

**SENATE SUBSTITUTE AMENDMENT 1,  
TO 2001 SENATE BILL 37**

February 8, 2001 – Offered by COMMITTEE ON ENVIRONMENTAL RESOURCES.

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

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

6           **SECTION 1.** 23.321 (title) and (1) (title), (a) and (b) of the statutes are  
7           renumbered 281.37 (title) and (1) (title), (a) and (b).

8           **SECTION 2.** 23.321 (1) (c) of the statutes is repealed.

9           **SECTION 3.** 23.321 (1) (d) to (f) and (2) to (5) of the statutes are renumbered  
10          281.37 (1) (d) to (f) and (2) to (5), and 281.37 (2m) (a) and (b) 3., as renumbered, are  
11          amended to read:

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

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

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

16           **SECTION 4.** 281.01 (21) of the statutes is created to read:

17           281.01 **(21)** “Wetland” has the meaning given in s. 23.32 (1).

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

19           **281.36 Water quality certification for nonfederal wetlands. (1)**

20           DEFINITIONS. In this section:

21           (a) “Artificial wetland” has the meaning specified by the department by rule.

22           (b) “Federal law” means any regulation, rule, memorandum of agreement,  
23 guidance letter, or other provision established by a federal agency that has the effect  
24 of law.

1 (c) “Nonfederal wetland” means a wetland to which the federal permitting  
2 process under 33 USC 1344 does not apply due to the decision in Solid Waste Agency  
3 of Northern Cook County v. U.S. Army Corps of Engineers, No. 99–1178 (U.S. Jan.  
4 9, 2001) but to which such permitting process did apply on January 8, 2001.

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

7 (e) “Working day” has the meaning given in s. 227.01 (14).

8 **(2) CERTIFICATION REQUIREMENT.** No person may discharge dredged or fill  
9 material into a nonfederal wetland unless the discharge is authorized by a water  
10 quality certification issued by the department under this section. No person may  
11 violate any condition imposed by the department in a water quality certification  
12 under this section. The department may not issue a water quality certification under  
13 this section unless it determines that the discharge will comply with all applicable  
14 water quality standards.

15 **(3) DELINEATION PROCEDURES.** If there is a dispute between the department and  
16 a person who is applying for or who holds a water quality certification issued under  
17 this section as to the boundary delineation of a nonfederal wetland, the department  
18 and the person shall use the procedures contained in the wetlands delineation  
19 manual published by the U.S. army corps of engineers in resolving the dispute. The  
20 department shall use the 1987 edition of the manual unless the U.S. army corps of  
21 engineers publishes an edition of the manual after the effective date of this  
22 subsection .... [revisor inserts date], and the department by rule designates that  
23 edition as the one to be used under this subsection.

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

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

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

7           (c) Construction or maintenance of farm ponds, stock ponds, or irrigation  
8 ditches.

9           (d) Maintenance of drainage ditches.

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

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

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

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

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

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

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

1           **(6) RULES FOR EXEMPTIONS.** The department shall promulgate rules to interpret  
2 and implement the provisions under subs. (4) and (5). The rules shall be consistent  
3 with 33 USC 1334 (f), as amended to the effective date of this subsection .... [revisor  
4 inserts date], and with any other federal law that is promulgated or adopted  
5 pursuant to that subsection or that is used to implement that subsection and that is  
6 in effect on the effective date of this subsection .... [revisor inserts date]. If 33 USC  
7 1334 (f) or the other federal law is amended or modified after the effective date of this  
8 subsection .... [revisor inserts date], the department may incorporate any of these  
9 amendments or modifications into the rules promulgated under this subsection but  
10 may not otherwise amend the rules.

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

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

16           2. Within 15 working days after the date on which the department receives the  
17 notice under subd. 1., the department does not notify the person that the artificial  
18 nonfederal wetland has a significant functional value as a wetland.

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

21           1. A sedimentation or storm water detention basin or associated conveyance  
22 feature that is operated and maintained only for sediment detention or flood storage  
23 purposes.

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

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

2           4. An active nonmetallic mining operation.

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.

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.

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, that is subject to a water quality certification issued  
6 under this section.

7           2. Enter and inspect any property on which is located a wetland and where the  
8 department has reasonable suspicion that a violation of this section has occurred or  
9 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          (b) Any employee or representative of the department may exercise the  
13 authority granted under par. (a) 1., 2., or 3. only during reasonable hours and only  
14 after the department has provided reasonable advance notice to the person owning  
15 the property involved or to the holder of the water quality certification.

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

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

22          (a) Regulate the discharge of dredged or fill material in a nonfederal wetland  
23 under s. 29.601, 30.11, 30.12, 30.123, 30.19, 30.195, 30.20, 59.692, 61.351, 62.231, or  
24 87.30 or chs. 281 to 285 or 289 to 299, except s. 281.48.

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

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

4 281.69 (3) (b) 2. The restoration of a wetland, ~~as defined in s. 23.32 (1),~~ if the  
5 restoration will protect or improve a lake's water quality or its natural ecosystem.

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

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

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

14 **299.95 Enforcement; duty of department of justice; expenses.** The  
15 attorney general shall enforce chs. 281 to 285 and 289 to 295 and this chapter, except  
16 ss. 281.48, 285.57, 285.59, and 299.64, and all rules, special orders, licenses, plan  
17 approvals ~~and~~, permits, and water quality certifications of the department, except  
18 those promulgated or issued under ss. 281.48, 285.57, 285.59, and 299.64 and except  
19 as provided in s. 285.86. The circuit court for Dane county or for any other county  
20 where a violation occurred in whole or in part has jurisdiction to enforce chs. 281 to  
21 285 and 289 to 295 or this chapter or the rule, special order, license, plan approval  
22 ~~or~~, permit, or certification by injunctive and other relief appropriate for  
23 enforcement. For purposes of this proceeding where chs. 281 to 285 and 289 to 295  
24 or this chapter or the rule, special order, license, plan approval ~~or~~, permit or  
25 certification prohibits in whole or in part any pollution, a violation is considered a

1 public nuisance. The department of natural resources may enter into agreements  
2 with the department of justice to assist with the administration of chs. 281 to 285 and  
3 289 to 295 and this chapter. Any funds paid to the department of justice under these  
4 agreements shall be credited to the appropriation account under s. 20.455 (1) (k).

5 **SECTION 9. Nonstatutory provisions.**

6 (1) TEMPORARY PROCESS.

7 (a) In this subsection, “federal law” has the meaning given in section 281.36 (1)  
8 (b) of the statutes, as created by this act.

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

13 1. The person demonstrates to the satisfaction of the department of natural  
14 resources that the activity which will result in the discharge will qualify for an  
15 exemption under 33 USC 1334 (f), as amended to the effective date of this  
16 subdivision, and under any other federal law that is promulgated or adopted  
17 pursuant to that subsection or that is used to implement that subsection and that is  
18 in effect on the effective date of this subdivision.

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

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

23 (2) RULES DEADLINE. The department of natural resources shall submit in  
24 proposed form the rules required under section 281.36 (6) of the statutes, as created  
25 by this act, to the legislative council staff under section 227.15 (1) of the statutes no

1 later than the first day of the 13th month beginning after the effective date of this  
2 subsection.

3 (END)