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Environmental Law

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Environmental-law-related developments in 2013 focused generally on water and iron mining. The Seventh Circuit Court of Appeals decided a case on permitting under the Clean Water Act (CWA); the Wisconsin Supreme Court decided a case involving the authority of the Wisconsin Department of Natural Resources (DNR) to regulate water levels of impounded lakes; and the Wisconsin Court of Appeals decided a case regarding the standard for injunctive relief in wetland violations and a case that examined whether cow manure is a pollutant for insurance claims. The Wisconsin Legislature passed comprehensive legislation that created a separate and expedited permitting process for ferrous (iron) mining. The legislature also passed the state budget and addressed issues of wetland violations enforcement and air permitting. The DNR revised rules related to the remediation of contaminated properties and has proposed revisions to procedures for the environmental review of agency actions.

Seventh Circuit Court of Appeals

In *Wisconsin Resources Protection Council v. Flambeau Mining Co.*, 727 F.3d 700 (7th Cir. 2013), the Seventh Circuit Court of Appeals held that the “permit shield” defense of the CWA, 33 U.S.C. § 1342(k), applies when a National Pollutant Discharge Elimination System (NPDES) permit holder is not on notice that its facially valid permit is potentially invalid. This case involved a stormwater discharge permit issued by the DNR.

In 1974, the U.S. Environmental Protection Agency (EPA) delegated authority to the DNR to implement a state version of the CWA. After receiving legislative authority under former chapter 147 (now chapter 283), the DNR adopted administrative rules to implement the Wisconsin Pollutant Discharge Elimination System (WPDES)

Textual references to the Wisconsin Statutes are indicated as “chapter xxx” or “section xxx.xx,” without the designation “of the Wisconsin Statutes.” Unless otherwise indicated, in the Statutory Developments section of this chapter, all references to the Wisconsin Statutes are to the 2011–12 Wisconsin Statutes, as affected by acts through 2013 Wisconsin Act 116.

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program. Once the EPA delegates permitting authority to a state, the state may modify its permitting program only with further approval from the EPA. In 1994, Wisconsin modified its WPDES program to comply with new federal stormwater regulations. Wisconsin adopted new state regulations, but the modifications were never approved by the EPA for federal purposes.

Under the state WPDES program, a facility may comply with stormwater regulations by obtaining (1) a WPDES permit, or (2) a different permit that regulates stormwater, as provided in Wisconsin Administrative Code section NR 216.21(4)(a). A party is in compliance under section NR 216.21(4)(a) if it is subject to another permit that contains stormwater requirements at least as stringent as those required by the WPDES permit regulations. That alternative means of compliance was part of Wisconsin’s 1994 proposed WPDES program revisions that had not been approved by EPA at the time this case arose.

The petitioners in this case brought an action under the citizen-suit provision of the CWA, 33 U.S.C. § 1365, alleging that the Flambeau Mining Company (Flambeau) was discharging stormwater into a navigable water without a WPDES permit. In fact, Flambeau did not have a WPDES permit at the time the case arose because the DNR chose to regulate Flambeau’s stormwater discharges through a mining permit as allowed by section NR 216.21(4)(a). *Flambeau*, 727 F.3d at 704. The petitioners asserted that section NR 216.21(4)(a) was not part of Wisconsin’s EPA-approved NPDES program because the EPA had not officially accepted the regulation, and, therefore, Flambeau was discharging without a valid permit. *Id.* at 705.

Flambeau claimed it was protected by the permit shield provision of the CWA, 33 U.S.C. § 1342(k), which provides that compliance with a permit shields a facility from citizen suits. The district court disagreed. It found the permit shield did not apply because Flambeau did not have a WPDES permit when the petitioners brought their action and the EPA had not approved the WPDES modifications that would have covered Flambeau under section NR 216.21(4)(a). *Id.*

The Seventh Circuit Court of Appeals reversed the district court’s decision on due-process grounds. *Id.* at 707–11. Flambeau was informed in writing by the DNR, the authorized Wisconsin permitting agency, that its mining permit would serve as a WPDES permit under section NR 216.21(4)(a), and Flambeau was unaware that EPA had not officially approved section NR 216.21(4)(a). The court held that the permit shield must apply in this situation because Flambeau did not have notice that its permit might be invalid. *Id.*

Wisconsin Supreme Court

In *Rock-Koshkonong Lake District v. DNR*, 2013 WI 74, 350 Wis. 2d 45, 833 N.W.2d 800, the Wisconsin Supreme

Court reversed a decision by the court of appeals on the DNR's authority to regulate water levels of Lake Koshkonong, an impounded lake on the Rock River.

In 2003, the Rock-Koshkonong Lake District and other parties petitioned the DNR to raise the water levels of the lake from those established in a 1991 DNR order and to eliminate a winter level "drawdown" set by the order. *Id.* ¶¶ 3, 27; see Linda H. Bochert & Leah H. Ziemba, *Environmental Law, in Annual Survey* 83 (State Bar of Wisconsin PINNACLE 2012) (outlining the complete factual history of the case in greater detail). The DNR denied the petition under section 31.02(1), which grants the DNR authority to establish water levels for impounded lakes "in the interest of public rights in navigable waters or to promote safety and protect life, health and property." *Id.* ¶¶ 27, 30. The denial was affirmed by an administrative law judge, the circuit court, and the court of appeals. See *Rock-Koshkonong Lake District v. DNR*, 2011 WI App 115, 336 Wis. 2d 677, 803 N.W.2d 853.

Four issues were presented to and decided by the supreme court. First, the court considered the level of deference to be granted to the DNR's conclusions of laws. The court granted the DNR no deference because the decision was inconsistent with the agency's prior opinions, ignored supreme court precedent, and provided new interpretations to both the Wisconsin Constitution and Wisconsin Statutes. *Rock-Koshkonong*, 2013 WI 74, ¶¶ 60–63, 350 Wis. 2d 45.

Second, the court determined whether the "DNR exceeded its authority in making a water level determination under Wis. Stat. § 31.02(1) 'in the interest of public rights in navigable waters,' by considering the impact of water levels that are adjacent" to the lake and are above the ordinary high water mark." *Id.* ¶ 6. The court held that the DNR

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erred in relying on the public trust doctrine to regulate nonnavigable land and water above the ordinary high-water mark because such resources were beyond the scope of the public trust doctrine. *Id.* ¶ 11. However, the court held that the DNR *did* have statutory authority, grounded in police powers, to consider water-level impact on *all* adjacent property under section 31.02(1). *Id.* ¶ 95. The DNR erred in part by relying on the public trust doctrine, but it had another statutory authority—so its action was upheld.

Third, the court held that the DNR may consider water quality standards in Wisconsin Administrative Code chapter NR 103 when it makes a water-level determination pursuant to section 31.02(1). The court explained that chapter NR 103 defines wetland functions and values to be considered in regulatory decisions. *Id.* ¶ 114. Therefore, the court concluded that the DNR should not be barred from consulting relevant water quality standards when making a water-level determination. *Id.* ¶ 116.

Finally, the court examined whether the DNR must consider relevant economic evidence when making a water-level determination under section 31.02(1). The court held that the DNR's authority to regulate water levels to "protect ... property" under section 31.02(1) includes not only the physical land, but also the economic improvements and interests in the land. *Id.* ¶ 139. The DNR *must* consider the economic impacts of a water-level determination when the decision will adversely affect some interests. *Id.* ¶ 13. Nevertheless, the DNR retains discretion to consider only relevant, not remote, economic impacts. *Id.* ¶ 146.

Wisconsin Court of Appeals

The Wisconsin Court of Appeals decided one case related to injunctive relief standards for wetland violations, and another case regarding whether cow manure was a pollutant under an insurance pollution exclusion clause.

The Wisconsin Court of Appeals applied a new standard for injunctive relief to cases that deal with wetland protection statutes in *State v. CGIP Lake Partners, LLP*, 2013 WI App 122, 351 Wis. 2d 100, 839 N.W.2d 136. There, the DNR sought penalties and an injunction to remove a road and restore a wetland, in an action against a property owner who unlawfully built a road through a wetland in violation of section 281.36(2)(a). *Id.* ¶ 1. The

circuit court applied penalties to the defendant, but declined to grant the injunction.

On appeal, the DNR asserted, and the court of appeals agreed, that the circuit court erred in not granting the injunction. The court of appeals held that injunctions against wetland violations should be granted according to the standard in *Forest County v. Goode*, 219 Wis. 2d 654, 579 N.W.2d 715 (1998). *CGIP Lake Partners*, 2013 WI App 122, ¶ 22, 351 Wis. 2d 100. While *Goode* was a shoreland zoning case, the court of appeals held it applicable here, because the purpose of both shoreland zoning ordinances and wetland protection statutes is to protect the waters of the state. *Id.* ¶ 23. Under the adopted *Goode* standard, there is a rebuttable presumption that a court should grant an injunction once a violation of a wetland protection statute is proved. *Id.* ¶ 25. “To overcome this presumption, the defendant must convince the court that there are compelling equitable reasons to deny injunctive relief.” *Id.*

The court of appeals held that, under the *Goode* standard, the circuit court placed an unfair burden on the state to obtain an injunction against the landowner. The case was reversed and remanded with orders to grant the injunction.

In *Wilson Mutual Insurance Co. v. Falk*, 2014 WI App 10, 352 Wis. 2d 461, ___ N.W.2d ___ (review granted), the Wisconsin Court of Appeals held that cow manure from a dairy farm was not a pollutant under the pollution exclusion clause of an insurance policy.

Wilson Mutual provided property and personal liability insurance to Robert and Jane Falk, the owners of a dairy farm. The insurance policy provided coverage for the operation of the Falks’ farm, but expressly excluded losses from the

“discharge, dispersal, seepage, migration, release, or escape of ‘pollutants’ into or upon land, water, or air” and “any loss, cost, or expense arising out of any ... claim or suit by or on behalf of any governmental authority relating to testing for, ... cleaning up, removing, ... or in any way responding to or assessing the effects of ‘pollutants.’”

Id. ¶ 5. The policy defined “pollutant” as “any solid, liquid, gaseous ... irritant or contaminant, including ... waste.” *Id.* (pollutant exclusion clause). The term “waste” included “materials to be recycled, reclaimed, or reconditioned, as well as disposed of.” *Id.*

Early in 2011, the Falks fertilized their fields with manure from their dairy cows according to a nutrient management plan prepared by an agronomist and approved by the county conservation division. *Id.* ¶ 6. In the spring of 2011, the DNR notified the Falks that their farm’s manure had polluted an aquifer and neighboring wells. The neighboring well owners demanded compensation from the Falks, who turned to Wilson Mutual for coverage under their insurance policy.

Wilson Mutual brought an action in circuit court to declare that the Falks’ damages fell under the pollution exclusion clause of the insurance policy. The circuit court found the pollution exclusion clause applied and denied the Falks any coverage. The Falks appealed the decision to the Wisconsin Court of Appeals.

On appeal, the court conceded that manure fits the plain meaning of “pollutant” under the insurance policy. However, the policy’s definition of “pollutant” was found to be “undeniably broad” because “there is virtually no substance or chemical in existence that would not irritate or damage some person or property.” *Id.* ¶ 10. Accordingly, the court applied the supreme court’s narrowed analysis of pollution exclusion clauses articulated in *Peace v. Northwestern National Insurance Co.*, 228 Wis. 2d 106, 596 N.W.2d 429 (1999). Following *Peace*, the court of appeals examined whether the manure from the Falks’ farm would be a pollutant “as understood by a reasonable person in the position of the insured.” *Wilson Mut.*, 2014 WI App 10, ¶ 10, 352 Wis. 2d 461.

The insureds in *Wilson Mutual* were dairy farmers, and from the perspective of the reasonable dairy farmer, the court held that manure is not considered a pollutant, irritant, or contaminant; it is “liquid gold” because it is used to fertilize the fields that grow the food that nourishes the cows. *Id.* ¶ 15. Moreover, the court explained that Wilson Mutual could not maintain that it had not considered that it would have to pay claims related to manure spreading because it insured the Falks’ manure-handling equipment. *Id.* ¶ 16.

STATUTORY DEVELOPMENTS

Mining

Wisconsin enacted comprehensive metallic mining regulations in the 1970s when Exxon Minerals was seeking to mine a large copper and zinc deposit near Crandon. Spurred by recent interest in mining a significant iron deposit in the Penokee Range in Ashland and Iron Counties, the legislature created a separate, accelerated process governing one form of metallic mining—ferrous (iron) mining—with the passage of 2013 Wisconsin Act 1 (Act 1), signed into law on March 11, 2013. Act 1 differentiates ferrous (iron) mining from nonferrous metallic mining, establishes most of the regulatory provisions in the statute instead of relying on the adoption of detailed administrative rules, and mandates that its provisions control in the case of conflicts with statutes or rules that apply to ferrous metallic mining. Act 1 changed the name and the scope of chapter 293 from “Metallic Mining” to “Nonferrous Metallic Mining”; and created a new subchapter (subchapter III) in a new chapter, chapter 295, to apply to ferrous metallic mining. Some procedures and standards from chapter 293 were carried over into chapter 295, while others were revised. The most significant provisions of the law—procedural changes and modifications to the DNR’s authority—are summarized here.

Ferrous Mining: DNR Permitting Process

In Wisconsin, a person needs permission from the DNR to conduct any of three levels of metallic mineral mining activity: (1) exploration, (2) prospecting or bulk sampling, and (3) mining. Act 1 accelerates and modifies the permitting process for all three activities as they relate to ferrous mining.

Exploration Permits. Act 1 makes several changes to the application process and issuance of exploration licenses to expedite the permitting process. All requirements for an exploration license are now set forth in the statute instead of in administrative rules. Wis. Stat. § 295.44(2); *see also* 2013 Wis. Act 1, § 103 (requiring DNR to clarify that rules promulgated under chapter 293, *see, e.g.*, Wis. Admin. Code ch. NR 130, do not apply to ferrous mining).

Once an application has been filed, it is automatically deemed to be administratively complete, and the DNR has 10 days to approve or deny the application. Wis. Stat. § 295.44(4)(b). Only upon written notice to the applicant from the DNR within 10 days from submission can an application be considered incomplete. Wis. Stat. § 295.44(4)(b).

Act 1 changes the standards for approving or denying an application for exploration. An exploration application for ferrous mining must be denied if it will have “substantial and irreparable adverse impact on the environment or present a substantial risk of injury to public health and welfare.” Wis. Stat. § 295.44(4)(e). Once approved, an operation must notify the DNR of intent to drill at least 5 days before drilling (instead of 10 days for nonferrous minerals) and no notice is needed when drilling of each drillhole commences or when filling a drillhole (instead of 24-hour notice for nonferrous minerals). Wis. Stat. § 295.44(8).

Prospecting or Bulk Sampling Permits. After exploration, a mining operation generally begins to examine larger samples of minerals in a process called prospecting. Act 1 eliminates the need for a prospecting permit for ferrous mining. Instead, ferrous operations must submit “bulk sampling plans” to the DNR. *Bulk sampling* is defined as excavating to remove less than 10,000 tons of material to obtain site-specific data. Wis. Stat. § 295.41(7). The necessary components for a bulk sampling plan are listed in section 295.45(2). Once the DNR receives the bulk

sampling plan, and at least a \$5,000 bond, Wis. Stat. § 295.45(5), it has 14 days to determine what approvals will be necessary to implement the plan and what exceptions may apply. Wis. Stat. § 296.45(3). The applicant may petition for a waiver from any of the necessary approvals, and the DNR must respond within 30 days. Wis. Stat. § 295.45(4)(a). No public hearing is required for determinations of waivers. All other standard approvals for a bulk sampling plan must be decided within 60 days. Wis. Stat. § 295.45(10)(a).

The DNR must require the bulk sampling activity to occur in an area that minimizes environmental impacts to the extent practicable. Wis. Stat. § 295.45(2). While the DNR has historically prepared an environmental impact statement (EIS) to issue prospecting permits for some metallic mines, no EIS is required for bulk sampling of ferrous minerals. Wis. Stat. § 295.45(11). Additionally, Act 1 grants the DNR authority, regardless of what local controls exist, over any stormwater management and erosion control of the construction site. Wis. Stat. § 295.45(3m). All deadlines for the DNR's review in Act 1 are controlling, even when the deadlines conflict with other general statutes or administrative rules.

Preapplication Description and Notification. At the same time a bulk sampling plan is filed, Act 1 requires a preapplication description. Wis. Stat. § 295.46. The preapplication description must include information and maps about the proposed mine site. Wis. Stat. § 295.46(1). Once the preapplication description and bulk sampling plan are received, the DNR must publish a notice and hold a public informational hearing within 30 days in the county in which the majority of the mine site is located. Wis. Stat. § 295.46(2)(d). The DNR can accept comments for 30 days, instead of 45 days for nonferrous mining applications, after the publication of the notice for a public hearing. Wis. Stat. § 295.46(2)(b)2.

In addition to a preapplication description, a mining operation must also file a preapplication notification with the DNR and the U.S. Army Corps of Engineers (ACE). Wis. Stat. § 295.465. The preapplication notification expresses a potential applicant's intention to apply for a mining permit. After the notification is filed, the DNR will meet with the potential applicant to discuss the scope of the mine and any approvals that will be necessary to obtain a permit.

Mining Permit Application. A party may submit an application for a mining permit 12 months after filing the preapplication notice. The DNR must determine whether the mining permit application is complete within 30 days after submission. Wis. Stat. § 295.57(2)(a). If the application is incomplete, the DNR may make only one request for more information. Wis. Stat. § 295.57(2)(b). Once the additional information is received, the DNR must notify the applicant within 10 days if the additional information is sufficient. Wis. Stat. § 295.57(2)(b). An application is deemed administratively complete when the DNR sends a notice of completion to the applicant, or on the last day of the 30- or 10-day time limit. Wis. Stat. § 295.57(2)(c).

Mining Permits: DNR Review and Decision-Making. Once the application is administratively complete, the DNR has 420 days (or up to 480 days with a mutually agreed extension) to issue or deny the mining permit. Wis. Stat. § 295.57(7). This permit-review timeline is much shorter than general metallic mining law, which estimates 2.5 years for a decision on an application. The expedited review schedule may complicate the fulfillment of another

new requirement in Act 1—that the DNR seek to enter into a memorandum of understanding with federal agencies to streamline the permit-review process—because the ACE typically takes more than two years to review a project. Wis. Stat. § 295.465(5); see Letter from Bob Jauch, Sen., Wis. Leg., et al., to Wis. Leg. (Jan. 7, 2014), available at http://thewheelerreport.com/wheeler_docs/files/0107jauchletter.pdf.

Act 1 stipulates that the DNR must hold the second of two informational public hearings at least 30 days after the date of the publication of the notice under section 295.57(4)(b). Wis. Stat. § 295.57(5). The second informational public hearing must cover the mining permit, the EIS on the full mining permit, and all other approvals. Notice of the hearing and copies of all discussed approvals must be made available for review in the city, village, or town

where the mining is to take place. *Id.*

The DNR's decision on a mining permit may be challenged in a contested case hearing pursuant to section 227.42. The case must be brought within 30 days after the permit is issued, and the hearing examiner must issue a decision on the contested case hearing within 150 days after the permit is issued; if no decision is entered by the 150-day deadline, the DNR's decision is affirmed. Wis. Stat. § 295.77(2)(b).

Act 1 changed the grounds for approving a permit for ferrous mining. The DNR must issue a ferrous mining permit if it finds the following:

1. That the mining plan and reclamation plan are reasonably certain to result in reclamation of the mining site consistent with [ferrous mining law;]
2. That the waste site feasibility study and plan of operation complies with [ferrous mining law;]
3. That the applicant has committed to conducting the proposed mining in compliance with the mining permit and any other approvals issued for the mining[;]
- 3m. That the proposed mining is likely to meet or exceed the requirements of any municipal floodplain zoning ordinance applicable to the proposed mining under [section] 295.607(3) to the extent that the ordinance has not been made inapplicable to the proposed mining by a local agreement under [section] 295.443 (1m)[;]
4. That the proposed mining is reasonably certain not to result in substantial adverse impacts to public health, safety, or welfare[;]
5. That the proposed mining will result in a net positive economic impact in the area reasonably expected to be most impacted by the mining[; and]
6. That the applicant has applied for all necessary zoning approvals applicable to the proposed mining.

Wis. Stat. § 295.58(1).

Act 1 also changes the process for an applicant to receive an exemption from the metallic mining requirements. The DNR has discretion to grant an exemption to mining permit requirements under general metallic mining law, but Act 1 requires DNR to grant an exemption for ferrous mining if all of the following apply:

1. The exemption is consistent with the purposes of chapter 295.
2. The exemption will not violate any environmental laws outside chapter 295.
3. The exemption will not violate federal law.
4. The exemption will not result in significant adverse environmental impacts *on* the mining site, or such adverse impacts will be mitigated.
5. The exemption will not result in significant adverse environmental impacts *off* the mining site.

Wis. Stat. § 295.56.

Ferrous Mining: State and Citizen Enforcement Powers

Act 1 limits the enforcement powers of the DNR. The DNR can no longer issue a stop order to a ferrous mining operation if it determines that continued mining is an immediate and substantial threat to public health and safety or the environment. *Cf.* Wis. Stat. § 293.83(4)(a) (allowing stop orders for nonferrous mining). Instead, the DNR can request that the Wisconsin Department of Justice (DOJ) initiate an action for injunctive relief. Wis. Stat. § 295.78(4). Also, citizen suits are not authorized regarding ferrous mining operations.

environmental permits. Act 1 changes the procedures and standards for the necessary approvals as they are applied to ferrous mining. Primary changes are to the application of laws concerning impacts to wetlands, navigable waters, and groundwater.

Wetlands. Act 1 makes various modifications to state wetland laws as they apply to ferrous mining operations—among them, changes to the wetland permit review process and the availability of different wetland mitigation requirements—and removes DNR enforcement powers for wetland violations.

Section 281.36 establishes a system for permitting discharges to wetlands through either general permits or individual permits. Under Act 1, ferrous mine operations may be granted general wetland permits if the operation fits the DNR's requirements at section 281.36(3g). For individual permits, Act 1 requires the DNR to consider the following: (1) the standard factors at section 281.36(3m)(b), (2) the functional values of the wetland with other wetlands in the mining site, and (3) the floristic province in which the mining site is located. Wis. Stat. § 295.60(4)(c), (d). Under Act 1, the DNR must issue a wetland individual permit and make a finding that a discharge of dredged material complies with water quality standards if the following apply:

1. The proposed project of which the discharge is a part represents the least environmentally damaging practicable alternative taking into consideration practical alternatives that avoid wetland impacts.
2. All practicable measures to minimize the adverse impacts to wetland functional values will be taken.
3. The proposed discharge will not result in significant adverse impact to wetland functional values, ... water quality ... or in other significant adverse environmental consequences.

Wis. Stat. § 295.60(6).

To facilitate the approval process, Act 1 makes a legislative finding that significant adverse impacts to wetlands as a result of ferrous mining are probable and presumed to be necessary. Wis. Stat. § 295.40(7).

Act 1 creates a different wetland mitigation system for ferrous mining activities. Instead of requiring the DNR to create a mitigation program, it provides that an applicant may propose its own mitigation program. The proposed mitigation program *must* follow the federal mitigation measures, *see* Wis. Stat. § 295.60(7), and *may* include “[i]mplementation of a project for mitigation”; “[p]urchase of mitigation credits from a mitigation bank for a site in a mitigation bank that is located anywhere in the state”; or “[p]articipation in the in lieu fee subprogram.” Wis. Stat. § 295.60(8)(dm).

Navigable Waters. Generally applicable navigable water laws set forth separate requirements to obtain a permit for placing structures in navigable waters; constructing bridges and culverts; enlarging waterways; changing stream courses; and removing material from the bed of a navigable waterway. Act 1 consolidates all these activities as “navigable water activities,” and requires the DNR to approve any of them if

1. The navigable water activity will not significantly impair public rights and interests in a navigable water.
2. The navigable water activity will not significantly reduce the effective flood flow capacity of a stream.
3. The navigable water activity will not significantly affect the rights of riparian owners or the applicant obtains the consent of the riparian owners.
4. The navigable water activity will not significantly degrade water quality.

Wis. Stat. § 295.605(4). Act 1 requires the applicant to propose measures to meet these standards. Subject to a few exceptions, the DNR generally must determine a schedule and set of measures to apply to the applicant. *Id.*

Act 1 specifically addresses the filling of a lake bed. Previously, the DNR could not authorize the filling of a lake bed for any purpose in connection with metallic mining. Act 1 removes this prohibition and subjects any proposals to fill a lake bed to the navigable water activities standards listed above.

Surface Water and Groundwater Withdrawals. Act 1 merges the prior separate permitting schemes for surface water and groundwater withdrawals into a single permit to withdraw surface water or groundwater. A permit is only

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required for groundwater if the withdrawal will be more than 100,000 gallons a day. Wis. Stat. § 295.61(2). The DNR must issue a general water withdrawal permit if the water use meets seven requirements enumerated at section 295.61(4)(a).

State Budget

The biennial state budget was signed into law as 2013 Wisconsin Act 20. Certain provisions of the budget affect public rights to challenge high-capacity-well approvals and DNR authority over air permits for minor sources of emissions.

Citizens are prohibited, under 2013 Wisconsin Act 20, § 2092g (creating section 281.34(5m)), from challenging the approval, or the application for an approval, of a high-capacity-well system on grounds that the DNR failed to consider the cumulative impacts of the well together with existing wells. The provision applies to high-capacity-well approvals, or applications for approvals, filed on or after July 1, 2014. *See* 2013 Wis. Act 20, §§ 9332(2L), 9432(2L). This provision of the budget is a result of uncertainty in the high-capacity-well approval process after the supreme court's decision in *Lake Beulah Management District v. DNR*, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73.

According to 2013 Wisconsin Act 20, § 2104n (creating section 285.60(2g)(am)), the DNR must issue a registration air permit for the construction and operation of a stationary source with emissions under 50% of any applicable major source threshold under the federal Clean Air Act. The DNR must also exempt “natural minor sources” of air emissions from the obligation to obtain a state air operation permit. 2013 Wis. Act 20, § 2104r (creating section 285.60(6)(c)). The DNR is authorized to promulgate rules to define “natural minor sources” and seek necessary approvals from the EPA for all exemptions under the federal Clean Air Act. *Id.*

Wetlands Enforcement

The DNR gained the authority to issue citations for violating wetland resources law in 2013 Wisconsin Act 69. Before the new law, judicial enforcement actions for wetland violations could only be brought by the DOJ upon referral from the DNR. Now, under the newly created section 281.36(14)(f), the DNR may choose to use the same citation procedure for wetland violations that it has historically had available to enforce violations of navigable waterway laws in chapter 30. The addition of the citation authority for wetland violations is consistent with the overall wetland reforms enacted in the 2011–12 legislative session. *See* Linda H. Bochert & Leah H. Ziembra, *Environmental Law*, in *Annual Survey* 72–74 (State Bar of Wisconsin PINNACLE 2013). It is expected that more wetland violations will be addressed, especially minor violations, under this less time-consuming standard.

Air Permitting

Nitrogen oxide (NOx) emission limits for stationary sources are set in Wisconsin Administrative Code chapter NR 428. In 2013 Wisconsin Act 91 (creating section 285.27(3m)), the legislature provides that the NOx standards do not apply to simple cycle combustion turbines that are modified after February 1, 2001, if the owner of the turbine demonstrates that equipping the turbine with a dry low NOx combustion system is not feasible, either technologically or economically; the DNR and the EPA both agree with the owner's demonstration of infeasibility; and the NOx concentration emitted from the turbine meets certain enumerated emission statistics in the new section 285.27(3m).

ADMINISTRATIVE DEVELOPMENTS***Changes to the Chapter NR 700 Series***

The chapter NR 700 series of the Wisconsin Administrative Code governs investigation and remediation of contaminated properties. On November 1, 2013, after years of development by the DNR and stakeholders in environmental remediation procedures, significant changes to the chapter NR 700 series went into effect. The updates to the rules reflect technical and policy changes that have occurred since the original adoption of the chapter NR 700 series in 1994. The changes affect existing and newly identified contaminated sites.

Generally, the rules provide changes that help expedite the remediation process. The DNR and responsible parties are now held to deadlines for site investigations, which specify that (1) a site investigation work plan must be submitted within 60 days after notice that investigation is required; (2) the DNR has 30 days to comment on the plan; and (3) field investigations must begin within 90 days after the work plan submission, or within 60 days if a fee is paid. *See generally* Wis. Admin. Code ch. NR 716. Additionally, open sites must now submit semi-annual progress reports to track site progress (the first reports will be due in July 2014).

The DNR adopted new rules related to vapor intrusion in chapter NR 700. The rules authorize the DNR to require the installation of a vapor mitigation system as a condition for closure. Also, a new definition of *vapor action level* was added to include vapor concentrations at or above a 1-in-100,000 for a cancer risk action level for carcinogens, and a hazard index at or above 1 for noncarcinogens. Wis. Admin. Code § NR 700.03(66p).

Significant changes were made to the soil cleanup standards. For example, under chapter NR 720, the new rules clarify that the soil cleanup value will be determined by the *actual* land use of the site, not the expected land use. The rules also change the case closure requirements of chapter NR 726. Notably, new requirements were added for sites involving vapor intrusion, and the minimum number of successive quarterly groundwater monitoring rounds is increased from four to eight.

Revisions to Chapter NR 150

The Wisconsin Environmental Policy Act (WEPA), section 1.11, requires each state agency to implement an environmental review process for agency decisions. Wisconsin Administrative Code chapter NR 150 establishes the procedures the DNR uses to comply with WEPA. The DNR has proposed a revised version of chapter NR 150 that would significantly restructure the rule and reduce redundancies with other DNR review processes. The revised chapter NR 150 has passed through the required legislative process, but it must still be published in the *Wisconsin Administrative Register* to take effect. The updated status of the proposal, Clearinghouse Rule 13-022, is available at https://docs.legis.wisconsin.gov/code/chr/2013/cr_13_022.

Most significantly, the new chapter NR 150 would eliminate the old “type list” system and create four new categories of departmental actions that warrant varying levels of environmental review. Omitted from all levels of review would be the use of an environmental assessment (EA) to assess whether an EIS is warranted.

The proposed categories are:

1. “Minor actions”: would not require environmental analysis because they would have no potential for environmental impact (e.g., enforcement actions);
2. “Equivalent analysis actions”: would not require additional environmental analysis under chapter NR 150 because the DNR has already established environmental review elsewhere in the decision-making process (e.g., individual wetland permits);
3. “Prior compliance actions”: would not require additional environmental analysis for the project at hand because environmental analysis has been performed on a similar proposal (e.g., reissuance of a WPDES permit); and
4. “EIS actions”: either would not fall into the other categories, or the project would involve multiple department actions such that a cumulative impact to the environment may result that would be undetectable by piecemeal environmental review. EIS actions would require an EIS that would be scaled to the project.

Water Regulations

The DNR adopted revisions relating to unpermitted and potentially hazardous discharges of untreated or partially treated sewage to align the WPDES regulations more closely with federal regulations. Generally, the rules (1) create new terms and definitions to improve consistency with federal regulations, (2) prohibit sanitary sewer overflows and sewage treatment facility overflows, (3) create reporting requirements for sewage collection system permit holders, and (4) establish factors for the DNR to determine whether an overflow has occurred at a sewage collection system. *See* Wis. Admin. Code chs. NR 205, NR 208, NR 210. The rules took effect on August 1, 2013.

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