

1 **AN ACT** *to repeal* 30.10 (4) (c); *to amend* 227.53 (1) (a) 3.; and *to create* 30.10 (5),
 2 30.10 (6), 30.22, 101.12 (7), 101.63 (10) and 452.05 (1) (bm) of the statutes;
 3 **relating to:** appeals from the determination that a stream is navigable, mapping of
 4 navigable streams, the exemption for certain drainage ditches from certain permit
 5 requirements, and notices in forms for building permit applications and for offers to
 6 purchase real property regarding wetlands and navigable streams and requiring
 7 rule-making.

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

JOINT LEGISLATIVE COUNCIL PREFATORY NOTE: This draft was developed by the joint legislative council’s special committee on navigability and drainage ditches. It is based on drafting instructions given by the committee at its January 19, 2007 meeting. The draft does the following:

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

8 **SECTION 1.** 30.10 (4) (c) of the statutes is repealed.

NOTE: The current law provision regarding navigability of farm drainage ditches is relocated to s. 30.22 and modified by this SECTION and SECTION 4 of this draft.

1 **SECTION 2.** 30.10 (5) of the statutes is created to read:

2 30.10 (5) ADMINISTRATIVE PROCEDURES. In making a determination that any individual
3 body of water is navigable, the department shall use the declaratory rulings procedures under
4 s. 227.41

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

5 **SECTION 3.** 30.10 (6) of the statutes is created to read:

6 30.10 (6) MAPS AND DATA. (a) The department shall develop, and make publicly
7 available, maps and data that show the results of determinations of navigability that are made
8 by the department. At a minimum, the maps and data shall include navigability determinations
9 made after the effective date of this subsection [revisor inserts date]. To the extent
10 practicable, within the constraints of available staff and funds, the department shall
11 incorporate past determinations of navigability into the maps and data.

12 (b) The department shall prepare and periodically update a digital navigable streams
13 database and make the database available to the general public via the Internet.

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

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

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

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

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

COMMENT: This provision is based on 2005 Assembly Bill 500 (AB 500), which was developed by the joint legislative council's special committee on navigable waters recodification. The rule-making provision directs the DNR to include in the rules a description of the current common law and statutory standards for determining whether a lake or stream is navigable. It does *not* authorize the DNR to change those standards.

3 **SECTION 4.** 30.22 of the statutes is created to read:

4 **30.22 Farm drainage ditches.** Except as provided in s. 30.20 (1g) (a), a project that is
5 for an agricultural purpose and is located in or adjacent to a farm drainage ditch is exempt from
6 the requirement for a permit, contract, or approval under this subchapter unless it is shown,
7 by means of a U.S. geological survey map or other reliable scientific evidence, that the farm
8 drainage ditch was a stream that was a navigable water prior to ditching.

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

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

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

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

COMMENT: This provision is based on 2005 Assembly bill 500.

1 **SECTION 5.** 101.12 (7) of the statutes is created to read:

2 101.12 (7) The department shall ensure through the promulgation of rules, specification
3 of forms, or other appropriate means that any form used to apply for a permit for the
4 construction or modification of a public building or place of employment include or be
5 accompanied by a statement that the presence of wetlands or navigable waterways on or
6 adjacent to the construction site could result in the need for the applicant to obtain additional
7 authorization from the department of natural resources for the proposed project, and that the
8 applicant is advised to consult the department of natural resources or a private professional
9 consultant and the local zoning authority for information regarding the possibility that
10 wetlands or navigable waterways are present on or adjacent to the construction site.

11 **SECTION 6.** 101.63 (10) of the statutes is created to read:

12 101.63 (10) Ensure through the promulgation of rules, specification of forms, or other
13 appropriate means that any form used to apply for a permit for the construction or modification
14 of a one- or two-family dwelling include or be accompanied by a statement that the presence
15 of wetlands or navigable waterways on or adjacent to the construction site could result in the
16 need for the applicant to obtain additional authorization from the department of natural
17 resources for the proposed project, and that the applicant is advised to consult the department
18 of natural resources or a private professional consultant and the local zoning authority for
19 information regarding the possibility that wetlands or navigable waterways are present on or
20 adjacent to the construction site.

NOTE: SECTIONS 5 and 6 direct the department of commerce to ensure that standard building permit forms include a cautionary statement regarding the possibility that wetlands or navigable waterways on or

adjacent to the construction site could result in the need for the applicant to obtain DNR approval for the construction project.

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

2 227.53 (1) (a) 3. If the petitioner is a resident, the proceedings shall be held in the circuit
3 court for the county where the petitioner resides, except that if the petitioner is an agency, the
4 proceedings shall be in the circuit court for the county where the respondent resides and except
5 as provided in ss. 73.0301 (2) (b) 2., 77.59 (6) (b), 182.70 (6), and 182.71 (5) (g). If the
6 petitioner is a nonresident, the proceedings shall be held in the county where the property
7 affected by the decision is located or, if no property is affected, in the county where the dispute
8 arose. If the petition is for the review of a determination by the department of natural resources
9 that a waterbody is navigable, if the petitioner is a resident or nonresident, the proceedings
10 shall be held in the county where the property affected by the determination is located. If all
11 parties stipulate and the court to which the parties desire to transfer the proceedings agrees,
12 the proceedings may be held in the county designated by the parties. If 2 or more petitions
13 for review of the same decision are filed in different counties, the circuit judge for the county
14 in which a petition for review of the decision was first filed shall determine the venue for
15 judicial review of the decision, and shall order transfer or consolidation where appropriate.

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

16 **SECTION 8.** 452.05 (1) (bm) of the statutes is created to read:

17 452.05 (1) (bm) In preparing the form for the offer to purchase real property under par.
18 (b), the department shall include a statement that the presence of wetlands or navigable
19 waterways on or adjacent to the real property could affect the purchaser's use of the real
20 property, and that the buyer is advised to consult the department of natural resources or a

1 private professional consultant and the local zoning authority for information regarding the
2 possibility that wetlands or navigable waterways are present on or adjacent to the real property.

NOTE: This provision direct the department of regulation and licensing to ensure that standard forms for an offer to purchase real estate include cautionary statements regarding the possibility that wetlands or navigable waterways on or adjacent to the construction site could result in the need of the applicant to obtain DNR approval for the construction project.

3 **SECTION 9. Nonstatutory provisions.** (1) DEPARTMENT OF COMMERCE. Before
4 requiring any municipality or municipal agency to utilize forms used to apply for a permit for
5 the construction or modification of a public building or place of employment or of a one- or
6 two-family dwelling that have been revised to comply with the requirements of section 101.12
7 (7) or 101.63 (10) of the statutes, as created by this act, the department of commerce shall allow
8 the municipality or municipal agency a reasonable time to exhaust its supply of forms that do
9 not comply with section 101.12 (7) or 101.63 (10) of the statutes.

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(END)