



State of Wisconsin
2001 - 2002 LEGISLATURE

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~~PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION~~

D-NOTES

Gen. Cert.

1 AN ACT *to repeal* 23.321 (1) (c), 88.01 (8m), 88.31 (1) to (7m), 88.35 (5m) and 88.62
 2 (3) (b); *to renumber* 23.321 (title) and (1) (title), (a) and (b), 23.321 (1) (d) to (f)
 3 and 23.321 (2); *to renumber and amend* 23.321 (2m) to (5), 30.10 (4) (d), 30.12
 4 (4m) (intro.), 30.12 (4m) (a), 30.12 (4m) (b) and 88.62 (3) (a); *to amend* 30.12
 5 (4m) (title), 30.20 (1) (d), 31.02 (7), 31.02 (7m), 31.02 (8), 31.02 (9), 88.11 (1) (f),
 6 88.31 (title), 88.31 (8) (intro.), 88.35 (6) (intro.), 88.72 (3), 88.72 (4), 281.69 (3)
 7 (b) 2., 281.98 (1) and 299.95; and *to create* 30.10 (4) (d) 1., 30.12 (4m) (c), 30.20
 8 (1) (dm), 31.01 (2m), 281.01 (21) and 281.365 of the statutes; **relating to:** water
 9 quality certification for nonfederal wetlands, disputes concerning the
 10 delineation of boundaries of nonfederal wetlands, the regulation of drainage
 11 district drains, ~~and~~ granting rule-making authority, and providing a penalty

Analysis by the Legislative Reference Bureau

Under federal law, activities involving the discharge of dredged or fill material into "navigable waters" must comply with certain guidelines contained in regulations promulgated by the federal environmental protection agency (EPA) in order for a discharge permit to be issued by the U.S. army corps of engineers (ACE).

Before ACE may issue a permit, the department of natural resources (DNR) must determine that the project complies with state water quality standards, including those for wetlands.

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

A recent U.S. supreme court decision, *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 69 U.S.L.W. 4048 (2001), limited the types of bodies of waters for which ACE discharge permits are required. The court held that these nonnavigable, isolated, intrastate waters that serve as habitat for migratory birds cannot be interpreted by ACE to be navigable waters and, therefore, no ACE discharge permits are required to discharge dredged or fill material into these bodies of water.

For discharges into wetlands that no longer are subject to the ACE permitting process (nonfederal wetlands), this bill incorporates into state law the content of some of the federal provisions governing the issuance of ACE discharge permits. These provisions are in addition to any other requirements under current state law that regulate discharges into wetlands. Under the bill, no one may discharge dredged or fill material into a nonfederal wetland unless the discharge is authorized by a certification from DNR that the discharge will meet all applicable state water quality standards. The bill exempts from this certification process activities that are exempt from ACE discharge permits under federal law. These exemptions include normal farming, forestry, and ranching activities, maintenance and reconstruction of damaged parts of structures that are in bodies of water, maintenance of drainage ditches, and construction and maintenance of certain farm roads, forest roads, and temporary mining roads if certain requirements are met. As under federal law, a discharge that would be exempt loses its exemption under certain circumstances. The exemption is lost if the discharge is incidental to an activity that brings the nonfederal wetland into a use for which it was not previously used and if the activity may impair the flow or circulation or reduce the reach of any nonfederal wetland. Under the bill, DNR must promulgate rules to interpret and implement the provisions under the bill that establish the exemptions and the provisions concerning the loss of the exemptions. These rules must be consistent with applicable federal law or interpretations of that law made by the federal government. If federal law or the federal interpretations are subsequently modified, DNR 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 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.

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 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 that must be kept by a holder of a water quality certification for a nonfederal wetland.

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).

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

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

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

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

18 **SECTION 6.** 30.10 (4) (d) of the statutes is renumbered 30.10 (4) (d) 2. and
19 amended to read:

20 30.10 (4) (d) 2. A drainage district drain located in the Duck Creek Drainage
21 District and operated by the board for that district or any other drainage district
22 drain that is used primarily for agricultural purposes is not navigable unless it is
23 shown, by means of a U.S. geological survey map or other similarly reliable scientific
24 evidence, that the drain was a navigable stream before it became a drainage district
25 drain.

1 **SECTION 7.** 30.10 (4) (d) 1. of the statutes is created to read:

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

4 **SECTION 8.** 30.12 (4m) (title) of the statutes is amended to read:

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

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

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

13 **SECTION 10.** 30.12 (4m) (a) of the statutes is renumbered 30.12 (4m) (a) 1. and
14 amended to read:

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

18 **SECTION 11.** 30.12 (4m) (b) of the statutes is renumbered 30.12 (4m) (a) 2. and
19 amended to read:

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

25 **SECTION 12.** 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 13.** 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 14.** 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 15.** 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 (1nm).

3 **SECTION 16.** 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 17.** 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 18.** 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 19.** 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 20.** 88.01 (8m) of the statutes is repealed.

16 **SECTION 21.** 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 22.** 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 23.** 88.31 (1) to (7m) of the statutes are repealed.

23 **SECTION 24.** 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 25.** 88.35 (5m) of the statutes is repealed.

5 **SECTION 26.** 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)~~ (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 27.** 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 28.** 88.62 (3) (b) of the statutes is repealed.

17 **SECTION 29.** 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 30.** 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 **SECTION 31.** 281.01 (21) of the statutes is created to read:

9 281.01 (21) "Wetland" has the meaning given in s. 23.32 (1).

10 ^{281.36}
SECTION 32. ~~281.365~~ of the statutes is created to read:

11 ^{281.36}
~~281.365~~ **Water quality certification for nonfederal wetlands. (1)**

12 DEFINITIONS. In this section:

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

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

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

19 3. A regulation, rule, memorandum of agreement, ^{guidance} letter, or other provision
20 established by a federal agency that is promulgated or adopted pursuant to 33 USC
21 1344 (f) or that is used to interpret or implement 33 USC 1344 (f), that applies to
22 wetlands in this state, and that becomes effective after the effective date of this
23 subdivision [revisor inserts date].

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

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

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

4 1. 33 USC 1344 (f), as amended to the effective date of this subdivision
5 [revisor inserts date].

6 2. A regulation, rule, memorandum of agreement, ^{liquidation} letter, or other provision
7 established by a federal agency that is promulgated or adopted pursuant to 33 USC
8 1344 (f) or that is used to interpret or implement 33 USC 1344 (f), that applies to
9 wetlands in this state, and that is in effect on the effective date of this subdivision
10 [revisor inserts date].

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

15 (c) "Nonfederal wetland" means a wetland that is identified as such under sub.
16 (1m).

17 (d) "Water quality standards" means water quality standards set under rules
18 promulgated by the department under s. 281.15.

19 (1m) DETERMINATION OF NONFEDERAL WETLANDS. (a) A wetland is identified as
20 a nonfederal wetland if either of the following applies:

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

federal district or federal appellate
a federal agency

That applies to wetlands located in this state

SECTION 32

Federal district or federal appellate

1 2. The wetland is determined to be a nonnavigable, intrastate, and isolated
2 wetland under the decision in Solid Waste Agency of Northern Cook County v. U.S.
3 Army Corps of Engineers, No. 99-1178 (U.S. Jan. 9, 2001) or any subsequent
4 interpretations of that decision by ^athe federal agency or by a court ^eof competent
5 jurisdiction, *that applies to wetlands located in this state.*

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

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

9 2. If the U.S. army corps of engineers does not issue a determination as to
10 whether a wetland ^{is} a nonfederal wetland, the department shall determine whether
11 the wetland is a nonfederal wetland.

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

19 (3) DELINEATION PROCEDURES. (a) For purposes of delineating the boundary of
20 a nonfederal wetland, the department and the person who is applying for or who
21 holds a water quality certification under this section shall use the procedures
22 contained in the wetlands delineation manual published by the U.S. army corps of
23 engineers. The edition of the manual that shall be used shall be the 1987 edition of
24 the manual and any document that the U.S. army corps of engineers issues
25 interpreting that manual, unless the U.S. army corps of engineers publishes an

1 edition of the manual after the effective date of this paragraph [revisor inserts
2 date], and the department by rule designates that edition as the one to be used under
3 this subsection. If the U.S. army corps of engineers issues a guidance document
4 interpreting the edition of the wetlands delineation manual that the department is
5 required to use under this subsection and if that guidance document is issued after
6 the effective date of this paragraph [revisor inserts date], the department shall
7 notify the appropriate standing committee of each house of the legislature, as
8 determined by the speaker of the assembly and the president of the senate, of the
9 issuance of the guidance document and whether the department intends to
10 promulgate a rule incorporating the provisions of the guidance document.

11 (b) If there is dispute between the department and the U.S. army corps of
12 engineers as to the boundary delineation of a nonfederal wetland, the department
13 shall use the edition of the wetland delineation manual published by the U.S. army
14 corps of engineers, including any guidance documents interpreting that edition, that
15 the corps determines shall be used.

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

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

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

22 (c) Construction or maintenance of farm ponds, stock ponds, or irrigation
23 ditches.

24 (d) Maintenance of drainage ditches.

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

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

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

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

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

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

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

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

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

1 to the discharge or to submit a description of any investigation conducted to
2 determine the viability of such alternatives.

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, for which an application for a water quality
6 certification has been submitted to the department.

7 2. Enter and inspect any property on which is located a nonfederal wetland and
8 where the department has probable cause to believe that a violation of this section
9 has occurred or 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 (am) An employee or representative of the department may not exercise the
13 authority granted under par. (a) 1. before the date upon which the application is
14 submitted. If the application is denied, an employee or representative of the
15 department may not exercise this authority after the date on which the application
16 is denied. If the application is approved, an employee or representative of the
17 department may not exercise this authority after the 20th day immediately following
18 the completion of the discharge of the dredged or fill material.

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

23 (c) An employee or representative of the department may not gain access to or
24 inspect any records as authorized under par. (a) 3. unless the holder of the water

1 quality certification, or the holder's designee, is present or unless the holder of the
2 certification waives this requirement.

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

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

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

10 **SECTION 33.** 281.69 (3) (b) 2. of the statutes is amended to read:

11 281.69 (3) (b) 2. The restoration of a wetland, ~~as defined in s. 23.32 (1)~~, if the
12 restoration will protect or improve a lake's water quality or its natural ecosystem.

13 **SECTION 34.** 281.98 (1) of the statutes is amended to read:

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

20 **SECTION 35.** 299.95 of the statutes is amended to read:

21 **299.95 Enforcement; duty of department of justice; expenses.** The
22 attorney general shall enforce chs. 281 to 285 and 289 to 295 and this chapter, except
23 ss. 281.48, 285.57, 285.59, and 299.64, and all rules, special orders, licenses, plan
24 approvals and, permits, and water quality certifications of the department, except
25 those promulgated or issued under ss. 281.48, 285.57, 285.59, and 299.64 and except

1 as provided in s. 285.86. The circuit court for Dane county or for any other county
2 where a violation occurred in whole or in part has jurisdiction to enforce chs. 281 to
3 285 and 289 to 295 or this chapter or the rule, special order, license, plan approval
4 ~~or~~, permit, or certification by injunctive and other relief appropriate for
5 enforcement. For purposes of this proceeding where chs. 281 to 285 and 289 to 295
6 or this chapter or the rule, special order, license, plan approval ~~or~~, permit or
7 certification prohibits in whole or in part any pollution, a violation is considered a
8 public nuisance. The department of natural resources may enter into agreements
9 with the department of justice to assist with the administration of chs. 281 to 285 and
10 289 to 295 and this chapter. Any funds paid to the department of justice under these
11 agreements shall be credited to the appropriation account under s. 20.455 (1) (k).

12 **SECTION 36. Nonstatutory provisions.**

13 (1) TEMPORARY PROCESS.

14 (a) In this subsection, "existing federal law or interpretation" has the meaning
15 given in section ^{281.36 ✓}~~281.365~~ (1) (b) of the statutes, as created by this act.

16 (b) Except as provided in paragraph (c), no person may discharge dredged or
17 fill material into a nonfederal wetland before the date on which the rules required
18 under section ^{281.36 ✓}~~281.365~~ (6) of the statutes, as created by this act, are effective unless
19 one of the following applies:

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

23 2. The person receives a water quality certification issued under section
24 ^{281.36}~~281.365~~ of the statutes, as created by this act.

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-2921/230n
MCG: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

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-2921/1dn
MGG:king:rs

April 3, 2001

Attention: Dan Johnson

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

Barman, Mike

From: Barman, Mike
Sent: Tuesday, April 03, 2001 1:54 PM
To: Stolzenberg, John; Letzing, Rachel
Subject: LRB-2921/1 (attached)



State of Wisconsin
2001 - 2002 LEGISLATURE

LRB-2921/2

MGG/RNK:kmg/wlj/hmh:rs

Due: → today 4/3, if possible or later wed a.m.
2001 BILL

Sen. Cat

1 **AN ACT to repeal** 23.321 (1) (c), 88.01 (8m), 88.31 (1) to (7m), 88.35 (5m) and 88.62
2 (3) (b); **to renumber** 23.321 (title) and (1) (title), (a) and (b), 23.321 (1) (d) to (f)
3 and 23.321 (2); **to renumber and amend** 23.321 (2m) to (5), 30.10 (4) (d), 30.12
4 (4m) (intro.), 30.12 (4m) (a), 30.12 (4m) (b) and 88.62 (3) (a); **to amend** 30.12
5 (4m) (title), 30.20 (1) (d), 31.02 (7), 31.02 (7m), 31.02 (8), 31.02 (9), 88.11 (1) (f),
6 88.31 (title), 88.31 (8) (intro.), 88.35 (6) (intro.), 88.72 (3), 88.72 (4), 281.69 (3)
7 (b) 2., 281.98 (1) and 299.95; and **to create** 30.10 (4) (d) 1., 30.12 (4m) (c), 30.20
8 (1) (dm), 31.01 (2m), 281.01 (21) and 281.36 of the statutes; **relating to:** water
9 quality certification for nonfederal wetlands, disputes concerning the
10 delineation of boundaries of nonfederal wetlands, the regulation of drainage
11 district drains, granting rule-making authority, and providing a penalty.

subsub
Nonfederal wetlands →

Analysis by the Legislative Reference Bureau

Under federal law, activities involving the discharge of dredged or fill material into "navigable waters" must comply with certain guidelines contained in regulations promulgated by the federal environmental protection agency (EPA) in order for a discharge permit to be issued by the U.S. army corps of engineers (ACE).

BILL

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.

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~~ ^{is} 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.

(X)

is must shall

BILL

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 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.

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 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 that must be kept by a holder of a water quality certification for a nonfederal wetland.~~

~~Finally,~~ ^{also} 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. INS "B"

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).

BILL

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

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

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

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

18 **SECTION 6.** 30.10 (4) (d) of the statutes is renumbered 30.10 (4) (d) 2. and
19 amended to read:

20 30.10 (4) (d) 2. A drainage district drain located in the Duck Creek Drainage
21 District and operated by the board for that district or any other drainage district
22 drain that is used primarily for agricultural purposes is not navigable unless it is
23 shown, by means of a U.S. geological survey map or other similarly reliable scientific
24 evidence, that the drain was a navigable stream before it became a drainage district
25 drain.

BILL

1 **SECTION 7.** 30.10 (4) (d) 1. of the statutes is created to read:

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

4 **SECTION 8.** 30.12 (4m) (title) of the statutes is amended to read:

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

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

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

13 **SECTION 10.** 30.12 (4m) (a) of the statutes is renumbered 30.12 (4m) (a) 1. and
14 amended to read:

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

18 **SECTION 11.** 30.12 (4m) (b) of the statutes is renumbered 30.12 (4m) (a) 2. and
19 amended to read:

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

25 **SECTION 12.** 30.12 (4m) (c) of the statutes is created to read:

BILL**SECTION 12**

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 13.** 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 14.** 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 15.** 31.01 (2m) of the statutes is created to read:

BILL

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

3 **SECTION 16.** 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 17.** 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

BILL**SECTION 17**

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 18.** 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 19.** 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 20.** 88.01 (8m) of the statutes is repealed.

16 **SECTION 21.** 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 22.** 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 23.** 88.31 (1) to (7m) of the statutes are repealed.

23 **SECTION 24.** 88.31 (8) (intro.) of the statutes is amended to read:

BILL

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 25.** 88.35 (5m) of the statutes is repealed.

5 **SECTION 26.** 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)~~ (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 27.** 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 28.** 88.62 (3) (b) of the statutes is repealed.

17 **SECTION 29.** 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 30.** 88.72 (4) of the statutes is amended to read:

BILL**SECTION 30**

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 **SECTION 31.** 281.01 (21) of the statutes is created to read:

9 281.01 (21) “Wetland” has the meaning given in s. 23.32 (1).

10 **SECTION 32.** 281.36 of the statutes is created to read:

11 **281.36 Water quality certification for nonfederal wetlands. (1)**

12 DEFINITIONS. In this section:

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

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

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

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

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

BILL

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

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

4 1. 33 USC 1344 (f), as amended to the effective date of this subdivision
5 [revisor inserts date].

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

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

15 (c) “Nonfederal wetland” means a wetland that is identified as such under sub.
16 (1m).

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

19 **(1m) DETERMINATION OF NONFEDERAL WETLANDS.** (a) A wetland is identified as
20 a nonfederal wetland if either of the following applies:

21 1. Any discharges of dredged or fill material into the wetland are determined
22 not to be subject to regulation under 33 USC 1344 due to the decision in Solid Waste
23 Agency of Northern Cook County v. U.S. Army Corps of Engineers, No. 99–1178 (U.S.
24 Jan. 9, 2001) or any subsequent interpretations of that decision by a federal agency

BILL**SECTION 32**

1 or by a federal district or federal appellate court that applies to wetlands located in
2 this state.

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

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

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

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

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

21 (3) DELINEATION PROCEDURES. (a) For purposes of delineating the boundary of
22 a nonfederal wetland, the department and the person who is applying for or who
23 holds a water quality certification under this section shall use the procedures
24 contained in the wetlands delineation manual published by the U.S. army corps of
25 engineers. The edition of the manual that shall be used shall be the 1987 edition of

BILL

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

13 (b) If there is dispute between the department and the U.S. army corps of
14 engineers as to the boundary delineation of a nonfederal wetland, the department
15 shall use the edition of the wetland delineation manual published by the U.S. army
16 corps of engineers, including any guidance documents interpreting that edition, that
17 the corps determines shall be used.

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

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

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

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

BILL**SECTION 32**

1 (d) Maintenance of drainage ditches.

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

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

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

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

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

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

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

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

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

BILL

1 to the discharge or to submit a description of any investigation conducted to
2 determine the viability of such alternatives.

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.

BILL**SECTION 32**

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, for which an application for a water quality
6 certification has been submitted to the department.

7 2. Enter and inspect any property on which is located a nonfederal wetland and
8 where the department has probable cause to believe that a violation of this section
9 has occurred or 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 (am) An employee or representative of the department may not exercise the
13 authority granted under par. (a) 1. before the date upon which the application is
14 submitted. If the application is denied, an employee or representative of the
15 department may not exercise this authority after the date on which the application
16 is denied. If the application is approved, an employee or representative of the
17 department may not exercise this authority after the 20th day immediately following
18 the completion of the discharge of the dredged or fill material.

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

23 (c) An employee or representative of the department may not gain access to or
24 inspect any records as authorized under par. (a) 3. unless the holder of the water

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1 quality certification, or the holder's designee, is present or unless the holder of the
2 certification waives this requirement.

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

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

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

10 **SECTION 33.** 281.69 (3) (b) 2. of the statutes is amended to read:

11 281.69 (3) (b) 2. The restoration of a wetland, ~~as defined in s. 23.32 (1)~~, if the
12 restoration will protect or improve a lake's water quality or its natural ecosystem.

13 **SECTION 34.** 281.98 (1) of the statutes is amended to read:

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

20 **SECTION 35.** 299.95 of the statutes is amended to read:

21 **299.95 Enforcement; duty of department of justice; expenses.** The
22 attorney general shall enforce chs. 281 to 285 and 289 to 295 and this chapter, except
23 ss. 281.48, 285.57, 285.59, and 299.64, and all rules, special orders, licenses, plan
24 approvals ~~and~~, permits, and water quality certifications of the department, except
25 those promulgated or issued under ss. 281.48, 285.57, 285.59, and 299.64 and except

BILL**SECTION 35**

1 as provided in s. 285.86. The circuit court for Dane county or for any other county
2 where a violation occurred in whole or in part has jurisdiction to enforce chs. 281 to
3 285 and 289 to 295 or this chapter or the rule, special order, license, plan approval
4 ~~or~~, permit, or certification by injunctive and other relief appropriate for
5 enforcement. For purposes of this proceeding where chs. 281 to 285 and 289 to 295
6 or this chapter or the rule, special order, license, plan approval ~~or~~, permit or
7 certification prohibits in whole or in part any pollution, a violation is considered a
8 public nuisance. The department of natural resources may enter into agreements
9 with the department of justice to assist with the administration of chs. 281 to 285 and
10 289 to 295 and this chapter. Any funds paid to the department of justice under these
11 agreements shall be credited to the appropriation account under s. 20.455 (1) (k).

SECTION 36. Nonstatutory provisions.

(1) TEMPORARY PROCESS.

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

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

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

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

INSA

beginning on the date

¶ The bill authorizes DNR to inspect any property on which there is located a nonfederal wetland during a period on which ~~between~~ ~~that~~ ~~between~~ the time an application for water quality certification is submitted and the time ending on the 20th day immediately following the completion of the discharge, or, if the application is denied, on the date of denial.

subject to the certification

DOA:.....Grinde - Regulation of drainage districts

FOR 2001-03 BUDGET - NOT READY FOR INTRODUCTION

The department of agriculture, trade and consumer protection

1

AN ACT ...; relating to: the budget.

~~Analysis by the Legislative Reference Bureau~~

~~NATURAL RESOURCES~~

~~OTHER NATURAL RESOURCES~~

subsub Drainage district drains

*IWS
B*

Under current law, drainage boards operate one or more drainage districts. A drainage district drains property owned by two or more persons. (DATCP) assists drainage boards and oversees their activities, and promulgates rules that apply to drainage boards. A city, village, or town (municipality) may assume jurisdiction to operate a drainage district from a drainage board in certain instances. However, once a drainage district is under municipal jurisdiction, it is subject to the drainage laws of that municipality and is exempt from state drainage law.

DNR regulates construction in navigable waters, including construction relating to the drainage of land. Generally, DNR determines whether a body of water such as a stream is navigable. Current law, however, provides an exemption for a drainage district drain that is located in the Duck Creek Drainage District. Under the exemption, the drain is not considered navigable unless a U.S. geological survey map or other scientific evidence shows that the drain was a navigable stream before it became a drainage district drain. This bill extends this exemption to any other drainage district drain if the drain is used primarily for agricultural purposes.

Current law provides that a person wishing to deposit any material or to place any structure upon the bed of any navigable water must obtain a permit from DNR unless the legislature otherwise authorizes the structure or deposit. Current law

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.

INS
B
↓
end

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:

Gretschmann, Karen

From: Gretschmann, Karen
Sent: Tuesday, April 03, 2001 4:30 PM
To: Stolzenberg, John; Letzing, Rachel
Subject: 01-2921/2



01-2921/2

*Karen Gretschmann
Legislative Program Assistant/Financial Specialist
Legal Section
Wisconsin Legislative Reference Bureau
(608) 266-3561*

MEMO

To: Mary Gibson-Glass, Legislative Reference Bureau
From: Dan Johnson, Office of State Representative Neal Kedzie
Date: April 12, 2001
Re: Re-draft instructions for LRB 2921/2

Technical changes

AFB ✓ **Page 12, Line 13:** After "issued", strike "after", insert "on or before" ~~OK~~

General changes

- ✓ ▪ **Strike all references and language pertaining to retroactivity**
- ✓ ▪ **Strike all references and language pertaining to drainage district drains**
- **On page 14, strike lines 13-17**
- **Add language to create a public purpose or public safety exemption from the practicable alternatives analysis:**

Our intent here is to allow an exemption from the practicable alternatives analysis (PAA) where public safety would be jeopardized or is in conflict with a mandate by a unit of government for some other public purpose. For example, a city mandates or requires a sidewalk in a specified area. However, by following the mandate, the applicant is forced to ~~alter~~ or fill a wetland or part of a wetland.

In another example, a curved access road is created behind a business that intersects with a railroad crossing. However, the Office of the Railroad Commissioner inspects the road and mandates that the road be perpendicular to the crossing, for safety reasons. In complying with the requirement, though, the applicant is forced to alter or fill a wetland or part of a wetland.

disch
My idea for PAA exemption language in those types of circumstances would alter **page 15, lines 22-25; page 16 line 1-2: (this language may not be perfect)**

discharge into (7) Rules Prohibition. The department *or fill* 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 discharge of dredged material into a non-federal wetland ~~that is 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 if the fill of the non-federal wetland or part of the non-federal wetland is required by a federal, state or local government to accomplish a public purpose as a condition of plat approval, building permit requirement, infrastructure standard or other approval or when the safety of the general public is considered at risk by the federal, state or local government.

Other Changes

- The department shall promulgate by rule a permitting process timeline for water quality certification standards for wetlands.
- Modify the General Water Quality Certifications process on page 16, section (8) to provide that the department shall adopt, as the initial general water quality certifications under this provision, provisions consistent with the General Permits and ~~Letters of Permission~~ which were in place on January 8, 2001.
- In addition to that, add a provision that states if the General Permits adopted by the federal government under 33USC 1344 are amended or modified after the effective date of this law, the department shall incorporate those changes.

Mike
Cain

You have our permission to share this memo with Rachel Letzing and John Stoltzenberg of the Legislative Council staff. Again, thank you for your efforts in this matter.

As I'm sure you know, this is an urgent request and I would need this re-draft language by Tuesday, April 17, 2001.

Thank you!

January 9, 2001

Dan Johnson
State Representative Neal Kedzie
43rd Assembly District