

**2001 DRAFTING REQUEST**

**Bill**

Received: **03/22/2001**

Received By: **rkite**

Wanted: **As time permits**

Identical to LRB:

For: **Neal Kedzie (608) 266-9650**

By/Representing: **Dan Johnson**

This file may be shown to any legislator: **NO**

Drafter: **gibsom**

May Contact:

Addl. Drafters: **rkite**

Subject: **Nat. Res. - wet/shore/flood**

Extra Copies: **KMG**  
**e-mail to John Stolzenberg an**

Submit via email: **YES**

Requester's email: **Rep.Kedzie@legis.state.wi.us**

**Pre Topic:**

No specific pre topic given

**Topic:**

Water quality certification for certain wetlands

**Instructions:**

See Attached

**Drafting History:**

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/P1	rkite 03/24/2001	gilfokm 03/24/2001	haugeca 03/26/2001	_____	_____	_____	_____

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/P2	gibsom 03/26/2001	gilfokm 03/26/2001	haugeca 03/26/2001	_____	lrb_docadmin 03/26/2001		
/P3	gibsom 04/02/2001 gibsom 04/03/2001	gilfokm 04/02/2001	jfrantze 04/03/2001	_____ _____ _____			S&L
/1		gilfokm 04/03/2001	rschluet 04/03/2001	_____	lrb_docadmin 04/03/2001		S&L
/2	gibsom 04/03/2001	gilfokm 04/03/2001	kfollet 04/03/2001	_____	lrb_docadmin 04/03/2001		S&L
/3	gibsom 04/12/2001 gibsom 04/12/2001	csicilia 04/12/2001	jfrantze 04/12/2001 pgreensl 04/12/2001	_____ _____ _____	lrb_docadmin 04/12/2001	lrb_docadmin 04/16/2001	S&L

FE Sent For: 04/13/2001.

<END>

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Drafter: gibson

May Contact:

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e-mail to John Stolzenberg an

Submit via email: YES

Requester's email: Rep.Kedzie@legis.state.wi.us

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/P2	gibson 03/26/2001	gilfokm 03/26/2001	haugeca 03/26/2001	_____	lrb docadmin 03/26/2001		
/P3	gibson 04/02/2001 gibson 04/03/2001	gilfokm 04/02/2001	jfrantze 04/03/2001	_____ _____ _____			S&L
/1		gilfokm 04/03/2001	rschluet 04/03/2001	_____	lrb docadmin 04/03/2001		S&L

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/2	gibsom 04/03/2001	gilfokm 04/03/2001	kfollet 04/03/2001	_____	lrb_docadmin 04/03/2001		S&L
/3	gibsom 04/12/2001	csicilia 04/12/2001	jfrantze 04/12/2001	_____	lrb_docadmin 04/12/2001		S&L
	gibsom 04/12/2001		pgreensl 04/12/2001	_____			

FE Sent For:

<END>

04-13-01  
"/3"

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By/Representing: Dan Johnson

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Drafter: gibson

May Contact:

Addl. Drafters: rkite

Subject: Nat. Res. - wet/shore/flood

Extra Copies: KMG

Submit via email: NO

e-mail to John Stolzenberg and  
Rachel Letzing  
Submit by e-mail  
to requester

Requester's email:

**Pre Topic:**

No specific pre topic given

**Topic:**

Water quality certification for certain wetlands

**Instructions:**

See Attached

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/P1	rkite 03/24/2001	gilfokm 03/24/2001	haugeca 03/26/2001	_____	_____	_____	_____
/P2	gibson	gilfokm	haugeca	_____	lrb_docadmin	_____	_____

*Handwritten notes:*  
4/1/01  
4/1/01  
4/24/01  
ms/cn

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
	03/26/2001	03/26/2001	03/26/2001	_____	03/26/2001		
/P3	gibsom 04/02/2001 gibsom 04/03/2001	gilfokm 04/02/2001	jfrantze 04/03/2001	_____ _____ _____			S&L
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/2	gibsom 04/03/2001	gilfokm 04/03/2001	kfollet 04/03/2001	_____ _____	lrb_docadmin 04/03/2001		S&L

FE Sent For:

13 cjs 4/12  
01

<END>

14 cjs 4/12  
01

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By/Representing: **Dan Johnson**

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Drafter: **gibson**

May Contact:

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Subject: **Nat. Res. - wet/shore/flood**

Extra Copies: **KMG**  
**e-mail to John Stolzenberg an**

Submit via email: **NO**

Requester's email:

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**Pre Topic:**

No specific pre topic given

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**Topic:**

Water quality certification for certain wetlands

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**Instructions:**

See Attached

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/P1	rkite 03/24/2001	gilfokm 03/24/2001	haugeca 03/26/2001	_____	_____	_____	_____
/P2	gibson	gilfokm <i>12-4/KMG 12-4/3-01</i>	haugeca <i>KJL 4/3</i>	_____	lrb_docadmin	_____	_____

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
	03/26/2001	03/26/2001	03/26/2001	_____	03/26/2001		
/P3	gibsom 04/02/2001	gilfokm 04/02/2001	jfrantze 04/03/2001	_____			S&L
	gibsom 04/03/2001			_____			
/1		gilfokm 04/03/2001	rschluet 04/03/2001	_____	lrb_docadmin 04/03/2001		S&L

FE Sent For:

<END>



### 2001 DRAFTING REQUEST

#### Bill

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By/Representing: Dan Johnson

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Drafter: rkite

May Contact:

Addl. Drafters:

Subject: Nat. Res. - wet/shore/flood

Extra Copies: MGG and RCT

*Handwritten initials: RMG*

#### Pre Topic:

No specific pre topic given

#### Topic:

Water quality certification for certain wetlands

*Handwritten note:* email to at LC  
John Stolzenberg  
Rachel Letzing

#### Instructions:

See Attached

#### Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
1?	rkite	KMG 3-24	CK 3-24-01	CK 3-24 <del>KMG</del>			
FE Sent For:		1/2-3/KMG 26-a	CK 3-26	CK 3-26	3F 3-26		
		1-4/KMG 3-01	<i>[Signature]</i> 3-3-01	<i>[Signature]</i> 3-3-1			

*Handwritten:* <END>

**Drafting instructions for a proposal relating to: water quality certification for nonfederal wetlands and granting rule-making authority.**

**Special instructions: We would like the provisions of this bill to be retroactive to January 9, 2001**

*done*

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

281.37(2m) (a)

1. A person who is the holder of a permit or other approval that authorizes a mitigation project shall grant a conservation easement under s. 700.40 to the department to ensure that a wetland that is being restored, enhanced or created will not be destroyed or substantially degraded by any subsequent proprietor of or holder of interest in the property on which the wetland is located. The department shall revoke the permit or other approval if the holder of the permit or other approval fails to take these measures.
2. A person who is restoring, enhancing or creating a wetland to provide transferable credits as part of a wetlands mitigation bank shall grant a conservation easement under s. 700.40 to the department, to ensure that the wetland will not be destroyed or substantially degraded by any subsequent proprietor of or holder of interest in the property on which the wetland is located.
3. Any subsequent owner proprietor of or holder of interest in the property on which the wetland specified in subd. 1. is located did not contribute to the loss of the wetland.

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

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

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

281.36 Water quality certification for nonfederal wetlands.

(1) DEFINITIONS. In this section:

(a) "~~of guidance~~ Federal law" means any regulation, ~~statute~~ decision, rule, memorandum of agreement, guidance letter, or other provision ~~that has the effect of law established by~~ the United States Congress, a federal court, or a federal agency.

(b) "Nonfederal wetland" means a wetland that is not subject to regulation under 33 USC 1344 ~~due to the decision in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, No. 99-1178 (U.S. Jan. 9, 2004)~~ and has any of the following characteristics:

*John Stolzenberg*

1. The wetland is an isolated, non-navigable, intrastate wetland under the Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, No. 99-1178 (U.S. Jan. 9, 2001) and subsequent interpretations of the decision by the U.S. Army Corps of Engineers or a court of competent jurisdiction.
  2. The discharge of dredged or fill material into the wetland is not subject to regulation under 33 U.S.C. s. 1344 due to the decision in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, No. 99-1178 (U.S. Jan. 9, 2001) and subsequent interpretations of the decision by the U.S. Army Corps of Engineers or a court of competent jurisdiction but to which such regulation did apply on January 8, 2001.
    - (a) If the U.S. Army Corps of Engineers issues a determination on whether a wetland meets a characteristic identified in par. 1 or 2, the department shall use that determination in administering this subsection. If the U.S. Army Corps of Engineers does not issue such a determination, the department shall determine whether a wetland is a nonfederal wetland.
- (c) "Water quality standards" means water quality standards set under rules promulgated by the department under s. 281.15.
- (d) "Working day" has the meaning given in s. 227.01 (14).

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

(3) DELINEATION PROCEDURES. When delineating the boundaries of a nonfederal wetland, the department and the person shall use the procedures contained in the wetlands delineation manual published by the U.S. army corps of engineers in resolving the dispute. The department shall use the 1987 edition of the manual unless the U.S. army corps of engineers publishes an edition of the manual after the effective date of this subsection . . . [revisor inserts date], and the department by rule designates that edition as the one to be used under this subsection. In addition, if the U.S. Army Corps of Engineers issues a new guidance document after the effective date of this law, the department must notify the standing committees in each house of the Legislature that deal with water quality issues of the change in guidance and whether the department intends to promulgate the guidance as a rule.

*ask*

*including referencing docs.*

*add*

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

- (a) Normal farming, silviculture, or ranching activities.
- (b) Maintenance, emergency repair, or reconstruction of damaged parts of structures that are in use in a nonfederal wetland.
- (c) Construction or maintenance of farm ponds, stock ponds, or irrigation ditches.
- (d) Maintenance of drainage ditches.
- (e) Construction or maintenance of farm roads, forest roads, or temporary mining roads that is performed in accordance with best management practices, as determined by the department, to ensure all of the following:

- 1. That the flow and circulation patterns and chemical and biological characteristics of the affected nonfederal wetland are not impaired.
- 2. That the reach of the affected nonfederal wetland is not reduced.
- 3. That any adverse effect on the aquatic environment of the affected nonfederal wetland is minimized to the degree required by the department.

*add*  
*a district drain used for*  
**Special instructions:** Provide that a drainage district drain used primarily for agricultural purposes, including aquaculture, be specified as not navigable unless a United States Geological Survey map or other equally reliable scientific evidence shows that the drain was a navigable stream before it became a district drain. (LRB 2402/1, page 673, line 3-6)

*add*  
**Special instructions:** Delete the requirement that a drainage district must have a permit to acquire or remove any dam or obstruction from navigable waters or to clean out, deepen, widen or straighten any navigable stream.

(5) INAPPLICABILITY OF EXEMPTIONS. Notwithstanding sub. (4), a discharge that would be exempt under sub. (4) is subject to the certification requirement under sub.

(2) if the discharge is incidental to an activity that has as its purpose bringing a nonfederal wetland, or part of a nonfederal wetland, into a use for which it was not previously subject and if the activity may do any of the following:

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

(6) RULES FOR EXEMPTIONS. The department shall promulgate rules to interpret and implement the provisions under subs. (4) and (5). The rules shall be consistent with 33 USC 1344 (f), as amended to the effective date of this subsection ... [revisor inserts date], and with any other federal law that is promulgated or adopted pursuant to that subsection or that is used to implement that subsection and that is in effect on the

*done*  
*LRB*  
*0605*

effective date of this subsection .... [revisor inserts date]. If 33 USC 1344 (f) or the other federal law is amended or modified after the effective date of this subsection .... [revisor inserts date], the department may incorporate any of these amendments or modifications into the rules promulgated under this subsection but may not otherwise amend the rules.

281.36(6a) of the statues is created to read:

*add* 281.36(6a) Exemption; Practicable Alternatives Analysis. All nonfederal wetlands less than 1 acre in area are exempt from the requirements under NR 299.03(1)(g). *done*

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

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

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

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

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

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

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

2. Enter and inspect any property on which is located a non-federal wetland and where the department has probable cause to believe that a violation of this section has occurred or is occurring to investigate a discharge of dredged or fill material.
3. Gain access to and inspect any records that the department requires a holder of a water quality certification to keep.
  - (b) Any employee or representative of the department may exercise the authority granted under par. (a) 1., 2., or 3. only during reasonable hours and only after the department has provided reasonable advance notice to the person owning the property involved or to the holder of the water quality certification.
  - (c) An employee or representative of the department may not gain access to or inspect any records as authorized under par. (a) 3. unless the holder of the water quality certification, or the holder's designee, is present or unless the holder of the certification waives this requirement.

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

- (a) Regulate the discharge of dredged or fill material in a nonfederal wetland under s. 29.601, 30.11, 30.12, 30.123, 30.19, 30.195, 30.20, 59.692, 61.351, 62.231, or 87.30 or chs. 281 to 285 or 289 to 299, except s. ~~281.48~~. *(J. Stoltzenberg should clarify this)*
- (b) Issue a water quality certification under rules promulgated under this chapter to implement 33 USC 1341 (a).

*change  
to list  
in AB  
215  
per J.  
Stoltzenberg*

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

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

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

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

5

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

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

2. Section 281.163 is repealed (**repeal of the isolated wetlands moratorium**) *done*

SECTION 9. Nonstatutory provisions.

(1) TEMPORARY PROCESS.

*add*  
**Special instructions:** The temporary process should be clarified to establish that a person who has been notified by DNR that he or she does not need a water quality certification to discharge dredged or fill material into a nonfederal wetland under a ch. NR 103 exemption may do so under the temporary process. *ask John*

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

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

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

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

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

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

(END)



## Kite, Robin

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From: Johnson, Dan (Legislature)  
Sent: Thursday, March 22, 2001 11:35 AM  
To: Kite, Robin

(3) DELINEATION PROCEDURES. When delineating the boundaries of a nonfederal wetland, the department and the person shall use the procedures contained in the wetlands delineation manual published by the U.S. army corps of engineers in resolving the dispute. The department shall use the 1987 edition of the manual [ **including any corresponding reference documents interpreting the manual** ] unless the U.S. army corps of engineers publishes an edition of the manual after the effective date of this subsection . . . [revisor inserts date], and the department by rule designates that edition as the one to be used under this subsection. In addition, if the U.S. Army Corps of Engineers issues a- [ any]new guidance document [**interpreting the manual**] after the effective date of this law, the department must notify the standing committees in each house of the Legislature that deal with water quality issues of the change in guidance and whether the department intends to promulgate the guidance as a rule. OK



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## WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

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TO: SENATORS JAMES BAUMGART, ROBERT COWLES AND DALE SCHULTZ; AND REPRESENTATIVES DUWAYNE JOHNSRUD AND NEAL KEDZIE

FROM: Rachel E. Letzing, Staff Attorney and John Stolzenberg, Staff Scientist

RE: Proposed Changes to Senate Substitute Amendment 1 to 2001 Senate Bill 37

DATE: March 5, 2001

This memorandum summarizes suggested changes to Senate Substitute Amendment 1 to 2001 Senate Bill 37 raised during the discussion among you or your staff and staff from the Department of Natural Resources (DNR) on February 27, 2001. The substitute amendment relates to water quality certification for nonfederal wetlands. Our comments on these changes identify either the effect of a change or concerns related to a change or provide information on a change.

### WATER QUALITY CERTIFICATION

1. Page 2, lines 22-24, change the definition of "federal law" by deleting the phrase "that has the effect of law" and replacing it with "to interpret 33 U.S.C. s. 1344."

**Comment:** These changes bring in guidance documents used at the federal level to administer the Section 404 program which do not have the force of law. Since the term would include guidance documents that are not legally binding under federal law, we would suggest that the term be changed from "federal law" to "federal law or guidance."

2. On page 3, lines 1 to 4, change the definition of "nonfederal wetland" to the following:

"Nonfederal wetland" means an isolated, nonnavigable, intrastate wetland as determined by the U.S. Army Corps of Engineers as not subject to regulation under 33 U.S.C. s. 1344, due to the decision in *Solid Waste Agency v. U.S. Army Corps of Engineers*, No. 99-1178 (January 9, 2001), but to which such regulation did apply on January 8, 2001.

**Comment:** This change is designed to incorporate the U.S. Supreme Court's terminology ["isolated, nonnavigable, intrastate wetland"] into this definition, to rely on the Army Corps of Engineers (ACE) interpretation of the *SWANCC* decision and to remove the

potentially ambiguous reference to the federal permitting process. A subsequent discussion with the drafting attorney at the Legislative Reference Bureau indicated that this revised definition of "nonfederal wetland" creates an unacceptable situation, as it always relies upon a determination of the ACE and a state law cannot force a federal agency to participate in a state regulatory process.

An alternative that accommodates various formats of ACE determinations on its jurisdiction under *SWANCC* would be to define "nonfederal wetland" as follows:

(1) (c) "Nonfederal wetland" means a wetland identified under sub. (1m).

(1m) Applicability. (a) A wetland is a nonfederal wetland if the wetland has any of the following characteristics:

1. The wetland is an isolated, nonnavigable, intrastate wetland under the decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, No. 99-1178 (U.S. January 9, 2001) and subsequent interpretations of the decision by the U.S. Army Corps of Engineers or a court of competent jurisdiction.
  2. The discharge of dredged or fill material into the wetland is not subject to regulation under 33 U.S.C. s. 1344 due to the decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, No. 99-1178 (U.S. January 9, 2001) and subsequent interpretations of the decision by the U.S. Army Corps of Engineers or a court of competent jurisdiction but to which such regulation did apply on January 8, 2001.
- (b) If the U.S. Army Corps of Engineers issues a determination on whether a wetland meets a characteristic identified in par. (a) 1. or 2., the department shall use that determination in administering this subsection. If the U.S. Army Corps of Engineers does not issue such a determination, the department shall determine whether a wetland is a nonfederal wetland under par. (a).

### **DELINEATION PROCEDURES**

Page 3, lines 15 to 23, change the delineation procedures to state that if there is a dispute between the DNR and a person who is applying for or holds a water quality certification over the delineation of the boundary of a nonfederal wetland, the DNR and the person must use the 1987 Wetlands Delineation Manual plus current guidance documents interpreting the Manual in Wisconsin which DNR must identify by rule. In addition, this section would be changed so that if the ACE issues a new guidance document after the effective date of this law, the DNR must notify the natural resources standing committees in each house of the Legislature of the change in guidance and whether the department intends to promulgate the guidance as a rule.

### **ARTIFICIAL WETLANDS**

Page 5, line 11 to page 6, line 2, delete the Artificial Wetlands Exemptions.

**Comment:** This change was intended to reduce confusion over the applicability of the artificial wetlands exemptions. Since the artificial wetlands exemptions in the substitute amendment were taken directly from s. NR 103.06 (4), Wis. Adm. Code, water quality standards for wetlands, the codification of the exemptions in the statutes was not intended to change their applicability. The DNR will continue to use ch. NR 103 exemptions to determine whether a water quality certification is necessary to discharge dredged or fill material into a nonfederal wetland under s. 281.36, as created by the substitute amendment. As part of this change, the definition of "artificial wetland" on page 2, line 21 should also be deleted.

### **INSPECTION AUTHORITY**

On page 7, line 7, in the DNR's inspection authority to enter property where the DNR has reasonable suspicion that a violation of this section has occurred, insert "nonfederal" before "wetland."

**Comment:** This change applies this inspection authority specifically to property on which is located a nonfederal wetland.

### **RELATION TO OTHER DNR REGULATORY PROGRAMS**

On page 7, line 20 to page 8, line 2, sub. (10) establishes that the water quality certification requirements created by the substitute amendment do not affect DNR's authority to regulate the discharge of dredged or fill material in a nonfederal wetland under the specified regulatory programs. It was suggested to create an exception for s. 281.36 and to treat s. 281.48 like the other listed regulatory programs.

**Comment:** The substitute amendment creates s. 281.36, water quality certification for nonfederal wetlands, and thus it would be nonsensical for that section to create an exemption to itself. Section 281.48, Stats., relates to servicing septic tanks, soil absorption fields, holding tanks, grease traps and privies. Chapter NR 113, Wis. Adm. Code, implements s. 281.48. Since s. NR 113.08 (3) (b) 3. regulates the discharge of septage into wetlands (by prohibiting the landspreading or discharging of septage into or on any wetlands), it is consistent with the treatment of other regulatory programs in sub. (10) to include s. 281.48 with those programs.

### **TEMPORARY PROCESS**

On page 9, lines 6 to 22, the temporary process should be clarified to establish that a person who has been notified by DNR that he or she does not need a water quality certification to discharge dredged or fill material into a nonfederal wetland under a ch. NR 103 exemption may do so under the temporary process.

**Comment:** This change recognizes exemptions from water quality certification requirements under ch. NR 103.

If you have any questions or we can be of further assistance, please contact either of us at the Legislative Council offices.

REL:JES:rv:wu:ksm:rv



DEPARTMENT OF THE ARMY

ST. PAUL DISTRICT CORPS OF ENGINEERS  
ARMY CORPS OF ENGINEERS CENTRE  
180 FIFTH STREET EAST  
ST. PAUL, MN 55101-1638

From John Stolzenberg -  
He got this from DNR -  
Examples of ACE letters

REPLY TO  
ATTENTION OF

Construction-Operations  
Regulatory (91-50152-WMS)

Mr. William Suick  
D'Onofrio, Kottke and Associates  
7530 Westward Way  
Madison, Wisconsin 53717

Post-It® Fax Note	7671	Date	3/23	# of pages	4
To	Robin Kite	From	John Stolzenberg		
Co./Dept.	LRB	Co.	Leg Council		
Phone #		Phone #	6-2988		
Fax #	4-6948	Fax #			

Dear Mr. Suick:

This letter is in regard to your request for a jurisdictional determination on wetlands at the "Flying J" site located in the SW ¼ of Section 13, T. 9N., R. 9E., Dane County, WI. This jurisdictional determination takes into consideration the standards set out by the U.S. Supreme Court's decision in Solid Waste Agency of Northern Cook County v. Corps of Engineers (the SWANCC decision).

The subject wetland is not a "water of the United States" because it is: (1) not a navigable water, (2) not an interstate water, (3) not part of a tributary system to 1 or 2, (4) not a wetland adjacent to any of the foregoing, and not an impoundment of any of the above. In addition, the interstate commerce nexus to this particular waterbody is insufficient to establish Clean Water Act jurisdiction. This waterbody is therefore not subject to regulation by the Corps of Engineers under Section 404 of the Clean Water Act.

This jurisdictional determination is valid only for the project and waterbody referenced above. It is based on the Headquarters guidance available to us at this time.

PLEASE NOTE THAT THIS LETTER DOES NOT ELIMINATE THE NEED FOR OTHER FEDERAL, STATE, LOCAL, OR OTHER AUTHORIZATIONS (SUCH AS THOSE OF THE DEPARTMENT OF NATURAL RESOURCES OR COUNTY).

If you have any questions, please contact William M. Sande in our Waukesha office at (262) 547-1876. In any correspondence or inquiries, please refer to the file number shown above.

Sincerely,

Ben Wopat  
Chief, Regulatory Branch

(Reference (WDNR NO. 3-SC-1999-3146LR))

03/23/2001 16:20 DNR ADMINISTRATION → 92663830

NO. 441 0003

03/21/01 WED 09:56 FAX 612 290 5330

CON OPS St. Paul

016



## DEPARTMENT OF THE ARMY

ST. PAUL DISTRICT CORPS OF ENGINEERS  
 ARMY CORPS OF ENGINEERS CENTRE  
 130 FIFTH STREET EAST  
 ST. PAUL, MN 55101-1638

REPLY TO  
 ATTENTION OF

March 19, 2001

Construction-Operations  
 Regulatory (00-06105-JBK)

Mr. Don Gallo  
 Reinhart, Boerner, Van Deuren,  
 Norris & Rieselbach, S.C.  
 1000 North Water Street  
 P.O. Box 514000  
 Milwaukee, WI 53203-3400

Dear Mr. Gallo:

We have reviewed information about a proposal by your client, The Penguin Group, to construct a residential subdivision within a parcel of land that contains wetlands adjacent to a tributary to Underwood Creek, and also contains an abandoned gravel pit, with adjacent wetlands, also known as Quarry Lake. The project site is located in Sec. 13, T. 7N., R. 20E., Waukesha County, Wisconsin.

We have determined that the wetland areas that are located near Lilly Road, and not adjacent to the Quarry Lake, are adjacent to a tributary to Underwood Creek. Underwood Creek, its tributaries, and adjacent wetlands, are part of an intrastate tributary system that drains into the Milwaukee River and Lake Michigan, which is a U.S. Navigable Waterway. Therefore the project site at the location stated contains waters and wetlands that are subject to regulation by the Corps under §404 of the Clean Water Act.

We have enclosed application forms used to apply for a Department of the Army permit should your client propose to discharge fill material into the tributary to Underwood Creek or its tributaries, and all adjacent wetlands. You can help expedite our permit process if you:

- Fill out the application completely and specifically.
- Send accurate drawings, including smaller 8 1/2" by 11" copies for our public notice. The drawings should identify the boundaries of the wetland and the dimensions of the wetland to be filled.
- Please describe any alternatives considered when planning this project. This consideration should include other potential sites and other methods of accomplishing the desired result. Our regulations often prevent the issuance of permits where there are less environmentally

03/23/2001 16:20 DNR ADMINISTRATION -&gt; 92663830

NO.441 0004

03/21/01 WED 09:57 FAX 812 280 5330

CON QFS St. Paul

017

damaging alternatives available. For instance, if the project involves placing fill in a water or wetland, there may be a way to accomplish the project purpose without filling, or without filling as large an area.

- The Wisconsin Department of Natural Resources (WDNR) has asked that we forward to you State Water Quality Certification Information Requirements. We request that you provide the information listed on the enclosure, send one copy to the WDNR Area Office and another to this office. Providing the information requested in the enclosure will also satisfy the request for an alternatives analysis contained in the preceding paragraph.

With regard to the Quarry Lake site, and its adjacent wetlands, this waterbody is not considered waters of the United States. This jurisdictional determination takes into consideration the standards set out by the U.S. Supreme Court's decision in Solid Waste Agency of Northern Cook County v. Corps of Engineers (the SWANCC decision).

The subject water body is not a "water of the United States" because it is: (1) not a navigable water, (2) not an interstate water, (3) not part of a tributary system to 1 or 2, (4) not a wetland adjacent to any of the foregoing, and not an impoundment of any of the above. In addition, the interstate commerce nexus to this particular waterbody is insufficient to establish Clean Water Act jurisdiction. This waterbody is therefore not subject to regulation by the Corps of Engineers under Section 404 of the Clean Water Act.

This jurisdictional determination is valid only for the project and waterbodies referenced above. It is based on the Headquarters guidance available to us at this time.

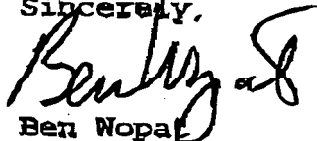
PLEASE NOTE THAT THIS LETTER DOES NOT ELIMINATE THE NEED FOR OTHER FEDERAL, STATE, LOCAL, OR OTHER AUTHORIZATIONS (SUCH AS THOSE OF THE DEPARTMENT OF NATURAL RESOURCES OR COUNTY).

If you disagree with the enclosed jurisdictional determination, you may provide new information or appeal the jurisdictional determination. Please follow the directions in Section D of the enclosed Notification of Administrative Appeals Options and Process and Request for Appeal.

The decision regarding this action is based on information found in the administrative record, which documents the District's decision-making process, the basis for decision, and the final decision.

If you have any questions, please contact Mr. James Knowles in our Waukesha field office (262) 547-3064. In any correspondence or inquiries, please refer to the file number shown above.

Sincerely,



Ben Wopat  
Chief, Regulatory Branch

Copy Furnished:

Ms. Brooke Robinson, WDNR

Mr. Mike Cain, WDNR





(Sun. 3-25)  
State of Wisconsin  
2001 - 2002 LEGISLATURE

LRB-2921/P1

RNK.....

King/wlj/hmh

D-Note

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

JPS: check auto refs.

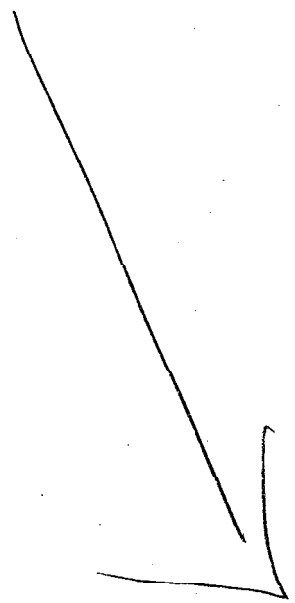
Sen. Cat.

- 1 AN ACT...; relating to: water quality certification for nonfederal wetlands, the
- 2 regulation of drainage district drains, and granting rule-making authority.

**Analysis by the Legislative Reference Bureau**

This is a preliminary draft. An analysis will be provided in a later version of the draft.

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



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

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

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

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

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

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

2m

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

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

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

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

*SEC. #. 23.321 (2) of the statutes, as created by 1999 Wisconsin Act 147, is remembered 281.37(2).*

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

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

SECTION 5. ~~281.36~~ <sup>281.365</sup> of the statutes is created to read:

~~281.36~~ <sup>281.365</sup> **Water quality certification for nonfederal wetlands. (1)**

DEFINITIONS. In this section:

(a) ~~"Artificial wetland"~~ has the meaning specified by the department by rule.

<sup>(a)</sup> "Federal law" ~~means~~ <sup>includes</sup> any regulation, rule, memorandum of agreement, guidance letter, or other provision established by a federal agency that has the effect of law.

*Insert 2-1516*  
*Insert 7*  
*17*

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

5 ~~(c)~~ "Water quality standards" means water quality standards set under rules  
 6 promulgated by the department under s. 281.15.

7 ~~(d)~~ "Working day" has the meaning given in s. 227.01 (14).

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

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

and any document that the U.S. army corps of engineers  
 issues interpreting that manual,

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

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

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

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

9           (d) Maintenance of drainage ditches.

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

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

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

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

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

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

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

1 (6) RULES FOR EXEMPTIONS. The department shall promulgate rules to interpret  
2 and implement the provisions under subs. (4) and (5). The rules shall be consistent  
3 with 33 USC ~~1334~~<sup>1344</sup>(f), as amended to the effective date of this subsection .... [revisor  
4 inserts date], and with any other federal law that is promulgated or adopted  
5 pursuant to that subsection or that is used to implement that subsection and that is  
6 in effect on the effective date of this subsection .... [revisor inserts date]. If 33 USC  
7 ~~1334~~<sup>1344</sup>(f) or the other federal law is amended or modified after the effective date of this  
8 subsection .... [revisor inserts date], the department may incorporate any of these  
9 amendments or modifications into the rules promulgated under this subsection but  
10 may not otherwise amend the rules.

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

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

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

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

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

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

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

2 ~~4. An active nonmetallic mining operation.~~

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

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

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

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

14 (c) If the department determines that any of the discharges under a general  
15 water quality certification issued under this section fails to meet any of the standards  
16 in par. (a), the department shall modify the certification so that the discharges meet  
17 all of the standards. If the department cannot modify the certification so that all of  
18 the standards will be met or if the department determines that the discharges subject  
19 to the general certification are more appropriately certified by using individual  
20 water quality certifications, the department shall revoke the general certification.

21 (d) Before issuing, modifying, or revoking a general water quality certification  
22 under this subsection, the department shall provide notice and a hearing under ss.  
23 227.17 and 227.18.

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

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

*probable cause to believe  
nonfederal*

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

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

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

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

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

22 (a) Regulate the discharge of dredged or fill material in a nonfederal wetland  
23 under ~~429.601, 30.11, 30.12, 30.13, 30.14, 30.15, 30.16, 30.17, 30.18, 30.19, 30.20, 59.692, 61.351, 62.231, or~~

24 ~~30.30 or chs. 281 to 285 or 289 to 299, except 281.45~~ *Insert 7-24 ✓*  
*prohibit 281.305*  
*provision if the discharge of dredged or fill material as authorized by the certification has not been completed*



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

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

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

6 SECTION 7. 281.98 (1) of the statutes is ~~amended~~ <sup>repealed and recreated</sup> to read:

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

13 SECTION 8. 299.95 of the statutes is ~~amended~~ <sup>repealed and recreated</sup> to read:

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

*will  
component*

*will  
component*

*will  
component*

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

5 **SECTION 9. Nonstatutory provisions.**

6 (1) TEMPORARY PROCESS.

7 (a) In this subsection, "federal law" has the meaning given in section 281.36<sup>(5)</sup>(1)  
8 ~~of~~ <sup>(a)</sup> 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(1)~~ <sup>281.365 (b)</sup> of the statutes, as created by this act, are effective unless

12 either of the following applies: <sup>one</sup>

13 1. The person demonstrates to the satisfaction of the department of natural  
14 resources that the activity ~~which~~ <sup>that</sup> will result in the discharge will qualify for an  
15 exemption under 33 USC ~~1334~~ <sup>1344</sup> (f), as amended to the effective date of this  
16 subdivision, and under any other federal law that is promulgated or adopted  
17 pursuant to that subsection or that is used to implement that subsection and that is  
18 in effect on the effective date of this subdivision.

19 2. The person receives a water quality certification issued under section 281.36<sup>(5)</sup>  
20 of the statutes, as created by this act.

21 (c) This subsection does not apply after the date on which the rules required  
22 under section 281.36<sup>(5)</sup>(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<sup>(5)</sup>(6) of the statutes, as created  
25 by this act, to the legislative council staff under section 227.15 (1) of the statutes no

281.365

Insert  
9-20

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

2  
Insert  
0-28

(END)

2  
**INSERT 2-15**

provides an exemption to this requirement for the Duck Creek Drainage District under which the drainage board for that district may place a structure or deposit in a drain if DATCP, after consulting with DNR, specifically approves the structure or deposit or if the structure or deposit is required by DATCP in order to conform the drain to specifications approved by DATCP in consultation with DNR. This bill extends this exemption to any other structure or deposit to be placed in a drainage district drain if the structure or deposit is used primarily for agricultural purposes.

Current law also provides that, with certain exceptions, a person wishing to remove material from the bed of a lake or stream must obtain a permit from DNR. Under one of the exemptions, the drainage board for the Duck Creek Drainage District may remove material from a drain that the board operates if the removal is required by DATCP in order to conform the drain to specifications imposed by DATCP in consultation with DNR. This bill extends this exemption to all other drainage district drains if the removal of the material is necessary primarily for agricultural purposes.

In addition to the current law requirements for obtaining permits to place a structure or deposit in navigable waters or to remove material from the bed of a lake or stream, current law requires that a drainage board obtain a separate permit from DNR to acquire and remove any dam or obstruction or to clean out, widen, deepen, or straighten any navigable stream. Under current law, only the Duck Creek Drainage District is exempt from this permitting requirement. This bill eliminates the permitting requirement for all drainage districts operated by drainage boards.

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. 30.10 (4) (d) of the statutes is renumbered 30.10 (4) (d) 2. and  
2           amended to read:

3           30.10 (4) (d) 2. A drainage district drain located in the Duck Creek Drainage  
4           District and operated by the board for that district or any other drainage district  
5           drain that is used primarily for agricultural purposes is not navigable unless it is  
6           shown, by means of a U.S. geological survey map or other similarly reliable scientific  
7           evidence, that the drain was a navigable stream before it became a drainage district  
8           drain.

9           SECTION 2. 30.10 (4) (d) 1. of the statutes is created to read:

, including a drainage district drain that is used for aquaculture,

*are defined in*

1           30.10 (4) (d) 1. In this paragraph, “agricultural purposes” has the meaning  
2 given in s. 29.181 (1b) (a).

3           **SECTION 3.** 30.12 (4m) (title) of the statutes is amended to read:

4           30.12 (4m) (title) ~~DUCK CREEK DRAINAGE DISTRICT~~ CERTAIN DRAINAGE DISTRICT  
5 STRUCTURES AND DEPOSITS.

6           **SECTION 4.** 30.12 (4m) (intro.) of the statutes is renumbered 30.12 (4m) (a)  
7 (intro.) and amended to read:

8           30.12 (4m) (a) (intro.) Subsection (1) does not apply to a qualifying structure  
9 or deposit ~~that the drainage board for the Duck Creek Drainage District places in a~~  
10 ~~drain that the board operates in the Duck Creek Drainage District~~ if either of the  
11 following applies:

12           **SECTION 5.** 30.12 (4m) (a) of the statutes is renumbered 30.12 (4m) (a) 1. and  
13 amended to read:

14           30.12 (4m) (a) 1. The department of agriculture, trade and consumer  
15 protection, after consulting with the department of natural resources, specifically  
16 approves the qualifying structure or deposit.

17           **SECTION 6.** 30.12 (4m) (b) of the statutes is renumbered 30.12 (4m) (a) 2. and  
18 amended to read:

19           30.12 (4m) (a) 2. The qualifying structure or deposit is required, under rules  
20 promulgated by the department of agriculture, trade and consumer protection, in  
21 order to conform the drain to specifications approved by the department of  
22 agriculture, trade and consumer protection after consulting with the department of  
23 natural resources.

24           **SECTION 7.** 30.12 (4m) (c) of the statutes is created to read:

1           30.12 (4m) (c) For purposes of this subsection, a “qualifying structure or  
2 deposit” is either of the following:

3           1. Any structure or deposit that is placed in a drain that is operated in the Duck  
4 Creek Drainage District by the board for the Duck Creek Drainage District.

5           2. Any structure or deposit that is placed in a drain that is not described in subd.  
6 1. if the structure or deposit is used primarily for agricultural purposes, as defined  
7 in s. 29.181 (1b) (a).

8           **SECTION 8.** 30.20 (1) (d) of the statutes is amended to read:

9           30.20 (1) (d) ~~The A drainage board for the Duck Creek Drainage District~~ may,  
10 without a permit under sub. (2) (c), remove qualifying material from a drain ~~that the~~  
11 ~~board operates in the Duck Creek Drainage District~~ if the removal is required, under  
12 rules promulgated by the department of agriculture, trade and consumer protection,  
13 in order to conform the drain to specifications imposed by the department of  
14 agriculture, trade and consumer protection after consulting with the department of  
15 natural resources.

16           **SECTION 9.** 30.20 (1) (dm) of the statutes is created to read:

17           30.20 (1) (dm) For purposes of this paragraph, “qualifying material” is either  
18 of the following:

19           1. Any material that is removed from a drain that is operated in the Duck Creek  
20 Drainage District by the board for the Duck Creek Drainage District.

21           2. Any material that is removed from a drain that is not described in subd. 1.  
22 if the removal is necessary primarily for agricultural purposes, as defined in s. 29.181  
23 (1b) (a).

24           **SECTION 10.** 31.01 (2m) of the statutes is created to read:

1           31.01 (2m) "Duck Creek Drainage District" has the meaning given in s. 30.01  
2 (1m).

3           **SECTION 11.** 31.02 (7) of the statutes is amended to read:

4           31.02 (7) The department of natural resources shall confer with the  
5 department of agriculture, trade and consumer protection and the drainage  
6 commissioners in each drainage district on the formation of policies for the operation  
7 and maintenance of the dams; ~~in districts.~~ In a district having no commissioners, the  
8 department of natural resources shall confer in like manner with the department of  
9 agriculture, trade and consumer protection and with the any committee appointed  
10 by the county board, ~~if any,~~ to represent ~~either such~~ the drainage district, ~~or in.~~ In  
11 the event that ~~the~~ a drainage district is dissolved, ~~to represent~~ the department of  
12 natural resources shall confer with any committee appointed by the county board to  
13 represent the interests of the county in all matters whatsoever pertaining to water  
14 conservation and control within the area which theretofore constituted ~~such~~ the  
15 drainage district. ~~This subsection does not apply to the Duck Creek Drainage~~  
16 ~~District.~~

17           **SECTION 12.** 31.02 (7m) of the statutes is amended to read:

18           31.02 (7m) The drainage board for the Duck Creek Drainage District shall  
19 operate, repair and maintain dams, dikes and other structures in district drains that  
20 the board operates in the Duck Creek Drainage District in compliance with ch. 88  
21 and any rules promulgated by the department of agriculture, trade and consumer  
22 protection under ch. 88. ~~If a county~~ Subsection (7) does not apply to the Duck Creek  
23 Drainage District unless the drainage board for the district fails to perform its duties  
24 under this subsection, the. If the drainage board fails to perform these duties, the

1 department of natural resources may exercise its authority under subs. (6), (8) and  
2 (9) and shall perform its duties under subs. (7) and (8).

3 SECTION 13. 31.02 (8) of the statutes is amended to read:

4 31.02 (8) The department of natural resources shall give careful consideration  
5 to the suggestions ~~of~~ made under sub. (7) by the department of agriculture, trade and  
6 consumer protection, the drainage commissioners, or any committee of the county  
7 board, but the final decision in all matters under consideration shall rest with the  
8 department of natural resources.

9 SECTION 14. 31.02 (9) of the statutes is amended to read:

10 31.02 (9) So far as seems practicable, the department may designate or employ  
11 the drainage commissioners of any drainage district, or the committee of the county  
12 board ~~above referred to~~ appointed under sub. (7), to operate the dams in ~~such~~ the  
13 district or in the area formerly comprising a drainage district or to perform services  
14 in the repair and maintenance of the dams, ~~dykes~~ dikes and other works.

15 SECTION 15. 88.01 (8m) of the statutes is repealed.

16 SECTION 16. 88.11 (1) (f) of the statutes is amended to read:

17 88.11 (1) (f) Assist districts in applying for permits under s. ~~88.31~~ chs. 30 and  
18 31.

19 SECTION 17. 88.31 (title) of the statutes is amended to read:

20 88.31 (title) ~~Special procedure in cases affecting~~ Drainage work in  
21 navigable waters.

22 SECTION 18. 88.31 (1) to (7m) of the statutes are repealed.

23 SECTION 19. 88.31 (8) (intro.) of the statutes is amended to read:



1           88.31 (8) (intro.) Subject to other restrictions imposed by this chapter, a  
2 drainage board which has obtained all of the permits as required under this chapter  
3 and ch. 30 may:

4           **SECTION 20.** 88.35 (5m) of the statutes is repealed.

5           **SECTION 21.** 88.35 (6) (intro.) of the statutes is amended to read:

6           88.35 (6) (intro.) Upon the completion of its duties under subs. (1) to ~~(5m)~~ <sup>✓</sup> (5),  
7 the board shall prepare a written report, including a copy of any maps, plans or  
8 profiles that it has prepared. The assessment of benefits and awards of damages  
9 shall be set forth in substantially the following form:

10          **SECTION 22.** 88.62 (3) (a) of the statutes is renumbered 88.62 (3) and amended  
11 to read:

12          88.62 (3) If drainage work is undertaken in navigable waters, the drainage  
13 board shall obtain a permit under ~~s. 30.20 or 88.31 or ch. 31, as directed by the~~  
14 ~~department of natural resources, except as provided in par. (b) any permit that is~~  
15 required under ch. 30 or 31.

16          **SECTION 23.** 88.62 (3) (b) of the statutes is repealed.

17          **SECTION 24.** 88.72 (3) of the statutes is amended to read:

18          88.72 (3) At the hearing on the petition, any interested person may appear and  
19 contest its sufficiency and the necessity for the work. If the drainage board finds that  
20 the petition has the proper number of signers and that to afford an adequate outlet  
21 it is necessary to remove dams or other obstructions from waters and streams which  
22 may be navigable, or to straighten, clean out, deepen, or widen any waters or streams  
23 either within or beyond the limits of the district, the board shall obtain any permit  
24 that is required under this chapter or ch. 30 or 31.

25          **SECTION 25.** 88.72 (4) of the statutes is amended to read:

1           88.72 (4) Within 30 days after the department of natural resources has issued  
2 all of the permits as required under ~~this chapter~~ and chs. 30 and 31, the board shall  
3 proceed to estimate the cost of the work, including the expenses of the proceeding  
4 together with the damages that will result from the work, and shall, within a  
5 reasonable time, award damages to all lands damaged by the work and assess the  
6 cost of the work against the lands in the district in proportion to the assessment of  
7 benefits then in force.

8 (END)

*of insert 2-15*

2001-2002 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

LRB-2921/P1ins  
RNK.....

INSERT 2-17

SECTION 1. 281.163 of the statutes, as created by 2001 Wisconsin Act .... (Assembly Bill 215), is repealed.

SECTION 2. 281.36 of the statutes, as created by 2001 Wisconsin Act .... (Senate Bill 54), is repealed.

INSERT 3-4

(b) "Nonfederal wetland" means a wetland that was subject to regulation under 33 USC 1344 on or before January 8, 2001, and that the U.S. Army Corps of Engineers has determined is not subject to regulation under 33 USC 1344 on or after January 9, 2001, because it is an isolated, non-navigable, intrastate wetland under the decision in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, No. 99-1178 (U.S. Jan. 9, 2001) or, if no such determination has been made by the U.S. Army Corps of Engineers, that the department has determined is an isolated, non-navigable, intrastate wetland under that decision.

INSERT 3-23

If the U.S. Army Corps of Engineers issues a guidance document interpreting the edition of the wetlands delineation manual that the department is required to use under this subsection and that guidance document is issued after the effective date of this subsection .... [revisor inserts date], the department shall notify the standing committees of each house of the legislature of the issuance of the guidance document and whether the department intends to promulgate a rule incorporating the provisions of the guidance document.

INSERT 6-2

(7) RULES PROHIBITION. The department may not promulgate or enforce a rule requiring a person who submits an application for a water quality certification under this section for the discharge of dredged or fill material into a nonfederal wetland that is less than one acre in size to submit a description of practicable alternatives to the discharge or to submit a description of any investigation conducted to determine the viability of such alternatives.

INSERT 7-24

NO P

ss. 59.692, 61.351, 62.231, 87.30, 281.11 to 281.16 to 281.35, 281.41 to 281.47, or 281.49 to 281.85 or ch. 30, 31, 283, 289, 291, 292, 293, 295, or 299

INSERT 9-20

# 3. The person demonstrates to the satisfaction of the department that the discharge is exempt from the water quality standards for wetlands set under rules promulgated under s. 281.15 of the statutes

of natural resources

nonstat: subd.

INSERT 10-2

# (3) RECONCILIATION PROVISIONS.  
# (a) If Wisconsin Act ... (2001 Senate Bill 54) is enacted into law, and if the creation of section 281.36 of the statutes by that act takes effect before the effective date of this paragraph, then the repeal of section 281.36 of the statutes by this act takes effect on the effective date of this paragraph.

nonstat

# 2001  
 (b) If Wisconsin Act ... (2001 Senate Bill 54) is enacted into law, and if the creation of section 281.36 of the statutes by that act takes effect on or after the effective date of this paragraph, or if Wisconsin Act ... (2001 Senate Bill 54) is not enacted into law, then the repeal of section 281.36 of the statutes by this act is void.

# 2001  
 (c) If Wisconsin Act ... (2001 Assembly Bill 215) is enacted into law, and if the creation of section 281.163 of the statutes by that act takes effect before the effective date of this paragraph, then the repeal of section 281.163 of the statutes by this act takes effect on the effective date of this paragraph.

# 2001  
 (d) If Wisconsin Act ... (2001 Assembly Bill 215) is enacted into law, and if the creation of section 281.163 of the statutes by that act takes effect on or after the effective date of this paragraph, or if Wisconsin Act ... (2001 Assembly Bill 215) is not enacted into law, then the repeal of section 281.163 of the statutes by this act is void.

**SECTION 3. Effective dates.** This act takes effect on the day after publication, except as follows:

#  
 (1) The treatment of sections 23.321 (title) and (1) (title), (a) to (f), (2) to (5), 281.01 (21), 281.365, and 281.69 (3) (b) 2. of the statutes takes effect retroactively to January 9, 2001.

#  
 (2) The treatment of section 23.321 (2) of the statutes takes effect on August 1, 2001.

(c),  
 (b), and (d)  
 2m

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-2921/P1dn

RNK.....

*img*

I have prepared this draft in preliminary form to give you an opportunity to consider the issues raised in this note and to allow for redrafting based on that consideration.

I have prepared this draft based on your written redraft instructions and based on conversations with Dan Johnson of your office and John Stolzenberg of the legislative council. Please review this entire draft very closely to ensure that it meets your intent.

You will note that I have defined the term "federal law" in this draft in a manner that is somewhat different than the manner described in your instructions. I have done this because I am reluctant to try and list, in the definition, all the types of federal law that might be applicable because there is a risk that we might inadvertently leave something out of the definition. I believe that the definition in the draft provides a broader definition and that this broad definition is consistent with your intent. If my assumption is incorrect, please let me know and I will redraft as necessary.

Please also look very carefully at the definition of "nonfederal wetland" in the draft to ensure that it captures your intent. The definition presumes that if the U.S. army corps of engineers determines that it does not have authority to regulate a wetland based on the "SWANCC decision" the corps will state that its lack of jurisdiction is based on that determination. I do not know if the corps always specifies the basis on which its determinations are made.

Section 281.365 (a), as created in this draft, provides that the certification requirements under the draft do not affect the authority of DNR to regulate the discharge of dredged or fill material in a nonfederal wetland under certain provisions in current law. Please look very closely at this list of statutes in s. 281.365, as created in this draft, to ensure that it includes all the provisions intended to be included. The list of statutes differs from a similar provision in SB-54. I made this change in the draft based on my discussions with John Stolzenberg.

As you requested, the draft specifies that the water quality certification provisions of the draft apply retroactively to January 9, 2001. This retroactive application may give rise to a constitutional challenge on three separate grounds:

First, an argument could be made that the retroactive application of the proposed law violates article I, section 10, of the U.S. Constitution and article I, section 12, of the

*which is not in existence until August 1, 2001*

*of*

*is*

*10*

*of*

*except for s. 23.321 (2)*

Wisconsin Constitution which prohibit the passage of a law that impairs the obligation of contracts. Under those provisions, an act, despite its effective date, may not deprive a party of a valuable right under a contract entered into before the effective date. The contract clause is not, however, absolute. The Wisconsin supreme court has developed a three-part analysis to determine when the state may impair an existing contract:

1. Does the legislation substantially impair an existing contract?
2. If the impairment is substantial, is there a significant and legitimate public purpose for the legislation?
3. Is the legislation a reasonable and necessary means of achieving that public purpose?

The possibility that a person might prevail under this argument is particularly strong if the person started discharging dredged or fill material into a nonfederal wetland after January 8, 2001, and completed the activity before the enactment of the proposal.

Secondly, an argument could be made that the retroactive application of the proposed law violates the due process requirements of the 14th Amendment to the U.S. Constitution and article I, section 10 of the Wisconsin Constitution. These requirements are satisfied if the public interest served by the retroactive application outweighs the private interests that are overturned by it and if that retroactive application is not fundamentally unfair.

Finally, an argument could be made that the retroactive application of the proposed law violates the Wisconsin Constitution's prohibition against ex post facto laws.

While it is difficult to predict how a court might ultimately rule on any of these possible challenges, I believe that there is a substantial risk that a court might conclude that the retroactive application of this proposal is unconstitutional.

In addition to the constitutional issues raised by the retroactive application of certain provisions of this proposal, there are practical problems that arise as a result of that retroactivity. It is unclear to me how a person who fills a nonfederal wetland after January 9, 2001, but before the enactment of this proposal must go about "undoing" that activity.

As an alternative to making the proposed law retroactive and risking a constitutional challenge, you might consider a provision that would require a person who has begun filling a nonfederal wetland to cease that activity on the day that this proposal is enacted and to apply for certification to continue that activity. The draft could provide that if the person does not qualify for certification, he or she must take specified action to mitigate the damage done by the filling of the wetland. If you would like to discuss these issues in greater depth or discuss other drafting alternatives, please feel free to contact me.

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