165, 174, 177 thru 207, 281, 284, and 285]

11. PUBLIC BENEFITS -- AUTHORITY OF PUBLIC UTILITIES TO RETAIN CERTAIN MAJOR MARKETS PUBLIC BENEFITS TRANSITIONAL FUNDING

The bill would authorize the Public Service Commission (PSC) to permit a public utility to retain a portion of the public benefits energy conservation and efficiency and renewable resources transitional funding, instead of contributing the entire amount to the PSC to be credited to DOA's utility public benefits fund, provided: (a) the PSC determines that the portion is used by the utility for energy conservation programs for the industrial, commercial and agricultural sectors in the utility's service area; and (b) the programs comply with rules promulgated by the Commission.

Stipulate that the Commission's rules must: (a) specify the annual energy savings targets that the programs must achieve; and (b) require the utility to demonstrate that no later than a reasonable time period, as determined by the PSC after the utility implements the program, that the economic value of the benefits resulting from the program will be equal to the portion of the transitional funding that the utility is authorized to retain. Specify that any public utility authorized to retain a portion of these transitional funds must still contribute 1.75% of the amount retained to the public benefits fund for research and development in areas of energy conservation and efficiency markets and 4.5% of the amounts retained for renewable resource programs.

Under 1999 Wisconsin Act 9, the PSC was required to identify amounts that major electric and gas utilities collected from their customers in 1998 for low-income energy assistance and weatherization programs and for energy conservation and efficiency, renewable resources and energy conservation research and development programs. Utilities must continue to collect these amounts from their customers and remit these amounts to the PSC for crediting to DOA's utility public benefits fund. Currently, $45.8 million annually of such funding is allocated to the energy conservation and efficiency portion of the public benefits program.

For the 2003-04 and the 2004-05 fiscal years, approximately $24.4 million had tentatively been budgeted for major markets activities under the DOA utility public benefits program prior to the adoption of 2003 Wisconsin Act 33 (the 2003-05 biennial budget act). However, Act 33 diverted $17.6 million in 2003-04 and $29.5 million in 2004-05 of energy conservation and efficiency public benefits funding to other purposes. A portion of these diverted amounts will be applied against activities that would have been budgeted for major markets activities. Consequently, under the bill, it is likely that the PSC would have to adjust the amounts that could actually be retained by public utilities for major market activities during the current fiscal biennium in order to reflect these scheduled diversions.

[AB 655/SB 313 Sections: 7, 166, and 167]

12. PUBLIC BENEFITS -- ENERGY CONSERVATION SAVINGS STANDARDS FOR CERTAIN UTILITY PUBLIC BENEFITS FUND GRANTS

First effective for grants made on July 1, 2005, the bill would require the PSC to promulgate rules specifying annual energy savings targets for energy conservation and efficiency grants made under DOA's public benefits program. No proposal for an energy conservation and efficiency grant could be funded by DOA (or by the program administrator) unless the applicant could demonstrate that within a reasonable period of time after the project's implementation, as determined by PSC, the economic benefits from the project would be equal to the amount of the grant. The PSC rules would be required to specify the annual energy savings targets that the proposal must achieve to be eligible for a grant. Initially, the PSC would be authorized to promulgate emergency rules to establish these targets without the necessity to find that the emergency rules are necessary for the preservation of public peace, health, safety, or welfare. The emergency rules could remain in effect until the permanent rules were promulgated.

Under current law, grants are awarded for a wide variety of energy conservation projects in the residential, industrial, commercial and agricultural sectors. Currently, there are no formal statutory standards with respect to the economic benefits that must flow from any energy conservation grant. However, a project's ability to achieve increased energy conservation or efficiency is a factor in the awarding of grants.

[AB 655/SB 313 Sections: 1 thru 4, 290(1), 291(3), and 292(1)]

13. DFI -- MERGERS AND ACQUISITIONS OF IN-STATE BANKS AND IN-STATE BANK HOLDING COMPANIES

Under current law, a company may not merge or consolidate with an in-state bank holding company without prior approval of the Division of Banking within the Department of Financial Institutions (DFI). The bill would provide that approval of the Division is also required for a merger or consolidation with an in-state bank.

With one exception, current law prohibits the Division from approving an application by an out-of-state bank holding company to acquire an in-state bank or an in-state bank holding company unless the in-state bank or all in-state bank subsidiaries of the in-state bank holding company to be acquired have been in existence and in continuous operation for at least five years. The exception is that such an acquisition may be approved if the out-of-state bank holding company divests itself of the in-state bank or banks within two years of the acquisition date. The bill would provide that these requirements apply to all acquisitions of an in-state bank or in-state bank holding company other than such acquisitions by another in-state bank or in-state bank holding company.

These provisions would take effect on the day after publication of the bill.

[AB 655 Sections: 172, 173, and 292]

14. ACTIONS CONCERNING FINANCIAL INSTITUTIONS

Under the doctrine of promissory estoppel, when a promise has been made to another person, a court of law may find that an enforceable contract exists, even in the absence of a written agreement, and that injustice can only be avoided by enforcement of such promise. The doctrine applies if the person making the promise should reasonably expect the promise to induce action or forbearance of a definite and substantial character on the part of the second person and if the promise induces such action or forbearance. Although the statutes specify certain situations under which an agreement must be in writing, these statutes may not apply if enforcement of the agreement is sought under the doctrine of promissory estoppel.

Under certain conditions, the bill would prohibit a person from commencing an action against a financial institution based on any of the following promises or commitments: (a) a promise or commitment to lend money, grant or extend credit, or make any other financial accommodation; or (b) a promise or commitment to renew, extend, modify, or permit a delay in repayment or performance of a loan, extension of credit, or other financial accommodation. With certain exceptions, this prohibition would apply unless the promise or commitment is in writing, sets forth relevant terms and conditions, and is signed by the financial institution. The bill would further specify that such a promise or commitment by a financial institution could not be enforced under the doctrine of promissory estoppel. For the purpose of these provisions, a financial institution would include a bank, savings bank, or savings and loan association organized under the laws of this state, another state, or the United States. A financial institution would also include all affiliates of a bank, savings bank, or savings and loan associated or organized under such laws. An affiliate would be defined as a business entity that controls, is controlled by, or is under common control with the bank, savings bank, or savings and loan association.

The provisions on actions concerning financial institutions would not apply to transactions subject to the Wisconsin Consumer Act. The Wisconsin Consumer Act generally regulates credit transactions of $25,000 or less that are entered into for personal, family, or household purposes. The provisions would first apply to actions commenced on the day after publication of the bill.

[AB 655 Sections: 209, 291(1), and 292]

15. DWD -- APPRENTICESHIP PROGRAM

The Department of Workforce Development (DWD) is authorized to determine reasonable apprenticeship classifications, issue rules and regulations, issue general or special orders, hold

hearings, and make findings necessary for conducting apprenticeship programs. The Bureau of Apprenticeship Standards in the Division of Workforce Solutions is responsible for monitoring the apprenticeship programs. Apprenticeship programs involve employers, labor unions, employer associations, technical colleges, and the state and federal governments. The employer contracts with an employee to provide a combination of on-the-job and related classroom training in a particular trade, craft, or business. The contract must be approved by the Bureau.

The bill would prohibit the Department from prescribing, under the apprenticeship program, the ratio of apprentices to journeymen that an employer may have at a job site

[AB 655/SB 313 Sections: 158 thru 160]

16. PATIENT HEALTH CARE RECORDS

Under current law, all patient health care records must remain confidential. However the records are required to be released without informed consent if the records are requested in specified circumstances, including, but not limited to: (a) patient treatment; (b) health care provider payment and medical records management; (c) certain audits; and (d) program monitoring, accreditation, and health care services review activities by health care facility staff committees or accreditation or review organizations.

The bill would: (a) authorize, rather than require, release under the specified circumstances; (b) eliminate the requirement that a request for the records be received before the release of the records; and (c) add to the list of specified circumstances under which records may be released without informed consent the purposes of health care operations, as defined and authorized under federal law.

[AB 655/SB 313 Sections: 161 and 162]

17. COUNTY AND MUNICIPAL FEES FOR SERVICES

The bill would require that any fee imposed by a city, village, town, or county bear a reasonable relationship to the service for which the fee is imposed. Also, it would require any municipality or county that is first imposing a fee or increasing a fee after the effective date of the bill to issue written findings that demonstrate that the fee bears a reasonable relationship to the service for which the fee is imposed. This provision is identical to the provision in the 2003-05 biennial budget bill, as passed by the Legislature, that was item-vetoed by the Governor in 2003 Act 33.

[AB 655/SB 313 Section: 153]

18. FISCAL EFFECT

The bill makes no appropriations. However, provisions of the bill may affect revenues received by, or expenditures of, a number of state agencies.

Proponents of the bill argue that regulatory streamlining and reducing permit issuance times would make Wisconsin more competitive with other states and thereby increase the likelihood that businesses will locate or expand in Wisconsin. This may be particularly true of the types of construction or manufacturing processes most likely to be subject to the waterway and air emissions provisions addressed in the bill. They argue that slow or burdensome permit procedures may be discouraging job growth in the state. Others argue that the bill could reduce environmental protections and thereby increase public health costs and harm the state's tourism industry. Opponents of the bill also argue that factors other than permit procedures affect business location and expansion decisions and that states with strong environmental policies also tend to perform well in economic measures.

Administrative Rulemaking. The bill provides no funding or position authorization for any additional agency workload that might arise in connection with the revised administrative rulemaking procedures. To the extent that the requirements for the preparation and submission of additional supporting materials and analysis would necessitate the commitment of additional agency staff time, agencies would be required to provide the additional staff support from existing base level resources.

With respect to the requirement that DOA review the economic impact statements for various agencies' proposed rules, DOA estimates that approximately 200 administrative rules are promulgated annually by executive branch agencies. Approximately 18% are promulgated as emergency rules, suggesting that approximately 164 rules promulgations annually could potentially be subject to an economic impact analysis. The bill does not provide any additional funding or position authorization to DOA for the purpose of reviewing the adequacy of the documentation and justification of agencies' proposed rules. Further, some agency rules are likely to involve subject matter in which DOA staff has little expertise. In the absence of additional resources for DOA to undertake a meaningful review of such complex rules, DOA may be required to rely on the staff of the agency that developed the rule. Some argue that this type of approach could raise concerns about the independence of any DOA review of the proposed rule.

The bill also grants the Governor the authority to review, modify or reject agency proposed rules. The bill establishes no standard for the Governor's review and action. Further, the provision makes no distinction between rules proposed by cabinet agencies and agencies headed by independently elected state officials. Under current rules promulgation procedures, the Legislature has delegated to state agencies the duty to establish administrative rules on matters established by the Legislature. The inclusion of the Governor in this process (particularly where the Governor could block a proposed rule) could raise issues relating to the delegation of legislative powers that may need to be resolved.

DNR Air Emissions Permits. The bill would reduce the number of air pollution construction and operation permits issued by DNR by an unknown number. Issuance of fewer permits would result in decreased costs by the Air Management Bureau. Fewer permits would also mean that DNR would receive a lesser amount of construction permit fee revenue than under current law. DNR issued 206 air construction permits in 2002-03 and received construction permit fee revenue of approximately $2.2 million. Construction permit fees currently support 19.5 air construction permit review staff.

The bill would also result in an unknown number of construction and operation permits being at least partially processed by certified contractors instead of by DNR. For construction permit applications that are submitted to certified contractors, DNR would be required to charge lower construction permit fees than for applications submitted to DNR. This would also reduce the total amount of construction permit fee revenue from that received under current law. It is unknown whether contractors would charge fees in an amount which, when combined with the fees charged by DNR, would result in applicants paying construction permit fees that are less than or more than current law fees.

The bill would not make changes in the air emissions tonnage fees paid by holders of operation permits. However, if a source that is currently required to obtain an operation permit becomes exempt as a result of implementation of the bill, the owner or operator of the source would no longer be required to pay annual emission tonnage fees. Emission tonnage fees support 98.25 authorized DNR positions and 2.0 authorized Department of Commerce positions. The DNR positions primarily process operation permits, and perform associated monitoring, compliance, enforcement and administrative activities.

DNR utilizes construction permit fee revenues for part of the match for the federal clean air grant from EPA. A decrease in construction permit fee revenues could decrease the amount of state funds available to match the federal funds, and could potentially result in a decrease in the amount of federal grant funds awarded to DNR.

The bill would require that operation and construction permits be acted on in time periods that are shorter than under current law and practice. DNR had a backlog of operation permits being processed of approximately 460 as of September, 2003. Since the bill does not provide additional resources to the Department, DNR would need to reallocate resources to complete processing of applications within required timeframes.

If the reduced amount of construction permit fee revenue and annual emissions tonnage fee revenue under the bill would prove insufficient for DNR to process air emissions permits under the timelines included in the bill, DNR would likely seek additional resources through future legislation.

DNR Waterway Permits. The Department of Natural Resources has not yet submitted a fiscal note for the bill. However, some fiscal impacts are anticipated as a result of the changes made

to the permit structure for activities involving navigable waters. As the bill does not provide additional expenditure authority, DNR would be required to absorb these impacts within its current budget authority or seek additional resources through future legislation.

There will be a number of costs to the Department under the bill that are anticipated to be one-time in nature. One of these would involve the staff time required to analyze and draft the types of general permits created under the bill. To the extent that the general permits will require oversight and revision after implementation, some ongoing costs associated with this permitting process may be incurred.

In addition, the bill establishes a specification that activities occurring in outstanding and exceptional resource waters or in state natural areas would require individual permits. There are currently over 400 state natural areas, encompassing in excess of 150,000 acres in 70 counties. In addition, DNR has identified over 500 outstanding resource or exceptional resource waters in administrative rule. Some would argue that requiring individual permits for activities occurring in outstanding and exceptional resource waters means that DNR should evaluate which waters, statewide, were subject to this classification in order to provide adequate protection to exceptional resources. Currently, DNR has only focused on selective water bodies for evaluation under the Outstanding Resource Waters program. If the agency were to determine if additional bodies of water would qualify for this designation, DNR anticipates (among other activities) the need to conduct surveys of streams and other bodies of water located outside of state natural areas that may qualify but have not yet been adequately inventoried. As no additional expenditure authority is provided under the bill, DNR would be required to reallocate existing staff and LTE resources to accomplish this. However, the bill would not require DNR to evaluate additional water bodies, or make an exhaustive determination beyond what has been completed under current law.

The bill would also implement changes in permitting requirements that would affect revenues and costs to DNR on an ongoing basis. In fiscal year 2002-03, DNR received approximately 5,200 waterway and wetland permit applications that generated revenues of approximately $750,000. Under the bill, the number of activities covered by exemptions would increase. In addition, numerous activities would be covered by statewide general permits, rather than individual permits under current law. Consequently, individual permit applications may be expected to decrease significantly under the bill. This decrease in applications would result in both a substantial decrease in the workload associated with processing navigable water-related permits and a decrease in revenues from permit fees. A significant loss of revenue from permit application fees could result in a reduction in water management specialists and LTE positions that were assigned to processing and approving permit applications and who were, under current law, funded through permit application fees. However, to the extent that the workload associated with individual permit application processing would also significantly decrease, these factors, to some extent, may offset one another.

An issue that remains to be determined is how well the current permit processing structure within DNR will be able to adapt to changes under the bill. The bill would require a general permit

for a wider range of activities than are currently authorized. Further, DNR would be required to review each of these general permit requests within 30 days. With individual permits, DNR is authorized to charge an application fee that is proportionate to the work hours required to process and review the permit, allowing the Department to support additional permit processing staff with these fee revenues. Under the bill (as under current law), DNR would not have the authority to charge a fee for the review of general permits. From this perspective, the Department may have difficulty meeting the increased demand within the 30-day time period if general permit requests increase significantly under the bill. In addition, DNR would not receive additional revenues to support application review staff should the workload increase substantially.

Concerns have been raised by some over potential reductions in DNR's authority to approve or deny permits based on water quality or habitat considerations. If, under the bill, DNR is not able to meet federally mandated water quality standards, the EPA could assume responsibility for implementing and enforcing federal minimum water quality standards statewide. This DNR responsibility, as well as the federal support currently received by DNR to complete these activities could be withdrawn. Currently, DNR receives approximately $12.5 million FED annually for activities related to water quality oversight and enforcement. Compliance with federal laws would most likely not be able to be determined until DNR promulgated rules or other criteria under the bill relating to statewide general permits and exemption criteria.

From the perspective that the bill would reduce the level of oversight that DNR has over activities associated with navigable waters by expanding the number of activities that are either exempt or covered under a statewide general permit, more pressure may be placed on local units of government to complete independent reviews of navigable water related projects. Currently, DNR requires individual permits for most of the practices affected by the bill's restructuring of permits. The current application and permit procedure provides extensive background information that local units of government frequently use in making their own determinations on local shoreline ordinances. To the extent that the amount of information typically generated by activities requiring an individual permit would no longer be available for projects (as more activities are covered by exemptions or general permits under the bill), additional efforts could be required of some local governments to generate the information needed to make local determinations. This consideration is likely to vary in relevancy from unit to unit of local governments.

Finally, it should be noted that some have raised legal concerns regarding provisions of the bill relating to navigable waters (Chapter 30) regulations. Constitutional issues have been raised regarding provisions of the bill and the state's public trust doctrine. It is argued that the significantly expanded use of permit exemptions and general permits may not meet the state's obligation under the Wisconsin Constitution to protect public rights in the navigable waters of the state. In particular, to the extent that the standards established in the bill could be viewed as restricting the ability of DNR to deny permits based on recognized public rights (such as navigation, hunting, fishing and other recreational uses) such provisions may be subject to challenge. Others raise the modified due process procedures (notice and hearing) under the bill,

particularly those relating to exemptions and general waterway permits, as subject to challenge (by neighboring land owners or public users of the water body).