

2001 DRAFTING REQUEST

Bill

Received: 01/16/2001

Received By: gibsom

Wanted: Soon

Identical to LRB:

For: Jim Baumgart (608) 266-2056

By/Representing: Patrick Henderson

This file may be shown to any legislator: NO

Drafter: gibsom

May Contact:

Alt. Drafters:

Subject: Nat. Res. - wet/shore/flood

Extra Copies: RCT

Pre Topic:

No specific pre topic given

Topic:

Wetland water quality certification

Instructions:

See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	gibsom 01/23/2001			_____			State
/P1		wjackson 01/24/2001	martykr 01/24/2001	_____	lrb_docadmin 01/24/2001		S&L
/1	gibsom 01/25/2001	gilfokm 01/26/2001	kfollet 01/26/2001	_____	gretskl 01/26/2001	lrb_docadmin 01/26/2001	

FE Sent For:

01-31-01
 (1/11)
 OKed By
 Patrick
 (Staff?)

<END>

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Wetland water quality certification

Instructions:

Paul Scott Hausmann 67360

See Attached

Mike Cain 62177

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/?	gibsom	1/11 WLJ 1/24	1/24	1/24	1/24		

FE Sent For:

<END>

WETLANDS REGULATORY ACT

Section 1. 281.01(18) of the statutes is amended to read:

(18) "Waters of the state" includes those portions of Lake Michigan and Lake Superior within the boundaries of this state, and all lakes, bays, rivers, streams, springs, ponds, wells, impounding reservoirs, ~~marshes,~~ *wetlands*, watercourses, drainage systems and other surface water or groundwater, natural or artificial, public or private, within this state or its jurisdiction.

Section 2. DEFINITIONS

- (A) "Artificial wetland" means a landscape feature where hydrophytic vegetation may be present as a result of human modifications to the landscape or hydrology and for which there is no prior wetland or stream history.
- (B) "Wetland" has the meaning given in s. 23.32(1).

Section 3. WATER QUALITY CERTIFICATION FOR ACTIVITIES THAT WOULD ADVERSELY IMPACT WETLANDS OF WISCONSIN:

(Note: *Italic type below indicates exact CWA S. 404 language*)

(A) PROHIBITED ACTIVITIES.

- (1) No person shall undertake an activity that would adversely impact a wetland of Wisconsin unless such activity is undertaken pursuant to a water quality certification issued by the department.
- (2) For purposes of this section, the term "activity in wetlands of Wisconsin" means *the discharge of dredged or fill material into wetlands.*

(B) *NON-PROHIBITED DISCHARGES OF DREDGED OR FILL MATERIAL.*

(1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material from the following activities is not prohibited by or otherwise subject to regulation under this section:

- (a) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water practices;*
- (b) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;*
- (c) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or maintenance of drainage ditches;*
- (d) for the purpose of construction of temporary sedimentation basins on a construction site which does not include placement of fill material in to navigable waters;*
- (e) for the purpose of construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized,*

(2) Any discharge of dredged or fill material into wetlands incidental to any activity having as its purpose bringing an area of waters of the state into a use to which it was not previously subject, where the flow of circulation of waters of the state may be impaired or the reach of such waters be reduced, shall be required to obtain a water quality certification under this section.

SECTION 4. GENERAL PERMITS

- (A) *In carrying out functions relating to the discharge of dredged or fill material, the department may, after notice and opportunity for public hearing, issue general water quality certifications for any category of activities involving discharges of dredged or fill material if the department determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.*
- (B) *No general water quality certification under this subsection shall be for a period of more than five years after the date of its issuance and such a general water quality certification may be revoked or modified by the department, if after opportunity for public hearing, the department determines that the activities authorized by such a general water quality certification have an adverse impact on the environment or such activities are more appropriately authorized by individual water quality certification.*

SECTION 5. EXEMPTION OF ARTIFICIAL WATERS. (this language is from NR 103, WACode)

(1) For the purpose of this section, the following artificial wetlands may be exempted from the requirements of a water quality certification after following the procedures in sub. (2):

a) Sedimentation and stormwater detention basins and associated conveyance features operated and maintained only for sediment detention and flood storage purposes.

(b) Active sewage lagoons, cooling ponds, waste disposal pits, fish rearing ponds and landscape ponds.

(c) Actively maintained farm drainage and roadside ditches.

(d) Artificial wetlands within active nonmetallic mining operations.

(2) A person who proposes a project that may affect an artificial wetland shall notify the department at least 15 working days prior to initiating the project. For purposes of this chapter, the following artificial wetlands are exempt from the provisions of this chapter unless the department notifies the applicant within 15 working days from when the department receives notice of the proposed project from the applicant that the artificial wetland has significant functional values or uses.

Mary,

Below is the hand written notes on the bottom of page 1 and top of page 2 of the enclosed additions to the wetlands legislation:

281.01(18) of the statutes is amended to read: (18) "Waters of the state" includes those portions of Lake Michigan and Lake Superior with the boundaries of this state and all lakes, bays, rivers, streams, springs, ponds, wells, impounding reservoirs, ~~marshes~~ wetlands, water courses, drainage systems and other surface water or groundwater, natural or artificial public or private waters within this state or its jurisdiction.

I believe everything else is readable. If you have any questions please feel free to contact me or the DNR staff, Scott Hausman and Mike Kane, as we spoke about on the phone. Also, your efforts on our behalf are absolutely appreciated. This is certainly a busy time and we are thankful that you are willing to make this critical issue a priority.

Thanks,

Pat

CONFIDENTIAL

1 **AN ACT** to renumber 23.321; and to create 281.01 (1), 281.01 (21) and 281.36 of the
 2 statutes; relating to: permits for the discharge of dredged or fill material into
 3 wetlands.

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

LEGISLATIVE COUNCIL STAFF PREFATORY NOTE: This draft creates a state permitting process for the discharge of dredged or fill material into wetlands. The approval, granted by the department of natural resources, is referred to as a water quality certification, to indicate that it is the same as the state water quality certification required for permits issued by the U.S. army corps of engineers under s. 404 of the clean water act. The new requirements are placed in ch. 281, stats., *Water and Sewage*. The existing wetland mitigation statute is renumbered to follow the new permitting statute.

4 SECTION 1. 23.321 of the statutes is renumbered 281.37.

5 SECTION 2. 281.01 (1) of the statutes is created to read:

6 281.01 (1) "Artificial wetland" means a wetland that is present as a result of human
 7 modifications to the landscape or hydrology and for which there is no prior wetland or stream
 8 history.

9 SECTION 3. 281.01 (21) of the statutes is created to read:

10 281.01 (21) "Wetland" has the meaning given in s. 23.32 (1).

11 SECTION 4. 281.36 of the statutes is created to read:

12 **281.36 Wetlands; water quality certification. (1) GENERAL PROHIBITION.** Unless a
 13 water quality certification has been issued by the department under this section, it is unlawful
 14 to discharge dredged or fill material into a wetland.

281.01(18) of the statutes is amended to read:

(18) "waters of the state" includes those portions of Lake Michigan and Lake Superior with the boundaries of this state.

Impounding reservoirs, ~~marshes~~ wetlands, water courses,

01/16/2001

drainage systems and other² surface water or groundwater, natural or artificial, public ~~waters~~ WLC: 007412 within this state or its jurisdiction.

(2) GENERAL EXCEPTIONS. (a) Except as provided in sub. (3), sub. (1) does not apply

to a discharge of dredged or fill material if the discharge results from or is for the purpose of any of the following:

1. Normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water practices.

2. Maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures.

3. Construction or maintenance of farm or stock ponds or irrigation ditches, or maintenance of drainage ditches.

4. Construction of temporary sedimentation basins on a construction site which does not include placement of fill material into navigable waters.

5. Construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the ~~navigable waters~~ wetlands are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized.

(3) GENERAL EXCEPTIONS NOT APPLIED TO NEW USES. ^(a) Any discharge of dredged or fill material into wetlands incidental to any activity having as its purpose bringing an area of ~~waters of the state~~ wetlands into a use to which it was not previously subject, where the flow or circulation of waters of the state may be impaired or the reach of such waters be reduced, shall be required to obtain a water quality certification under this section.

(b) This section does not affect jurisdiction under other state statutes.

~~COMMENT: This provision limits the applicability of the general exceptions. Should the exception for artificial wetlands be similarly limited?~~ **NO**

1 (4) EXCEPTION FOR ARTIFICIAL WETLANDS. (a) Subdivision (1) does not apply to a
2 discharge of dredged or fill material into an artificial wetland identified in par. (b) if all of the
3 following apply:

4 1. The person who proposes to make the discharge notifies the department at least 15
5 working days prior to initiating the discharge.

6 2. Within 15 working days from the day that the department receives the notice under
7 subd. 1.; the department does not notify the person that the artificial wetland has significant
8 functional values or uses.

9 (b) Paragraph (a) applies to an artificial wetland that is or is within any of the following:

10 1. A sedimentation or stormwater detention basin or associated conveyance features
11 that is operated and maintained only for sediment detention or flood storage purposes.

12 2. An active sewage lagoon, cooling pond, waste disposal pit, fish rearing pond or
13 landscape pond.

14 3. An actively maintained farm drainage or roadside ditch.

15 4. An active nonmetallic mining operation.

16 (5) GENERAL WATER QUALITY CERTIFICATIONS. (a) In carrying out functions relating to
17 the discharge of dredged or fill material, the department may, after notice and opportunity for
18 public hearing, issue a general water quality certification ^{to simplify the process or} for a category of activities involving
19 discharges of dredged or fill material if the department determines that the activities in the
20 category are similar in nature, will cause only minimal adverse environmental effects when
21 performed separately, and will have only minimal cumulative adverse effect on the
22 environment.

1 (b) A general water quality certification under this subsection shall be for a period of
 2 not more than 5 years after the date of its issuance. The department may revoke or modify a
 3 general water quality certification if, after opportunity for public hearing, the department
 4 determines that the activities authorized by the general water quality certification have an
 5 adverse impact on the environment or the activities are more appropriately authorized by
 6 individual water quality certifications.

7 (END)

SECTION 6. 281.17(10) (a) is renumbered 281.36(6) and amended to read:

281.36(6)(a) No person may conduct an activity under sub. (1) without a water quality certification or for which the department denies a water quality certification. ~~required by rules promulgated under this subchapter to implement 33 USC 1341(a).~~

(b) No person may violate a condition imposed by the department in a water quality certification. ~~required by rules promulgated under this subchapter to implement 33 USC 1341(a).~~

SECTION 7. 281.37 created to read:

281.37. **INSPECTIONS AND ENTRY:** A department representative, upon presentation of their credentials, (a) shall have a right of entry to, upon, or through any property which is the subject of a wetland water quality certification or to investigate a discharge of dredged or fill material, and (b) may at reasonable times have access to any records which the water quality certification holder is required to establish and maintain.



State of Wisconsin
2001 - 2002 LEGISLATURE

RMR p
LRB-2106/1
MGG:/.....
NLJ

D-Note

Wed 1/24

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

GEN

1 AN ACT ...; relating to: wetland water quality certification.

Analysis by the Legislative Reference Bureau

This is a preliminary draft. An analysis will be provided in a later version.
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:

2 SECTION 1. 23.321[↓] of the statutes is renumbered 281.37[↓] and 281.37 (2m) (a) 1.
3 and 2. and (b) 3., as renumbered, are amended to read:
4 281.37 (2m) (a) 1. A person who is the holder of a permit or other approval that
5 authorizes a mitigation project shall grant a conservation easement under s. 700.40
6 to the department to ensure that a wetland that is being restored, enhanced or
7 created will not be destroyed or substantially degraded by any subsequent owner
8 proprietor of or holder of interest in the property on which the wetland is located.
9 The department shall revoke the permit or other approval if the holder of the permit
10 or other approval fails to take these measures.

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

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

History: 1999 a. 147.

9 **SECTION 2.** 281.01 (18)¹ of the statutes is amended to read:

10 281.01 (18) "Waters of the state" includes those portions of Lake Michigan and
11 Lake Superior within the boundaries of this state, and all lakes, bays, rivers,
12 streams, springs, ponds, wells, impounding reservoirs, ~~marshes,~~ wetlands,
13 watercourses, drainage systems and other surface water or groundwater, natural or
14 artificial, public or private, within this state or its jurisdiction.

History: 1995 a. 227 ss. 380, 384, 387, 389, 392, 418, 420; 1995 a. 378 s. 43; 1997 a. 27, 35; 1999 a. 147.

15 **SECTION 3.** 281.01 (21)¹ of the statutes is created to read:

16 281.01 (21) "Wetland" has the meaning given in s. 23.32 (1).¹

17 **SECTION 4.** 281.17 (10)¹ of the statutes is repealed.

18 **SECTION 5.** 281.36¹ of the statutes is created to read:

19 **281.36 Wetland water quality certification. (1) DEFINITIONS.** In this
20 section:

21 (a) "Artificial wetland" ~~means~~ ^{has} the meaning specified by the department by
22 the rule.

23 (b) "~~Wetland water quality standards~~" have the meaning given in s. 281.37(1)

24 (e)

1 (b) ~~(e)~~ "Water quality certification standards" mean ⁶ water quality standards
2 promulgated by the department under s. ^{281.15} ~~281.15~~ ~~that relate to the discharge of~~
3 ~~pollutants into the waters of the state.~~

4 (c) (d) "Working day" has the meaning given in s. 227.01 (14).¹

5 (2) CERTIFICATION REQUIREMENT. No person may discharge dredged or fill
6 material in a wetland unless the discharge is authorized by a wetland water quality
7 certification issued by the department. No person may violate any condition imposed
8 by the department in a wetland water quality certification. The department may not
9 issue a wetland water quality certification unless it determines that the discharge
10 will comply with all applicable wetland water quality standards and all applicable
11 water quality certification standards.

12 (3) EXEMPTIONS. Except as provided in sub. (4),¹ the certification requirement
13 under sub. (2)¹ does not apply to any discharge that is the result of any of the following
14 activities:

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

16 (b) Maintenance, emergency repair, or reconstruction of damaged parts of
17 structures that are in use in the waters of the state.

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

20 (d) Maintenance of drainage ditches.

21 (e) Construction of temporary sedimentation basins used at a construction site,
22 if the construction includes the discharge of dredged or fill material into a navigable
23 water.

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

4 1. The flow and circulation patterns and chemical biological characteristics of
5 the affected wetland are not impaired.

6 2. The reach of any navigable water is not reduced.

7 3. Any adverse effect on the aquatic environment of the affected wetland is
8 minimized to the degree required by the department.

9 (4) DISCHARGES AFFECTING WATERS. Notwithstanding sub. (3), a discharge that
10 would be exempted under sub. (3) shall be subject to the certification requirement
11 under sub. (2) if it is incidental to any of the following activities:

****NOTE: Although "incidental to" is used in federal law, I think a more precise
term should be used. How about "is a part of"?

12 (a) An activity that has as its purpose bringing a wetland, or part of a wetland,
13 into a use for which it ~~was not~~ was not previously subject.

14 (b) An activity that may impair the flow or circulation of any water of the state.

15 (c) An activity that may reduce the reach of any water of the state.

16 (5) EXEMPTIONS; ARTIFICIAL WETLANDS. (a) The certification requirement under
17 sub. (2) does not apply to a discharge into an artificial wetland identified in par. (b)
18 if all of the following apply:

19 1. The person who proposes to make the discharge notifies the department of
20 the discharge at least 15 working days before beginning the discharge.

21 2. Within 15 working days from the date that the department receives the
22 notice under subd. 1., the department does not notify the person that the artificial
23 wetland has a significant functional value.

1 (b) To qualify for the exemption under par. (a), an artificial wetland must be
2 one or more of the following:

3 1. A sedimentation or storm water detention basin, or any associated
4 conveyance feature, that is operated and maintained only for detention of sediment
5 or for storage of flood water.

6 2. A lagoon for sewage, a waste disposal pit, a cooling pond, a landscape pond,
7 or a fish rearing pond, if the lagoon, pit, or pond is used on a regular basis.

8 *D-Note functioning* 3. A farm drainage ditch or roadside ditch if the ditch is used on a regular basis.

9 *An artificial wetland* 4. Located in a nonmetallic mining site where nonmetallic mining is being
10 conducted.

11 (6) GENERAL WATER QUALITY CERTIFICATIONS. (a) In lieu of issuing individual
12 wetland water quality certifications, the department may issue a general wetland
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 would be 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 wetland water quality certification issued under this section
21 shall be for a period of more than ⁵five years after the date of its issuance.

22 (c) If the department determines that a general wetland water quality
23 certification fails to meet any of the standards in par. (a), the department shall
24 modify the certification ~~in order for it~~ to meet all of those standards. If the
25 department cannot modify the certification so that all ^{of} the standards will be met or

1 if the department determines that the discharges subject to the general certification
 2 are more appropriately certified by using individual wetland water quality
 3 certifications, the department shall revoke the general certification.

4 (d) Before issuing, modifying or revoking a general wetland water quality
 5 certification, the department shall provide notice and hearing under ss. 227.17 and
 6 227.18.

7 (7) INSPECTION AUTHORITY. For purposes of enforcing this section, any employee
 8 or other representative of the department, upon present^{ing} his or her credentials, may
 9 do any of the following:

10 (a) Enter and inspect any property on which is located a wetland, or part of a
 11 wetland, which is subject to a wetland water quality certification issued under this
 12 section.

13 (b) Enter and inspect any property to investigate a discharge of dredged or fill
 14 material.

15 (c) Gain access to and inspect any records that the department requires the
 16 holder of the wetland water quality certification to keep.

17 SECTION 6. 281.69 (3) (b) 2. of the statutes is amended to read:

18 281.69 (3) (b) 2. The restoration of a wetland, ^{plain commo-} as defined in s. 23.32 (1), if the
 19 restoration will protect or improve a lake's water quality or its natural ecosystem.

20 History: 1991 a. 39; 1993 a. 343; 1995 a. 27; 1995 a. 227 s. 31; Stats. 1995 s. 281.69; 1997 a. 27; 1999 a. 9; 1999 a. 150 s. 672; 1999 a. 185.

21 SECTION 7. 281.98 (1) of the statutes is amended to read:

22 ^{permit} 281.98 (1) Except as provided in ss. 281.47 (1) (d), 281.75 (19) and 281.99 (2),
 23 any person who violates this chapter or any rule promulgated or any plan approval,
 24 license or special order or wetland water quality certification issued under this
 chapter shall forfeit not less than \$10 nor more than \$5,000 for each violation. Each

1 day of continued violation is a separate offense. While an order is suspended, stayed[^]
2 or enjoined, this penalty does not accrue.

3 History: 1995 a. 227; 1997 a. 27; 1999 a. 147.

3 SECTION 8. 299.95[√] of the statutes is amended to read:

4 **299.95 Enforcement; duty of department of justice; expenses.** The
5 attorney general shall enforce chs. 281 to 285 and 289 to 295 and this chapter, except
6 ss. 281.48, 285.57, 285.59[^] and 299.64, and all rules, special orders, licenses, plan
7 approvals ~~and~~, permits, and wetland water quality certifications of the department,
8 except those promulgated or issued under ss. 281.48, 285.57, 285.59[^] and 299.64 and
9 except as provided in s. 285.86. The circuit court for Dane county or for any other
10 county where a violation occurred in whole or in part has jurisdiction to enforce chs.
11 281 to 285 and 289 to 295 or this chapter or the rule, special order, license, plan
12 approval ~~or~~, permit, or certification by injunctive and other relief appropriate for
13 enforcement. For purposes of this proceeding where chs. 281 to 285 and 289 to 295
14 or this chapter or the rule, special order, license, plan approval ~~or~~, permit ~~or~~
15 certification prohibits in whole or in part any pollution, a violation is considered a
16 public nuisance. The department of natural resources may enter into agreements
17 with the department of justice to assist with the administration of chs. 281 to 285 and
18 289 to 295 and this chapter. Any funds paid to the department of justice under these
19 agreements shall be credited to the appropriation account under s. 20.455 (1) (k).

20 History: 1975 c. 39 s. 734; 1979 c. 34 s. 985g; 1979 c. 221; Stats. 1979 s. 144.98; 1981 c. 374; 1989 a. 284; 1993 a. 243; 1995 a. 27; 1995 a. 227 s. 829; Stats. 1995 s. 299.95; 1995 a. 290 s. 12; 1997 a. 35; 1999 a. 9.

(END)

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-2106/3dn

MGG:.....

WJ

1. Please have DNR attorney Michael Cain review this draft

2. In this draft, I took less liberty than usual in incorporating federal law into the statutes. However, the federal law is difficult because it uses similar but different terms. A basic tenet of statutory construction is that if different terms are used, then different meanings must be intended. In reviewing this draft, please consider the following:

- * a. The term "maintenance" is used often in the exemption language under s. 281.36 (3), but "emergency repair" is used only once.
- b. The term "construction" is used often in the exemption language under s. 281.36 (3), but "reconstruction" is used only once.
- c. Section 281.36 (3) (d) refers only to maintenance (and not construction) of drainage ditches, and s. 281.36 (3) (e) refers only to construction (and not maintenance or reconstruction) of temporary sedimentation basins.
- d. Four different terms are used for "ditches": irrigation ditches and drainage ditches under s. 281.36 (3) and farm drainage ditches and roadside ditches under s. 281.36 (5) (b).
- e. Five different terms are used for "ponds": farm ponds and stock ponds under s. 281.36 (3) and cooling ponds, landscape ponds, and fish rearing ponds under s. 281.36 (5) (b).
- * g. In s. 281.36 (4) (a) the phrase "reach of any water of the state" is used, but in s. 281.36 (3) (f) 2. the phrase "reach of any navigable water" is used.
- * f. In s. 281.36 (4) (b) the phrase "the flow or circulation of any water of the state" is used, but in s. 281.36 (3) (f) 1. the phrase "flow and circulation patterns of the affected wetland" is used.

These terms need to be reviewed and if these different terms are describing the same thing or concept, then one term should be chosen and used consistently. If they do mean different things, does it make sense to continue that difference? Does it make sense, for example, that construction and maintenance of irrigation ditches are exempt but only maintenance of drainage ditches is exempt?

3 2. I eliminated some of the verbiage found in s. 281.36 (3) (a) and (b). Please review and please call me to discuss any changes.

5 3. Note that the definition of "waters of the state" is chapter-wide for ch. 281 and is used throughout the statutes. Although I do not believe that changing "marshes" to "wetlands" makes any real substantive change, you may wish to check how the definition is used within ch. 281 and in the following provisions under current law that are outside ch. 281: ss. 29.503 (1) (b), 29.735 (1), 60.70 (11), 85.17 (1) (b), 94.645 (1) (g), 95.60 (1) (b), 101.09 (1) (d), 145.01 (17), 160.01 (4), 236.13 (2m), and 560.65 (1) (f).

6 5. Under the draft, the definition for "wetland" applies to all of ch. 281. Therefore, under the draft, it is a defined term for ss. 281.165, 281.22, 281.65 (2) (d), and 281.665 (5) (c) 1. OK?

7 6. By moving s. 23.321 to ch. 281, the chapter-wide definitions in s. 281.01 apply to the wetland mitigation provisions. I changed "owner" to "proprietor" in s. 23.321 (2m), as renumbered in the draft, because the definition of "owner" for purposes of ch. 281 is limited to owners of certain water or sewage systems. Note also that the definition of "person" in s. 281.01 will now apply to these wetland mitigation provisions.

8 7. Note that the words "person" and "sewage" are defined in s. 281.01 and that those definitions will apply wherever "person" or "sewage" is used in s. 281.36.

9 8. As I understood your drafting instructions, you want the language in s. 281.17 (10) to be limited to wetland water quality certifications. I, therefore, incorporated it into s. 281.36 (2).

10 9. General permits under ch. 30 require an "environmental analysis" as well as notice and hearing. Do you want the "environmental analysis" requirement for general wetland water quality certifications?

11 10. I have limited the inspection authority to s. 281.36. If you want it to have broader scope, please let me know what other statutory provisions are to be included.

12 11. The penalty and remedy provisions under ss. 281.98, 283.87 (if the discharge involves water pollution), and 299.95 apply to violations under s. 281.36 (2). OK?

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

13 12. Note the definition of "water quality standards". If there are standards that are promulgated ~~and~~ ~~out~~ that are not included in those promulgated under s. 281.15 that you want to apply to this certification process, this will need to be re drafted to include cross-reference to that statutory authority.

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-2106/P1dn
MGG:wlj:km

January 24, 2001

1. Please have DNR attorney Michael Cain review this draft.
2. In this draft, I took less liberty than usual in incorporating federal law into the statutes. However, the federal law is difficult because it uses similar but different terms. A basic tenet of statutory construction is that if different terms are used, then different meanings must be intended. In reviewing this draft, please consider the following:
 - a. The term "maintenance" is used often in the exemption language under s. 281.36 (3), but "emergency repair" is used only once.
 - b. The term "construction" is used often in the exemption language under s. 281.36 (3), but "reconstruction" is used only once.
 - c. Section 281.36 (3) (d) refers only to maintenance (and not construction) of drainage ditches, and s. 281.36 (3) (e) refers only to construction (and not maintenance or reconstruction) of temporary sedimentation basins.
 - d. Four different terms are used for "ditches": irrigation ditches and drainage ditches under s. 281.36 (3) and farm drainage ditches and roadside ditches under s. 281.36 (5) (b).
 - e. Five different terms are used for "ponds": farm ponds and stock ponds under s. 281.36 (3) and cooling ponds, landscape ponds, and fish rearing ponds under s. 281.36 (5) (b).
 - g. In s. 281.36 (4) (c) the phrase "reach of any water of the state" is used, but in s. 281.36 (3) (f) 2. the phrase "reach of any navigable water" is used.
 - f. In s. 281.36 (4) (b) the phrase "the flow or circulation of any water of the state" is used, but in s. 281.36 (3) (f) 1. the phrase "flow and circulation *patterns* ... of the affected wetland" is used.

These terms need to be reviewed and if these different terms are describing the same thing or concept, then one term should be chosen and used consistently. If they do mean different things, does it make sense to continue that difference? Does it make sense,

for example, that construction and maintenance of irrigation ditches are exempt but only maintenance of drainage ditches is exempt?

3. I eliminated some of the verbiage found in s. 281.36 (3) (a) and (b). Please review and call me to discuss any changes.

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7. By moving s. 23.321 to ch. 281, the chapter-wide definitions in s. 281.01 apply to the wetland mitigation provisions. I changed "owner" to "proprietor" in s. 23.321 (2m), as renumbered in the draft, because the definition of "owner" for purposes of ch. 281 is limited to owners of certain water or sewage systems. Note also that the definition of "person" in s. 281.01 will now apply to these wetland mitigation provisions.

8. Note that the words "person" and "sewage" are defined in s. 281.01 and that those definitions will apply wherever "person" or "sewage" is used in s. 281.36.

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12. The penalty and remedy provisions under ss. 281.98, 283.87 (if the discharge involves water pollution), and 299.95 apply to violations under s. 281.36 (2). OK?

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

Cowles

the DNR

~~2048~~

Redraft instructions

delete "wetland" in front of any water
quality certifications

delete ~~of~~ (e) p. 3, lines 19 to 21

p 4 line 3 - change to affected wetland

keep "incidental to"

add in concept re: this is in addition to
other requirements

want language from rules re: artificial
wetlands - must be exact, cannot
be referenced to rules



State of Wisconsin
2001 - 2002 LEGISLATURE

DN

LRB-2106/P1
MGG:wj/km
RMR
King

Friday
→ as early as possible

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

9 SEC. #. PN; 23.321 (title) and (1) (title), (a) and (b); 281.37 (title) and (1) (title), (a) and (b)
SEC. #. RP; 23.321 (1)(c)

Gen. Act.

for wetlands

1
2
3

AN ACT to repeal 281.17 (10); to renumber and amend 23.321; to amend 281.01 (18), 281.69 (3) (b) 2., 281.98 (1) and 299.95; and to create 281.01 (21) and 281.36 of the statutes; relating to: ~~wetland~~ water quality certification.

Analysis by the Legislative Reference Bureau

This is a preliminary draft. An analysis will be provided in a later version. For further information see the state fiscal estimate, which will be printed as an appendix to this bill.

INS
ANL

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

4
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9

SECTION 1. 23.321 of the statutes ^{to} ~~are~~ renumbered 281.37, and 281.37 (2m) (a)

1. and 2. and (b) 3., as renumbered, are amended to read:

281.37 (2m) (a) 1. A person who is the holder of a permit or other approval that authorizes a mitigation project shall grant a conservation easement under s. 700.40 to the department to ensure that a wetland that is being restored, enhanced or created will not be destroyed or substantially degraded by any subsequent owner

1 proprietor of or holder of interest in the property on which the wetland is located.
2 The department shall revoke the permit or other approval if the holder of the permit
3 or other approval fails to take these measures.

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

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

12 **SECTION 2.** 281.01 (18) of the statutes is amended to read:

13 281.01 (18) "Waters of the state" includes those portions of Lake Michigan and
14 Lake Superior within the boundaries of this state, and all lakes, bays, rivers,
15 streams, springs, ponds, wells, impounding reservoirs, ~~marshes~~, wetlands,
16 watercourses, drainage systems and other surface water or groundwater, natural or
17 artificial, public or private, within this state or its jurisdiction.

18 **SECTION 3.** 281.01 (21) of the statutes is created to read:

19 281.01 (21) "Wetland" has the meaning given in s. 23.32 (1).

20 **SECTION 4.** 281.17 (10) of the statutes is repealed.

21 **SECTION 5.** 281.36 of the statutes is created to read:

22 **281.36 Wetland water quality certification.** ^W ^{for wetlands} (1) DEFINITIONS. In this
23 section:

24 (a) "Artificial wetland" has the meaning specified by the department by the
25 rule.

1 (b) "Water quality standards" means water quality standards ~~promulgated~~ ^{established} by
2 the department under s. 281.15. ^{under rules promulgated}

3 (c) "Working day" has the meaning given in s. 227.01 (14).

4 (2) CERTIFICATION REQUIREMENT. No person may discharge dredged or fill
5 material ^{into} a wetland unless the discharge is authorized by a ~~wetland~~ water quality
6 certification issued by the department. No person may violate any condition imposed
7 by the department in a ~~wetland~~ water quality certification. The department may not
8 issue a ~~wetland~~ water quality certification unless it determines that the discharge
9 will comply with all applicable water quality standards. ^{INSERT 3-9}

10 (3) EXEMPTIONS. Except as provided in sub. (4), the certification requirement
11 under sub. (2) does not apply to any discharge that is the result of any of the following
12 activities:

- 13 (a) Normal farming, silviculture, or ranching activities.
- 14 (b) Maintenance, emergency repair, or reconstruction of damaged parts of
- 15 structures that are in use in the waters of the state.
- 16 (c) Construction or maintenance of farm ponds, stock ponds, or irrigation
- 17 ditches.
- 18 (d) Maintenance of drainage ditches.

19 (e) Construction of temporary sedimentation basins used at a construction site,
20 if the construction ^{does not} includes the discharge of dredged or fill material into a navigable
21 water.

22 ~~(e)~~ Construction or maintenance of farm roads, forest roads, or temporary
23 mining roads that is performed in accordance with best management practices, as
24 determined by the department, to ^{ensure} ~~assure~~ all of the following:

SECTION 5

1

1. ^{That} The flow and circulation patterns and chemical ^{and} biological characteristics of the affected wetland are not impaired.

2

2. The reach of ~~any navigable water~~ ^{the affected wetland} is not reduced.

3

3. ^{That} Any adverse effect on the aquatic environment of the affected wetland is minimized to the degree required by the department.

4

(4) DISCHARGES AFFECTING WATERS. Notwithstanding sub. (3), a discharge that would be exempted ^{under sub. (3)} is subject to the ^{greater requirement} certification requirement under sub. (2) if ^{the discharge} it is incidental to any of the following activities:

5

***NOTE: Although "incidental to" is used in federal law, I think a more precise term should be used. How about "is a part of"?

6

(a) An activity that has as its purpose bringing a wetland, or part of a wetland, into a use for which it was not previously subject.

7

(b) An activity that may impair the flow or circulation of any water ^(S) of the state.

8

(c) An activity that may reduce the reach of any water ^(S) of the state.

9

(5) EXEMPTIONS; ARTIFICIAL WETLANDS. (a) The certification requirement under sub. (2) does not apply to a discharge into an artificial wetland identified in par. (b) if all of the following apply:

10

1. The person who proposes to make the discharge notifies the department of the discharge at least 15 working days before beginning the discharge.

11

2. Within 15 working days ^{after} ~~from~~ the date ^{on which} ~~that~~ the department receives the notice under subd. 1., the department does not notify the person that the artificial wetland has a significant functional value ^{as a wetland}.

12

(b) To qualify for the exemption under par. (a), an artificial wetland must be one or more of the following:

13

1 1. A sedimentation or storm water detention basin, or any associated
2 conveyance feature, that is operated and maintained only for detention of sediment
3 or for storage of flood water.

4 2. A lagoon for sewage, a waste disposal pit, a cooling pond, a landscape pond,
5 or a fish rearing pond, if the lagoon, pit, or pond is used on a regular basis.

6 3. A functioning farm drainage ditch or roadside ditch.

7 4. An artificial wetland located in a nonmetallic mining site where nonmetallic
8 mining is being conducted.

9 (6) GENERAL WATER QUALITY CERTIFICATIONS. (a) In lieu of issuing individual
10 wetland water quality certifications, the department may issue a general wetland
11 water quality certification for types of discharges that the department determines
12 are similar in nature or for the purpose of simplifying the certification process if the

INS
ERT
5-8

13 ~~discharges~~ meet all of the following standards: ~~general~~ ~~certification~~

STEP

14 1. The discharges will cause only minimal adverse environmental effects, as
15 determined by the department, if they ~~would be~~ performed separately.

STEP

subject to the certification

subject to the general

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

18 (b) No general wetland water quality certification issued under this section
19 shall be for a period of more than 5 years after the date of its issuance.

may

effective

any of the discharges under

20 (c) If the department determines that a general wetland water quality
21 certification fails to meet any of the standards in par. (a), the department shall
22 modify the certification to meet all of those standards. If the department cannot
23 modify the certification so that all of the standards will be met or if the department
24 determines that the discharges subject to the general certification are more

so that the discharges meet

the

1 appropriately certified by using individual ~~wetland~~ water quality certifications, the
2 department shall revoke the general certification.

3 (d) Before issuing, modifying, or revoking a general ~~wetland~~ water quality
4 certification, the department shall provide notice and ^{for a} hearing under ss. 227.17 and
5 227.18.

6 (7) INSPECTION AUTHORITY. For purposes of enforcing this section, any employee
7 or other representative of the department, upon presenting his or her credentials,
8 may do any of the following:

9 (a) Enter and inspect any property on which is located a wetland, or part of a
10 wetland, ^{that} ~~which~~ is subject to a ~~wetland~~ water quality certification issued under this
11 section.

12 (b) Enter and inspect any property to investigate a discharge of dredged or fill
13 material.

14 (c) Gain access to and inspect any records that the department requires the
15 holder of the ~~wetland~~ water quality certification to keep.

16 **SECTION 6.** 281.69 (3) (b) 2. of the statutes is amended to read:

17 281.69 (3) (b) 2. The restoration of a wetland, ~~as defined in s. 23.32 (1)~~, if the
18 restoration will protect or improve a lake's water quality or its natural ecosystem.

19 **SECTION 7.** 281.98 (1) of the statutes is amended to read:

20 281.98 (1) Except as provided in ss. 281.47 (1) (d), 281.75 (19), and 281.99 (2),
21 any person who violates this chapter or any rule promulgated or any plan approval,
22 license ~~or~~, special order, or ~~wetland~~ water quality certification issued under this
23 chapter shall forfeit not less than \$10 nor more than \$5,000 for each violation. Each
24 day of continued violation is a separate offense. While an order is suspended, stayed,
25 or enjoined, this penalty does not accrue.

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

2 **299.95 Enforcement; duty of department of justice; expenses.** The
3 attorney general shall enforce chs. 281 to 285 and 289 to 295 and this chapter, except
4 ss. 281.48, 285.57, 285.59, and 299.64, and all rules, special orders, licenses, plan
5 approvals ~~and~~, permits, and ~~wetland~~ water quality certifications of the department,
6 except those promulgated or issued under ss. 281.48, 285.57, 285.59, and 299.64 and
7 except as provided in s. 285.86. The circuit court for Dane county or for any other
8 county where a violation occurred in whole or in part has jurisdiction to enforce chs.
9 281 to 285 and 289 to 295 or this chapter or the rule, special order, license, plan
10 approval ~~or~~, permit, or certification by injunctive and other relief appropriate for
11 enforcement. For purposes of this proceeding where chs. 281 to 285 and 289 to 295
12 or this chapter or the rule, special order, license, plan approval ~~or~~, permit or
13 certification prohibits in whole or in part any pollution, a violation is considered a
14 public nuisance. The department of natural resources may enter into agreements
15 with the department of justice to assist with the administration of chs. 281 to 285 and
16 289 to 295 and this chapter. Any funds paid to the department of justice under these
17 agreements shall be credited to the appropriation account under s. 20.455 (1) (k).

18

(END)

2001-2002 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-2106/lins
MGG:.....

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.

^{U.S.} ^I A recent ~~United State~~ Supreme Court decision, ~~Solid Water 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 that, therefore, no ACE discharge permits are required to discharge dredged or fill material into these bodies of water.

For discharges into wetlands, this bill incorporates into state law the content of some of the federal provisions governing the issuance of ACE discharge permits. Under the bill, no one may discharge dredged or fill material into a 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 ~~the~~ federal law, an activity that would be exempt loses its exemption if it is incidental to certain activities. Under the bill, these activities include using a wetland for a use for which it was not previously used, an activity that may impair the flow of any body of water in this state, and activity that may reduce the reach of any body of water in this state. Finally, as under federal law, there are provisions allowing DNR to issue general permits for types of discharges that are similar in nature. A general permit allows anyone to carry out the type of discharge subject to the general permit, as opposed to an individual permit authorizing the discharge being issued to a specific person.

Under current rules promulgated by DNR, discharges into certain artificial wetlands are exempt from meeting the water quality standards that apply to wetlands if the person seeking permission for the discharge notifies DNR at least 15 days before beginning the discharge and DNR does not notify the person within 15 days after receiving the notification that the artificial wetland has a significant

functional value as a wetland. Under these rules, an artificial wetland is an area where water-based vegetation is present and for which there is no prior wetland or stream history. Wetlands that are eligible for this exemption include certain sedimentation and storm water detention basins, sewage lagoons^v and farm drainage and roadside ditches. This bill incorporates these provisions into the statutes and expands the exemption to include all water quality standards.

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

water quality

Section # 30.48 (1) of the statutes is amended to read:

The certification requirement under this section is

30.48(1) Sections 30.44 to 30.47 are in addition to and ^{is} are not superseded by any law, rule, ordinance, ^v or other regulation governing an activity that occurs in the riverway,

History: 1989 a. 31; 1991 a. 189.

other requirement under any

the discharge of dredged or fill material ~~to~~ a wetland.

into

COMMENT: ~~This provision limits the applicability of the general exceptions. Should the exception for artificial wetlands be similarly limited?~~ **NO**

1 (4) EXCEPTION FOR ARTIFICIAL WETLANDS. (a) Subdivision (1) does not apply to a
2 discharge of dredged or fill material into an artificial wetland identified in par. (b) if all of the
3 following apply:

4 1. The person who proposes to make the discharge notifies the department at least 15
5 working days prior to initiating the discharge.

6 2. Within 15 working days from the day that the department receives the notice under
7 subd. 1.; the department does not notify the person that the artificial wetland has significant
8 functional values or uses.

9 (b) Paragraph (a) applies to an artificial wetland that is or is within any of the following:

10 1. A sedimentation or storm[^]water detention basin or associated conveyance features ~~that~~
11 that is operated and maintained only for sediment detention or ~~flood~~ storage purposes. **STET**

INSERT
5-8

12 2. An active sewage lagoon, cooling pond, waste disposal pit, fish rearing pond or
13 landscape pond.

14 3. An actively maintained farm drainage or roadside ditch.

15 4. An active nonmetallic mining operation.

16 (5) GENERAL WATER QUALITY CERTIFICATIONS. (a) In carrying out functions relating to
17 the discharge of dredged or fill material, the department may, after notice and opportunity for
18 public hearing, issue a general water quality certification for a category of activities involving
19 discharges of dredged or fill material if the department determines that the activities in the
20 category are similar in nature, will cause only minimal adverse environmental effects when
21 performed separately, and will have only minimal cumulative adverse effect on the
22 environment.

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-2106/1dn

MGG: *king*

1. Please have Michael Cain review the analysis.
2. Note that I added "as a wetland" to s. 281.36 (5) (a) 2. for clarity. ✓

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

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-2106/1dn
MGG:kmg:kjf

January 26, 2001

1. Please have Michael Cain review the analysis.
2. Note that I added "as a wetland" to s. 281.36 (5) (a) 2. for clarity.

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



State of Wisconsin

LEGISLATIVE REFERENCE BUREAU

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MADISON, WI 53701-2037

STEPHEN R. MILLER
CHIEF

LEGAL SECTION: (608) 266-3561
LEGAL FAX: (608) 264-6948

January 26, 2001

MEMORANDUM

To: Senator Baumgart

From: Mary Gibson-Glass, Senior Legislative Attorney

Re: LRB-2106 Wetland water quality certification

The attached draft was prepared at your request. Please review it carefully to ensure that it is accurate and satisfies your intent. If it does and you would like it jacketed for introduction, please indicate below for which house you would like the draft jacketed and return this memorandum to our office. If you have any questions about jacketing, please call our program assistants at 266-3561. Please allow one day for jacketing.

____ JACKET FOR ASSEMBLY JACKET FOR SENATE

If you have any questions concerning the attached draft, or would like to have it redrafted, please contact me at (608) 267-3215 or at the address indicated at the top of this memorandum.

If the last paragraph of the analysis states that a fiscal estimate will be prepared, the LRB will request that it be prepared after the draft is introduced. You may obtain a fiscal estimate on the attached draft before it is introduced by calling our program assistants at 266-3561. Please note that if you have previously requested that a fiscal estimate be prepared on an earlier version of this draft, you will need to call our program assistants in order to obtain a fiscal estimate on this version before it is introduced.

Please call our program assistants at 266-3561 if you have any questions regarding this memorandum.