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~~D-Note~~ NOW O-N stays

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, rules for wetland compensatory mitigation, granting
 6 rule-making authority, providing an exemption from emergency rule
 7 procedures, 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.

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

INSERT A-0

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

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For an individual certification, DNR must determine whether it will approve or deny the certification within 90 days after the application for the certification is submitted unless the deadline is extended for an additional 60 days for good cause.

Applicant and DNR agree to an extension

The bill

imposes requirements and time limits on the DNR

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If DNR fails to meet the applicable deadline, the application is considered to be approved.

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 if the discharge is determined by a local governmental unit to be necessary for 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 30th day immediately following completion of the discharge or of any conditions imposed under the certification, or, if the application is denied or withdrawn, on the date of denial or withdrawal. 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.

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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).

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

21 **281.36 Water quality certification for nonfederal wetlands. (1)**

22 DEFINITIONS. In this section:

23 (a) “Additional federal law or interpretation” means any of the following:

24 1. An amendment to 33 USC 1344 (f) that becomes effective after January 9,
25 2001.

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

3 3. A regulation, rule, memorandum of agreement, guidance letter, interpretive
4 document, or other provision established by a federal agency that is promulgated or
5 adopted pursuant to 33 USC 1344 (f) or that is used to interpret or implement 33 USC
6 1344 (f), that applies to wetlands located in this state, and that becomes effective
7 after January 9, 2001.

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

11 (b) "Existing federal law or interpretation" means any of the following:

12 1. 33 USC 1344 (f), as amended to January 8, 2001.

13 2. A regulation, rule, memorandum of agreement, guidance letter, interpretive
14 document, or other provision established by a federal agency that is promulgated or
15 adopted pursuant to 33 USC 1344 (f) or that is used to interpret or implement 33 USC
16 1344 (f), that applies to wetlands in this state, and that is in effect on January 8, 2001.

17 3. A decision issued by a federal district or federal appellate court that affects
18 the application of a federal ^{statute} ~~amendment~~ or provision described in subs. 1. ^{or} ~~and~~ 2.,
19 that applies to wetlands located in this state, and that is issued on or before January
20 8, 2001.

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

24 (c) "Nonfederal wetland" means a wetland that is identified as such under sub.

25 (1m).

¶ (am) "Area of special natural resource interest"
has the meaning given in S. 281.37(1)(a).

1 (d) "Water quality standards" means water quality standards set under rules
2 promulgated by the department under s. 281.15.

3 **(1m) DETERMINATION OF NONFEDERAL WETLANDS.** (a) A wetland is identified as
4 a nonfederal wetland if either of the following applies:

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

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

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

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

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

22 **(2) CERTIFICATION REQUIREMENT.** (a) No person may discharge dredged or fill
23 material into a nonfederal wetland unless the discharge is authorized by a water
24 quality certification issued by the department under this section. No person may
25 violate any condition imposed by the department in a water quality certification

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unless the applicant and the department agree to

to compel the department to approve or deny the application

1 under this section. The department may not issue a water quality certification under
2 this section unless it determines that the discharge will comply with all applicable
3 water quality standards.

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4 (b) 1. The department shall ~~determine whether to~~ approve or deny a complete
5 application for a water quality certification under this section within ~~90~~ days after
6 the ^{complete} application for the certification is ~~initially~~ submitted. ~~The department shall~~
7 extend the time period for ~~an additional 60 days upon request of the applicant or~~
8 ~~upon its own initiative if the department finds that good cause exists for the~~
9 ~~extension.~~ If the department fails to ^{approve or deny the complete application} make the determination within the applicable
10 time period, the ^{applicant may bring an action for mandamus} application shall be considered to be approved and the department
11 ^{if the court grants the mandamus,} shall immediately issue the water quality certification.

INSERT 7-11

12 2. For purposes of subd. 1., the department shall determine when a complete
13 application has been submitted. The department shall review an application for
14 completeness within ~~30~~ days after receiving the application and shall notify the
15 applicant within 10 days after that review of any information that is necessary to
16 complete the application. The department may not consider an application complete
17 until the requirements under s. 1.11 have been met and until all of the ^{items of} information
18 ~~necessary~~ for the water quality certification and ^{for} any associated permits or other
19 approvals have been submitted to the department.

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

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

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

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

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

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

19 (d) Maintenance of drainage ditches.

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

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

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

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(C3)
DETERMINATIONS OF PUBLIC SAFETY

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

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

- 8 (a) Impair the flow or circulation of any nonfederal wetland.
- 9 (b) Reduce the reach of any nonfederal wetland.

10 (6) RULES FOR EXEMPTIONS. The department shall promulgate rules to interpret
11 and implement the provisions under subs. (4) and (5). The rules shall be consistent
12 with all existing federal laws or interpretations. The department shall incorporate
13 all ^{applicable} additional federal laws or interpretations into the rules that the department
14 ~~promulgates under this subsection and may not otherwise amend the rules.~~

INS
9-14

15 (7) RULES PROHIBITION. ^{and that is not in an area of special natural} The department may not promulgate or enforce a rule
16 requiring a person who submits an application for a water quality certification under
17 this section for the discharge of dredged or fill material into a nonfederal wetland
18 that is less than one acre in size to submit a description of practicable alternatives
19 to the discharge or to submit a description of any investigation conducted to
20 determine the viability of such alternatives if the discharge is determined by a local
21 governmental unit to be necessary for public safety. ^{as provided in par. (b) ✓} 9-21 ✓

resource
interest

22 (8) GENERAL WATER QUALITY CERTIFICATIONS. (a) In lieu of issuing individual
23 water quality certifications under this section, the department may issue a general
24 water quality certification for types of discharges that the department determines

1 are similar in nature or for the purpose of simplifying the certification process if the
2 discharges meet all of the following standards:

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

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

7 (b) No general water quality certification issued under ^{par. (a)} this section may be
8 effective for more than 5 years after the date of its issuance. ← INSERT 10-8

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

16 (d) Before issuing, ^{issued} modifying, or revoking a general water quality certification
17 ^{par. (a)} under this subsection, the department shall provide notice and a hearing under ss.
18 227.17 and 227.18.

19 (e) Subsection (2) (b) does not apply to general water quality certifications
20 issued under this subsection.

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

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

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

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

9 (am) An employee or representative of the department may not exercise the
10 authority granted under par. (a) 1. before the date on which the application for the
11 water quality certification is submitted. If the application is withdrawn or denied,
12 an employee or representative of the department may not exercise this authority
13 after the date on which the application is withdrawn or denied. If the application is
14 approved, an employee or representative of the department may not exercise this
15 authority after the 30th day immediately following the completion date of the
16 discharge of the dredged or fill material or the completion date of any conditions
17 imposed under the water quality certification, whichever date is later.

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

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

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

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

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

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

9 281.69 (3) (b) 2. The restoration of a wetland, ~~as defined in s. 23.32 (1),~~ if the
10 restoration will protect or improve a lake's water quality or its natural ecosystem.

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

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

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

19 **299.95 Enforcement; duty of department of justice; expenses.** The
20 attorney general shall enforce chs. 281 to 285 and 289 to 295 and this chapter, except
21 ss. 281.48, 285.57, 285.59, and 299.64, and all rules, special orders, licenses, plan
22 approvals and, permits, and water quality certifications of the department, except
23 those promulgated or issued under ss. 281.48, 285.57, 285.59, and 299.64 and except
24 as provided in s. 285.86. The circuit court for Dane county or for any other county
25 where a violation occurred in whole or in part has jurisdiction to enforce chs. 281 to

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

10 **SECTION 11. Nonstatutory provisions.**

11 (1) TEMPORARY PROCESS.

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

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

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

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

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

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

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

8 (3) **EMERGENCY RULES FOR WETLAND MITIGATION.** Using the procedure under
9 section 227.24 of the statutes, the department of natural resources may promulgate
10 the rules required under section 281.37 (3) of the statutes, as affected ~~by~~ by this act,
11 for the period before the effective date of the rules submitted under 1999 Wisconsin
12 Act 147, section 5 (1), but not to exceed the period authorized under section 227.24
13 (1) (c) and (2) of the statutes. Notwithstanding section 227.24 (1) (a), (2) (b), and (3)
14 of the statutes, the department is not required to provide evidence that promulgating
15 a rule under this subsection as an emergency rule is necessary for the preservation
16 of the public peace, health, safety, or welfare and is not required to provide a finding
17 of emergency for a rule promulgated under this subsection.

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

20 (1) The treatment of section 23.321 (2) of the statutes takes effect on August
21 1, 2001, or on the day after publication, whichever is later.

22 (END)

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FROM THE
LEGISLATIVE REFERENCE BUREAU

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Insert A-0

no ¶ 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 A-1

no ¶ The bill imposes specific requirements on the method DNR uses to determine whether the application is complete.

Insert A-2

no ¶ the applicant may petition a court to compel DNR to approve or deny the application. If the court grants the petition, DNR must comply within 30 days after the granting of the petition, and the applicant shall be awarded reasonable attorney fees and court costs.

Insert B

no ¶ that is not in an "area of special natural resource interest" 

Insert C

no ¶ The bill imposes specific procedural requirements on a local governmental unit that is making such a determination.

Current law defines "an area of special natural resource interest" as being an area that has significant ecological, cultural, aesthetic, educational, recreational, or scientific values and specifically lists certain areas. The areas listed include Lake Superior, Lake Michigan, the Mississippi River, the Lower Wisconsin State Riverway, fish and wildlife refuges, and state parks and forests.

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→ 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 that applies to that wetland is submitted and ending on the 20th day immediately following the completion of the discharge or if the application is denied or withdrawn on the date of denial or withdrawal. DNR may also inspect any property to investigate a discharge of dredged or fill material that DNR has reason to believe is in violation of the statutes regulation nonfederal wetlands. The bill specifies a procedure DNR must follow in (in) investigating these possible violations. 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.

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no ¶ the department shall approve or deny the application within 30 days after the mandamus is granted and the court shall award the applicant reasonable attorney fees and court cost^s incurred in bringing the action.

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2. For purposes of subd. 1., the department shall determine whether a complete application has been submitted and, no later than 30 days after the application is submitted, notify the applicant in writing about the determination. If the department determines that the application is incomplete, the notice shall state the reason for the determination and the specific items of information necessary to make the application complete. An applicant may supplement and resubmit an application that the department has determined to be incomplete. There is no limit on the number of times that an applicant may resubmit an application that the department has determined to be incomplete under this subdivision. The department may not demand items of information that are not specified in the notice as a condition for determining whether the application is complete unless both the department and the applicant agree or unless the applicant makes material additions or alterations to the project for which the the application has been submitted. ✓

Insert 9-21

(b) Upon request of an applicant for a water quality certification, a local governmental unit shall make a written determination as to whether a discharge is necessary for public safety. Before making any such determination, a local governmental unit shall issue a public notice stating that it is considering making the determination. The local governmental unit may hold a public hearing on whether the discharge is necessary for public safety. If the local unit of government holds a public hearing, it shall hold the hearing no later than 30 days after the applicant for the water quality certification submitted the application to the department. A written determination by a local governmental unit under this

 paragraph shall include a statement of the grounds for making the determination.

1 (e) 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 ensure all of the following:

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

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

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

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

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

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

16 ¶ (6) RULES FOR EXEMPTIONS. (a) The department shall promulgate rules to
17 interpret and implement the provisions under subs. (4) and (5). In promulgating
18 these rules, the department shall do all of the following:

19 1. Make the rules ^{applicable} consistent with existing federal law.

20 2. Incorporate any additional federal law or interpretation into the rules.

21 (b) Whenever an additional federal law or interpretation is initially
22 incorporated into the rules, the department may modify the additional federal law
23 or interpretation as it determines is necessary, but the department may not
24 otherwise amend or modify any of the rules promulgated under this subsection.

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1 (7) RULES PROHIBITION. The department may not promulgate or enforce a rule
2 requiring a person who submits an application for a water quality certification under
3 this section for the discharge of dredged or fill material into a nonfederal wetland to
4 submit a description of practicable alternatives to the discharge or to submit a
5 description of any investigation conducted to determine the viability of such
6 alternatives if the area to be filled is less than one acre in size and a governmental
7 unit has determined that the discharge is necessary for public safety.

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

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

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

17 (b) No general water quality certification issued under par. (a) may be effective
18 for more than 5 years after the date of its issuance.

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

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

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

8 (d) Before issuing, modifying, or revoking a general water quality certification
9 issued under par. (a), the department shall provide notice and a hearing under ss.
10 ~~227.17 and 227.18.~~

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

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

17 2. Enter and inspect any property on which is located a nonfederal wetland to
18 investigate a discharge of dredged or fill material that the department has reason
19 to believe is in violation of this section.

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

22 (am) An employee or representative of the department may not exercise the
23 authority granted under par. (a) 1. before the date on which the application is
24 submitted. If the application is denied or withdrawn, an employee or representative
25 of the department may not exercise this authority after the date on which the

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1 application is denied or withdrawn. If the application is approved, an employee or
2 representative of the department may not exercise this authority after the 20th day
3 immediately following the completion of the discharge of the dredged or fill material.

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4 (ar) 1. Before entering and inspecting a property under par. (a) 2., the
5 department shall make at least one of the following requests:

6 a. A request for consent from the proprietor to enter and inspect the property.

7 b. A request, orally or in writing, that the proprietor provide an oral or written
8 explanation, as elected by the department, concerning the activity that the
9 department has reason to believe may constitute a violation of this section.

10 2. a. If the proprietor grants consent for the entry on, and the inspection of, the
11 property to investigate a discharge as authorized under par. (a) 2., the department,
12 upon reasonable advance notice, may enter and inspect the property in compliance
13 the terms of the consent granted by the proprietor.

with

14 b. If the proprietor refuses to grant consent for the entry on, or the inspection
15 of, the property or if the proprietor's explanation or terms of consent are not
16 acceptable to the department of natural resources, the department of natural
17 resources may refer the matter to the department of justice for enforcement under
18 s. 299.95.

19 c. If the proprietor fails to respond to all requests made under subd. 1., an agent
20 of the department of natural resources may apply for, obtain, and execute a special
21 inspection warrant under s. 66.0119. The department shall give the proprietor
22 reasonable advance notice of its intent to apply for the warrant.

23 3. Any employee or representative of the department may make the requests
24 under subd. 1., enter or inspect property under subd. 2. a., or execute a warrant under
25 subd. 2. c. only during reasonable hours.

↓

1 (b) Any employee or representative of the department may exercise the
2 authority granted under par. (a) 1. or 3. only during reasonable hours and only after
3 the department has provided reasonable advance notice to the proprietor of the
4 property involved or to the holder of the water quality certification. ✓

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

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

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

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

16 SECTION 11. 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 12. 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 water quality certification issued under this chapter shall
23 forfeit not less than \$10 nor more than \$5,000 for each violation. Each day of
24 continued violation is a separate offense. While an order is suspended, stayed, or
25 enjoined, this penalty does not accrue.

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D - NOTE

MGG : cjs :

Scott Kelly

Since

Please review this draft carefully, especially to make ~~it~~ sure it includes all the provisions you do want and none of the ones you do not want.

MGG



State of Wisconsin
2001 - 2002 LEGISLATURE

April 2001 Special Session

LRB-3093/5
MGG:kmg/wlj/hmh/cs:rs

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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, rules for wetland compensatory mitigation, granting
6 rule-making authority, providing an exemption from emergency rule
7 procedures, 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.

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

Parallel to the general permitting procedures under federal law, this bill provides that DNR may issue general certifications for types of discharges that are similar in nature. A general certification allows any person to carry out the type of discharge subject to the general 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.

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For an individual certification, DNR must approve or deny the certification within 120 days after the completed application for the certification is submitted unless the applicant and DNR agree to an extension. The bill imposes specific requirements on the method DNR uses to determine whether the application is complete. If DNR fails to meet the applicable deadline, the applicant may petition a court to compel DNR to approve or deny the application. If the court grants the petition, DNR must comply within 30 days after the granting of the petition, and the applicant shall be awarded reasonable attorney fees and court costs.

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 and that is not in an "area of special natural resource interest" to submit information concerning practicable alternatives to the discharge that exist or that may be viable if the discharge is determined by a local governmental unit to be necessary for public safety. The bill imposes specific procedural requirements on a local governmental unit that is making such a determination.

Current law defines "an area of special natural resource interest" as being an area that has significant ecological, cultural, aesthetic, educational, recreational, or scientific values and specifically lists certain areas. The areas listed include Lake Superior, Lake Michigan, the Mississippi River, the Lower Wisconsin State Riverway, fish and wildlife refuges, and state parks and forests.

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 that applies to that wetland is submitted and ending on the 20th day immediately following the completion of the discharge or if the application is denied or withdrawn, on the date of denial or withdrawal. DNR may also inspect any property to investigate a discharge of dredged or fill material that DNR has reason to believe is in violation of the statutes regulation nonfederal wetlands. The bill specifies a procedure DNR must follow in investigating these possible violations. 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:

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SECTION 1

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

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

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

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

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

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

3 **281.36 Water quality certification for nonfederal wetlands. (1)**

4 DEFINITIONS. In this section:

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

6 1. An amendment to 33 USC 1344 (f) that becomes effective after January 9,
7 2001.

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

10 3. A regulation, rule, memorandum of agreement, guidance letter, interpretive
11 document, or other provision established by a federal agency that is promulgated or
12 adopted pursuant to 33 USC 1344 (f) or that is used to interpret or implement 33 USC
13 1344 (f), that applies to wetlands located in this state, and that becomes effective
14 after January 9, 2001.

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

18 (am) "Area of special natural resource interest" has the meaning given in s.
19 281.37 (1) (a).

20 (b) "Existing federal law or interpretation" means any of the following:

21 1. 33 USC 1344 (f), as amended to January 8, 2001.

22 2. A regulation, rule, memorandum of agreement, guidance letter, interpretive
23 document, or other provision established by a federal agency that is promulgated or
24 adopted pursuant to 33 USC 1344 (f) or that is used to interpret or implement 33 USC
25 1344 (f), that applies to wetlands in this state, and that is in effect on January 8, 2001.

1 3. A decision issued by a federal district or federal appellate court that affects
2 the application of a federal statute or provision described in subd. 1. or 2., that
3 applies to wetlands located in this state, and that is issued on or before January 8,
4 2001.

5 (bn) "Local governmental unit" means a city, village, town, or county.

6 (c) "Nonfederal wetland" means a wetland that is identified as such under sub.
7 (1m).

8 (d) "Water quality standards" means water quality standards set under rules
9 promulgated by the department under s. 281.15.

10 **(1m)** DETERMINATION OF NONFEDERAL WETLANDS. (a) A wetland is identified as
11 a nonfederal wetland if either of the following applies:

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

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

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

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

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

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

11 (b) 1. The department shall approve or deny a complete application for a water
12 quality certification under this section within 120 days after the complete
13 application for the certification is submitted unless the applicant and the
14 department agree to extend the time period. If the department fails to approve or
15 deny the complete application within the applicable time period, the applicant may
16 bring an action for mandamus to compel the department to approve or deny the
17 application. If the court grants the mandamus, the department shall approve or deny
18 the application within 30 days after the mandamus is granted and the court shall
19 award the applicant reasonable attorney fees and court costs incurred in bringing
20 the action.

21 2. For purposes of subd. 1., the department shall determine whether a complete
22 application has been submitted and, no later than 30 days after the application is
23 submitted, notify the applicant in writing about the determination. If the
24 department determines that the application is incomplete, the notice shall state the
25 reason for the determination and the specific items of information necessary to make

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SECTION 7

1 the application complete. An applicant may supplement and resubmit an
2 application that the department has determined to be incomplete. There is no limit
3 on the number of times that an applicant may resubmit an application that the
4 department has determined to be incomplete under this subdivision. The
5 department may not demand items of information that are not specified in the notice
6 as a condition for determining whether the application is complete unless both the
7 department and the applicant agree or unless the applicant makes material
8 additions or alterations to the project for which the the application has been
9 submitted. The department may not consider an application complete until the
10 requirements under s. 1.11 have been met and until all of the items of information
11 for the water quality certification and for any associated permits or other approvals
12 have been submitted to the department.

13 **(3) DELINEATION PROCEDURES.** For purposes of delineating the boundary of a
14 nonfederal wetland, the department and the person who is applying for or who holds
15 a water quality certification under this section shall use the procedures contained
16 in the wetlands delineation manual published by the U.S. army corps of engineers.
17 The edition of the manual that shall be used shall be the 1987 edition of the manual
18 and any document that the U.S. army corps of engineers issues interpreting that
19 manual, unless the U.S. army corps of engineers publishes an edition of the manual
20 after January 9, 2001, and the department by rule designates that edition as the one
21 to be used under this subsection. If the U.S. army corps of engineers issues a
22 guidance document interpreting the edition of the wetlands delineation manual that
23 the department is required to use under this subsection and if that guidance
24 document is issued after the effective date of this paragraph [revisor inserts date],
25 the department shall notify the appropriate standing committee of each house of the

1 legislature, as determined by the speaker of the assembly and the president of the
2 senate, of the issuance of the guidance document and whether the department
3 intends to promulgate a rule incorporating the provisions of the guidance document.

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

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

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

10 (c) Construction or maintenance of farm ponds, stock ponds, or irrigation
11 ditches.

12 (d) Maintenance of drainage ditches.

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

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

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

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

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

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

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

3 (6) RULES FOR EXEMPTIONS. (a) The department shall promulgate rules to
4 interpret and implement the provisions under subs. (4) and (5). In promulgating
5 these rules, the department shall do all of the following:

6 1. Make the rules consistent with existing federal law.

7 2. Incorporate any applicable additional federal law or interpretation into the
8 rules.

9 (b) Whenever an additional federal law or interpretation is initially
10 incorporated into the rules, the department may modify the additional federal law
11 or interpretation as it determines is necessary, but the department may not
12 otherwise amend or modify any of the rules promulgated under this subsection.

13 (7) RULES PROHIBITION; DETERMINATIONS OF PUBLIC SAFETY. (a) The department
14 may not promulgate or enforce a rule requiring a person who submits an application
15 for a water quality certification under this section for the discharge of dredged or fill
16 material into a nonfederal wetland that is less than one acre in size and that is not
17 in an area of special natural resource interest to submit a description of practicable
18 alternatives to the discharge or to submit a description of any investigation
19 conducted to determine the viability of such alternatives if the discharge is
20 determined by a local governmental unit to be necessary for public safety as provided
21 in par. (b).

22 (b) Upon request of an applicant for a water quality certification, a local
23 governmental unit shall make a ~~written~~ determination as to whether a discharge is

24 necessary for public safety. Before making any such determination, a local
25 governmental unit shall ~~issue~~ ^{publish} a ~~written~~ notice stating that it is considering making

This word is
"governmental"

class 1

under ch. 985 describing the re-
quest
and stating it will
be making

the local governmental unit shall do so in writing

requests
that

1 ^{after publishing} the determination. The local governmental unit may hold a public hearing ^{on}
2 ^{the notice to determine} whether the discharge is necessary for public safety. If the local ~~discharge~~ governmental unit

3 holds a public hearing, it shall hold the hearing no later than 30 days after the
4 applicant for the water quality certification submitted ~~the application to the~~
5 department. ^{made the request.} A written determination by a local governmental unit under this
6 paragraph shall include a statement of the grounds for making the determination.

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

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

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

16 (b) No general water quality certification issued under par. (a) may be effective
17 for more than 5 years after the date of its issuance.

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

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

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

8 (d) Before issuing, modifying, or revoking a general water quality certification
9 issued under par. (a), the department shall provide notice and a hearing under ss.
10 227.17 and 227.18.

11 (e) Subsection (2) (b) does not apply to general water quality certifications
12 issued under this subsection.

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

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

19 2. Enter and inspect any property on which is located a nonfederal wetland to
20 investigate a discharge of dredged or fill material that the department has reason
21 to believe is in violation of this section.

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

24 (am) An employee or representative of the department may not exercise the
25 authority granted under par. (a) 1. before the date on which the application is

1 submitted. If the application is denied or withdrawn, an employee or representative
2 of the department may not exercise this authority after the date on which the
3 application is denied or withdrawn. If the application is approved, an employee or
4 representative of the department may not exercise this authority after the 20th day
5 immediately following the completion of the discharge of the dredged or fill material.

6 (ar) 1. Before entering and inspecting a property under par. (a) 2., the
7 department shall make at least one of the following requests:

8 a. A request for consent from the proprietor to enter and inspect the property.

9 b. A request, orally or in writing, that the proprietor provide an oral or written
10 explanation, as elected by the department, concerning the activity that the
11 department has reason to believe may constitute a violation of this section.

12 2. a. If the proprietor grants consent for the entry on, and the inspection of, the
13 property to investigate a discharge as authorized under par. (a) 2., the department,
14 upon reasonable advance notice, may enter and inspect the property in compliance
15 with the terms of the consent granted by the proprietor.

16 b. If the proprietor refuses to grant consent for the entry on, or the inspection
17 of, the property or if the proprietor's explanation or terms of consent are not
18 acceptable to the department of natural resources, the department of natural
19 resources may refer the matter to the department of justice for enforcement under
20 s. 299.95.

21 c. If the proprietor fails to respond to all requests made under subd. 1., an agent
22 of the department of natural resources may apply for, obtain, and execute a special
23 inspection warrant under s. 66.0119. The department shall give the proprietor
24 reasonable advance notice of its intent to apply for the warrant.

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1 3. Any employee or representative of the department may make the requests
2 under subd. 1., enter or inspect property under subd. 2. a., or execute a warrant under
3 subd. 2. c. only during reasonable hours.

4 (b) Any employee or representative of the department may exercise the
5 authority granted under par. (a) 1. or 3. only during reasonable hours and only after
6 the department has provided reasonable advance notice to the proprietor of the
7 property involved or to the holder of the water quality certification.

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

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

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

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

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

20 281.69 **(3)** (b) 2. The restoration of a wetland, ~~as defined in s. 23.32 (1)~~, if the
21 restoration will protect or improve a lake's water quality or its natural ecosystem.

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

23 281.98 **(1)** Except as provided in ss. 281.47 (1) (d), 281.75 (19), and 281.99 (2),
24 any person who violates this chapter or any rule promulgated or any plan approval,
25 license or, special order, or water quality certification issued under this chapter shall

1 forfeit not less than \$10 nor more than \$5,000 for each violation. Each day of
2 continued violation is a separate offense. While an order is suspended, stayed, or
3 enjoined, this penalty does not accrue.

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

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

21 **SECTION 11. Nonstatutory provisions.**

22 (1) TEMPORARY PROCESS.

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

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

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

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

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

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

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

20 (3) EMERGENCY RULES FOR WETLAND MITIGATION. Using the procedure under
21 section 227.24 of the statutes, the department of natural resources may promulgate
22 the rules required under section 281.37 (3) of the statutes, as affected by this act, for
23 the period before the effective date of the rules submitted under 1999 Wisconsin Act
24 147, section 5 (1), but not to exceed the period authorized under section 227.24 (1)
25 (c) and (2) of the statutes. Notwithstanding section 227.24 (1) (a), (2) (b), and (3) of

1 the statutes, the department is not required to provide evidence that promulgating
2 a rule under this subsection as an emergency rule is necessary for the preservation
3 of the public peace, health, safety, or welfare and is not required to provide a finding
4 of emergency for a rule promulgated under this subsection.

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

7 (1) The treatment of section 23.321 (2) of the statutes takes effect on August
8 1, 2001, or on the day after publication, whichever is later.

9 (END)

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Section #. 814.04 (intro.) of the statutes is amended to read:

281.36(2)(b) 1.

¶ **814.04 Items of costs.** (intro.) Except as provided in ss. 93.20, 100.30 (5m), 106.50 (6) (i) and (6m) (a), 115.80 (9), 1769.313, 814.025, 814.245, 895.035 (4), 895.10 (3), 895.75 (3), 895.77 (2), 895.79 (3), 895.80 (3), 943.212 (2) (b), 943.245 (2) (d) and 943.51 (2) (b), when allowed costs shall be as follows:

NOTE: Section 814.04 (intro.) is shown as affected by two acts of the 1999 legislature and as merged by the revisor under s. 13.93 (2) (c).

History: Sup. Ct. Order, 50 Wis. 2d vii (1971); 1971 c. 141; Sup. Ct. Order, 67 Wis. 2d 585, 761, 780 (1975); Stats. 1975 s. 814.04; 1977 c. 209; 1979 c. 110 s. 60 (13); 1979 c. 271, 355; 1981 c. 123, 317; 1985 a. 52, 311; 1987 a. 348; 1991 a. 39, 65, 189, 295; 1993 a. 98, 326, 486, 490, 491; 1995 a. 24, 27, 133, 149, 262, 417; 1997 a. 55, 164, 254; 1999 a. 32, 82, 122, 190; s. 13.93 (2) (c).

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3093/5dn
MGG:cjs:rs

Slays

April 24, 2001

Scott Kelly

Please review this draft carefully, especially to make sure it includes all the provisions you do want and none of the ones you do not want.

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

*The entire instrument is drafted to the date
the "public service" instrument is... K IFAH
ss*

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

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MGG:cjs:rs

April 24, 2001

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Please review this draft carefully, especially to make sure it includes all the provisions you do want and none of the ones you do not want.

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

for 16

- delete last sentence from 28136(2)(b)
p. 8, line 11

- go back to language in 14 for last sentence in
28:36(9) (am)

- authorize, ~~not~~ require, local to make public
safety determination



State of Wisconsin
2001 - 2002 LEGISLATURE

April 2001 Special Session

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LRB-3093/S 6

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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), 299.95 and 814.04 (intro.); and *to*
 4 *create* 281.01 (21) and 281.36 of the statutes; **relating to:** water quality
 5 certification for nonfederal wetlands, rules for wetland compensatory
 6 mitigation, granting rule-making authority, providing an exemption from
 7 emergency rule procedures, 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.

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

Parallel to the general permitting procedures under federal law, this bill provides that DNR may issue general certifications for types of discharges that are similar in nature. A general certification allows any person to carry out the type of discharge subject to the general 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.

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For an individual certification, DNR must approve or deny the certification within 120 days after the completed application for the certification is submitted unless the applicant and DNR agree to an extension. The bill imposes specific requirements on the method DNR uses to determine whether the application is complete. If DNR fails to meet the applicable deadline, the applicant may petition a court to compel DNR to approve or deny the application. If the court grants the petition, DNR must comply within 30 days after the granting of the petition, and the applicant shall be awarded reasonable attorney fees and court costs.

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 and that is not in an "area of special natural resource interest" to submit information concerning practicable alternatives to the discharge that exist or that may be viable if the discharge is determined by a local governmental unit to be necessary for public safety. The bill imposes specific procedural requirements on a local governmental unit that ~~is making~~ such a determination. makes

Current law defines "an area of special natural resource interest" as being an area that has significant ecological, cultural, aesthetic, educational, recreational, or scientific values and specifically lists certain areas. The areas listed include Lake Superior, Lake Michigan, the Mississippi River, the Lower Wisconsin State Riverway, fish and wildlife refuges, and state parks and forests.

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 that applies to that wetland is submitted and ending on the 20th day immediately following the completion of the discharge or if the application is denied or withdrawn, on the date of denial or withdrawal. DNR may also inspect any property to investigate a discharge of dredged or fill material that DNR has reason to believe is in violation of the statutes regulation nonfederal wetlands. The bill specifies a procedure DNR must follow in investigating these possible violations. 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. INS ANL2

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

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

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

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

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

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

3 **281.36 Water quality certification for nonfederal wetlands. (1)**

4 DEFINITIONS. In this section:

5 (a) “Additional federal law or interpretation” means any of the following:

6 1. An amendment to 33 USC 1344 (f) that becomes effective after January 9,
7 2001.

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

10 3. A regulation, rule, memorandum of agreement, guidance letter, interpretive
11 document, or other provision established by a federal agency that is promulgated or
12 adopted pursuant to 33 USC 1344 (f) or that is used to interpret or implement 33 USC
13 1344 (f), that applies to wetlands located in this state, and that becomes effective
14 after January 9, 2001.

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

18 (am) “Area of special natural resource interest” has the meaning given in s.
19 281.37 (1) (a).

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

21 1. 33 USC 1344 (f), as amended to January 8, 2001.

22 2. A regulation, rule, memorandum of agreement, guidance letter, interpretive
23 document, or other provision established by a federal agency that is promulgated or
24 adopted pursuant to 33 USC 1344 (f) or that is used to interpret or implement 33 USC

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1 1344 (f), that applies to wetlands located in this state, and that is in effect on January
2 8, 2001.

3 3. A decision issued by a federal district or federal appellate court that affects
4 the application of a federal statute or provision described in subd. 1. or 2., that
5 applies to wetlands located in this state, and that is issued on or before January 8,
6 2001.

7 (bn) “Local governmental unit” means a city, village, town, or county.

8 (c) “Nonfederal wetland” means a wetland that is identified as such under sub.
9 (1m).

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

12 **(1m) DETERMINATION OF NONFEDERAL WETLANDS.** (a) A wetland is identified as
13 a nonfederal wetland if either of the following applies:

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

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

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

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

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

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

13 (b) 1. The department shall approve or deny a complete application for a water
14 quality certification under this section within 120 days after the complete
15 application for the certification is submitted unless the applicant and the
16 department agree to extend the time period. If the department fails to approve or
17 deny the complete application within the applicable time period, the applicant may
18 bring an action for mandamus to compel the department to approve or deny the
19 application. If the court grants the mandamus, the department shall approve or
20 deny the application within 30 days after the mandamus is granted and the court
21 shall award the applicant reasonable attorney fees and court costs incurred in
22 bringing the action.

23 2. For purposes of subd. 1., the department shall determine whether a complete
24 application has been submitted and, no later than 30 days after the application is
25 submitted, notify the applicant in writing about the determination. If the

1 department determines that the application is incomplete, the notice shall state the
2 reason for the determination and the specific items of information necessary to make
3 the application complete. An applicant may supplement and resubmit an
4 application that the department has determined to be incomplete. There is no limit
5 on the number of times that an applicant may resubmit an application that the
6 department has determined to be incomplete under this subdivision. The
7 department may not demand items of information that are not specified in the notice
8 as a condition for determining whether the application is complete unless both the
9 department and the applicant agree or unless the applicant makes material
10 additions or alterations to the project for which the the application has been

11 submitted. The department may not consider an application complete until the
12 requirements under s. 1.11 have been met and until all of the items of information
13 for the water quality certification and for any associated permits or other approvals
14 have been submitted to the department.

15 (3) DELINEATION PROCEDURES. For purposes of delineating the boundary of a
16 nonfederal wetland, the department and the person who is applying for or who holds
17 a water quality certification under this section shall use the procedures contained
18 in the wetlands delineation manual published by the U.S. army corps of engineers.
19 The edition of the manual that shall be used shall be the 1987 edition of the manual
20 and any document that the U.S. army corps of engineers issues interpreting that
21 manual, unless the U.S. army corps of engineers publishes an edition of the manual
22 after January 9, 2001, and the department by rule designates that edition as the one
23 to be used under this subsection. If the U.S. army corps of engineers issues a
24 guidance document interpreting the edition of the wetlands delineation manual that
25 the department is required to use under this subsection and if that guidance

1 document is issued after the effective date of this paragraph [revisor inserts date],
2 the department shall notify the appropriate standing committee of each house of the
3 legislature, as determined by the speaker of the assembly and the president of the
4 senate, of the issuance of the guidance document and whether the department
5 intends to promulgate a rule incorporating the provisions of the guidance document.

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

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

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

12 (c) Construction or maintenance of farm ponds, stock ponds, or irrigation
13 ditches.

14 (d) Maintenance of drainage ditches.

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

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

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

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

23 (5) INAPPLICABILITY OF EXEMPTIONS. Notwithstanding sub. (4), a discharge that
24 would be exempt under sub. (4) is subject to the certification requirement under sub.
25 (2) if the discharge is incidental to an activity that has as its purpose bringing a

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1 nonfederal wetland, or part of a nonfederal wetland, into a use for which it was not
2 previously subject and if the activity may do any of the following:

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

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

5 **(6) RULES FOR EXEMPTIONS.** (a) The department shall promulgate rules to
6 interpret and implement the provisions under subs. (4) and (5). In promulgating
7 these rules, the department shall do all of the following:

8 1. Make the rules consistent with existing federal law.

9 2. Incorporate any applicable additional federal law or interpretation into the
10 rules.

11 (b) Whenever an additional federal law or interpretation is initially
12 incorporated into the rules, the department may modify the additional federal law
13 or interpretation as it determines is necessary, but the department may not
14 otherwise amend or modify any of the rules promulgated under this subsection.

15 **(7) RULES PROHIBITION; DETERMINATIONS OF PUBLIC SAFETY.** (a) The department
16 may not promulgate or enforce a rule requiring a person who submits an application
17 for a water quality certification under this section for the discharge of dredged or fill
18 material into a nonfederal wetland that is less than one acre in size and that is not
19 in an area of special natural resource interest to submit a description of practicable
20 alternatives to the discharge or to submit a description of any investigation
21 conducted to determine the viability of such alternatives if the discharge is
22 determined by a local governmental unit to be necessary for public safety as provided
23 in par. (b).

24 *Upon request*
25 ~~(b) If an applicant for a water quality certification requests that a local~~
~~governmental unit shall make a determination as to whether a discharge is~~

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1 ~~necessary for public safety, the local governmental unit shall do so in writing.~~ Before
2 making any such determination, a local governmental unit shall publish a class 1
3 notice under ch. 985 describing the request and stating it will be making the
4 determination. The local governmental unit may hold a public hearing after
5 publishing the notice to determine whether the discharge is necessary for public
6 safety. If the local governmental unit holds a public hearing, it shall hold the hearing
7 no later than 30 days after the applicant for the water quality certification made the
8 request. A written determination by a local governmental unit under this paragraph
9 shall include a statement of the grounds for making the determination.

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

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

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

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

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

24 2. If a general permit as specified in subd. 1. is amended or modified after
25 January 8, 2001, the department shall incorporate the amendments or modifications

1 into the general water quality certification issued under subd. 1. and may not
2 otherwise amend or modify the general water quality certification.

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

10 (d) Before issuing, modifying, or revoking a general water quality certification
11 issued under par. (a), the department shall provide notice and a hearing under ss.
12 227.17 and 227.18.

13 (e) Subsection (2) (b) does not apply to general water quality certifications
14 issued under this subsection.

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 to
22 investigate a discharge of dredged or fill material that the department has reason
23 to believe is in violation of this section.

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

INSERT 13-5

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

8 (ar) 1. Before entering and inspecting a property under par. (a) 2., the
9 department shall make at least one of the following requests:

10 a. A request for consent from the proprietor to enter and inspect the property.

11 b. A request, orally or in writing, that the proprietor provide an oral or written
12 explanation, as elected by the department, concerning the activity that the
13 department has reason to believe may constitute a violation of this section.

14 2. a. If the proprietor grants consent for the entry on, and the inspection of, the
15 property to investigate a discharge as authorized under par. (a) 2., the department,
16 upon reasonable advance notice, may enter and inspect the property in compliance
17 with the terms of the consent granted by the proprietor.

18 b. If the proprietor refuses to grant consent for the entry on, or the inspection
19 of, the property or if the proprietor's explanation or terms of consent are not
20 acceptable to the department of natural resources, the department of natural
21 resources may refer the matter to the department of justice for enforcement under
22 s. 299.95.

23 c. If the proprietor fails to respond to all requests made under subd. 1., an agent
24 of the department of natural resources may apply for, obtain, and execute a special

1 inspection warrant under s. 66.0119. The department shall give the proprietor
2 reasonable advance notice of its intent to apply for the warrant.

3 3. Any employee or representative of the department may make the requests
4 under subd. 1., enter or inspect property under subd. 2. a., or execute a warrant under
5 subd. 2. c. only during reasonable hours.

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

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

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

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

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

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

22 281.69 (3) (b) 2. The restoration of a wetland, as defined in s. 23.32 (1), if the
23 restoration will protect or improve a lake's water quality or its natural ecosystem.

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

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

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

8 **299.95 Enforcement; duty of department of justice; expenses.** The
9 attorney general shall enforce chs. 281 to 285 and 289 to 295 and this chapter, except
10 ss. 281.48, 285.57, 285.59, and 299.64, and all rules, special orders, licenses, plan
11 approvals ~~and~~, permits, and water quality certifications of the department, except
12 those promulgated or issued under ss. 281.48, 285.57, 285.59, and 299.64 and except
13 as provided in s. 285.86. The circuit court for Dane county or for any other county
14 where a violation occurred in whole or in part has jurisdiction to enforce chs. 281 to
15 285 and 289 to 295 or this chapter or the rule, special order, license, plan approval
16 ~~or~~, permit, or certification by injunctive and other relief appropriate for
17 enforcement. For purposes of this proceeding where chs. 281 to 285 and 289 to 295
18 or this chapter or the rule, special order, license, plan approval ~~or~~, permit ~~or~~
19 certification prohibits in whole or in part any pollution, a violation is considered a
20 public nuisance. The department of natural resources may enter into agreements
21 with the department of justice to assist with the administration of chs. 281 to 285 and
22 289 to 295 and this chapter. Any funds paid to the department of justice under these
23 agreements shall be credited to the appropriation account under s. 20.455 (1) (k).

24 **SECTION 11.** 814.04 (intro.) of the statutes is amended to read:

BILL

SECTION 11

1 **814.04 Items of costs.** (intro.) Except as provided in ss. 93.20, 100.30 (5m),
2 106.50 (6) (i) and (6m) (a), 115.80 (9), 281.36 (2) (b) 1., 769.313, 814.025, 814.245,
3 895.035 (4), 895.10 (3), 895.75 (3), 895.77 (2), 895.79 (3), 895.80 (3), 943.212 (2) (b),
4 943.245 (2) (d) and 943.51 (2) (b), when allowed costs shall be as follows:

5 **SECTION 12. Nonstatutory provisions.**

6 (1) TEMPORARY PROCESS.

7 (a) In this subsection, “existing federal law or interpretation” has the meaning
8 given in section 281.36 (1) (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 one of the following applies:

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

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

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

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 (3) EMERGENCY RULES FOR WETLAND MITIGATION. Using the procedure under
4 section 227.24 of the statutes, the department of natural resources may promulgate
5 the rules required under section 281.37 (3) of the statutes, as affected by this act, for
6 the period before the effective date of the rules submitted under 1999 Wisconsin Act
7 147, section 5 (1), but not to exceed the period authorized under section 227.24 (1)
8 (c) and (2) of the statutes. Notwithstanding section 227.24 (1) (a), (2) (b), and (3) of
9 the statutes, the department is not required to provide evidence that promulgating
10 a rule under this subsection as an emergency rule is necessary for the preservation
11 of the public peace, health, safety, or welfare and is not required to provide a finding
12 of emergency for a rule promulgated under this subsection.

13 **SECTION 13. Effective dates.** This act takes effect on the day after publication,
14 except as follows:

15 (1) The treatment of section 23.321 (2) of the statutes takes effect on August
16 1, 2001, or on the day after publication, whichever is later.

17 (END)

2001-2002 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3093/6ins
MGG.....

Insert ANL 1

NO 9 A local governmental unit is authorized, but not required, to make such a determination if requested to ~~so~~ ^{do} by an applicant for a water quality certification for a nonfederal wetland.

Insert 11-1

NO 4 A local governmental unit [✓] may make a determination as to whether a discharge is necessary for public safety if requested to do so by an applicant for a water quality certification under this section. [✓] If the local governmental unit makes the determination, it shall do so in writing.

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

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

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

9 (am) An employee or representative of the department may not exercise the
10 authority granted under par. (a) 1. before the date on which the application for the
11 water quality certification is submitted. If the application is withdrawn or denied,
12 an employee or representative of the department may not exercise this authority
13 after the date on which the application is withdrawn or denied. If the application is
14 approved, an employee or representative of the department may not exercise this
15 authority after the 30th day immediately following the completion date of the
16 discharge of the dredged or fill material or the completion date of any conditions
17 imposed under the water quality certification, whichever date is later.

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

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

INSERT
13-5

BILL

If DNR fails to meet the applicable deadline, the application is considered to be approved.

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 if the discharge is determined by a local governmental unit to be necessary for 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 30th day immediately following completion of the discharge or of any conditions imposed under the certification, or, if the application is denied or withdrawn, on the date of denial or withdrawal. ~~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.

NS
ANL
#2

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

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

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

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

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

Barman, Mike

From: Barman, Mike

Sent: Thursday, April 26, 2001 8:38 AM

To: Kelly, Scott

Subject: LRB-3093/6 (attached) (paper copy ready for pick-up at LRB-5th floor)

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

04/26/2001

Drafting Instructions for a New Bill on
Nonfederal Wetlands Water Quality Certification

put into
187

Base the bill on LRB-3093/5 with the following changes in LRB-3093/5:

1) On page 5, line 2, before the creation of s. 281.36 insert SEC. 9 from ASA 1 to AB 322, page 3, lines 3 to 12, except for the phrase "the steps involved in processing, approving, and denying applications for water quality certifications under s. 281.36 and for other". Also, add to the insert from Sec. 9 in ASA 1 to AB 322 after "wetlands" on page 3, line 8 in ASA 1 "other than nonfederal wetlands".

2) Amend the definition of "local governmental unit" on page 6, line 7 to include state and federal transportation agencies involved with railroad safety, aviation and highways, including the state commissioner of railroads.

3) Clarify the relation between the completeness determination proposed in the first sentence in s. 281.36 (2) (b) 2. and the last sentence in that subdivision. [See page 7, lines 23 and 24 and page 8, lines 11 to 14.]

4) On page 10, line 18, clarify that the phrase "that is less than one acre in size" modifies "wetland" on line 18 and not "discharge" on line 17.

5) Before the period on page 10, line 23 add a provision that conditions the prohibition in sub. (7) (a) on the application for the discharge including written documentation of the local governmental unit's public safety determination, e.g., insert "and the application for the water quality certification for the discharge includes a copy of the written determination by the local governmental unit and the statement of the grounds for making the determination prepared by the local government unit required under par. (b)".

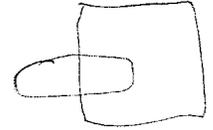
6) After page 11, line 9 insert the following new provision that specifies a process that DNR may follow to conduct its own practicable alternatives analysis if the conditions in sub. (7) (a), page 10, lines 15 to 23, are satisfied:

"(c) 1. If the prohibition in par. (a) applies to a discharge of dredged or fill material into a nonfederal wetland, the department may determine that the nonfederal wetland has sufficient functional value to warrant an examination by the department of practical alternatives to the proposed discharge that will not adversely affect the nonfederal wetland and will not result in other significant adverse environmental consequences.

2. The department shall proceed in an examination of practical alternatives under this paragraph by first determining, in cooperation with the applicant, whether there is any practical

after consulting

alternative to the discharge that is on the parcel where the nonfederal wetland is located and that, if implemented, would not conflict with the public safety determination by the local governmental unit. If the department identifies a practical alternative under this subdivision that meets the requirements of this subdivision, the department may require implementation of the alternative as a condition of the water quality certification for the discharge.



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by the
applicant

department
is
determining
to proceed.

3. If no practical alternative to the discharge is available under subd. 2., the department may determine, ^{after consulting} ~~in cooperation~~ with the applicant, whether there is any practical alternative that is not on the parcel where the nonfederal wetland is located and that, if implemented, would not conflict with the public safety determination by the local governmental unit. If the department identifies a practical alternative that meets the requirements of this subdivision, the department may require implementation of the alternative as a condition of the water quality certification for the discharge.

189.02(4)

4. If no practical alternative to the discharge is available under subd. 3., the department may require a mitigation project under s. 281.37 (2)."

[Note: The intent of this insert is that the public safety determination takes precedence over DNR's decision on practical alternatives under the conditions specified in par. (a).]

7) Delete "shall" on page 10, line 25. [The intent of this sentence is that upon the request of an applicant a local governmental unit must determine whether a discharge is necessary for public safety.] *dwz*

8) Modify par. (b) on page 10, line 24 to page 11, line 9 pursuant to separate instructions (forthcoming).

9) Delete the text of par. (am) on page 13, lines 1 to 7 and substitute the text of par. (am) on page 11, lines 9 to 17 in LRB-3093/4.

- 10) On page 13, line 21, after "may" insert "apply for, obtain and execute a special inspection warrant under s. 66.0119 or".
- 11) On page 14, lines 1 and 2, delete the sentence beginning with "The department" and ending with "warrant".
- 12) On page 14, lines 4 and 5, insert "or" before "enter" and delete ", or execute a warrant under subd. 2.c."

Prepared at the Request of Representative Neal Kedzie by:
John Stolzenberg, Legislative Council Staff
April 27, 2001, Revised April 28, 2001

delete emergency rules

*it council study
for wetlands
regulation*

Additional Instructions for the Drafting Instructions for a New Bill on

Nonfederal Wetlands Water Quality Certification

Based on Changes to LRB-3093/5

Make the following additional changes in LRB-3093/5: *put into 1/6*

1. Delete the emergency rules provision on page 17, lines 3 to 12.
2. Add a nonstatutory provision that requests the Joint Legislative Council to study the regulation of wetlands. [The intent is to provide a broad, openended study request.]
3. Amend sub. (7) (b) on page 10, line 24 to page 11, line 9 on the public safety determination process to reflect the following:
 - a. Who can make the public safety determination should be expanded to include the state and federal transportation agencies specified in item #2 in the first set of instructions for this bill. In the case of a local governmental unit, the decision maker must be the elected governing body.
 - b. Instead of a class 1 notice, require "appropriate notice" to the public and written notice to the DNR.
 - c. Include, as now provided, the opportunity for a public hearing by the local governmental unit and the 30 day limit to hold the hearing.
 - d. Include, as now provided, the requirement for a written determination including the statement of the grounds for making the determination.
 - e. If it is not already available, authorize judicial review of the determination. Do not have an intermediate review of a determination by a local governmental unit through a local board of appeals or equivalent body.
 - f. Modify the above provisions, as appropriate, to not apply to the affected federal agency, since the state can't dictate the decision making or appeal process for a decision by a federal agency.

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*apply to
state*

190 or 191
1.
Governing body of

*petition directly for the
circuit review*

Gibson-Glass, Mary

From: Stolzenberg, John
Sent: Saturday, April 28, 2001 12:35 PM
To: Gibson-Glass, Mary
Subject: Definitions

Mary,

put into 17

Here are the 2 definitions I had mentioned to you, based on amending LRB-3093/5:

1. Page 6, line 6, after that line insert:

“Federal transportation agency” means the federal aviation administration, the federal highway administration or the federal railroad administration.

2. Page 6, line 9, after that line insert:

“State transportation agency” means the department of transportation or the office of the commissioner of railroads.

John

John Stolzenberg, Staff Scientist
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John.Stolzenberg@legis.state.wi.us

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deletion of X-references to par. (b) in ~~§~~ § 281.36

(7)(c) is not substantive, needed becu

fed decisions are made under (b).

MG