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2001 BILL

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1 AN ACT **to repeal** 23.321 (1) (c), 88.01 (8m), 88.31 (1) to (7m), 88.35 (5m) and 88.62
2 (3) (b); **to renumber** 23.321 (title) and (1) (title), (a) and (b), 23.321 (1) (d) to (f)
3 and 23.321 (2); **to renumber and amend** 23.321 (2m) to (5), 30.10 (4) (d), 30.12
4 (4m) (intro.), 30.12 (4m) (a), 30.12 (4m) (b) and 88.62 (3) (a); **to amend** 30.12
5 (4m) (title), 30.20 (1) (d), 31.02 (7), 31.02 (7m), 31.02 (8), 31.02 (9), 88.11 (1) (f),
6 88.31 (title), 88.31 (8) (intro.), 88.35 (6) (intro.), 88.72 (3), 88.72 (4), 281.69 (3)
7 (b) 2., 281.98 (1) and 299.95; and **to create** 30.10 (4) (d) 1., 30.12 (4m) (c), 30.20
8 (1) (dm), 31.01 (2m), 281.01 (21) and 281.36 of the statutes; **relating to:** water
9 quality certification for nonfederal wetlands, ~~disputes concerning the~~
10 ~~delineation of boundaries of nonfederal wetlands, the regulation of drainage~~
11 ~~district drains~~, granting rule-making authority, and providing a penalty.

Analysis by the Legislative Reference Bureau

Nonfederal wetlands

Under federal law, activities involving the discharge of dredged or fill material into "navigable waters" must comply with certain guidelines contained in

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regulations promulgated by the federal environmental protection agency (EPA) in order for a discharge permit to be issued by the U.S. army corps of engineers (ACE). Before ACE may issue a permit, the department of natural resources (DNR) must determine that the project complies with state water quality standards, including those for wetlands.

Federal law defines "navigable waters" to be "the waters of the United States." ACE in turn has interpreted "the waters of the United States" to include nonnavigable, isolated, intrastate waters if they serve as habitat for migratory birds that cross state lines.

A recent U.S. supreme court decision, *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 69 U.S.L.W. 4048 (2001), limited the types of bodies of waters for which ACE discharge permits are required. The court held that these nonnavigable, isolated, intrastate waters that serve as habitat for migratory birds cannot be interpreted by ACE to be navigable waters and, therefore, no ACE discharge permits are required to discharge dredged or fill material into these bodies of water.

For discharges into wetlands that no longer are subject to the ACE permitting process (nonfederal wetlands), this bill incorporates into state law the content of some of the federal provisions governing the issuance of ACE discharge permits. These provisions are in addition to any other requirements under current state law that regulate discharges into wetlands. Under the bill, no one may discharge dredged or fill material into a nonfederal wetland unless the discharge is authorized by a certification from DNR that the discharge will meet all applicable state water quality standards. The bill exempts from this certification process activities that are exempt from ACE discharge permits under federal law. These exemptions include normal farming, forestry, and ranching activities, maintenance and reconstruction of damaged parts of structures that are in bodies of water, maintenance of drainage ditches, and construction and maintenance of certain farm roads, forest roads, and temporary mining roads if certain requirements are met. As under federal law, a discharge that would be exempt loses its exemption under certain circumstances. The exemption is lost if the discharge is incidental to an activity that brings the nonfederal wetland into a use for which it was not previously used and if the activity may impair the flow or circulation or reduce the reach of any nonfederal wetland. Under the bill, DNR must promulgate rules to interpret and implement the provisions under the bill that establish the exemptions and the provisions concerning the loss of the exemptions. These rules must be consistent with applicable federal law or interpretations of that law made by the federal government. If federal law or the federal interpretations are subsequently modified, DNR must incorporate the modifications into the rules. The bill also creates a temporary process to be used between the date on which the bill becomes law and the date on which the rules are promulgated for determining whether a discharge is exempt. During that time, no person may discharge into a nonfederal wetland based on the discharge being exempt unless the person demonstrates to DNR that the discharge is exempt from current DNR rules governing discharges into wetlands or that the

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discharge would be exempt under federal law or interpretations if the discharge were subject to the ACE permitting process.

As under federal law, this bill provides that DNR may issue general permits for types of discharges that are similar in nature. A general permit allows any person to carry out the type of discharge, subject to the general permit as opposed to an individual permit that is issued to a specific person. INSERT ANL 1

The bill also prohibits DNR from promulgating a rule that requires a person who is applying for a water quality certification for a nonfederal wetland ~~that is less than one acre in size~~ to submit information concerning practicable alternatives to the discharge that exist or that may be viable. INS ANL 2

The bill contains provisions for identifying nonfederal wetlands. Under the bill, if ACE has issued a determination as to whether a wetland is a nonfederal wetland, DNR must adopt that determination. If ACE has not issued a determination, then DNR makes the determination.

The bill authorizes DNR to inspect any property on which there is located a nonfederal wetland beginning on the date on which an application for water quality certification is submitted and ending on the 20th day immediately following completion of the discharge subject to the certification, or, if the application is denied, on the date of denial. DNR may also inspect any property to investigate a discharge of dredged or fill material that DNR has probable cause to believe is in violation of the statutes regulating nonfederal wetlands. The bill also authorizes DNR to gain access to inspect any records that must be kept by a holder of a water quality certification for a nonfederal wetland.

to delineate The bill also requires that certain procedures be used ~~to resolve disputes concerning the boundaries of nonfederal wetlands that may occur between DNR and applicants for, or holders of, water quality certifications for discharges into nonfederal wetlands.~~

Drainage district drains

Under current law, drainage boards operate one or more drainage districts. A drainage district drains property owned by two or more persons. The department of agriculture, trade and consumer protection (DATCP) assists drainage boards and oversees their activities, and promulgates rules that apply to drainage boards. A city, village, or town (municipality) may assume jurisdiction to operate a drainage district from a drainage board in certain instances. However, once a drainage district is under municipal jurisdiction, it is subject to the drainage laws of that municipality and is exempt from state drainage law.

DNR regulates construction in navigable waters, including construction relating to the drainage of land. Generally, DNR determines whether a body of water such as a stream is navigable. Current law, however, provides an exemption for a drainage district drain that is located in the Duck Creek Drainage District. Under the exemption, the drain is not considered navigable unless a U.S. geological survey map or other scientific evidence shows that the drain was a navigable stream before it became a drainage district drain. This bill extends this exemption to any other drainage district drain if the drain is used primarily for agricultural purposes.

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Current law provides that a person wishing to deposit any material or to place any structure upon the bed of any navigable water must obtain a permit from DNR unless the legislature otherwise authorizes the structure or deposit. Current law provides an exemption to this requirement for the Duck Creek Drainage District under which the drainage board for that district may place a structure or deposit in a drain if DATCP, after consulting with DNR, specifically approves the structure or deposit or if the structure or deposit is required by DATCP in order to conform the drain to specifications approved by DATCP in consultation with DNR. This bill extends this exemption to any other structure or deposit to be placed in a drainage district drain if the structure or deposit is used primarily for agricultural purposes.

Current law also provides that, with certain exceptions, a person wishing to remove material from the bed of a lake or stream must obtain a permit from DNR. Under one of the exemptions, the drainage board for the Duck Creek Drainage District may remove material from a drain that the board operates if the removal is required by DATCP in order to conform the drain to specifications imposed by DATCP in consultation with DNR. This bill extends this exemption to all other drainage district drains if the removal of the material is necessary primarily for agricultural purposes.

In addition to the current law requirements for obtaining permits to place a structure or deposit in navigable waters or to remove material from the bed of a lake or stream, current law requires that a drainage board obtain a separate permit from DNR to acquire and remove any dam or obstruction or to clean out, widen, deepen, or straighten any navigable stream. Under current law, only the Duck Creek Drainage District is exempt from this permitting requirement. This bill eliminates the permitting requirement for all drainage districts operated by drainage boards.

For further information see the *state and local* 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.** 23.321 (title) and (1) (title), (a) and (b) of the statutes are
2 renumbered 281.37 (title) and (1) (title), (a) and (b).

3 **SECTION 2.** 23.321 (1) (c) of the statutes is repealed.

4 **SECTION 3.** 23.321 (1) (d) to (f) of the statutes are renumbered 281.37 (1) (d) to
5 (f).

6 **SECTION 4.** 23.321 (2) of the statutes, as created by 1999 Wisconsin Act 147, is
7 renumbered 281.37 (2).

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1 **SECTION 5.** 23.321 (2m) to (5) of the statutes are renumbered 281.37 (2m) to (5),
2 and 281.37 (2m) (a) and (b) 3., as renumbered, are amended to read:

3 281.37 **(2m)** (a) 1. A person who is the holder of a permit or other approval that
4 authorizes a mitigation project shall grant a conservation easement under s. 700.40
5 to the department to ensure that a wetland that is being restored, enhanced, or
6 created will not be destroyed or substantially degraded by any subsequent ~~owner~~
7 proprietor of or holder of interest in the property on which the wetland is located.
8 The department shall revoke the permit or other approval if the holder of the permit
9 or other approval fails to take these measures.

10 2. A person who is restoring, enhancing, or creating a wetland to provide
11 transferable credits as part of a wetlands mitigation bank shall grant a conservation
12 easement under s. 700.40 to the department, to ensure that the wetland will not be
13 destroyed or substantially degraded by any subsequent ~~owner~~ proprietor of or holder
14 of interest in the property on which the wetland is located.

15 (b) 3. Any subsequent ~~owner~~ proprietor of or holder of interest in the property
16 on which the wetland specified in subd. 1. is located did not contribute to the loss of
17 the wetland.

18 ~~**SECTION 6.** 30.10 (4) (d) of the statutes is renumbered 30.10 (4) (d) 2. and~~
19 ~~amended to read:~~

20 ~~30.10 (4) (d) 2. A drainage district drain located in the Duck Creek Drainage~~
21 ~~District and operated by the board for that district or any other drainage district~~
22 ~~drain that is used primarily for agricultural purposes is not navigable unless it is~~
23 ~~shown, by means of a U.S. geological survey map or other similarly reliable scientific~~
24 ~~evidence, that the drain was a navigable stream before it became a drainage district~~
25 ~~drain.~~

BILL**SECTION 7**

1 **SECTION 7.** 30.10 (4) (d) 1. of the statutes is created to read:

2 30.10 (4) (d) 1. In this paragraph, “agricultural purposes” has the meaning
3 given in s. 29.181 (1b) (a).

4 **SECTION 8.** 30.12 (4m) (title) of the statutes is amended to read:

5 30.12 (4m) (title) ~~DUCK CREEK DRAINAGE DISTRICT~~ CERTAIN DRAINAGE DISTRICT
6 STRUCTURES AND DEPOSITS.

7 **SECTION 9.** 30.12 (4m) (intro.) of the statutes is renumbered 30.12 (4m) (a)
8 (intro.) and amended to read:

9 30.12 (4m) (a) (intro.) Subsection (1) does not apply to a qualifying structure
10 or deposit that the drainage board for the Duck Creek Drainage District places in a
11 drain that the board operates in the Duck Creek Drainage District if either of the
12 following applies:

13 **SECTION 10.** 30.12 (4m) (a) of the statutes is renumbered 30.12 (4m) (a) 1. and
14 amended to read:

15 30.12 (4m) (a) 1. The department of agriculture, trade and consumer
16 protection, after consulting with the department of natural resources, specifically
17 approves the qualifying structure or deposit.

18 **SECTION 11.** 30.12 (4m) (b) of the statutes is renumbered 30.12 (4m) (a) 2. and
19 amended to read:

20 30.12 (4m) (a) 2. The qualifying structure or deposit is required, under rules
21 promulgated by the department of agriculture, trade and consumer protection, in
22 order to conform the drain to specifications approved by the department of
23 agriculture, trade and consumer protection after consulting with the department of
24 natural resources.

25 **SECTION 12.** 30.12 (4m) (c) of the statutes is created to read:

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1 30.12 (4m) (c) For purposes of this subsection, a “qualifying structure or
2 deposit” is either of the following:

3 1. Any structure or deposit that is placed in a drain that is operated in the Duck
4 Creek Drainage District by the board for the Duck Creek Drainage District.

5 2. Any structure or deposit that is placed in a drain that is not described in subd.
6 1. if the structure or deposit is used primarily for agricultural purposes, as defined
7 in s. 29.181 (1b) (a).

8 **SECTION 13.** 30.20 (1) (d) of the statutes is amended to read:

9 30.20 (1) (d) ~~The A drainage board for the Duck Creek Drainage District may,~~
10 without a permit under sub. (2) (c), remove qualifying material from a drain that the
11 ~~board operates in the Duck Creek Drainage District~~ if the removal is required, under
12 rules promulgated by the department of agriculture, trade and consumer protection,
13 in order to conform the drain to specifications imposed by the department of
14 agriculture, trade and consumer protection after consulting with the department of
15 natural resources.

16 **SECTION 14.** 30.20 (1) (dm) of the statutes is created to read:

17 30.20 (1) (dm) For purposes of this paragraph, “qualifying material” is either
18 of the following:

19 1. Any material that is removed from a drain that is operated in the Duck Creek
20 Drainage District by the board for the Duck Creek Drainage District.

21 2. Any material that is removed from a drain that is not described in subd. 1.
22 if the removal is necessary primarily for agricultural purposes, as defined in s. 29.181
23 (1b) (a).

24 **SECTION 15.** 31.01 (2m) of the statutes is created to read:

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1 31.01 (2m) "Duck Creek Drainage District" has the meaning given in s. 30.01
2 (1nm).

3 **SECTION 16.** 31.02 (7) of the statutes is amended to read:

4 31.02 (7) The department of natural resources shall confer with the
5 department of agriculture, trade and consumer protection and the drainage
6 commissioners in each drainage district on the formation of policies for the operation
7 and maintenance of the dams; in districts. In a district having no commissioners, the
8 department of natural resources shall confer in like manner with the department of
9 agriculture, trade and consumer protection and with the any committee appointed
10 by the county board, if any, to represent either such the drainage district, or in. In
11 the event that the a drainage district is dissolved, to represent the department of
12 natural resources shall confer with any committee appointed by the county board to
13 represent the interests of the county in all matters whatsoever pertaining to water
14 conservation and control within the area which theretofore constituted such the
15 drainage district. This subsection does not apply to the Duck Creek Drainage
16 District.

17 **SECTION 17.** 31.02 (7m) of the statutes is amended to read:

18 31.02 (7m) The drainage board for the Duck Creek Drainage District shall
19 operate, repair and maintain dams, dikes and other structures in district drains that
20 the board operates in the Duck Creek Drainage District in compliance with ch. 88
21 and any rules promulgated by the department of agriculture, trade and consumer
22 protection under ch. 88. If a county Subsection (7) does not apply to the Duck Creek
23 Drainage District unless the drainage board for the district fails to perform its duties
24 under this subsection, the. If the drainage board fails to perform these duties, the

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1 department of natural resources may exercise its authority under subs. (6), (8) and
2 (9) and shall perform its duties under subs. (7) and (8).

3 **SECTION 18.** 31.02 (8) of the statutes is amended to read:

4 31.02 (8) The department of natural resources shall give careful consideration
5 to the suggestions of made under sub. (7) by the department of agriculture, trade and
6 consumer protection, the drainage commissioners, or any committee of the county
7 board, but the final decision in all matters under consideration shall rest with the
8 department of natural resources.

9 **SECTION 19.** 31.02 (9) of the statutes is amended to read:

10 31.02 (9) So far as seems practicable, the department may designate or employ
11 the drainage commissioners of any drainage district, or the committee of the county
12 board above-referred to appointed under sub. (7), to operate the dams in such the
13 district or in the area formerly comprising a drainage district or to perform services
14 in the repair and maintenance of the dams, ~~dykes~~ dikes and other works.

15 **SECTION 20.** 88.01 (8m) of the statutes is repealed.

16 **SECTION 21.** 88.11 (1) (f) of the statutes is amended to read:

17 88.11 (1) (f) Assist districts in applying for permits under ~~s. 88.31~~ chs. 30 and
18 31.

19 **SECTION 22.** 88.31 (title) of the statutes is amended to read:

20 **88.31** (title) ~~Special procedure in cases affecting~~ Drainage work in
21 navigable waters.

22 **SECTION 23.** 88.31 (1) to (7m) of the statutes are repealed.

23 **SECTION 24.** 88.31 (8) (intro.) of the statutes is amended to read:

BILL**SECTION 24**

1 88.31 (8) (intro.) Subject to other restrictions imposed by this chapter, a
2 drainage board which has obtained all of the permits as required under this chapter
3 and ch. 30 may:

4 **SECTION 25.** 88.35 (5m) of the statutes is repealed.

5 **SECTION 26.** 88.35 (6) (intro.) of the statutes is amended to read:

6 88.35 (6) (intro.) Upon the completion of its duties under subs. (1) to (5m) (5),
7 the board shall prepare a written report, including a copy of any maps, plans or
8 profiles that it has prepared. The assessment of benefits and awards of damages
9 shall be set forth in substantially the following form:

10 **SECTION 27.** 88.62 (3) (a) of the statutes is renumbered 88.62 (3) and amended
11 to read:

12 88.62 (3) If drainage work is undertaken in navigable waters, the drainage
13 board shall obtain a permit under s. 30.20 or 88.31 or ch. 31, as directed by the
14 department of natural resources, except as provided in par. (b) any permit that is
15 required under ch. 30 or 31.

16 **SECTION 28.** 88.62 (3) (b) of the statutes is repealed.

17 **SECTION 29.** 88.72 (3) of the statutes is amended to read:

18 88.72 (3) At the hearing on the petition, any interested person may appear and
19 contest its sufficiency and the necessity for the work. If the drainage board finds that
20 the petition has the proper number of signers and that to afford an adequate outlet
21 it is necessary to remove dams or other obstructions from waters and streams which
22 may be navigable, or to straighten, clean out, deepen, or widen any waters or streams
23 either within or beyond the limits of the district, the board shall obtain any permit
24 that is required under this chapter or ch. 30 or 31.

25 **SECTION 30.** 88.72 (4) of the statutes is amended to read:

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1 88.72 (4) Within 30 days after the department of natural resources has issued
 2 all of the permits as required under ~~this chapter and chs. 30 and 31~~, the board shall
 3 proceed to estimate the cost of the work, including the expenses of the proceeding
 4 together with the damages that will result from the work, and shall, within a
 5 reasonable time, award damages to all lands damaged by the work and assess the
 6 cost of the work against the lands in the district in proportion to the assessment of
 7 benefits then in force.

8 **SECTION 31.** 281.01 (21) of the statutes is created to read:

9 281.01 (21) "Wetland" has the meaning given in s. 23.32 (1).

10 **SECTION 32.** 281.36 of the statutes is created to read:

11 **281.36 Water quality certification for nonfederal wetlands. (1)**

12 **DEFINITIONS.** In this section:

13 (a) "Additional federal law or interpretation" means any of the following:

14 1. An amendment to 33 USC 1344 (f) that becomes effective after ~~the effective~~
 15 ~~date of this subdivision~~ [revisor inserts date] January 9, 2001

16 2. Any other federal statutory provision that affects the exemptions under 33
 17 USC 1344 (f) and that becomes effective after ~~the effective date of this subdivision~~
 18 ~~.....~~ [revisor inserts date] January 9, 2001

19 3. A regulation, rule, memorandum of agreement, guidance letter, or other
 20 provision established by a federal agency that is promulgated or adopted pursuant
 21 to 33 USC 1344 (f) or that is used to interpret or implement 33 USC 1344 (f), that
 22 applies to wetlands ^{located} in this state, and that becomes effective after ~~the effective date~~
 23 ~~of this subdivision~~ [revisor inserts date] January 9, 2001

24 4. A decision issued by a federal district or federal appellate court that affects
 25 the application of a federal amendment or provision described in subs. 1. to 3., that

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1 applies to wetlands located in this state, and that is issued after the effective date
2 of this subdivision [revisor inserts date] *January 9, 2001*

3 (b) “Existing federal law or interpretation” means any of the following:

4 1. 33 USC 1344 (f), as amended to *January 8, 2001* the effective date of this subdivision ...
5 [revisor inserts date].

6 2. A regulation, rule, memorandum of agreement, guidance letter, or other
7 provision established by a federal agency that is promulgated or adopted pursuant
8 to 33 USC 1344 (f) or that is used to interpret or implement 33 USC 1344 (f), that
9 applies to wetlands *located* in this state, and that is in effect on *January 8, 2001* the effective date of this
10 subdivision [revisor inserts date].

11 3. A decision issued by a federal district or federal appellate court that affects
12 the application of a federal amendment or provision described in subds. 1. and 2.,
13 that applies to wetlands located in this state, and that is issued *on or before January 8, 2001* after the effective
14 date of this subdivision [revisor inserts date].

15 (c) “Nonfederal wetland” means a wetland that is identified as such under sub.
16 (1m).

17 (d) “Water quality standards” means water quality standards set under rules
18 promulgated by the department under s. 281.15.

19 **(1m) DETERMINATION OF NONFEDERAL WETLANDS.** (a) A wetland is identified as
20 a nonfederal wetland if either of the following applies:

21 1. Any discharges of dredged or fill material into the wetland are determined
22 not to be subject to regulation under 33 USC 1344 due to the decision in Solid Waste
23 Agency of Northern Cook County v. U.S. Army Corps of Engineers, No. 99-1178 (U.S.
24 Jan. 9, 2001) or any subsequent interpretations of that decision by a federal agency

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1 or by a federal district or federal appellate court that applies to wetlands located in
2 this state.

3 2. The wetland is determined to be a nonnavigable, intrastate, and isolated
4 wetland under the decision in Solid Waste Agency of Northern Cook County v. U.S.
5 Army Corps of Engineers, No. 99-1178 (U.S. Jan. 9, 2001) or any subsequent
6 interpretations of that decision by a federal agency or by a federal district or federal
7 appellate court that applies to wetlands located in this state.

8 (b) For the purpose of identifying wetlands under par. (a):

9 1. If the U.S. army corps of engineers issues a determination as to whether a
10 wetland is a nonfederal wetland, the department shall adopt that determination.

11 2. If the U.S. army corps of engineers does not issue a determination as to
12 whether a wetland is a nonfederal wetland, the department shall determine whether
13 the wetland is a nonfederal wetland.

14 (2) CERTIFICATION REQUIREMENT. ^(a) No person may discharge dredged or fill
15 material into a nonfederal wetland unless the discharge is authorized by a water
16 quality certification issued by the department under this section. No person may
17 violate any condition imposed by the department in a water quality certification
18 under this section. The department may not issue a water quality certification under
19 this section unless it determines that the discharge will comply with all applicable
20 water quality standards.

21 (3) DELINEATION PROCEDURES. ~~(a)~~ For purposes of delineating the boundary of
22 a nonfederal wetland, the department and the person who is applying for or who
23 holds a water quality certification under this section shall use the procedures
24 contained in the wetlands delineation manual published by the U.S. army corps of
25 engineers. The edition of the manual that shall be used shall be the 1987 edition of

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1 the manual and any document that the U.S. army corps of engineers issues
2 interpreting that manual, unless the U.S. army corps of engineers publishes an
3 edition of the manual after ^{January 9, 2001} ~~the effective date of this paragraph~~ ... [revisor inserts
4 ~~date~~], and the department by rule designates that edition as the one to be used under
5 this subsection. If the U.S. army corps of engineers issues a guidance document
6 interpreting the edition of the wetlands delineation manual that the department is
7 required to use under this subsection and if that guidance document is issued after
8 the effective date of this paragraph ... [revisor inserts date], the department shall
9 notify the appropriate standing committee of each house of the legislature, as
10 determined by the speaker of the assembly and the president of the senate, of the
11 issuance of the guidance document and whether the department intends to
12 promulgate a rule incorporating the provisions of the guidance document.

13 (b) ~~If there is dispute between the department and the U.S. army corps of~~
14 ~~engineers as to the boundary delineation of a nonfederal wetland, the department~~
15 ~~shall use the edition of the wetland delineation manual published by the U.S. army~~
16 ~~corps of engineers, including any guidance documents interpreting that edition, that~~
17 ~~the corps determines shall be used.~~

18 (4) EXEMPTIONS. Except as provided in sub. (5), the certification requirement
19 under sub. (2) does not apply to any discharge that is the result of any of the following
20 activities:

21 (a) Normal farming, silviculture, or ranching activities.

22 (b) Maintenance, emergency repair, or reconstruction of damaged parts of
23 structures that are in use in a nonfederal wetland.

24 (c) Construction or maintenance of farm ponds, stock ponds, or irrigation
25 ditches.

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1 (d) Maintenance of drainage ditches.

2 (e) Construction or maintenance of farm roads, forest roads, or temporary
3 mining roads that is performed in accordance with best management practices, as
4 determined by the department, to ensure all of the following:

5 1. That the flow and circulation patterns and chemical and biological
6 characteristics of the affected nonfederal wetland are not impaired.

7 2. That the reach of the affected nonfederal wetland is not reduced.

8 3. That any adverse effect on the aquatic environment of the affected
9 nonfederal wetland is minimized to the degree required by the department.

10 (5) INAPPLICABILITY OF EXEMPTIONS. Notwithstanding sub. (4), a discharge that
11 would be exempt under sub. (4) is subject to the certification requirement under sub.
12 (2) if the discharge is incidental to an activity that has as its purpose bringing a
13 nonfederal wetland, or part of a nonfederal wetland, into a use for which it was not
14 previously subject and if the activity may do any of the following:

15 (a) Impair the flow or circulation of any nonfederal wetland.

16 (b) Reduce the reach of any nonfederal wetland.

17 (6) RULES FOR EXEMPTIONS. The department shall promulgate rules to interpret
18 and implement the provisions under subs. (4) and (5). The rules shall be consistent
19 with all existing federal laws or interpretations. The department shall incorporate
20 all additional federal laws or interpretations into the rules that the department
21 promulgates under this subsection and may not otherwise amend the rules.

22 (7) RULES PROHIBITION. The department may not promulgate or enforce a rule
23 requiring a person who submits an application for a water quality certification under
24 this section for the discharge of dredged or fill material into a nonfederal wetland
25 ~~that is less than one acre in size~~ to submit a description of practicable alternatives

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1 to the discharge or to submit a description of any investigation conducted to
2 determine the viability of such alternatives

if any of the following apply:
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3 (8) GENERAL WATER QUALITY CERTIFICATIONS. (a) In lieu of issuing individual
4 water quality certifications under this section, the department may issue a general
5 water quality certification for types of discharges that the department determines
6 are similar in nature or for the purpose of simplifying the certification process if the
7 discharges meet all of the following standards:

8 1. The discharges will cause only minimal adverse environmental effects, as
9 determined by the department, if they are performed separately.

10 2. The cumulative adverse effect on the environment by the discharges will be
11 minimal, as determined by the department.

12 (b) No general water quality certification issued under this section may be
13 effective for more than 5 years after the date of its issuance.

14 (c) If the department determines that any of the discharges under a general
15 water quality certification issued under this section fails to meet any of the standards
16 in par. (a), the department shall modify the certification so that the discharges meet
17 all of the standards. If the department cannot modify the certification so that all of
18 the standards will be met or if the department determines that the discharges subject
19 to the general certification are more appropriately certified by using individual
20 water quality certifications, the department shall revoke the general certification.

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21 (d) Before issuing, modifying, or revoking a general water quality certification
22 under this subsection, the department shall provide notice and a hearing under ss.
23 227.17 and 227.18.

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1 **(9) INSPECTION AUTHORITY.** (a) For purposes of enforcing this section, any
2 employee or other representative of the department, upon presenting his or her
3 credentials, may do any of the following:

4 1. Enter and inspect any property on which is located a nonfederal wetland, or
5 part of a nonfederal wetland, for which an application for a water quality
6 certification has been submitted to the department.

7 2. Enter and inspect any property on which is located a nonfederal wetland and
8 where the department has probable cause to believe that a violation of this section
9 has occurred or is occurring to investigate a discharge of dredged or fill material.

10 3. Gain access to and inspect any records that the department requires a holder
11 of a water quality certification to keep.

12 (am) An employee or representative of the department may not exercise the
13 authority granted under par. (a) 1. before the date upon which the application is
14 submitted. If the application is denied, an employee or representative of the
15 department may not exercise this authority after the date on which the application
16 is denied. If the application is approved, an employee or representative of the
17 department may not exercise this authority after the 20th day immediately following
18 the completion of the discharge of the dredged or fill material.

19 (b) Any employee or representative of the department may exercise the
20 authority granted under par. (a) 1., 2., or 3. only during reasonable hours and only
21 after the department has provided reasonable advance notice to the person owning
22 the property involved or to the holder of the water quality certification.

23 (c) An employee or representative of the department may not gain access to or
24 inspect any records as authorized under par. (a) 3. unless the holder of the water

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1 quality certification, or the holder's designee, is present or unless the holder of the
2 certification waives this requirement.

3 **(10) OTHER REQUIREMENTS.** This section does not affect the authority of the
4 department to do any of the following:

5 (a) Regulate the discharge of dredged or fill material in a nonfederal wetland
6 under ss. 59.692, 61.351, 62.231, 87.30, 281.11 to 281.35, 281.41 to 281.47, or 281.49
7 to 281.85 or ch. 30, 31, 283, 289, 291, 292, 293, 295, or 299.

8 (b) Issue a water quality certification under rules promulgated under this
9 chapter to implement 33 USC 1341 (a).

10 **SECTION 33.** 281.69 (3) (b) 2. of the statutes is amended to read:

11 281.69 (3) (b) 2. The restoration of a wetland, as defined in ~~s. 23.32 (1)~~, if the
12 restoration will protect or improve a lake's water quality or its natural ecosystem.

13 **SECTION 34.** 281.98 (1) of the statutes is amended to read:

14 281.98 (1) Except as provided in ss. 281.47 (1) (d), 281.75 (19), and 281.99 (2),
15 any person who violates this chapter or any rule promulgated or any plan approval,
16 license ~~or~~, special order, or water quality certification issued under this chapter shall
17 forfeit not less than \$10 nor more than \$5,000 for each violation. Each day of
18 continued violation is a separate offense. While an order is suspended, stayed, or
19 enjoined, this penalty does not accrue.

20 **SECTION 35.** 299.95 of the statutes is amended to read:

21 **299.95 Enforcement; duty of department of justice; expenses.** The
22 attorney general shall enforce chs. 281 to 285 and 289 to 295 and this chapter, except
23 ss. 281.48, 285.57, 285.59, and 299.64, and all rules, special orders, licenses, plan
24 approvals and, permits, and water quality certifications of the department, except
25 those promulgated or issued under ss. 281.48, 285.57, 285.59, and 299.64 and except

BILL

1 as provided in s. 285.86. The circuit court for Dane county or for any other county
2 where a violation occurred in whole or in part has jurisdiction to enforce chs. 281 to
3 285 and 289 to 295 or this chapter or the rule, special order, license, plan approval
4 ~~or~~, permit, or certification by injunctive and other relief appropriate for
5 enforcement. For purposes of this proceeding where chs. 281 to 285 and 289 to 295
6 or this chapter or the rule, special order, license, plan approval ~~or~~, permit or
7 certification prohibits in whole or in part any pollution, a violation is considered a
8 public nuisance. The department of natural resources may enter into agreements
9 with the department of justice to assist with the administration of chs. 281 to 285 and
10 289 to 295 and this chapter. Any funds paid to the department of justice under these
11 agreements shall be credited to the appropriation account under s. 20.455 (1) (k).

SECTION 36. Nonstatutory provisions.**(1) TEMPORARY PROCESS.**

14 (a) In this subsection, “existing federal law or interpretation” has the meaning
15 given in section 281.36 (1) (b) of the statutes, as created by this act.

16 (b) Except as provided in paragraph (c), no person may discharge dredged or
17 fill material into a nonfederal wetland before the date on which the rules required
18 under section 281.36 (6) of the statutes, as created by this act, are effective unless
19 one of the following applies:

20 1. The person demonstrates to the satisfaction of the department of natural
21 resources that the discharge would qualify for an exemption under existing federal
22 law or interpretation.

23 2. The person receives a water quality certification issued under section 281.36
24 of the statutes, as created by this act.

2001-2002 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-2921/3ins
MCC/RNK:kmg/wlj/hmh:kjf

Insert ANL 1

^{no 9} The bill requires that DNR issue general water quality certifications that are consistent with the general permits issued by ACE that applied to nonfederal wetlands before the U.S. Supreme Court decision.

Insert ANL 2

^{no 9} if the discharge is necessary to comply with a requirement imposed ^{by a} federal, state, or local government as a condition for approval by the federal, state, or local government of an activity that serves a public purpose or if the discharge is necessary to insure public safety.

Insert 12-14

(bn) "Local governmental unit" means a city, village, town, county, or special purpose district; an agency or corporation of a city, village, town, county, or special purpose district; or a combination or subunit of any of the foregoing.

Insert 13-20

(b) The department shall promulgate a rule to establish time limits for the steps involved in processing applications and issuing determinations that approve or deny applications for water quality certifications issued under this section.

Insert 16-13

(bn) 1. The department shall issue general water quality certifications that are consistent with all of the general permits issued under 33 USC 1344 (e) that applied on January 8, 2001, to nonfederal wetlands located in this state.

2. If a general permit as specified in subd. 1., is amended or modified after January 8, 2001, the department shall incorporate the amendments or modifications into the general water quality certifications issued under subd. 1. and may not otherwise amend or modify the general water quality certifications.

Insert 16-2

(a) The discharge is required by the federal government, the state, or a local governmental unit in order for the person submitting the application for the water quality certification to receive approval from the federal government, state, or local governmental unit for an activity that serves a public purpose.

(b) The federal government, the state, or a local governmental unit determines that the discharge is necessary to ensure public safety. ✓

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-2921/3dn

MGG.....

gjs

1. The term "guidance letter" is used in the definitions of "additional federal law" and "existing federal law". The term "guidance document" is used in the provisions on the delineation procedures. Is there a distinction? If not, these terms should be made uniform for consistency.
2. I agree with you that "after the effective date" in s 281.36 (1) (b) 3. should be changed to "on or before the effective date" *and I have made that change*
3. I have deleted the phrase "letters of permission" in s. 281.36 (8) (bn) since the federal statutes only speak about general permits. However, if Mike Cain feels it is necessary, I can incorporate that change.
4. I used the term "nonfederal wetland" in s. 281.36 (8) (bn) instead of just "wetland"?
OK? ✓
5. I have given some thought to the dates the January dates that should be used in this bill. The U.S. Supreme Court decision was issued January 9, 2001. Therefore, when referring to the law as it existed before that date, I have used the date January 8, 2001. When referring to the law as it existed after that date, I have used the phrase after January 9, 2001. This discourages any discussion concerning the ambiguity as to what the law actually was on January 9, 2001. Please review these dates throughout the draft carefully and call me with any questions or concerns.
6. As drafted, s. 281.36 (2) (b) will also apply to applications for general water quality certifications. OK?

Mary Gibson-Glass
Senior Legislative Attorney
Phone: (608) 267-3215

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-2921/son
MGG:ejs:jf

Slays

April 12, 2001

1. The term "guidance letter" is used in the definitions of "additional federal law" and "existing federal law". The term "guidance document" is used in the provisions on the delineation procedures. Is there a distinction? If not, these terms should be made uniform for consistency.
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6. As drafted, s. 281.36 (2) (b) will also apply to applications for general water quality certifications. OK?

Mary Gibson-Glass
Senior Legislative Attorney
Phone: (608) 267-3215



State of Wisconsin
2001 - 2002 LEGISLATURE

Now

RMR
LRB-2921
MGG/RNK:kmg/wlj/hmh/cs:jf
↑
stays stays

2001 BILL

Veget

only change is on p. 2
~~and LRB # or bill and on d-note~~

1 AN ACT to repeal 23.321 (1) (c); to renumber 23.321 (title) and (1) (title), (a) and
2 (b), 23.321 (1) (d) to (f) and 23.321 (2); to renumber and amend 23.321 (2m)
3 to (5); to amend 281.69 (3) (b) 2., 281.98 (1) and 299.95; and to create 281.01
4 (21) and 281.36 of the statutes; relating to: water quality certification for
5 nonfederal wetlands, granting rule-making authority, and providing a penalty.

Analysis by the Legislative Reference Bureau

Nonfederal wetlands

Under federal law, activities involving the discharge of dredged or fill material into "navigable waters" must comply with certain guidelines contained in regulations promulgated by the federal environmental protection agency (EPA) in order for a discharge permit to be issued by the U.S. army corps of engineers (ACE). Before ACE may issue a permit, the department of natural resources (DNR) must determine that the project complies with state water quality standards, including those for wetlands.

Federal law defines "navigable waters" to be "the waters of the United States." ACE in turn has interpreted "the waters of the United States" to include nonnavigable, isolated, intrastate waters if they serve as habitat for migratory birds that cross state lines.

A recent U.S. supreme court decision, *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 69 U.S.L.W. 4048 (2001), limited the types of

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bodies of waters for which ACE discharge permits are required. The court held that these nonnavigable, isolated, intrastate waters that serve as habitat for migratory birds cannot be interpreted by ACE to be navigable waters and, therefore, no ACE discharge permits are required to discharge dredged or fill material into these bodies of water.

For discharges into wetlands that no longer are subject to the ACE permitting process (nonfederal wetlands), this bill incorporates into state law the content of some of the federal provisions governing the issuance of ACE discharge permits. These provisions are in addition to any other requirements under current state law that regulate discharges into wetlands. Under the bill, no one may discharge dredged or fill material into a nonfederal wetland unless the discharge is authorized by a certification from DNR that the discharge will meet all applicable state water quality standards. The bill exempts from this certification process activities that are exempt from ACE discharge permits under federal law. These exemptions include normal farming, forestry, and ranching activities, maintenance and reconstruction of damaged parts of structures that are in bodies of water, maintenance of drainage ditches, and construction and maintenance of certain farm roads, forest roads, and temporary mining roads if certain requirements are met. As under federal law, a discharge that would be exempt loses its exemption under certain circumstances. The exemption is lost if the discharge is incidental to an activity that brings the nonfederal wetland into a use for which it was not previously used and if the activity may impair the flow or circulation or reduce the reach of any nonfederal wetland. Under the bill, DNR must promulgate rules to interpret and implement the provisions under the bill that establish the exemptions and the provisions concerning the loss of the exemptions. These rules must be consistent with applicable federal law or interpretations of that law made by the federal government. If federal law or the federal interpretations are subsequently modified, DNR must incorporate the modifications into the rules. The bill also creates a temporary process to be used between the date on which the bill becomes law and the date on which the rules are promulgated for determining whether a discharge is exempt. During that time, no person may discharge into a nonfederal wetland based on the discharge being exempt unless the person demonstrates to DNR that the discharge is exempt from current DNR rules governing discharges into wetlands or that the discharge would be exempt under federal law or interpretations if the discharge were subject to the ACE permitting process.

~~As under~~ federal law, this bill provides that DNR may issue general ~~permits~~ ^{certification} for types of discharges that are similar in nature. A general ~~permit~~ ^{certification} allows any person to carry out the type of discharge subject to the general ~~permit~~ ^{certification} as opposed to an individual permit that is issued to a specific person. The bill requires that DNR issue general water quality certifications that are consistent with the general permits issued by ACE that applied to nonfederal wetlands before the U.S. supreme court decision.

The bill also prohibits DNR from promulgating a rule that requires a person who is applying for a water quality certification for a nonfederal wetland to submit information concerning practicable alternatives to the discharge that exist or that

Parallel to the general permitting procedures under

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may be viable if the discharge is necessary to comply with a requirement imposed by a federal, state, or local government as a condition for approval by the federal, state, or local government of an activity that serves a public purpose or if the discharge is necessary to insure public safety.

The bill contains provisions for identifying nonfederal wetlands. Under the bill, if ACE has issued a determination as to whether a wetland is a nonfederal wetland, DNR must adopt that determination. If ACE has not issued a determination, then DNR makes the determination.

The bill authorizes DNR to inspect any property on which there is located a nonfederal wetland beginning on the date on which an application for water quality certification is submitted and ending on the 20th day immediately following completion of the discharge subject to the certification, or, if the application is denied, on the date of denial. DNR may also inspect any property to investigate a discharge of dredged or fill material that DNR has probable cause to believe is in violation of the statutes regulating nonfederal wetlands. The bill also authorizes DNR to gain access to inspect any records that must be kept by a holder of a water quality certification for a nonfederal wetland.

The bill also requires that certain procedures be used to delineate the boundaries of nonfederal wetlands.

For further information see the *state and local* 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.** 23.321 (title) and (1) (title), (a) and (b) of the statutes are
2 renumbered 281.37 (title) and (1) (title), (a) and (b).

3 **SECTION 2.** 23.321 (1) (c) of the statutes is repealed.

4 **SECTION 3.** 23.321 (1) (d) to (f) of the statutes are renumbered 281.37 (1) (d) to
5 (f).

6 **SECTION 4.** 23.321 (2) of the statutes, as created by 1999 Wisconsin Act 147, is
7 renumbered 281.37 (2).

8 **SECTION 5.** 23.321 (2m) to (5) of the statutes are renumbered 281.37 (2m) to (5),
9 and 281.37 (2m) (a) and (b) 3., as renumbered, are amended to read:

10 **281.37 (2m) (a) 1.** A person who is the holder of a permit or other approval that
11 authorizes a mitigation project shall grant a conservation easement under s. 700.40

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1 to the department to ensure that a wetland that is being restored, enhanced, or
2 created will not be destroyed or substantially degraded by any subsequent ~~owner~~
3 proprietor of or holder of interest in the property on which the wetland is located.
4 The department shall revoke the permit or other approval if the holder of the permit
5 or other approval fails to take these measures.

6 2. A person who is restoring, enhancing, or creating a wetland to provide
7 transferable credits as part of a wetlands mitigation bank shall grant a conservation
8 easement under s. 700.40 to the department, to ensure that the wetland will not be
9 destroyed or substantially degraded by any subsequent ~~owner~~ proprietor of or holder
10 of interest in the property on which the wetland is located.

11 (b) 3. Any subsequent ~~owner~~ proprietor of or holder of interest in the property
12 on which the wetland specified in subd. 1. is located did not contribute to the loss of
13 the wetland.

14 **SECTION 6.** 281.01 (21) of the statutes is created to read:

15 281.01 (21) "Wetland" has the meaning given in s. 23.32 (1).

16 **SECTION 7.** 281.36 of the statutes is created to read:

17 **281.36 Water quality certification for nonfederal wetlands. (1)**

18 **DEFINITIONS.** In this section:

19 (a) "Additional federal law or interpretation" means any of the following:

20 1. An amendment to 33 USC 1344 (f) that becomes effective after January 9,
21 2001.

22 2. Any other federal statutory provision that affects the exemptions under 33
23 USC 1344 (f) and that becomes effective after January 9, 2001.

24 3. A regulation, rule, memorandum of agreement, guidance letter, or other
25 provision established by a federal agency that is promulgated or adopted pursuant

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1 to 33 USC 1344 (f) or that is used to interpret or implement 33 USC 1344 (f), that
2 applies to wetlands located in this state, and that becomes effective after January
3 9, 2001.

4 4. A decision issued by a federal district or federal appellate court that affects
5 the application of a federal amendment or provision described in subds. 1. to 3., that
6 applies to wetlands located in this state, and that is issued after January 9, 2001.

7 (b) “Existing federal law or interpretation” means any of the following:

8 1. 33 USC 1344 (f), as amended to January 8, 2001.

9 2. A regulation, rule, memorandum of agreement, guidance letter, or other
10 provision established by a federal agency that is promulgated or adopted pursuant
11 to 33 USC 1344 (f) or that is used to interpret or implement 33 USC 1344 (f), that
12 applies to wetlands located in this state, and that is in effect on January 8, 2001.

13 3. A decision issued by a federal district or federal appellate court that affects
14 the application of a federal amendment or provision described in subds. 1. and 2.,
15 that applies to wetlands located in this state, and that is issued on or before January
16 8, 2001.

17 (bn) “Local governmental unit” means a city, village, town, county, or special
18 purpose district; and agency or corporation of a city, village, town, county, or special
19 purpose district; or a combination or subunit of any of the foregoing.

20 (c) “Nonfederal wetland” means a wetland that is identified as such under sub.
21 (1m).

22 (d) “Water quality standards” means water quality standards set under rules
23 promulgated by the department under s. 281.15.

24 **(1m) DETERMINATION OF NONFEDERAL WETLANDS.** (a) A wetland is identified as
25 a nonfederal wetland if either of the following applies:

BILL

1 1. Any discharges of dredged or fill material into the wetland are determined
2 not to be subject to regulation under 33 USC 1344 due to the decision in Solid Waste
3 Agency of Northern Cook County v. U.S. Army Corps of Engineers, No. 99–1178 (U.S.
4 Jan. 9, 2001) or any subsequent interpretations of that decision by a federal agency
5 or by a federal district or federal appellate court that applies to wetlands located in
6 this state.

7 2. The wetland is determined to be a nonnavigable, intrastate, and isolated
8 wetland under the decision in Solid Waste Agency of Northern Cook County v. U.S.
9 Army Corps of Engineers, No. 99–1178 (U.S. Jan. 9, 2001) or any subsequent
10 interpretations of that decision by a federal agency or by a federal district or federal
11 appellate court that applies to wetlands located in this state.

12 (b) For the purpose of identifying wetlands under par. (a):

13 1. If the U.S. army corps of engineers issues a determination as to whether a
14 wetland is a nonfederal wetland, the department shall adopt that determination.

15 2. If the U.S. army corps of engineers does not issue a determination as to
16 whether a wetland is a nonfederal wetland, the department shall determine whether
17 the wetland is a nonfederal wetland.

18 **(2) CERTIFICATION REQUIREMENT.** (a) No person may discharge dredged or fill
19 material into a nonfederal wetland unless the discharge is authorized by a water
20 quality certification issued by the department under this section. No person may
21 violate any condition imposed by the department in a water quality certification
22 under this section. The department may not issue a water quality certification under
23 this section unless it determines that the discharge will comply with all applicable
24 water quality standards.

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1 (b) The department shall promulgate a rule to establish time limits for the steps
2 involved in processing applications and issuing determinations that approve or deny
3 applications for water quality certifications issued under this section.

4 **(3) DELINEATION PROCEDURES.** For purposes of delineating the boundary of a
5 nonfederal wetland, the department and the person who is applying for or who holds
6 a water quality certification under this section shall use the procedures contained
7 in the wetlands delineation manual published by the U.S. army corps of engineers.
8 The edition of the manual that shall be used shall be the 1987 edition of the manual
9 and any document that the U.S. army corps of engineers issues interpreting that
10 manual, unless the U.S. army corps of engineers publishes an edition of the manual
11 after January 9, 2001, and the department by rule designates that edition as the one
12 to be used under this subsection. If the U.S. army corps of engineers issues a
13 guidance document interpreting the edition of the wetlands delineation manual that
14 the department is required to use under this subsection and if that guidance
15 document is issued after the effective date of this paragraph ... [revisor inserts date],
16 the department shall notify the appropriate standing committee of each house of the
17 legislature, as determined by the speaker of the assembly and the president of the
18 senate, of the issuance of the guidance document and whether the department
19 intends to promulgate a rule incorporating the provisions of the guidance document.

20 **(4) EXEMPTIONS.** Except as provided in sub. (5), the certification requirement
21 under sub. (2) does not apply to any discharge that is the result of any of the following
22 activities:

23 (a) Normal farming, silviculture, or ranching activities.

24 (b) Maintenance, emergency repair, or reconstruction of damaged parts of
25 structures that are in use in a nonfederal wetland.

BILL

1 (c) Construction or maintenance of farm ponds, stock ponds, or irrigation
2 ditches.

3 (d) Maintenance of drainage ditches.

4 (e) Construction or maintenance of farm roads, forest roads, or temporary
5 mining roads that is performed in accordance with best management practices, as
6 determined by the department, to ensure all of the following:

7 1. That the flow and circulation patterns and chemical and biological
8 characteristics of the affected nonfederal wetland are not impaired.

9 2. That the reach of the affected nonfederal wetland is not reduced.

10 3. That any adverse effect on the aquatic environment of the affected
11 nonfederal wetland is minimized to the degree required by the department.

12 (5) INAPPLICABILITY OF EXEMPTIONS. Notwithstanding sub. (4), a discharge that
13 would be exempt under sub. (4) is subject to the certification requirement under sub.
14 (2) if the discharge is incidental to an activity that has as its purpose bringing a
15 nonfederal wetland, or part of a nonfederal wetland, into a use for which it was not
16 previously subject and if the activity may do any of the following:

17 (a) Impair the flow or circulation of any nonfederal wetland.

18 (b) Reduce the reach of any nonfederal wetland.

19 (6) RULES FOR EXEMPTIONS. The department shall promulgate rules to interpret
20 and implement the provisions under subs. (4) and (5). The rules shall be consistent
21 with all existing federal laws or interpretations. The department shall incorporate
22 all additional federal laws or interpretations into the rules that the department
23 promulgates under this subsection and may not otherwise amend the rules.

24 (7) RULES PROHIBITION. The department may not promulgate or enforce a rule
25 requiring a person who submits an application for a water quality certification under

BILL

1 this section for the discharge of dredged or fill material into a nonfederal wetland to
2 submit a description of practicable alternatives to the discharge or to submit a
3 description of any investigation conducted to determine the viability of such
4 alternatives if any of the following apply:

5 (a) The discharge is required by the federal government, the state, or a local
6 governmental unit in order for the person submitting the application for the water
7 quality certification to receive approval from the federal government, state, or local
8 governmental unit for an activity that serves a public purpose.

9 (b) The federal government, the state, or a local governmental unit determines
10 that the discharge is necessary to ensure public safety.

11 (8) GENERAL WATER QUALITY CERTIFICATIONS. (a) In lieu of issuing individual
12 water quality certifications under this section, the department may issue a general
13 water quality certification for types of discharges that the department determines
14 are similar in nature or for the purpose of simplifying the certification process if the
15 discharges meet all of the following standards:

16 1. The discharges will cause only minimal adverse environmental effects, as
17 determined by the department, if they are performed separately.

18 2. The cumulative adverse effect on the environment by the discharges will be
19 minimal, as determined by the department.

20 (b) No general water quality certification issued under this section may be
21 effective for more than 5 years after the date of its issuance.

22 (bn) 1. The department shall issue general water quality certifications that are
23 consistent with all of the general permits issued under 33 USC 1344 (e) that applied
24 on January 8, 2001, to nonfederal wetlands located in this state.

BILL

1 2. If a general permit as specified in subd. 1., is amended or modified after
2 January 8, 2001, the department shall incorporate the amendments or modifications
3 into the general water quality certifications issued under subd. 1. and may not
4 otherwise amend or modify the general water quality certifications.

5 (c) If the department determines that any of the discharges under a general
6 water quality certification issued under this section fails to meet any of the standards
7 in par. (a), the department shall modify the certification so that the discharges meet
8 all of the standards. If the department cannot modify the certification so that all of
9 the standards will be met or if the department determines that the discharges subject
10 to the general certification are more appropriately certified by using individual
11 water quality certifications, the department shall revoke the general certification.

12 (d) Before issuing, modifying, or revoking a general water quality certification
13 under this subsection, the department shall provide notice and a hearing under ss.
14 227.17 and 227.18.

15 **(9) INSPECTION AUTHORITY.** (a) For purposes of enforcing this section, any
16 employee or other representative of the department, upon presenting his or her
17 credentials, may do any of the following:

18 1. Enter and inspect any property on which is located a nonfederal wetland, or
19 part of a nonfederal wetland, for which an application for a water quality
20 certification has been submitted to the department.

21 2. Enter and inspect any property on which is located a nonfederal wetland and
22 where the department has probable cause to believe that a violation of this section
23 has occurred or is occurring to investigate a discharge of dredged or fill material.

24 3. Gain access to and inspect any records that the department requires a holder
25 of a water quality certification to keep.

BILL

1 (am) An employee or representative of the department may not exercise the
2 authority granted under par. (a) 1. before the date upon which the application is
3 submitted. If the application is denied, an employee or representative of the
4 department may not exercise this authority after the date on which the application
5 is denied. If the application is approved, an employee or representative of the
6 department may not exercise this authority after the 20th day immediately following
7 the completion of the discharge of the dredged or fill material.

8 (b) Any employee or representative of the department may exercise the
9 authority granted under par. (a) 1., 2., or 3. only during reasonable hours and only
10 after the department has provided reasonable advance notice to the person owning
11 the property involved or to the holder of the water quality certification.

12 (c) An employee or representative of the department may not gain access to or
13 inspect any records as authorized under par. (a) 3. unless the holder of the water
14 quality certification, or the holder's designee, is present or unless the holder of the
15 certification waives this requirement.

16 (10) OTHER REQUIREMENTS. This section does not affect the authority of the
17 department to do any of the following:

18 (a) Regulate the discharge of dredged or fill material in a nonfederal wetland
19 under ss. 59.692, 61.351, 62.231, 87.30, 281.11 to 281.35, 281.41 to 281.47, or 281.49
20 to 281.85 or ch. 30, 31, 283, 289, 291, 292, 293, 295, or 299.

21 (b) Issue a water quality certification under rules promulgated under this
22 chapter to implement 33 USC 1341 (a).

23 **SECTION 8.** 281.69 (3) (b) 2. of the statutes is amended to read:

24 281.69 (3) (b) 2. The restoration of a wetland, as defined in s. 23.32(1), if the
25 restoration will protect or improve a lake's water quality or its natural ecosystem.

BILL**SECTION 9**

1 **SECTION 9.** 281.98 (1) of the statutes is amended to read:

2 281.98 (1) Except as provided in ss. 281.47 (1) (d), 281.75 (19), and 281.99 (2),
3 any person who violates this chapter or any rule promulgated or any plan approval,
4 license ~~or~~, special order, or water quality certification issued under this chapter shall
5 forfeit not less than \$10 nor more than \$5,000 for each violation. Each day of
6 continued violation is a separate offense. While an order is suspended, stayed, or
7 enjoined, this penalty does not accrue.

8 **SECTION 10.** 299.95 of the statutes is amended to read:

9 **299.95 Enforcement; duty of department of justice; expenses.** The
10 attorney general shall enforce chs. 281 to 285 and 289 to 295 and this chapter, except
11 ss. 281.48, 285.57, 285.59, and 299.64, and all rules, special orders, licenses, plan
12 approvals ~~and~~, permits, and water quality certifications of the department, except
13 those promulgated or issued under ss. 281.48, 285.57, 285.59, and 299.64 and except
14 as provided in s. 285.86. The circuit court for Dane county or for any other county
15 where a violation occurred in whole or in part has jurisdiction to enforce chs. 281 to
16 285 and 289 to 295 or this chapter or the rule, special order, license, plan approval
17 ~~or~~, permit, or certification by injunctive and other relief appropriate for
18 enforcement. For purposes of this proceeding where chs. 281 to 285 and 289 to 295
19 or this chapter or the rule, special order, license, plan approval ~~or~~, permit or
20 certification prohibits in whole or in part any pollution, a violation is considered a
21 public nuisance. The department of natural resources may enter into agreements
22 with the department of justice to assist with the administration of chs. 281 to 285 and
23 289 to 295 and this chapter. Any funds paid to the department of justice under these
24 agreements shall be credited to the appropriation account under s. 20.455 (1) (k).

25 **SECTION 11. Nonstatutory provisions.**

BILL

1 (1) TEMPORARY PROCESS.

2 (a) In this subsection, “existing federal law or interpretation” has the meaning
3 given in section 281.36 (1) (b) of the statutes, as created by this act.

4 (b) Except as provided in paragraph (c), no person may discharge dredged or
5 fill material into a nonfederal wetland before the date on which the rules required
6 under section 281.36 (6) of the statutes, as created by this act, are effective unless
7 one of the following applies:

8 1. The person demonstrates to the satisfaction of the department of natural
9 resources that the discharge would qualify for an exemption under existing federal
10 law or interpretation.

11 2. The person receives a water quality certification issued under section 281.36
12 of the statutes, as created by this act.

13 3. The person demonstrates to the satisfaction of the department of natural
14 resources that the discharge is exempt from the water quality standards for wetlands
15 set under rules promulgated under section 281.15 of the statutes.

16 (c) This subsection does not apply after the date on which the rules required
17 under section 281.36 (6) of the statutes, as created by this act, are effective.

18 (2) RULES DEADLINE. The department of natural resources shall submit in
19 proposed form the rules required under section 281.36 (6) of the statutes, as created
20 by this act, to the legislative council staff under section 227.15 (1) of the statutes no
21 later than the first day of the 13th month beginning after the effective date of this
22 subsection.

23 **SECTION 12. Effective dates.** This act takes effect on the day after publication,
24 except as follows:

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-2921/3dn
MCG:cjs:pg

April 12, 2001

1. The term "guidance letter" is used in the definitions of "additional federal law" and "existing federal law". The term "guidance document" is used in the provisions on the delineation procedures. Is there a distinction? If not, these terms should be made uniform for consistency.
2. I agree with you that "after the effective date" in s 281.36 (1) (b) 3. should be changed to "on or before the effective date" and I have made that change.
3. I have deleted the phrase "letters of permission" in s. 281.36 (8) (bn) since the federal statutes only speak about general permits. However, if Mike Cain feels it is necessary, I can incorporate that change.
4. I used the term "nonfederal wetland" in s. 281.36 (8) (bn) instead of just "wetland." OK?
5. I have given some thought to the January dates that should be used in this bill. The U.S. Supreme Court decision was issued January 9, 2001. Therefore, when referring to the law as it existed before that date, I have used the date January 8, 2001. When referring to the law as it existed after that date, I have used the phrase after January 9, 2001. This discourages any discussion concerning the ambiguity as to what the law actually was on January 9, 2001. Please review these dates throughout the draft carefully and call me with any questions or concerns.
6. As drafted, s. 281.36 (2) (b) will also apply to applications for general water quality certifications. OK?

Mary Gibson-Glass
Senior Legislative Attorney
Phone: (608) 267-3215

Barman, Mike

From: Barman, Mike
Sent: Friday, April 13, 2001 2:03 PM
To: Uecker, Deborah
Cc: Johnson, Dan (Legislature)
Subject: FW: Submitted: LRB-2921/3 Topic: Water quality certification for certain wetlands

Deborah - Please note the time limitations on this request. I will beam it over to you in a few minutes.

Thanks,

Mike Barman

Mike Barman - Senior Program Asst. (PH. 608-266-3561)
(E-Mail: mike.barman@legis.state.wi.us) (FAX: 608-264-6948)

State of Wisconsin
Legislative Reference Bureau - Legal Section - Front Office
100 N. Hamilton Street - 5th Floor
Madison, WI 53703

-----Original Message-----

From: Johnson, Dan (Legislature)
Sent: Friday, April 13, 2001 1:29 PM
To: LRB.Legal
Subject: Submitted: LRB-2921/3 Topic: Water quality certification for certain wetlands

I would like to request a fiscal estimate on LRB 2921/3. This is an urgent request as the Environment committee plans to hear and possibly exec. the bill on April 24, 2001

Thank you.

Dan Johnson
Research Assistant
Clerk, Committee on Environment
State Representative Neal Kedzie
43rd Assembly District
(608) 266-9650

Barman, Mike

From: .Johnson, Dan (l egislature)
Sent: Monday, April 16, 2001 4:29 PM
To: LRB.Legal
Subject: Draft review: LRB-2921/3 Topic: Water quality certification for certain wetlands

It has been requested by <Gretschmann, Karen> that the following draft be jacketed for the ASSEMBLY:

Draft review: LRB-2921/3 Topic: Water quality certification for certain wetlands

CCC

AB-322

→
Page 10, line 1: delete "1.")
and substitute "1."

KMG

Page 5, line 18: delete "and agency"
and substitute "an agency".



State of Wisconsin
2001-2002 LEGISLATURE

CORRECTIONS IN:

2001 ASSEMBLY BILL 322

Prepared by the Legislative Reference Bureau
(April 23, 2001)

1. Page 5, line 18: delete "and agency" and substitute "an agency".
2. Page 10, line 1: delete "1.," and substitute "1."