

## 2001 ASSEMBLY BILL 322

April 18, 2001 – Introduced by Representatives KEDZIE, GRONEMUS, JOHNSRUD, OTT, VRAKAS, GUNDERSON and JENSEN. 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, granting rule-making authority, and providing a penalty.

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### *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.

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

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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.

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 to submit information concerning practicable alternatives to the discharge that exist or that

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may be viable if the discharge is necessary to comply with a requirement imposed by a federal, state, or local government as a condition for approval by the federal, state, or local government of an activity that serves a public purpose or if the discharge is necessary to insure 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 20th day immediately following completion of the discharge subject to the certification, or, if the application is denied, on the date of denial. 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).

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

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

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

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

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

15 281.01 (21) “Wetland” has the meaning given in s. 23.32 (1).

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

17 **281.36 Water quality certification for nonfederal wetlands. (1)**

18 DEFINITIONS. In this section:

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

20 1. An amendment to 33 USC 1344 (f) that becomes effective after January 9,  
21 2001.

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

24 3. A regulation, rule, memorandum of agreement, guidance letter, or other  
25 provision established by a federal agency that is promulgated or adopted pursuant

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1 to 33 USC 1344 (f) or that is used to interpret or implement 33 USC 1344 (f), that  
2 applies to wetlands located in this state, and that becomes effective after January  
3 9, 2001.

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

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

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

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

13 3. A decision issued by a federal district or federal appellate court that affects  
14 the application of a federal amendment or provision described in subds. 1. and 2.,  
15 that applies to wetlands located in this state, and that is issued on or before January  
16 8, 2001.

17 (bn) “Local governmental unit” means a city, village, town, county, or special  
18 purpose district; and agency or corporation of a city, village, town, county, or special  
19 purpose district; or a combination or subunit of any of the foregoing.

20 (c) “Nonfederal wetland” means a wetland that is identified as such under sub.  
21 (1m).

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

24 **(1m) DETERMINATION OF NONFEDERAL WETLANDS.** (a) A wetland is identified as  
25 a nonfederal wetland if either of the following applies:

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

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

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

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

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

18           **(2) CERTIFICATION REQUIREMENT.** (a) No person may discharge dredged or fill  
19 material into a nonfederal wetland unless the discharge is authorized by a water  
20 quality certification issued by the department under this section. No person may  
21 violate any condition imposed by the department in a water quality certification  
22 under this section. The department may not issue a water quality certification under  
23 this section unless it determines that the discharge will comply with all applicable  
24 water quality standards.

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1           (b) The department shall promulgate a rule to establish time limits for the steps  
2 involved in processing applications and issuing determinations that approve or deny  
3 applications for water quality certifications issued under this section.

4           **(3) DELINEATION PROCEDURES.** For purposes of delineating the boundary of a  
5 nonfederal wetland, the department and the person who is applying for or who holds  
6 a water quality certification under this section shall use the procedures contained  
7 in the wetlands delineation manual published by the U.S. army corps of engineers.  
8 The edition of the manual that shall be used shall be the 1987 edition of the manual  
9 and any document that the U.S. army corps of engineers issues interpreting that  
10 manual, unless the U.S. army corps of engineers publishes an edition of the manual  
11 after January 9, 2001, and the department by rule designates that edition as the one  
12 to be used under this subsection. If the U.S. army corps of engineers issues a  
13 guidance document interpreting the edition of the wetlands delineation manual that  
14 the department is required to use under this subsection and if that guidance  
15 document is issued after the effective date of this paragraph .... [revisor inserts date],  
16 the department shall notify the appropriate standing committee of each house of the  
17 legislature, as determined by the speaker of the assembly and the president of the  
18 senate, of the issuance of the guidance document and whether the department  
19 intends to promulgate a rule incorporating the provisions of the guidance document.

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

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

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

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

3 (d) Maintenance of drainage ditches.

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

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

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

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

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

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

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

19 **(6) RULES FOR EXEMPTIONS.** The department shall promulgate rules to interpret  
20 and implement the provisions under subs. (4) and (5). The rules shall be consistent  
21 with all existing federal laws or interpretations. The department shall incorporate  
22 all additional federal laws or interpretations into the rules that the department  
23 promulgates under this subsection and may not otherwise amend the rules.

24 **(7) RULES PROHIBITION.** The department may not promulgate or enforce a rule  
25 requiring a person who submits an application for a water quality certification under



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1 this section for the discharge of dredged or fill material into a nonfederal wetland to  
2 submit a description of practicable alternatives to the discharge or to submit a  
3 description of any investigation conducted to determine the viability of such  
4 alternatives if any of the following apply:

5 (a) The discharge is required by the federal government, the state, or a local  
6 governmental unit in order for the person submitting the application for the water  
7 quality certification to receive approval from the federal government, state, or local  
8 governmental unit for an activity that serves a public purpose.

9 (b) The federal government, the state, or a local governmental unit determines  
10 that the discharge is necessary to ensure public safety.

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

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

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

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

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

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

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

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

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 and  
22               where the department has probable cause to believe that a violation of this section  
23               has occurred or is occurring to investigate a discharge of dredged or fill material.

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

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

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

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

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

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

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

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

24 281.69 **(3)** (b) 2. The restoration of a wetland, as defined in s. ~~23.32 (1)~~, if the  
25 restoration will protect or improve a lake's water quality or its natural ecosystem.

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

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

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

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

25           **SECTION 11. Nonstatutory provisions.**

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1 (1) TEMPORARY PROCESS.

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

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

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

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

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

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

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

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

