



2023 ASSEMBLY BILL 254

May 8, 2023 - Introduced by Representatives MURSAU, BEHNKE, S. JOHNSON, KITCHENS, O'CONNOR and STEFFEN, cosponsored by Senators COWLES and BALLWEG. Referred to Committee on Environment.

1 **AN ACT** *to amend* 15.347 (22) (b) 9. and 23.321 (5) (a); and *to create* 23.321 (2d)
2 of the statutes; **relating to:** a wetland assured delineation program, extending
3 the time limit for emergency rule procedures, providing an exemption from
4 emergency rule procedures, and granting rule-making authority.

Analysis by the Legislative Reference Bureau

This bill directs the Department of Natural Resources to establish a wetland assured delineation program.

Current law generally prohibits the discharge of dredged or fill material into a wetland unless a person is issued a wetland general permit or individual permit by DNR. Under current law, a person who owns or leases land may use the following methods to delineate the boundaries of a wetland in a manner recognized by DNR: 1) the person may request that DNR provide a wetland identification to determine if wetlands are located on a parcel, or part of a parcel, that does not exceed five acres; 2) the person may have a third person prepare a wetland delineation and request that DNR confirm the boundaries of the wetland as delineated by that third person, based on DNR's on-site inspection of the land; or 3) with respect to nonfederal wetlands, the person may have a qualified third person perform a wetland identification delineating the boundaries of a wetland and request DNR to confirm those boundaries, not based upon an on-site inspection of the land but rather based on a review of maps, aerial photographs, surveys, wetland delineations, and hydrophytic soil conditions. Under current law, nonfederal wetlands are wetlands that are not under the jurisdiction of the federal government, and a qualified third

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person is an individual who has completed basic and advanced wetland training and has a minimum of one year of field experience in wetland delineation.

The bill adds a wetland assured delineation program as a fourth method for delineating the boundaries of a wetland in a manner recognized by DNR. Under the program, a person may apply to DNR to be certified as an assured delineator. A wetland delineation prepared by an assured delineator has the same effect as a wetland identification or confirmation prepared by DNR, and a wetland delineation prepared by an assured delineator need not be confirmed by DNR. Under the bill, DNR must charge a \$1,200 annual certification fee to an assured delineator, must require a report of each wetland delineation an assured delineator prepares, and may charge a filing fee not to exceed \$20 for each report submitted. The bill provides that a wetland delineation prepared by an assured delineator is effective for five years from the date upon which the wetland delineation report is submitted to DNR. This matches the effective period for wetland identifications and confirmations of federal wetlands provided by DNR under current law.

The bill requires DNR to establish application and qualification requirements for assured delineator certification but includes some minimum requirements, such as at least five years of full-time professional field experience in wetland delineation and completion of a wetland delineation training course based on the U.S. Army Corps of Engineers wetland delineation manual. The bill also requires DNR to charge an application processing fee of \$500. The bill provides that an applicant whose application is not approved may reapply and requires DNR to accept applications no less than annually and at least during the period beginning September 15 and ending November 30 for applicants who wish to be certified beginning on March 15 of the next calendar year.

The bill requires DNR to review the performance of assured delineators on a recurring basis and authorizes DNR to perform in-field audits of specific wetland delineations performed by assured delineators. The bill allows DNR to investigate any person's complaint that an assured delineator may be violating program requirements. The bill allows DNR to gather—or to require a permit holder or applicant to provide—additional wetland delineation data if DNR receives a complaint alleging inaccuracies in a wetland delineation completed by an assured delineator or if DNR finds inaccuracies in a wetland delineation report. If the additional data show substantial evidence that a wetland delineation is inaccurate, the bill allows DNR to use the data for regulatory decision-making, including wetland permitting and exemption decisions. However, under the bill DNR may not modify a permit or exemption decision solely on the basis of this additional data.

The bill allows DNR to revoke a person's certification as an assured delineator if it finds the person did any of a list of actions, for example knowingly falsifying or misrepresenting a wetland boundary. Under the bill, a person whose assured delineator certification has been revoked is entitled to a contested case hearing.

Under the bill, DNR must consider a person who is approved or certified as an assured delineator under an existing pilot program as certified as an assured delineator under the program created in the bill.

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For further information see the state fiscal estimate, which will be printed as an appendix to this bill.

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

1 **SECTION 1.** 15.347 (22) (b) 9. of the statutes is amended to read:

2 15.347 **(22)** (b) 9. ~~The possibility of a professional, whose wetland delineation~~
3 ~~work is assured under the department of natural resources' wetland delineation~~
4 ~~professional assurance initiative, performing a wetland delineation confirmation~~
5 requirements for certification as an assured delineator and other matters related to
6 the wetland assured delineator program under s. 23.321 ~~on behalf of the department~~
7 (2d).

8 **SECTION 2.** 23.321 (2d) of the statutes is created to read:

9 23.321 **(2d)** WETLAND ASSURED DELINEATION PROGRAM. (a) *Definition.* In this
10 subsection, "assured delineator" means a professional wetland delineator who is
11 certified by the department under par. (c).

12 (b) *Program.* 1. The department shall establish a wetland assured delineation
13 program under which individuals may apply to the department to be certified as
14 assured delineators. Under the program, the department shall ensure that assured
15 delineators delineate wetlands consistent with the wetlands delineation manual
16 described under s. 281.36 (2m). The department may promulgate rules to implement
17 this subsection.

18 2. Under the program, a wetland delineation prepared by an assured delineator
19 has the same effect as a wetland identification or confirmation prepared by the
20 department under sub. (2) (b) to (d). A wetland delineation performed by an assured
21 delineator is not required to be confirmed by the department under sub. (2) (c) or (d).

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1 3. The department shall require an assured delineator to submit to the
2 department a report of each wetland delineation the assured delineator prepares,
3 including all items required in applicable joint guidance from the U.S. army corps
4 of engineers and the department. The report is due no later than a date determined
5 by the department that allows sufficient time for the department's regulatory
6 decision-making or March 15, whichever is sooner following the date on which the
7 delineation is completed, unless an extension is approved by the department.

8 4. Under the program, assured delineators shall conduct assured wetland
9 delineations during the growing season. The growing season shall be determined in
10 accordance with the wetlands delineation manual described under s. 281.36 (2m)
11 and applicable supplements.

12 (c) *Application.* 1. A professional wetland delineator seeking to become
13 certified as an assured delineator shall submit a complete application and shall
14 follow the application procedures specified by the department.

15 2. The department shall, in consultation with the wetland study council,
16 determine what must be submitted by an applicant to constitute a complete
17 application. Once established, the department shall make those requirements
18 available on the department's website. The department may not determine an
19 application to be complete without submission of the application fee under par. (e)

20 1. a.

21 3. The department shall establish application and qualification requirements
22 for certification as an assured delineator, including at least all of the following:

23 a. At least 5 years of full-time professional field experience in wetland
24 delineation.

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1 b. Completion of minimum educational requirements or requirements for
2 commensurate experience, as determined by the department in consultation with
3 the wetland study council.

4 c. Completion of a wetland delineation training course based on the wetlands
5 delineation manual described under s. 281.36 (2m) and applicable regional
6 supplements for this state.

7 d. Submittal of at least 6 representative wetland delineation reports completed
8 within the 2 growing seasons preceding the date on which the application was
9 submitted.

10 e. Demonstration that the applicant can complete delineations and submit
11 them in compliance with program expectations as established by the department.

12 f. Other application and qualification requirements specified by the
13 department to ensure that the applicant is achieving the technical standards of the
14 program.

15 4. Status as an assured delineator is valid unless revoked under par. (d).

16 5. If the department determines that the applicant does not meet the minimum
17 qualifications to be approved as an assured delineator, the applicant may reapply in
18 a future application process.

19 6. The department shall accept applications no less than annually and at least
20 during the period beginning September 15 and ending November 30 for applicants
21 who wish to be certified beginning on March 15 of the next calendar year.

22 7. The department may consider previous conduct and performance in scoring
23 a subsequent application for an applicant whose prior certification under the
24 program was revoked under par. (d). The department may not approve an

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1 application if the applicant's certification was revoked within 3 years of the
2 application date.

3 (d) *Performance review, auditing, and revocation.* 1. The department shall
4 review the performance of assured delineators on a recurring basis to ensure the
5 program standards and expectations are being met. As part of this review process,
6 the department may perform in-field audits of specific wetland delineations that
7 assured delineators have performed.

8 2. Upon a complaint submitted by any person to the department that an
9 assured delineator may be out of compliance with program requirements, the
10 department may investigate and gather information to determine if a violation of
11 program requirements has occurred.

12 3. The department may gather, or require a permit holder or applicant to
13 provide, additional wetland delineation data if a complaint is filed with the
14 department alleging inaccuracies in a wetland delineation completed by an assured
15 delineator or if the department finds inaccuracies in a report submitted under par.
16 (b) 3. If the additional data show substantial evidence that a wetland delineation is
17 inaccurate, this additional data may be used for regulatory decision-making,
18 including permitting and exemption decisions under s. 281.36. The department may
19 not modify a permit or exemption decision solely on the basis of additional data
20 gathered under this subdivision.

21 4. The department shall give notice to an assured delineator if the department
22 conducts an audit under subd. 1. or an investigation under subd. 2. or 3.

23 5. The department may revoke an individual's certification as an assured
24 delineator by providing to the individual written notice of the revocation and the

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1 reason for the revocation if it finds the individual did any of the following, taking into
2 consideration the type and frequency of infractions:

3 a. Knowingly took part in an activity that results in the violation of state or
4 federal wetland or waterway laws or regulations.

5 b. Knowingly falsified or misrepresented a wetland boundary.

6 c. Failed to delineate all wetland resources within a wetland delineation study
7 area.

8 d. Misrepresented another's work as his or her own.

9 e. Injured the reputation of another professional wetland delineator through
10 undocumented claims.

11 f. Failed to apply standard wetland delineation protocols in line with the
12 wetlands delineation manual described under s. 281.36 (2m) and applicable regional
13 supplements for this state.

14 g. Failed to implement the current state of the science, including techniques,
15 methods, and accurate reporting protocols.

16 h. Failed to meet continuing education expectations as set by the department.

17 i. Failed to submit an average of at least 3 delineation reports annually over
18 the prior 3 years, unless an exception is made by the department for extenuating
19 circumstances.

20 j. Failed to submit the annual certification fee under par. (e) 2. on or before
21 March 15 unless the department has granted an extension.

22 k. Failed to comply with any other program requirement established by the
23 department by rule.

24 6. Any individual who receives notice under subd. 5. that his or her certification
25 as an assured delineator has been revoked is entitled to a contested case hearing

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1 under ch. 227 if the individual requests the hearing within 30 days after receiving
2 the notice.

3 7. An individual whose certification as an assured delineator is revoked is not
4 precluded from delineating wetlands under sub. (2) (c) or (d).

5 (e) *Fees.* 1. Except as provided under subd. 3., the department shall charge the
6 following fees:

7 a. To an applicant under par. (c), an application processing fee of \$500 to be
8 submitted with an application.

9 b. To an assured delineator, an annual certification fee of \$1,200.

10 2. Except as provided under subd. 3., the department may charge an assured
11 delineator a filing fee of \$20 for each report submitted under par. (b) 3.

12 3. The department may promulgate rules to increase the fees specified in subds.
13 1. and 2. only if the increase is necessary to meet the costs of the department in
14 performing the activities for which the fee is charged.

15 **SECTION 3.** 23.321 (5) (a) of the statutes is amended to read:

16 23.321 (5) (a) Except as provided in par. (b), a wetland identification provided
17 by the department under sub. (2) (b) and a wetland confirmation provided by the
18 department under sub. (2) (c) remain effective for 5 years from the date provided by
19 the department. A wetland delineation prepared by an assured delineator under
20 sub. (2d) remains effective for 5 years from the date upon which the wetland
21 delineation report under sub. (2d) (b) 3. is submitted to the department.

22 **SECTION 4. Nonstatutory provisions.**

23 (1) The department of natural resources shall consider an individual who is
24 approved or certified as an assured delineator under a pilot program in effect on the

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1 effective date of this subsection to be certified as an assured delineator under s.
2 23.321 (2d).

3 (2) Using the procedure under s. 227.24, the department of natural resources
4 may promulgate rules authorized under s. 23.321 (2d) (b) 1. for the period before the
5 effective date of any permanent rules promulgated under s. 23.321 (2d) (b) 1.
6 Notwithstanding s. 227.24 (1) (c) and (2), emergency rules promulgated under this
7 subsection remain in effect until January 1, 2025, or the date on which permanent
8 rules take effect, whichever is sooner. Notwithstanding s. 227.24 (1) (a), (2) (b), and
9 (3), the department is not required to provide evidence that promulgating a rule
10 under this subsection as an emergency rule is necessary for the preservation of the
11 public peace, health, safety, or welfare and is not required to provide a finding of
12 emergency for a rule promulgated under this subsection.

SECTION 5. Initial applicability.

13
14 (1) (a) Except as provided in par. (b), this act first applies to an individual who
15 submits an application under s. 23.321 (2d) (c) on the effective date of this subsection.

16 (b) Except for the initial application requirements under s. 23.321 (2d) (c), the
17 remainder of this act first applies to individuals described under SECTION 4 (1) on the
18 effective date of this subsection.

19 (END)