

ENGROSSED 2001 ASSEMBLY BILL 215

March 26, 2001 – Printed by direction of SENATE CHIEF CLERK.

- 1 **AN ACT** *to amend* 281.98 (1) and 299.95; and *to create* 281.163 of the statutes;
2 **relating to:** discharges of dredged or fill material into nonfederal wetlands.

Analysis by the Legislative Reference Bureau

Engrossment information:

The text of Engrossed 2001 Assembly Bill 215, consists of the bill, as passed by the assembly on March 20, 2001, as affected by the following documents adopted in the assembly on March 20, 2001: the bill as affected by Assembly Amendment 1 and Assembly Amendment 3. The text also includes the March 20, 2001, chief clerk's correction to the bill.

Content of Engrossed 2001 Assembly Bill 215:

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 wetlands 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

ENGROSSED ASSEMBLY BILL 215

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

This bill places a moratorium on any person discharging dredged or fill material into wetlands for which ACE discharge permits are no longer required, with certain exceptions. Discharges that are authorized by certain permits or approvals under state law, discharges that are not subject to these requirements and that would have been exempt on January 8, 2001, from the wetland water quality standards set by DNR, discharges that are allowed under discharge permits that were issued by ACE before the date of the U.S. Supreme Court decision, and discharges that are the result of activities that would have qualified for an exemption from the federal permitting process on January 8, 2001 are excepted from the moratorium. These provisions sunset on the earlier of these two dates: July 1, 2001, or the day following the effective date of legislation that affords protection to these wetlands that is comparable to, or more protective than, the protection afforded under the federal permitting process.

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

1 **SECTION 1.** 281.163 of the statutes is created to read:

2 **281.163 Prohibitions against discharges into nonfederal wetlands. (1)**

3 DEFINITIONS. In this section:

4 (a) “Nonfederal wetland” means a wetland to which the federal permitting
5 process under 33 USC 1344 does not apply due to the decision in Solid Waste Agency
6 of Northern Cook County v. U.S. Army Corps of Engineers, No. 99–1178 (U.S. Jan.
7 9, 2001) but to which such permitting process did apply on January 8, 2001.

8 (b) “Wetland” has the meaning given in s. 23.32 (1).

9 **(2) PROHIBITION.** No person may discharge dredged or fill material into a
10 nonfederal wetland.

ENGROSSED ASSEMBLY BILL 215

1 **(3) INAPPLICABILITY.** (a) Subsection (2) does not apply to a person who
2 discharges dredged or fill material into a nonfederal wetland if any of the following
3 applies:

4 1. The person has received notification from the department that the discharge
5 is authorized by a permit or other approval under ss. 59.692, 61.351, 62.231, 87.30,
6 281.11 to 281.16, 281.165 to 281.47, or 281.49 to 281.85 or ch. 30, 31, 283, 289, 291,
7 292, 293, 295, or 299.

8 2. The person has received notification from the department that the discharge
9 is not subject to a permitting or other approval requirement under ss. 59.692, 61.351,
10 62.231, 87.30, 281.11 to 281.16, 281.165 to 281.47, or 281.49 to 281.85 or ch. 30, 31,
11 283, 289, 291, 292, 293, 295, or 299 and the discharge would have been exempt on
12 January 8, 2001 from the water quality standards for wetlands that are set under
13 rules promulgated under s. 281.15 (1).

14 3. The person has received notification from the department that the discharge
15 is permitted under a permit issued by the U.S. army corps of engineers on or before
16 January 8, 2001, and a water quality certification required by rules promulgated by
17 the department to implement 33 USC 1341 (a) has been issued by the department
18 on or before January 8, 2001, and the discharge is performed in compliance with that
19 permit.

20 4. The person has received notification from the department that the discharge
21 is the result of an activity that would have qualified for an exemption under 33 USC
22 1344 (f) on January 8, 2001, or under any other regulation, rule, memorandum of
23 agreement, guidance letter, or other provision established by a federal agency that
24 was promulgated or adopted pursuant to that subsection or that was used to
25 implement that subsection and that was in effect on January 8, 2001.

ENGROSSED ASSEMBLY BILL 215**SECTION 1**

1 (b) This section does not apply beginning on the earlier of the following:

2 1. July 1, 2001.

3 2. The day after the effective date of legislation enacted by the state legislature
4 that subjects discharges of dredged or fill material into nonfederal wetlands to a
5 certification process that includes provisions that afford protection to nonfederal
6 wetlands that is comparable to, or more protective than, the protection afforded
7 under the federal certification and permitting processes under 33 USC 1341 (a) and
8 1344 that applied to nonfederal wetlands on January 8, 2001.

9 **SECTION 2m.** 281.98 (1) of the statutes is amended to read:

10 281.98 (1) Except as provided in ss. 281.47 (1) (d), 281.75 (19) and 281.99 (2),
11 any person who violates this chapter or any rule promulgated or any plan approval,
12 license or special order issued under this chapter or who violates the prohibition
13 under s. 281.163, shall forfeit not less than \$10 nor more than \$5,000 for each
14 violation. Each day of continued violation is a separate offense. While an order is
15 suspended, stayed or enjoined, this penalty does not accrue.

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

17 **299.95 Enforcement; duty of department of justice; expenses.** The
18 attorney general shall enforce chs. 281 to 285 and 289 to 295 and this chapter, except
19 ss. 281.48, 285.57, 285.59 and 299.64, and all rules, special orders, licenses, plan
20 approvals and permits of the department, except those promulgated or issued under
21 ss. 281.48, 285.57, 285.59 and 299.64 and except as provided in s. 285.86, and shall
22 enforce the prohibition under s. 281.163. The circuit court for Dane county or for any
23 other county where a violation occurred in whole or in part has jurisdiction to enforce
24 chs. 281 to 285 and 289 to 295 or this chapter or the rule, special order, license, plan
25 approval or permit by injunctive and other relief appropriate for enforcement. For

ENGROSSED ASSEMBLY BILL 215

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

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(END)