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Joint Committee on Finance

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Transfer Commercial Construction Site Erosion Control From DSPTS to DNR (DSPTS and DNR – Environmental Quality)

[LFB 2013-15 Budget Summary: Page 353, #16, and Page 428, #6]

CURRENT LAW

The Department of Natural Resources (DNR) currently is required to establish minimum standards for general storm water management, as well as for erosion control at construction sites not involving construction of a public building or place of employment. The Department of Safety and Professional Services (DSPTS) currently is responsible for establishing minimum standards for erosion control at construction sites involving construction of public buildings or places of employment, and for one- and two-family dwelling sites.

Regulatory authority for commercial construction site erosion control was transferred from DNR to the then-Department of Industry, Labor and Human Relations in 1993 Act 16, parts of which later became the former Department of Commerce. The program was transferred from the Department of Commerce to DNR in 2009 Act 28, and transferred from DNR to the Division of Safety and Buildings in DSPTS under 2011 Act 32. Act 32 required DNR and DSPTS to enter into a memorandum of understanding (MOU) to delineate each agency's responsibilities in regulating erosion control at commercial construction sites.

GOVERNOR

Transfer statutory authority for enforcement of erosion control standards at certain construction sites involving a public building or place of employment from DSPTS to DNR. Require DSPTS to establish statewide standards for erosion control at building sites that have a land disturbance less than one acre in area, and that also are public buildings and buildings that are places of employment. Specify that statutory requirements for soil erosion control standards

for one- and two-family dwelling sites, which DSPS is required by statute to establish, do not apply to construction sites with a land disturbance area that is one acre or more. (DSPS would continue to administer erosion control laws for construction sites that involve the construction of a public building or place of employment, or a one- or two-family dwelling, provided the site has a land disturbance less than one acre.)

Specify DNR is to establish, by administrative rule, minimum standards for: (a) erosion control at construction sites that have a land disturbance one acre or more in area; (b) erosion control at construction sites with a land disturbance area of less than one acre, and that do not involve one- and two-family dwellings, public buildings, or buildings that are places of employment; and (c) storm water management. Specify if DNR determines current administrative rules meet requirements for establishing minimum erosion control and storm water standards, as required by statute, the rules are to be considered as satisfying associated rule-making requirements under Chapter 281 of the statutes. (A technical correction to the bill has been identified as necessary to reflect this intention.) Amend statutory cross-references to specify that, to provide for erosion control and storm water management in areas in its jurisdiction, a county, town, village or city exercising zoning authority may enact ordinances applying to the categories of sites for which DNR is required to establish erosion control standards. Specify that a storm water discharge permit under the Wisconsin Pollutant Discharge Elimination System (WPDES), which under current law is required for storm water discharges from a construction site with a land-disturbing area of one acre or larger, also apply to discharges from a construction site that includes construction of a building. Provide any matter pending with DSPS as of the bill's effective date and relating to erosion control for commercial building sites or one- and two-family dwellings remains the responsibility of DSPS.

DISCUSSION POINTS

1. 2011 Act 32 required the Departments, by October 1, 2011, to enter into an MOU to delineate each agency's responsibilities in regulating commercial construction sites, as construction sites involving a land disturbance of one acre or larger are required under the federal Clean Water Act to be permitted for their storm water discharges. EPA has delegated wastewater and storm water permitting authority in Wisconsin exclusively to DNR. However, in July, 2011, a letter from the U.S. Environmental Protection Agency (EPA) to DNR identified the division of storm water permitting authority as being inconsistent with the EPA's delegation solely to DNR. As such, construction sites of one acre or more not permitted by an approved authority (DNR) risk being in violation of the Clean Water Act. Due to EPA concerns, the agencies did not complete the MOU or the program transfer. Instead, DNR has continued to administer erosion control standards and permitting, where necessary, for commercial construction sites. The provision is intended to address this issue identified by EPA and consolidate regulatory authority for activities requiring a WPDES permit in DNR.

2. Construction sites of one acre or larger seeking storm water permit coverage must submit a notice of intent (NOI) to seek coverage under a permit; DNR at this time typically confers

coverage to one-acre construction sites or larger through a statewide general permit. Permit holders are assessed fees established by administrative rule NR 216 (storm water discharge management). Fees payable are: (a) \$140 for sites with fewer than five acres of land disturbance; (b) \$235 for sites with a land disturbance of at least five acres but less than 25 acres; or (c) \$350 for sites with a land disturbance of at least 25 acres. NOIs submitted to DNR constitute certification by the site owner that all applicable performance standards are being met by the erosion control plan. DNR reviews NOIs to determine whether that self-certification is plausible, as well as to assess any potential for a project to affect wetlands, threatened or endangered species, or cultural and historical artifacts and structures.

3. Administrative rule SPS 360 implements the responsibilities of DSPTS in regulating construction sites for public buildings and places of employment. SPS 360 includes language that is intended to make the rule functionally equivalent to NR 216 for purposes of regulating commercial building sites that are required to be WPDES-permitted. For example, SPS 360 requires a person to: (a) submit a notice of intent if disturbing an area of one acre or larger; (b) create and maintain an erosion control plan for the construction phase; and (c) create and maintain a storm water management plan for the building's use following completion of construction. All are consistent with federal permitting requirements.

4. Although DSPTS has not conducted significant administration of construction site erosion control standards since January 1, 2010, when 2009 Act 28 transferred programs to DNR, sites with a land disturbance of less than one acre generally would have remained subject to the performance standards in administrative rule NR 151 (runoff management) since Act 32. Provisions of this rule specify that construction sites not requiring a WPDES permit are to establish on-site practices to prevent discharges of sediment from construction sites. This coverage is in place for most sites with land disturbance smaller than one acre, regardless of whether a public building or place of employment is under construction. DNR has promulgated this rule under s. 281.16 of the statutes, which requires DNR to establish performance standards for nonpoint sources of water pollution to meet state water quality standards.

5. In addition, Chapter 283 of the statutes, relating to wastewater discharge permits, and administrative rule NR 216 provide DNR authority to require a construction site storm water permit for any site, regardless of size, that either contributes to violation of a water quality standard or is determined to be a significant contributor of pollutants to the waters of the state. DNR staff report this authority has not been invoked in recent years, if ever, although it is an authority a state storm water permitting program is required to hold under the Clean Water Act.

6. DSPTS is responsible for administering the state one- and two-family uniform dwelling code, including standards for construction site erosion control for such dwellings. DSPTS performs the following activities related to construction site erosion control at one- and two-family dwellings: (a) inspects soil erosion control activities at building sites where building inspections are performed or where complaints have been received; (b) provides consultation and advice to persons who may perform soil erosion control activities; (c) certifies local inspectors who inspect erosion control at building sites; (d) participates in interagency coordination efforts; and (e) audits agent

inspection municipalities. EPA, in the 2011 letter of program concerns, cited DSPS supervision of one- and two-family dwelling construction sites as a potential inconsistency for instances in which a site involves a land disturbance of one acre or larger. According to EPA, these sites are to be regulated by DNR, as the state's delegated permitting authority. DNR reports it has committed to addressing this matter in future administrative rule revisions, per EPA's directive.

7. It is possible a single development site under current law may be under DNR jurisdiction for certain pre-building activity such as street, sewer and water extensions, but shift to DSPS for regulation of erosion control during the construction of a commercial building, provided the site were not required to be WPDES-permitted. One- and two-family dwellings under current law also may be subject to varying agency jurisdictions. Specifically, although DSPS is generally responsible for erosion control standards at one- and two-family dwellings, federal law contains provisions providing that “common plans of development,” such as residential subdivisions, would require a construction site storm water discharge permit if the total land disturbance of multiple sites would be at least one acre. State permitting authorities have latitude in defining sites that constitute a common plan of development. Administrative rule NR 216 specifies individual sites within a common plan of development, but separated by at least a one-quarter mile distance that is undisturbed, constitute separate sites for purposes of determining permitting applicability, provided no road, pipeline, utility project or other connecting feature is disturbed concurrently. One could argue an entity implementing a common plan of development under current law may, depending on the circumstances, be unclear as to which agency is responsible for regulating storm water management on the site after construction.

8. Several arguments could be made in favor of the recommended transfer. Combined regulatory authority, in addition to resolving jurisdictional issues noted by EPA, has been thought by some to provide for more even application of standards by a single agency, instead of two agencies with potentially differing program responsibilities, resources and expertise. For instance, some have argued DNR administration of erosion control standards for all WPDES-permitted commercial building sites could allow one agency with the greatest expertise and knowledge of nearby water resources to review management practices proposed for sites and assess how well the practices would prevent sediment loading. The Committee could consider adopting the Governor's recommendation, as technically corrected [Alternative 1].

9. However, the Governor and administration, in recommending the 2011 transfer of commercial construction site erosion control regulation that took effect with Act 32, argued the oversight of commercial construction sites is best suited to an agency (DSPS) also responsible for administering the commercial building code. Such a structure, it has been argued, centralizes reviews and approvals required of builders and developers, which may assist the furtherance of building projects. However, it would appear such an alternative would not resolve the division of construction site erosion control authority the EPA has identified as a matter of concern. Maintaining a long-term disparity between state and federal law could jeopardize Wisconsin's delegation for wastewater permitting in the future.

10. The Committee could consider transferring to DNR the authority for erosion control

standards at sites with a land disturbance less than one acre and involving construction of public buildings or buildings that are places of employment [Alternative 2]. Under the bill, these sites would remain under the authority of DSPS. This would replace all authorities in DNR that had been transferred under 2009 Act 28. One could argue this would eliminate ambiguity in determining which agency held responsibility for erosion control or storm water management at commercial construction sites. However, it also could be argued that retaining this portion of the program in DSPS would continue allowing persons seeking other permits for the construction of commercial buildings to have regulatory reviews conducted by one agency, provided the land disturbance of the building site were under one acre in size.

11. If the Committee were to consider consolidating all responsibility for commercial construction site erosion control in DNR, it also could consider transferring responsibility for regulation of construction site erosion control at one- and two-family dwellings from DSPS to DNR [Alternative 3a]. One could argue this would eliminate ambiguity in determining which agency held responsibility for erosion control or storm water management at all construction sites, including for common plans of development in which it may at times be unclear which agency's regulatory authority is controlling.

12. If the Committee supports the transfer of regulatory authority for erosion control at commercial construction sites, it would be appropriate to transfer positions from DSPS to DNR sufficient to administer additional program responsibilities. However, 2009 Act 28 and 2011 Act 32 both did not transfer any positions between agencies, and program responsibilities have not substantively changed since 2009 Act 28.

13. If the Committee were to consider transferring authority for erosion control standards at one- and two-family dwellings, it could consider allocating a portion of the current staffing and funding used by DSPS for those purposes. DSPS reports it allocated \$192,100 and spent \$112,700 PR associated with 0.91 FTE in 2011-12 to administer the one- and two-family building site erosion control program. The program revenue funds are derived from permit fees for one- and two-family dwellings, which were \$845,600 in 2011-12. The amount of time is provided through a small portion of the time of several uniform dwelling code inspectors and other staff. DSPS anticipates a similar level of allocation during 2012-13. The Committee could consider appropriating \$112,700 PR with 1.0 position in a DNR annual appropriation, funded by permit fees received by DSPS for one- and two-family dwellings [Alternative 3b]. A corresponding reduction could be specified from the DSPS appropriation currently supporting these program responsibilities.

ALTERNATIVES

1. Approve the Governor's recommendation to transfer commercial construction site erosion control regulation for sites with a land disturbance of one acre or larger from DSPS to DNR, as technically corrected.

2. Adopt Alternative 1. In addition, transfer, from DSPS to DNR, authority for

establishing erosion control standards at sites of less than one acre involving construction of a public building or buildings that are places of employment.

3. Adopt Alternative 2. In addition, specify one or both of the following:
 - a. Transfer, from DSPS to DNR, authority for establishing erosion control standards at all sites involving construction of one- or two-family dwellings.
 - b. Provide DNR \$112,700 PR annually from DSPS building permit fee revenues with 1.0 position. Delete a corresponding amount from the DSPS appropriation for general operations for safety and buildings.

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