



State of Wisconsin
2001 - 2002 LEGISLATURE

LRB-2921/Pr P2 RMR

MOU + RNK:kmg/wlj/hmh:ch

Now

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PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

Gen. Cat.

1 AN ACT *to repeal* 23.321 (1) (c), 88.01 (8m), 88.31 (1) to (7m), 88.35 (5m), 88.62
2 (3) (b), 281.163 and 281.36; *to renumber* 23.321 (title) and (1) (title), (a) and
3 (b) and 23.321 (2); *to renumber and amend* 23.321 (1) (d) to (f) and (2m) to
4 (5), 30.10 (4) (d), 30.12 (4m) (intro.), 30.12 (4m) (a), 30.12 (4m) (b) and 88.62 (3)
5 (a); *to amend* 30.12 (4m) (title), 30.20 (1) (d), 31.02 (7), 31.02 (7m), 31.02 (8),
6 31.02 (9), 88.11 (1) (f), 88.31 (title), 88.31 (8) (intro.), 88.35 (6) (intro.), 88.72 (3),
7 88.72 (4) and 281.69 (3) (b) 2.; *to repeal and recreate* 281.98 (1) and 299.95;
8 and *to create* 30.10 (4) (d) 1., 30.12 (4m) (c), 30.20 (1) (dm), 31.01 (2m), 281.01
9 (21) and 281.365 of the statutes; **relating to:** water quality certification for

1 nonfederal wetlands, the regulation of drainage district drains, and granting
2 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:

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

5 SECTION 2. 23.321 (1) (c) of the statutes is repealed.

6 SECTION 3. 23.321 (1) (d) to (f) and (2m) to (5) of the statutes are renumbered
7 281.37 (1) (d) to (f) and (2m) to (5), and 281.37 (2m) (a) and (b) 3., as renumbered, are
8 amended to read:

9 281.37 (2m) (a) 1. A person who is the holder of a permit or other approval that
10 authorizes a mitigation project shall grant a conservation easement under s. 700.40
11 to the department to ensure that a wetland that is being restored, enhanced or
12 created will not be destroyed or substantially degraded by any subsequent ~~owner~~
13 proprietor of or holder of interest in the property on which the wetland is located.
14 The department shall revoke the permit or other approval if the holder of the permit
15 or other approval fails to take these measures.

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

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

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

6 SECTION 5. 30.10 (4) (d) of the statutes is renumbered 30.10 (4) (d) 2. and
7 amended to read:

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

14 SECTION 6. 30.10 (4) (d) 1. of the statutes is created to read:

15 30.10 (4) (d) 1. In this paragraph, "agricultural purposes" has the meaning
16 given in s. 29.181 (1b) (a).

17 SECTION 7. 30.12 (4m) (title) of the statutes is amended to read:

18 30.12 (4m) (title) ~~DUCK CREEK DRAINAGE DISTRICT~~ CERTAIN DRAINAGE DISTRICT
19 STRUCTURES AND DEPOSITS.

20 SECTION 8. 30.12 (4m) (intro.) of the statutes is renumbered 30.12 (4m) (a)
21 (intro.) and amended to read:

22 30.12 (4m) (a) (intro.) Subsection (1) does not apply to a qualifying structure
23 or deposit that ~~the drainage board for the Duck Creek Drainage District places in a~~
24 ~~drain that the board operates in the Duck Creek Drainage District~~ if either of the
25 following applies:

1 **SECTION 9.** 30.12 (4m) (a) of the statutes is renumbered 30.12 (4m) (a) 1. and
2 amended to read:

3 30.12 (4m) (a) 1. The department of agriculture, trade and consumer
4 protection, after consulting with the department of natural resources, specifically
5 approves the qualifying structure or deposit.

6 **SECTION 10.** 30.12 (4m) (b) of the statutes is renumbered 30.12 (4m) (a) 2. and
7 amended to read:

8 30.12 (4m) (a) 2. The qualifying structure or deposit is required, under rules
9 promulgated by the department of agriculture, trade and consumer protection, in
10 order to conform the drain to specifications approved by the department of
11 agriculture, trade and consumer protection after consulting with the department of
12 natural resources.

13 **SECTION 11.** 30.12 (4m) (c) of the statutes is created to read:

14 30.12 (4m) (c) For purposes of this subsection, a “qualifying structure or
15 deposit” is either of the following:

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

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

21 **SECTION 12.** 30.20 (1) (d) of the statutes is amended to read:

22 30.20 (1) (d) ~~The A drainage board for the Duck Creek Drainage District may,~~
23 without a permit under sub. (2) (c), remove qualifying material from a drain ~~that the~~
24 ~~board operates in the Duck Creek Drainage District~~ if the removal is required, under
25 rules promulgated by the department of agriculture, trade and consumer protection,

1 in order to conform the drain to specifications imposed by the department of
2 agriculture, trade and consumer protection after consulting with the department of
3 natural resources.

4 **SECTION 13.** 30.20 (1) (dm) of the statutes is created to read:

5 30.20 (1) (dm) For purposes of this paragraph, “qualifying material” is either
6 of the following:

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

9 2. Any material that is removed from a drain that is not described in subd. 1.
10 if the removal is necessary primarily for agricultural purposes, as defined in s. 29.181
11 (1b) (a).

12 **SECTION 14.** 31.01 (2m) of the statutes is created to read:

13 31.01 (2m) “Duck Creek Drainage District” has the meaning given in s. 30.01
14 (1nm).

15 **SECTION 15.** 31.02 (7) of the statutes is amended to read:

16 31.02 (7) The department of natural resources shall confer with the
17 department of agriculture, trade and consumer protection and the drainage
18 commissioners in each drainage district on the formation of policies for the operation
19 and maintenance of the dams; in districts. In a district having no commissioners, the
20 department of natural resources shall confer in like manner with the department of
21 agriculture, trade and consumer protection and with the any committee appointed
22 by the county board, if any, to represent either such the drainage district, or in. In
23 the event that the a drainage district is dissolved, to represent the department of
24 natural resources shall confer with any committee appointed by the county board to
25 represent the interests of the county in all matters whatsoever pertaining to water

1 conservation and control within the area which theretofore constituted such the
2 drainage district. ~~This subsection does not apply to the Duck Creek Drainage~~
3 ~~District.~~

4 **SECTION 16.** 31.02 (7m) of the statutes is amended to read:

5 31.02 (7m) The drainage board for the Duck Creek Drainage District shall
6 operate, repair and maintain dams, dikes and other structures in district drains that
7 the board operates in the Duck Creek Drainage District in compliance with ch. 88
8 and any rules promulgated by the department of agriculture, trade and consumer
9 protection under ch. 88. If a county Subsection (7) does not apply to the Duck Creek
10 Drainage District unless the drainage board for the district fails to perform its duties
11 under this subsection, the. If the drainage board fails to perform these duties, the
12 department of natural resources may exercise its authority under subs. (6), (8) and
13 (9) and shall perform its duties under subs. (7) and (8).

14 **SECTION 17.** 31.02 (8) of the statutes is amended to read:

15 31.02 (8) The department of natural resources shall give careful consideration
16 to the suggestions of made under sub. (7) by the department of agriculture, trade and
17 consumer protection, the drainage commissioners, or any committee of the county
18 board, but the final decision in all matters under consideration shall rest with the
19 department of natural resources.

20 **SECTION 18.** 31.02 (9) of the statutes is amended to read:

21 31.02 (9) So far as seems practicable, the department may designate or employ
22 the drainage commissioners of any drainage district, or the committee of the county
23 board ~~above referred to~~ appointed under sub. (7), to operate the dams in such the
24 district or in the area formerly comprising a drainage district or to perform services
25 in the repair and maintenance of the dams, ~~dykes~~ dikes and other works.

1 **SECTION 19.** 88.01 (8m) of the statutes is repealed.

2 **SECTION 20.** 88.11 (1) (f) of the statutes is amended to read:

3 88.11 (1) (f) Assist districts in applying for permits under s. ~~88.31~~ chs. 30 and
4 31.

5 **SECTION 21.** 88.31 (title) of the statutes is amended to read:

6 **88.31** (title) ~~Special procedure in cases affecting~~ Drainage work in
7 navigable waters.

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

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

10 88.31 (8) (intro.) Subject to other restrictions imposed by this chapter, a
11 drainage board which has obtained all of the permits as required under ~~this chapter~~
12 and ch. 30 may:

13 **SECTION 24.** 88.35 (5m) of the statutes is repealed.

14 **SECTION 25.** 88.35 (6) (intro.) of the statutes is amended to read:

15 88.35 (6) (intro.) Upon the completion of its duties under subs. (1) to ~~(5m)~~ (5),
16 the board shall prepare a written report, including a copy of any maps, plans or
17 profiles that it has prepared. The assessment of benefits and awards of damages
18 shall be set forth in substantially the following form:

19 **SECTION 26.** 88.62 (3) (a) of the statutes is renumbered 88.62 (3) and amended
20 to read:

21 88.62 (3) If drainage work is undertaken in navigable waters, the drainage
22 board shall obtain a permit under s. ~~30.20 or 88.31 or ch. 31~~, as directed by the
23 department of natural resources, except as provided in par. (b) any permit that is
24 required under ch. 30 or 31.

25 **SECTION 27.** 88.62 (3) (b) of the statutes is repealed.

1 SECTION 28. 88.72 (3) of the statutes is amended to read:

2 88.72 (3) At the hearing on the petition, any interested person may appear and
3 contest its sufficiency and the necessity for the work. If the drainage board finds that
4 the petition has the proper number of signers and that to afford an adequate outlet
5 it is necessary to remove dams or other obstructions from waters and streams which
6 may be navigable, or to straighten, clean out, deepen, or widen any waters or streams
7 either within or beyond the limits of the district, the board shall obtain any permit
8 that is required under ~~this chapter or~~ ch. 30 or 31.

9 SECTION 29. 88.72 (4) of the statutes is amended to read:

10 88.72 (4) Within 30 days after the department of natural resources has issued
11 all of the permits as required under ~~this chapter and~~ chs. 30 and 31, the board shall
12 proceed to estimate the cost of the work, including the expenses of the proceeding
13 together with the damages that will result from the work, and shall, within a
14 reasonable time, award damages to all lands damaged by the work and assess the
15 cost of the work against the lands in the district in proportion to the assessment of
16 benefits then in force.

17 SECTION 30. 281.01 (21) of the statutes is created to read:

18 281.01 (21) "Wetland" has the meaning given in s. 23.32 (1).

19 SECTION ~~31~~ 281.163 of the statutes, ^{auto ref. 31} as created by 2001 Wisconsin Act

20 (Assembly Bill 215), is repealed.

21 SECTION 32. ^{281.163} ~~281.36~~ (of the statutes, as created by 2001 Wisconsin Act (Senate
22 Bill 54), is repealed.

23 SECTION 33. 281.365 of the statutes is created to read:

24 281.365 Water quality certification for nonfederal wetlands. (1)

25 DEFINITIONS. In this section:

auto ref. 32.

1 (a) "Federal law" includes any regulation, rule, memorandum of agreement,
2 guidance letter, or other provision established by a federal agency that has the effect
3 of law.

4 (b) "Nonfederal wetland" means a wetland that was subject to regulation under
5 33 USC 1344 on or before January 8, 2001, and that the U.S. army corps of engineers
6 has determined is not subject to regulation under 33 USC 1344 on or after January
7 9, 2001, because it is an isolated, nonnavigable, intrastate wetland under the
8 decision in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of
9 Engineers, No. 99-1178 (U.S. Jan. 9, 2001) ^{95 days consumed} or, if no such determination has been
10 made by the U.S. army corps of engineers, that the department has determined is an
11 isolated, nonnavigable, intrastate wetland under that decision.

Not in definition

12 (c) "Water quality standards" means water quality standards set under rules
13 promulgated by the department under s. 281.15.

INSERT
9-11

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

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

22 (3) DELINEATION PROCEDURES. If there is a dispute between the department and
23 a person who is applying for or who holds a water quality certification issued under
24 this section as to the boundary delineation of a nonfederal wetland, the department
25 and the person shall use the procedures contained in the wetlands delineation

1 manual published by the U.S. army corps of engineers in resolving the dispute. The
2 department shall use the 1987 edition of the manual and any document that the U.S.
3 army corps of engineers issues interpreting that manual, unless the U.S. army corps
4 of engineers publishes an edition of the manual after the effective date of this
5 subsection [revisor inserts date], and the department by rule designates that
6 edition as the one to be used under this subsection. If the U.S. army corps of
7 engineers issues a guidance document interpreting the edition of the wetlands
8 delineation manual that the department is required to use under this subsection and
9 that guidance document is issued after the effective date of this subsection
10 [revisor inserts date], the department shall notify the standing committees of each
11 house of the legislature of the issuance of the guidance document and whether the
12 department intends to promulgate a rule incorporating the provisions of the
13 guidance document.

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

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

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

20 (c) Construction or maintenance of farm ponds, stock ponds, or irrigation
21 ditches.

22 (d) Maintenance of drainage ditches.

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

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

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

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

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

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

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

13 **(6) RULES FOR EXEMPTIONS.** The department shall promulgate rules to interpret
14 and implement the provisions under subs. (4) and (5). The rules shall be consistent
15 with 33 USC 1344 (f), as amended to the effective date of this subsection [revisor
16 inserts date], and with 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 subsection [revisor inserts date]. If 33 USC
19 1344 (f) or the other federal law is amended or modified after the effective date of this
20 subsection [revisor inserts date], the department may incorporate any of these
21 amendments or modifications into the rules promulgated under this subsection but
22 may not otherwise amend the rules.

23 **(7) RULES PROHIBITION.** The department may not promulgate or enforce a rule
24 requiring a person who submits an application for a water quality certification under
25 this section for the discharge of dredged or fill material into a nonfederal wetland

1 that is less than one acre in size to submit a description of practicable alternatives
2 to the discharge or to submit a description of any investigation conducted to
3 determine the viability of such alternatives.

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

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

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

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

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

22 (d) Before issuing, modifying, or revoking a general water quality certification
23 under this subsection, the department shall provide notice and a hearing under ss.
24 227.17 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 if the discharge of dredged or fill material as authorized by the
7 certification has not been completed.

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

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

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

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

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

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

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

3 **SECTION 34.** 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 35.** 281.98 (1) of the statutes is repealed and recreated to read:

7 281.98 (1) Except as provided in ss. 281.47 (1) (d), 281.75 (19), and 281.99 (2),
8 any person who violates this chapter or any rule promulgated or any plan approval,
9 license, special order, or water quality certification 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, or
12 enjoined, this penalty does not accrue.

13 **SECTION 36.** 299.95 of the statutes is repealed and recreated 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, and 299.64, and all rules, special orders, licenses, plan
17 approvals, permits, and water quality certifications of the department, except those
18 promulgated or issued under ss. 281.48, 285.57, 285.59, and 299.64 and except as
19 provided in s. 285.86. The circuit court for Dane county or for any other county where
20 a violation occurred in whole or in part has jurisdiction to enforce chs. 281 to 285 and
21 289 to 295 or this chapter or the rule, special order, license, plan approval, permit,
22 or certification by injunctive and other relief appropriate for enforcement. For
23 purposes of this proceeding where chs. 281 to 285 and 289 to 295 or this chapter or
24 the rule, special order, license, plan approval, permit, or certification prohibits in
25 whole or in part any pollution, a violation is considered a public nuisance. The

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

5 **SECTION 37. Nonstatutory provisions.**

6 (1) TEMPORARY PROCESS.

7 (a) In this subsection, “federal law” has the meaning given in section 281.365
8 (1) (a) 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 281.365 (6) of the statutes, as created by this act, are effective unless
12 one of the following applies:

13 1. The person demonstrates to the satisfaction of the department of natural
14 resources that the activity that will result in the discharge will qualify for an
15 exemption under 33 USC 1344 (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
20 281.365 of the statutes, as created by this act.

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

24 (c) This subsection does not apply after the date on which the rules required
25 under section 281.365 (6) of the statutes, as created by this act, are effective.

1 (2) RULES DEADLINE. The department of natural resources shall submit in
2 proposed form the rules required under section 281.365 (6) of the statutes, as created
3 by this act, to the legislative council staff under section 227.15 (1) of the statutes no
4 later than the first day of the 13th month beginning after the effective date of this
5 subsection.

6 (3) RECONCILIATION PROVISIONS.

7 (a) If 2001 Wisconsin Act ... (2001 Senate Bill 54) is enacted into law, and if the
8 creation of section ~~281.36~~^{281.163 ✓} of the statutes by that act takes effect before the effective
9 date of this paragraph, then the repeal of section ~~281.36~~^{281.163 ✓} of the statutes by this act
10 takes effect on the effective date of this paragraph.

11 (b) If 2001 Wisconsin Act ... (2001 Senate Bill 54) is enacted into law, and if the
12 creation of section ~~281.36~~^{281.163 ✓} of the statutes by that act takes effect on or after the
13 effective date of this paragraph, or if 2001 Wisconsin Act ... (2001 Senate Bill 54) is
14 not enacted into law, then the repeal of section ~~281.36~~^{281.163 ✓} of the statutes by this act is
15 void.

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

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

(c) SECTION 32 auto ref.

(c) SECTION 31 auto ref.

2001-2002 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

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INS 9-11

(b) "Nonfederal wetland" means a wetland that is classified as such under sub.

(1m).

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(1m) CLASSIFICATION OF NONFEDERAL WETLANDS. (a) A wetland is classified as a nonfederal wetland if either of the following ~~apply~~: *applies*

1. Any discharges of dredged or fill material into the wetland are determined not to be 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, 2001) or any subsequent interpretations of that decision by the U.S. army corps of engineers or by a court of competent jurisdiction.

2. The wetland is determined to ^{be a} nonnavigable, intrastate, and isolated 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 any subsequent interpretations of that decision by the U.S. army corps of engineers or by a court of competent jurisdiction.

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

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

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

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

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March 24, 2001

Rachel Letzing and

drafting

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 of 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 is broader 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 (10) (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 of 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, except for s. 23.321 (2) which is not in existence until August 1, 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

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 1, 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.

Robin N. Kite
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Barman, Mike

From: Barman, Mike
Sent: Monday, March 26, 2001 12:11 PM
To: Stolzenberg, John; Letzing, Rachel
Subject: LRB-2921/P2

Mike Barman

Mike Barman - Senior Program Asst. (PH. 608-266-3561)
(E-Mail: mike.barman@legis.state.wi.us) (FAX: 608-264-6948)

State of Wisconsin
Legislative Reference Bureau - Legal Section - Front Office
100 N. Hamilton Street - 5th Floor
Madison, WI 53703




MEMO

To: Mary Gibson-Glass, Legislative Reference Bureau
Robin Kite, Legislative Reference Bureau

From: Dan Johnson, Office of State Representative Neal Kedzie

Date: March 28, 2001

Re: Re-draft instructions for LRB 2921/P2

 **Page 9, Line 1:** After "regulation", insert "decision"

Page 9, Line 2: After "established by", delete "a federal agency" *None*

Page 9, Line 3: After "law", insert "the United States Congress, a court with competent jurisdiction over Wisconsin, or a federal agency."

*DNR
we doesn't
we like
"classified"
"identify"
WOK* ✓ **Page 9, Line 8:** Delete "Classification", insert "Determination"


✓ **Page 9, Line 8:** After "wetland is", delete "classified as"

✓ **Page 9, Line 20:** Delete "classifying", replace with "identifying"

✓ **Page 9, Line 22:** After "wetland is", delete "classified as"

✓ **Page 10, Line 2:** After "wetland is", delete "classified as"

identified

 ✓ **Page 10, Line 11-13:** Starting on line 11, delete "If there is a dispute between the department and a person who is applying for or who holds a water quality certification issued under this section as to the"

✓ **Page 10, Line 13:** Before "boundary" insert "For the purposes of"

✓ **Page 10, Line 14:** After "person", insert " who is applying for or who holds a water quality certification issued under this section"

✓ **Page 10, Line 15:** After "engineers", delete "in resolving the dispute."

✓ **Page 10, Line 15:** After "engineers.", insert "If there is a dispute between the department and the U.S. army corps of engineers as to the boundary delineation"

of a non-federal wetland, the department and the U.S. army corps of engineers shall use the procedures in the wetlands delineation manual published by the U.S. army corps of engineers." (Question: Is this the state telling the federal government to do something?) *Yes*

✓ Page 10, Line 25: After "legislature", insert "that deal with water quality issues"

Page 13, Line 18-20: Our intent here is to say that the DNR may inspect any property on which is located a nonfederal wetland, or part of a nonfederal wetland within a certain timeline:

1. When application for a water quality certification has been made
2. If approved, while the wetland activity or fill is occurring
3. And upon completion of the activity, but at some point after completion, the inspection authority under this section must end within a reasonable amount of time.

I told him he needs to pin this down. He will get back to you.

Page 13, Line 20-21: After "under this section", delete "if the discharge of dredged or fill material as authorized by the certification has not been completed."

Page 14, Line 14: After "281.41 to", delete "281.47" and replace with "281.48"

Page 14, Line 15: After "or 299", insert "except s. 281.36" (Question: Is it necessary to include this?)

he meant 281.365
I told him it should not be included.

Page 17, Line 18: After "281.365," delete "and"

Page 17, Line 18: After "(3)(b) 2.", insert "and 299.95" (Question: Was there a reason why enforcement was left out of the retroactive provision?)

Thank you very much!

Dan Johnson
State Representative Neal Kedzie
43rd Assembly District

Der JS
Take out
Reconciliation
stuff
Retro penalty
stuff

I told him there were problems with making a provision that is repealed + recreated retroactive. You might want to give him a more detailed explanation.

ASAP
on Tues

2001 - 2002 LEGISLATURE

~~MON~~

1/13 RMR
LRB-2921/P2
MGG/RNK:kmg/wlj/hmh:ch
stays

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

h.p.s.
check auto refs.

D-NOTE

Gen. Cat.

1 AN ACT *to repeal* 23.321 (1) (c), 88.01 (8m), 88.31 (1) to (7m), 88.35 (5m), 88.62
2 (3) (b), 281.163 and 281.163; *to renumber* 23.321 (title) and (1) (title), (a) and
3 (b) and 23.321 (2); *to renumber and amend* 23.321 (1) (d) to (f) and (2m) to
4 (5), 30.10 (4) (d), 30.12 (4m) (intro.), 30.12 (4m) (a), 30.12 (4m) (b) and 88.62 (3)
5 (a); *to amend* 30.12 (4m) (title), 30.20 (1) (d), 31.02 (7), 31.02 (7m), 31.02 (8),
6 31.02 (9), 88.11 (1) (f), 88.31 (title), 88.31 (8) (intro.), 88.35 (6) (intro.), 88.72 (3),
7 88.72 (4) and 281.69 (3) (b) 2.; *to repeal and recreate* 281.98 (1) and 299.95;
8 and *to create* 30.10 (4) (d) 1., 30.12 (4m) (c), 30.20 (1) (dm), 31.01 (2m), 281.01
9 (21) and 281.365 of the statutes; **relating to:** water quality certification for

1 nonfederal wetlands, ^{er n} ~~delimitation~~ disputes concerning the delineation
 2 rule-making authority. of ~~non~~ boundaries of nonfederal wetlands

Analysis by the Legislative Reference Bureau

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

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ANL

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

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

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

6 SECTION 3. 23.321 (1) (d) to (f) and (2m) to (5) of the statutes are renumbered
7 281.37 (1) (d) to (f) and (2m) to (5), and 281.37 (2m) (a) and (b) 3., as renumbered, are
8 amended to read:

9 281.37 (2m) (a) 1. A person who is the holder of a permit or other approval that
10 authorizes a mitigation project shall grant a conservation easement under s. 700.40
11 to the department to ensure that a wetland that is being restored, enhanced or
12 created will not be destroyed or substantially degraded by any subsequent owner
13 proprietor of or holder of interest in the property on which the wetland is located.
14 The department shall revoke the permit or other approval if the holder of the permit
15 or other approval fails to take these measures.

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

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

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

6 SECTION 5. 30.10 (4) (d) of the statutes is renumbered 30.10 (4) (d) 2. and
7 amended to read:

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

14 SECTION 6. 30.10 (4) (d) 1. of the statutes is created to read:

15 30.10 (4) (d) 1. In this paragraph, "agricultural purposes" has the meaning
16 given in s. 29.181 (1b) (a).

17 SECTION 7. 30.12 (4m) (title) of the statutes is amended to read:

18 30.12 (4m) (title) ~~DUCK CREEK DRAINAGE DISTRICT~~ CERTAIN DRAINAGE DISTRICT
19 STRUCTURES AND DEPOSITS.

20 SECTION 8. 30.12 (4m) (intro.) of the statutes is renumbered 30.12 (4m) (a)
21 (intro.) and amended to read:

22 30.12 (4m) (a) (intro.) Subsection (1) does not apply to a qualifying structure
23 or deposit ~~that the drainage board for the Duck Creek Drainage District places in a~~
24 ~~drain that the board operates in the Duck Creek Drainage District~~ if either of the
25 following applies:

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3-6

1 **SECTION 9.** 30.12 (4m) (a) of the statutes is renumbered 30.12 (4m) (a) 1. and
2 amended to read:

3 30.12 (4m) (a) 1. The department of agriculture, trade and consumer
4 protection, after consulting with the department of natural resources, specifically
5 approves the qualifying structure or deposit.

6 **SECTION 10.** 30.12 (4m) (b) of the statutes is renumbered 30.12 (4m) (a) 2. and
7 amended to read:

8 30.12 (4m) (a) 2. The qualifying structure or deposit is required, under rules
9 promulgated by the department of agriculture, trade and consumer protection, in
10 order to conform the drain to specifications approved by the department of
11 agriculture, trade and consumer protection after consulting with the department of
12 natural resources.

13 **SECTION 11.** 30.12 (4m) (c) of the statutes is created to read:

14 30.12 (4m) (c) For purposes of this subsection, a “qualifying structure or
15 deposit” is either of the following:

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

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

21 **SECTION 12.** 30.20 (1) (d) of the statutes is amended to read:

22 30.20 (1) (d) ~~The A drainage board for the Duck Creek Drainage District may,~~
23 without a permit under sub. (2) (c), remove qualifying material from a drain ~~that the~~
24 ~~board operates in the Duck Creek Drainage District~~ if the removal is required, under
25 rules promulgated by the department of agriculture, trade and consumer protection,

1 in order to conform the drain to specifications imposed by the department of
2 agriculture, trade and consumer protection after consulting with the department of
3 natural resources.

4 **SECTION 13.** 30.20 (1) (dm) of the statutes is created to read:

5 30.20 (1) (dm) For purposes of this paragraph, “qualifying material” is either
6 of the following:

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

9 2. Any material that is removed from a drain that is not described in subd. 1.
10 if the removal is necessary primarily for agricultural purposes, as defined in s. 29.181
11 (1b) (a).

12 **SECTION 14.** 31.01 (2m) of the statutes is created to read:

13 31.01 (2m) “Duck Creek Drainage District” has the meaning given in s. 30.01
14 (1nm).

15 **SECTION 15.** 31.02 (7) of the statutes is amended to read:

16 31.02 (7) The department of natural resources shall confer with the
17 department of agriculture, trade and consumer protection and the drainage
18 commissioners in each drainage district on the formation of policies for the operation
19 and maintenance of the dams; in districts. In a district having no commissioners, the
20 department of natural resources shall confer in like manner with the department of
21 agriculture, trade and consumer protection and with the any committee appointed
22 by the county board, if any, to represent either such the drainage district, or in. In
23 the event that the a drainage district is dissolved, to represent the department of
24 natural resources shall confer with any committee appointed by the county board to
25 represent the interests of the county in all matters whatsoever pertaining to water

1 conservation and control within the area which theretofore constituted such the
2 drainage district. ~~This subsection does not apply to the Duck Creek Drainage~~
3 ~~District.~~

4 SECTION 16. 31.02 (7m) of the statutes is amended to read:

5 31.02 (7m) The drainage board for the Duck Creek Drainage District shall
6 operate, repair and maintain dams, dikes and other structures in district drains that
7 the board operates in the Duck Creek Drainage District in compliance with ch. 88
8 and any rules promulgated by the department of agriculture, trade and consumer
9 protection under ch. 88. If a county Subsection (7) does not apply to the Duck Creek
10 Drainage District unless the drainage board for the district fails to perform its duties
11 under this subsection, the. If the drainage board fails to perform these duties, the
12 department of natural resources may exercise its authority under subs. (6), (8) and
13 (9) and shall perform its duties under subs. (7) and (8).

14 SECTION 17. 31.02 (8) of the statutes is amended to read:

15 31.02 (8) The department of natural resources shall give careful consideration
16 to the suggestions ~~of~~ made under sub. (7) by the department of agriculture, trade and
17 consumer protection, the drainage commissioners, or any committee of the county
18 board, but the final decision in all matters under consideration shall rest with the
19 department of natural resources.

20 SECTION 18. 31.02 (9) of the statutes is amended to read:

21 31.02 (9) So far as seems practicable, the department may designate or employ
22 the drainage commissioners of any drainage district, or the committce of the county
23 board above referred to appointed under sub. (7), to operate the dams in such the
24 district or in the area formerly comprising a drainage district or to perform services
25 in the repair and maintenance of the dams, dykes dikes and other works.

1 **SECTION 19.** 88.01 (8m) of the statutes is repealed.

2 **SECTION 20.** 88.11 (1) (f) of the statutes is amended to read:

3 88.11 (1) (f) Assist districts in applying for permits under s. ~~88.31~~ chs. 30 and
4 31.

5 **SECTION 21.** 88.31 (title) of the statutes is amended to read:

6 **88.31** (title) ~~Special procedure in cases affecting~~ Drainage work in
7 navigable waters.

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

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

10 88.31 (8) (intro.) Subject to other restrictions imposed by this chapter, a
11 drainage board which has obtained all of the permits as required under ~~this chapter~~
12 ~~and~~ ch. 30 may:

13 **SECTION 24.** 88.35 (5m) of the statutes is repealed.

14 **SECTION 25.** 88.35 (6) (intro.) of the statutes is amended to read:

15 88.35 (6) (intro.) Upon the completion of its duties under subs. (1) to ~~(5m)~~ (5),
16 the board shall prepare a written report, including a copy of any maps, plans or
17 profiles that it has prepared. The assessment of benefits and awards of damages
18 shall be set forth in substantially the following form:

19 **SECTION 26.** 88.62 (3) (a) of the statutes is renumbered 88.62 (3) and amended
20 to read:

21 88.62 (3) If drainage work is undertaken in navigable waters, the drainage
22 board shall obtain a permit under s. ~~30.20 or 88.31~~ or ch. 31, as directed by the
23 department of natural resources, except as provided in par. (b) any permit that is
24 required under ch. 30 or 31.

25 **SECTION 27.** 88.62 (3) (b) of the statutes is repealed.

1 **SECTION 28.** 88.72 (3) of the statutes is amended to read:

2 88.72 (3) At the hearing on the petition, any interested person may appear and
3 contest its sufficiency and the necessity for the work. If the drainage board finds that
4 the petition has the proper number of signers and that to afford an adequate outlet
5 it is necessary to remove dams or other obstructions from waters and streams which
6 may be navigable, or to straighten, clean out, deepen, or widen any waters or streams
7 either within or beyond the limits of the district, the board shall obtain any permit
8 that is required under ~~this chapter or~~ ch. 30 or 31.

9 **SECTION 29.** 88.72 (4) of the statutes is amended to read:

10 88.72 (4) Within 30 days after the department of natural resources has issued
11 all of the permits as required under ~~this chapter and~~ chs. 30 and 31, the board shall
12 proceed to estimate the cost of the work, including the expenses of the proceeding
13 together with the damages that will result from the work, and shall, within a
14 reasonable time, award damages to all lands damaged by the work and assess the
15 cost of the work against the lands in the district in proportion to the assessment of
16 benefits then in force.

17 **SECTION 30.** 281.01 (21) of the statutes is created to read:

18 281.01 (21) "Wetland" has the meaning given in s. 23.32 (1).

19 ~~**SECTION 31.** 281.163 of the statutes, as created by 2001 Wisconsin Act
20 (Assembly Bill 215), is repealed.~~

21 ~~**SECTION 32.** 281.163 of the statutes, as created by 2001 Wisconsin Act
22 (Senate Bill 54), is repealed.~~

23 **SECTION 33.** 281.365 of the statutes is created to read:

24 **281.365 Water quality certification for nonfederal wetlands. (1)**

25 DEFINITIONS. In this section:

1 (a) "Federal law" ^{MEMO} includes any regulation, rule, memorandum of agreement,
 2 guidance letter, or other provision established by a federal agency that has the effect
 3 of law. ^{or any rulings issued by a federal district or appellate court that is applicable to nonfederal wetlands in this state}

4 (c) ~~(c)~~ "Nonfederal wetland" means a wetland that is ^{identified} classified as such under sub.
 5 (1m). INS
9-5

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

8 (1m) ^{DETERMINATION} ~~CLASSIFICATION~~ OF NONFEDERAL WETLANDS. (a) A wetland is ^{identified} classified as
 9 a nonfederal wetland if either of the following applies:

10 1. Any discharges of dredged or fill material into the wetland are determined
 11 not to be subject to regulation under 33 USC 1344 due to the decision in Solid Waste
 12 Agency of Northern Cook County v. U.S. Army Corps of Engineers, No. 99-1178 (U.S.
 13 Jan. 9, 2001) or any subsequent interpretations of that decision by the U.S. army
 14 corps of engineers or by a court of competent jurisdiction.

15 2. The wetland is determined to be a nonnavigable, intrastate, and isolated
 16 wetland under the decision in Solid Waste Agency of Northern Cook County v. U.S.
 17 Army Corps of Engineers, No. 99-1178 (U.S. Jan. 9, 2001) or any subsequent
 18 interpretations of that decision by the ^{Federal agency} (U.S. Army Corps of Engineers) or by a court of
 19 competent jurisdiction.

20 (b) For the purpose of ^{identifying} ~~classifying~~ wetlands under par. (a):

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

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

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

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

Delete all of boxed text.

INS
10-15

has determined by the speaker
↑ comma

of the assembly and the
president of the senate,

1 department intends to promulgate a rule incorporating the provisions of the
2 guidance document.

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

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

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

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

11 (d) Maintenance of drainage ditches.

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

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

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

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

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

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

← INS
11-2

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

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

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

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

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

INS
12-12

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

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

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, ~~that is subject to~~ ^{for which an application for} a water quality certification issued
20 ~~under this section if the discharge of dredged or fill material as authorized by the~~ ^{has been submitted to the department}
21 ~~certification has not been completed.~~ ^{to the department}

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

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

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

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

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

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

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

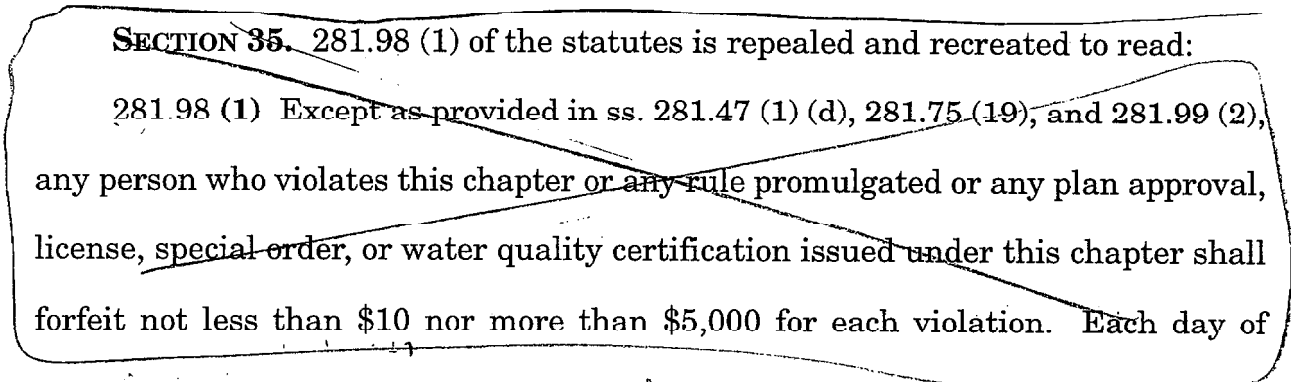
18 SECTION 34. 281.69 (3) (b) 2. of the statutes is amended to read:

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

21 SECTION 35. 281.98 (1) of the statutes is repealed and recreated to read:

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

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14-2



[Handwritten notes and scribbles at the bottom of the page, including what appears to be '2001-02-14']

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

3 SECTION 36. 299.95 of the statutes is repealed and recreated to read:

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

20 SECTION 37. Nonstatutory provisions.

21 (1) TEMPORARY PROCESS.

22 (a) In this subsection, "federal law" has the meaning given in section 281.365

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

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

INSERT
15-20

existing interpretation or guidance
a.r.

1 under section 281.365 (6) of the statutes, as created by this act, are effective unless
2 one of the following applies:

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

9 2. The person receives a water quality certification issued under section
10 281.365 of the statutes, as created by this act.

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

14 (c) This subsection does not apply after the date on which the rules required
15 under section 281.365 (6) of the statutes, as created by this act, are effective.

16 (2) RULES DEADLINE. The department of natural resources shall submit in
17 proposed form the rules required under section 281.365 (6) of the statutes, as created
18 by this act, to the legislative council staff under section 227.15 (1) of the statutes no
19 later than the first day of the 13th month beginning after the effective date of this
20 subsection.

21 (3) RECONCILIATION PROVISIONS.

22 (a) If 2001 Wisconsin Act ... (2001 Senate Bill 54) is enacted into law, and if the
23 creation of section 281.163 of the statutes by that act takes effect before the effective
24 date of this paragraph, then the repeal of section 281.163 (by SECTION 32) of the
25 statutes by this act takes effect on the effective date of this paragraph.

1 (b) If 2001 Wisconsin Act (2001 Senate Bill 54) is enacted into law, and if the
 2 creation of section 281.163 of the statutes by that act takes effect on or after the
 3 effective date of this paragraph, or if 2001 Wisconsin Act (2001 Senate Bill 54) is
 4 not enacted into law, then the repeal of section 281.163 (by SECTION 32) of the statutes
 5 by this act is void.

6 (c) If 2001 Wisconsin Act (2001 Assembly Bill 215) is enacted into law, and
 7 if the creation of section 281.163 of the statutes by that act takes effect before the
 8 effective date of this paragraph, then the repeal of section 281.163 (by SECTION 31)
 9 of the statutes by this act takes effect on the effective date of this paragraph.

10 (d) If 2001 Wisconsin Act (2001 Assembly Bill 215) is enacted into law, and
 11 if the creation of section 281.163 of the statutes by that act takes effect on or after
 12 the effective date of this paragraph, or if 2001 Wisconsin Act (2001 Assembly Bill
 13 215) is not enacted into law, then the repeal of section 281.163 (by SECTION 31) of the
 14 statutes by this act is void.

15 **SECTION 38. Effective dates.** This act takes effect on the day after publication,
 16 except as follows:

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

20 (2) The treatment of section 23.321 (2) of the statutes takes effect on August
 21 1, 2001

22 *on the day after publication, whichever is later*
 (END)

Comma

281.01(21), 281.365, and 281.69(3)(b) 2



State of Wisconsin
2001 - 2002 LEGISLATURE

LEB-2958/P1
MGG:kmg/vlj/hmh:jf

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

Insert To
2921/p3

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

Analysis by the Legislative Reference Bureau

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ANL

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

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

A recent U.S. supreme court decision, *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 69 U.S.L.W. 4048 (2001), limited the types of bodies of waters for which ACE discharge permits are required. The court held that these nonnavigable, isolated, intrastate waters that serve as habitat for migratory

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.

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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 may 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.

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

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 a nonfederal wetland that is subject to a water quality certification is located, to inspect any property to investigate a discharge of dredged or fill material that DNR suspects to be in violation of the statutes regulating nonfederal wetlands, and to gain access to inspect

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any records that a holder of a water quality certification for a nonfederal wetland must keep.

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

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

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

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

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

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

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

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

10 281.37 (2m) (a) 1. A person who is the holder of a permit or other approval that
11 authorizes a mitigation project shall grant a conservation easement under s. 700.40
12 to the department to ensure that a wetland that is being restored, enhanced, or
13 created will not be destroyed or substantially degraded by any subsequent owner
14 proprietor of or holder of interest in the property on which the wetland is located.
15 The department shall revoke the permit or other approval if the holder of the permit
16 or other approval fails to take these measures.

17 2. A person who is restoring, enhancing, or creating a wetland to provide
18 transferable credits as part of a wetlands mitigation bank shall grant a conservation

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2001-2002 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-2921/P3ins
MGC:.....

Insert A

The bill also prohibits DNR from promulgating a rule that requires a person who is applying for a water quality certification for a nonfederal wetland that is less than one acre in size to submit information concerning practicable alternatives to the discharge that exist or that may be viable.

Insert B

The bill authorizes DNR to inspect any property on which is located a nonfederal wetland that is subject to a water quality certification if the discharge is ongoing or has been completed within 20 days after the inspection. 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, must be kept by a holder of a water quality certification for a nonfederal wetland.

Insert 9-5

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

1. An amendment to 33 USC 1344 (f) that becomes effective after the effective date of this subdivision [revisor inserts date].

2. Any other federal statutory provision that affects the exemptions under 33 USC 1344 (f) and that becomes effective after the effective date of this subdivision [revisor inserts date].

3. A regulation, rule, memorandum of agreement letter, or other provision established by a federal agency that is promulgated or adopted pursuant to 33 USC 1344 (f) or that is used to interpret or implement 33 USC 1344 (f), that applies to wetlands in this state, and that becomes effective after the effective date of this subdivision [revisor inserts date].

4. A decision issued by a federal district or federal appellate court that affects the application of a federal amendment or provision described in subds. 1. to 3., that

that

applies to wetlands located in this state, and that is issued after the effective date of this subdivision [revisor inserts date].

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

1. 33 USC 1344 (f), as amended to the effective date of this subdivision [revisor inserts date].

2. A regulation, rule, memorandum of agreement letter, or other provision established by a federal agency that is promulgated or adopted pursuant to 33 USC 1344 (f) or that is used to interpret or implement 33 USC 1344 (f), that applies to wetlands in this state, and that is in effect on the effective date of this subdivision [revisor inserts date].

3. A decision issued by a federal district or federal appellate court that affects the application of a federal amendment or provision described in subds. 1. ^{and 2.} that applies to wetlands located in this state, and that is issued after the effective date of this subdivision [revisor inserts date].

Insert 10-15

No Pt (a) For purposes of delineating the boundary of a nonfederal wetland, the department and the person who is applying for or who holds a water quality certification under this section shall use the procedures contained in the wetlands delineation manual published by the U.S. army corps of engineers. The edition of the manual that shall be used shall be the 1987 edition of the manual

Insert 11-2

(b) If there is dispute between the department and the ^{U.S.} army corps of engineers as to the boundary delineation of a nonfederal wetland, the department shall use the edition of the wetland delineation manual published by the ^{U.S.} army corps of

✓
engineers, including any guidance documents interpreting that edition, that the
corps determines shall be used.

Insert 12-2

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

Insert 14-2

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

ASSEMBLY BILL 204

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

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

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

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

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

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

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

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

8 **SECTION 5.** 23.321 (2m) to (5) of the statutes are renumbered 281.37 (2m) to (5),
9 and 281.37 (2m) (a) and (b) 3., as renumbered, are amended to read:

10 281.37 (2m) (a) 1. A person who is the holder of a permit or other approval that
11 authorizes a mitigation project shall grant a conservation easement under s. 700.40
12 to the department to ensure that a wetland that is being restored, enhanced, or
13 created will not be destroyed or substantially degraded by any subsequent owner
14 proprietor of or holder of interest in the property on which the wetland is located.

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ASSEMBLY BILL 204

SECTION 5

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

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

End
of
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3-6

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

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

12 ~~281.01 (21) "Wetland" has the meaning given in s. 23.32 (1).~~

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

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

15 ~~DEFINITIONS. In this section:~~

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

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

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

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

ASSEMBLY BILL 204

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

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

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

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

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

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

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

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

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

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

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15-20



ASSEMBLY BILL 204

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

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

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

END
OF 15-20
INSERT

20 **SECTION 11. Nonstatutory provisions.**

21 (1) **TEMPORARY PROCESS.**

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

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

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

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-2921/P3dn

MGG:

kmg

Attention:  Dan Johnson

U.S.

In response to your question in your drafting instructions concerning boundary disputes, you are correct in stating that this is a concern. I have rewritten this so that the legislation is not directing the army corps of engineers to do anything

For the inspection authority, I arbitrarily chose 20 days. We try to avoid the use of vague time frames such as "reasonable amount of time" in the statutes. Also, if this phrase is used, DNR will have the authority to determine what that means, and I am not sure that is what is intended. Please let me know if you want any changes.

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

LPS: 2
"that" here

that

time frame for the

but I think
the rewrite
achieves
your intent

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-2921/P3dn
MGG:kmg:jf

April 3, 2001

Attention: Dan Johnson

In response to your question in your drafting instructions concerning boundary disputes, you are correct in stating that this is a concern. I have rewritten this so that the legislation is not directing the U.S. army corps of engineers to do anything, but I think the rewrite achieves your intent.

For the time frame for the inspection authority, I arbitrarily chose 20 days. We try to avoid the use of vague time frames such as "reasonable amount of time" in the statutes. Also, if this phrase is used, DNR will have the authority to determine what that means, and I am not sure that that is what is intended. Please let me know if you want any changes.

In the temporary process provisions, under subsection (1) (b) 1., I made some changes. I changed the verb tense in the first clause and deleted the reference to "activity" since the "discharge" is what is exempt. Let me know if you have any questions concerning this.

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

*Mary wants this para in
check over
by hmk*