

2001 ASSEMBLY BILL 204

March 15, 2001 – Introduced by Representatives PLOUFF, BLACK, MEYERHOFER, RYBA, YOUNG, BERCEAU, J. LEHMAN, HEBL, LASSA, MILLER, COLON, MORRIS-TATUM, KREUSER, SINICKI, KRUG, BOCK, RICHARDS, HUBER, CARPENTER, BOYLE, POCAN and BALOW, cosponsored by Senators BAUMGART, RISSER, WIRCH, BURKE, SCHULTZ, ROBSON and MOEN. Referred to Committee on Environment.

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 and granting rule-making authority.

Analysis by the Legislative Reference Bureau

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

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

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

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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, an activity 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. If federal law is subsequently modified, DNR may incorporate the modifications into the rules. The bill also creates a temporary process to be used between the date the bill becomes law and the date the rules are promulgated for determining whether an activity is exempt. During this time, no person may discharge into a nonfederal wetland based on the wetland being exempt unless the person demonstrates to DNR that the activity would qualify as an exempted activity under federal law if the wetland were subject to the ACE permitting process.

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

Under current rules promulgated by DNR, discharges into certain artificial wetlands are exempt from meeting the water quality standards that apply to wetlands if the person seeking permission for the discharge notifies DNR at least 15 days before beginning the discharge, and DNR does not notify the person within 15 days after receiving the notification that the artificial wetland has a significant functional value as a wetland. Under these rules, an artificial wetland is an area where water-based vegetation is present and for which there is no prior wetland or stream history. Wetlands that are eligible for this exemption include certain sedimentation and storm water detention basins, sewage lagoons, and farm drainage and roadside ditches. This bill incorporates these provisions into the statutes and expands the exemption to include all water quality standards. The bill

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authorizes DNR to inspect any property on which a nonfederal wetland that is subject to a water quality certification is located, to inspect any property to investigate a discharge of dredged or fill material that DNR suspects to be in violation of the statutes regulating nonfederal wetlands, and to gain access to inspect any records that a holder of a water quality certification for a nonfederal wetland must keep.

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

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.

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1 The department shall revoke the permit or other approval if the holder of the permit
2 or other approval fails to take these measures.

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

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

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

12 281.01 (21) “Wetland” has the meaning given in s. 23.32 (1).

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

14 **281.36 Water quality certification for nonfederal wetlands. (1)**

15 DEFINITIONS. In this section:

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

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

20 (c) “Nonfederal wetland” means a wetland to which the federal permitting
21 process under 33 USC 1344 does not apply due to the decision in Solid Waste Agency
22 of Northern Cook County v. U.S. Army Corps of Engineers, No. 99–1178 (U.S. Jan.
23 9, 2001) but to which such permitting process did apply on January 8, 2001.

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

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

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

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

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

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

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

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

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1 (d) Maintenance of drainage ditches.

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

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

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

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

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

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

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

17 **(6) RULES FOR EXEMPTIONS.** The department shall promulgate rules to interpret
18 and implement the provisions under subs. (4) and (5). The rules shall be consistent
19 with 33 USC 1344 (f), as amended to the effective date of this subsection [revisor
20 inserts date], and with any other federal law that is promulgated or adopted
21 pursuant to that subsection or that is used to implement that subsection and that is
22 in effect on the effective date of this subsection [revisor inserts date]. If 33 USC
23 1344 (f) or the other federal law is amended or modified after the effective date of this
24 subsection [revisor inserts date], the department may incorporate any of these

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1 amendments or modifications into the rules promulgated under this subsection but
2 may not otherwise amend the rules.

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

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

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

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

13 1. A sedimentation or storm water detention basin or associated conveyance
14 feature that is operated and maintained only for sediment detention or flood storage
15 purposes.

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

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

19 4. An active nonmetallic mining operation.

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

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

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

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

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

14 (d) Before issuing, modifying, or revoking a general water quality certification
15 under this subsection, the department shall provide notice and a hearing under ss.
16 227.17 and 227.18.

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

20 1. Enter and inspect any property on which is located a nonfederal wetland, or
21 part of a nonfederal wetland, that is subject to a water quality certification issued
22 under this section.

23 2. Enter and inspect any property on which is located a wetland and where the
24 department has reasonable suspicion that a violation of this section has occurred or
25 is occurring to investigate a discharge of dredged or fill material.

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

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

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

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

13 (a) Regulate the discharge of dredged or fill material in a nonfederal wetland
14 under s. 29.601, 30.11, 30.12, 30.123, 30.19, 30.195, 30.20, 59.692, 61.351, 62.231, or
15 87.30 or chs. 281 to 285 or 289 to 299, except s. 281.48.

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

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

19 281.69 **(3)** (b) 2. The restoration of a wetland, ~~as defined in s. 23.32 (1)~~, if the
20 restoration will protect or improve a lake's water quality or its natural ecosystem.

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

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

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

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

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

20 **SECTION 11. Nonstatutory provisions.**

21 (1) TEMPORARY PROCESS.

22 (a) In this subsection, “federal law” has the meaning given in section 281.36 (1)

23 (b) of the statutes, as created by this act.

24 (b) Except as provided in paragraph (c), no person may discharge dredged or
25 fill material into a nonfederal wetland before the date on which the rules required

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1 under section 281.36 (6) of the statutes, as created by this act, are effective unless
2 either of the following applies:

3 1. The person demonstrates to the satisfaction of the department of natural
4 resources that the activity which will result in the discharge will qualify for an
5 exemption under 33 USC 1344 (f), as amended to the effective date of this
6 subdivision, and under any other federal law that is promulgated or adopted
7 pursuant to that subsection or that is used to implement that subsection and that is
8 in effect on the effective date of this subdivision.

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

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

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