

2001 DRAFTING REQUEST

Assembly Substitute Amendment (ASA-AB322)

Received: **04/23/2001**

Received By: **gibsom**

Wanted: **As time permits**

Identical to LRB:

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

By/Representing: **Dan Johnson**

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

Drafter: **gibsom**

May Contact:

Addl. Drafters:

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

Extra Copies:

Submit via email: **YES**

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

Pre Topic:

No specific pre topic given

Topic:

Nonfederal wetlands

Instructions:

See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	gibsom 04/23/2001	gilfokm 04/23/2001		_____			
/1			haugca 04/23/2001	_____	lrb_docadmin 04/23/2001	lrb_docadmin 04/23/2001	

FE Sent For:

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Extra Copies:

*Copies via e-mail to LC
staff:
John Stolzenberg
Rachel Letzig*

Submit via email: **YES**

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

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1?	gibsom	<i>1-4/KMG /23-01</i>	<i>CK 4-23</i>	<i>CK 4-23 DJB</i>			

FE Sent For:

<END>

MEMO

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

From: Dan Johnson, Office of State Representative Neal Kedzie

Date: April 20, 2001

Re: Draft instructions for Assembly Substitute Amendment 1 to AB 322

Changes

- ✓ **Page 4, Line 24:** After "guidance letter", insert "interpretive document"
- ✓ **Page 5, Line 9:** After "guidance letter", insert "interpretive document"
- ✓ **Page 5, Line 9:** After "guidance letter", insert "interpretive document"
- ✓ **Page 5, Strike lines 17-19**
- ✓ **Page 7, Line 3:** After "certifications", strike "issued under this section"

■ **Author's intent:** to apply rules timeline process to all wetlands, not just non-federal and the rules shall be sent to the appropriate standing committee of each house of the legislature as determined by the speaker of the assembly and the president of the senate.

} relating

Page 9, Strike Lines 5 through 8

Page 9, Line 4: After "alternatives", strike "any of the following apply", insert "if the impact on the wetland is less than one acre and the discharge is determined by a federal, state, county, city, village or town government to be necessary for public safety."

Page 8, Line 23: After "may", strike "not otherwise" insert "by rule"

■ **Author's intent:** The department shall incorporate all additional federal laws into the rules, but may modify them by rule during the incorporation process

Page 10, Line 3-4: After "may", strike "not otherwise" insert "by rule"

■ **Author's intent:** The department shall incorporate all amendments or modifications, but may modify them by rule.

may modify - but must incorporate all of them

Page 10, Line 6: After "under", strike "this section", insert "par. (a)"

Page 10, Line 13: After "under", strike "this subsection", insert "par. (a)"

Page 11, Line 3: After "is", insert "withdrawn or"

Page 11, Line 5: After "is", insert "withdrawn or"

Page 14, Line 2: After "whichever is", strike "later", insert "earlier"

don't draft

Dan Johnson

do not draft - explained cannot be by rule

▪ **Changes to Inspection Authority – Author's Intent**

Establish an inspection authority for non-permitted, non-federal wetlands that follows the federal model for inspection and the ~~DNR anticipated~~ use of the inspection authority.

With suspicion of an illegal or non-permitted activity, ACE, at times, will notify a landowner that they suspect such an activity has occurred and ask for an explanation. If field staff are in the area, they may knock on their door and ask for permission from the landowner to inspect the property.

In most cases, landowners want to cooperate with ACE and will offer an explanation or grant permission to enter the property. That is acceptable to us and should be a decision for the landowner. So long as the landowner understands that as soon as the agent is on the property, other unrelated environmental violations that are in plain view may be questioned as well.

However, in those instances, and apparently they are rare, when a landowner denies permission or explanation, ACE will contact the EPA and the EPA may go to court and request an administrative inspection warrant.

So, what we would like to do would follow the federal process and the expressed intent by the DNR as to its use of the inspection authority.

On page 10, under Section 9 (2), it may read: "The department may exercise the following sequential inspection procedures for non-federal wetlands:"

- only of 3*
- If the department has reason to believe a violation of this section is occurring or has occurred, the department may request an explanation by the landowner (or offer a written notice to the landowner) or request permission from the landowner to enter the property.
 - ✓ If the department is granted permission to enter, the department may conduct the inspection under the terms of the consent.
 - ✓ If the department receives a written response from the landowner, the department may elect to initiate an enforcement action in court based on the contents of that response.
 - ✓ If the department is not granted permission to enter the property or does not receive a response from the property owner after providing the reasonable advanced notice required under 281.36 (9) (b), the department may make a request for a special inspection warrant under ss. 66.0119.

request an explanation

does respond

66.0119

reason to be



264-6948

264-8522

**WISCONSIN LEGISLATIVE COUNCIL
STAFF MEMORANDUM**

TO: SENATOR DALE SCHULTZ
FROM: Rachel E. Letzing, Staff Attorney
RE: Legal Standards and Clean Water Act Inspection Authority
DATE: April 10, 2001

This memorandum responds to a request from your staff for information regarding the legal definitions of "probable cause" and "reasonable suspicion," and the U.S. Army Corps of Engineers' (ACE) inspection authority under s. 404 of the Clean Water Act before the *SWANCC* decision was issued.¹

PROBABLE CAUSE AND REASONABLE SUSPICION

The standards of probable cause and reasonable suspicion are used to evaluate the constitutionality of investigative stops, searches, arrests, criminal complaints, binding a defendant over for trial, and driver's license revocation hearings, and are not readily reduced to a set of legal rules. Rather, the standards are fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed.

Probable Cause

The Fourth Amendment to the U.S. Constitution protects against "unreasonable" searches and seizures, and guarantees that no search warrants will issue without probable cause.² Article I, Section 11 of the Wisconsin Constitution, provides the same protections.³

¹ For more information on the *SWANCC* decision, see Legal Memorandum LM-2001-01, *U.S. Supreme Court Case on Wetlands* (January 25, 2001).

² The Fourth Amendment to the U.S. Constitution provides the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

- 2 -

The U.S. Supreme Court has interpreted the Search Warrant Clause of the Fourth Amendment as requiring a showing of probable cause to the issuing authority (a judge or magistrate) before a search warrant may be issued. Probable cause is also required for arrest or search without a warrant.

The Fourth Amendment requires probable cause to support every search or seizure in order to "safeguard the privacy and security of individuals against arbitrary invasions by government officials." [*State v. DeSmidt*, 454 N.W.2d 780 (1990).] Generally, probable cause is a reasonable ground in fact and circumstance for a belief that, for example, an offense has been or is being committed, that a particular search will uncover contraband, or that an item to be seized is in a particular place.

Depending upon the context, the proper inquiry for probable cause may require a showing of probabilities regarding different facts and circumstances. The proper inquiry in the context of an arrest is "whether probable cause exists to believe that a particular suspect has committed a crime." [*State v. Kiper*, 532 N.W.2d 698 (1995).] In the context of a search of a person's property, the proper inquiry is whether evidence of a crime will be found. The amount of evidence required to establish probable cause to search is a "fair probability that contraband or evidence of a crime will be found in a particular place." [*Illinois v. Gates*, 462 U.S. 213, 238 (1983).]

Administrative Warrants

The issuance of administrative inspection warrants is limited to situations in which, in the performance of a regulatory function authorized by a statute, it is necessary to inspect the premises, equipment, records or material covered by the statute. Administrative, or inspection, warrants may be issued for the purposes of inspecting a business or a house for health, safety, or environmental pollution violations.

A lesser degree of probable cause is necessary for the issuance of an inspection warrant than is required in a criminal case because an administrative search of a business is considered to be a lesser invasion of privacy than a police search at a home. [See *U.S. v. Lawson*, 502 F. Supp. 158 (D. Md. 1980).] The invasion of privacy which the inspection requires must be reasonable in light of the government's interest in the inspection. [See *In the Matter of Inspection of Asarco, Inc.*, 508 F. Supp. 350 (N.D. Tex. 1981).]

Probable cause to support an administrative search warrant is established by showing that the proposed inspection is based upon a reasonable belief that a violation has been or is being committed, by showing evidence sufficient to support a reasonable suspicion of a violation. [See *West Point-Pepparell, Inc. v. Donovan*, 689 F.2d 950 (11th Cir. 1982).]

In Wisconsin, special inspection warrants are authorized under s. 66.0119, Stats.

³ Article I, Section 11 of the Wisconsin Constitution provides the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

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Reasonable Suspicion

The reasonable suspicion standard was first articulated by the U.S. Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968). In *Terry*, the court concluded that a police officer was allowed to stop a person on the street and detain him briefly for questioning upon a "reasonable suspicion" that the individual may be connected with criminal activity. Upon suspicion that the detained individual may be armed, the police also have the authority to frisk (search the outer clothing) for weapons. If the "stop and frisk" gives rise to probable cause to believe that the individual has committed a crime, a police officer may make a formal arrest and conduct a full search. The court explained that a "stop and frisk" based upon reasonable suspicion amounts to a mere inconvenience and petty indignity which can properly be imposed on a person in the interest of effective law enforcement. [See *Terry* at 35.]

Generally, a "reasonable suspicion" means an objectively justifiable suspicion, based on specific, articulable facts and circumstances and rational inferences from those facts, that justifies an initial intrusion by police officers upon a person. The level of suspicion does not need to rise to the level of probable cause, but must be more than a hunch. Thus, "reasonable suspicion" is a lesser standard than "probable cause."

In Wisconsin, the reasonable suspicion standard is used to allow temporary questioning without arrest by police officers [ss. 968.24 and 968.26, Stats.], and to allow a Department of Natural Resources (DNR) warden to stop and board a vehicle or boat [s. 29.921 (1) to (5), Stats.].

ACE AND ENVIRONMENTAL PROTECTION AGENCY (EPA) ENFORCEMENT AUTHORITY

The ACE and the EPA have enforcement authorities for the dredged and fill material permit requirements under the s. 404 program of the Clean Water Act. Section 404 (n) [33 U.S.C. s. 1344 (n)] provides that nothing in s. 404 limits the EPA authority to take enforcement action, and s. 404 (s) [33 U.S.C. s. 1344 (s)] establishes that if the ACE, on the basis of any available information, finds that a person is in violation of a permit condition or limitation, the ACE must issue an order requiring the person to comply with the permit, or the person will face civil action. For purposes of effective administration of the program, the ACE and the EPA have also entered into a Memorandum of Agreement (MOA) which sets forth the allocation of enforcement responsibilities among the agencies.

Under the MOA, the EPA acts as the lead enforcement agency on all unpermitted discharge violations when an unpermitted activity involves the following: repeat violators; flagrant violations; where EPA requests a class of cases or a particular case; or the ACE recommends that an EPA administrative penalty action may be warranted. The ACE acts as the lead enforcement agency for all ACE-issued permit condition violations, and in all other unpermitted cases for which the EPA lacks enforcement authority contained in the MOA. In the majority of enforcement cases, the ACE, because it has more field resources, will conduct initial investigations. Under the MOA, the EPA and ACE are directed to seek assistance from the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, and other federal, state, tribal and local agencies when appropriate.

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ACE INSPECTION AUTHORITY

Discharges With a Permit

One of the general conditions included in a s. 404 permit is that the applicant "must allow representatives from [the ACE] to inspect the authorized activity at any time deemed necessary to ensure that it is being or has been accomplished in accordance with the terms and conditions of [the] permit." [See 33 C.F.R. s. 325, App. A]. The ACE interprets this language as granting it an implied inspection authority over a permitted s. 404 project regardless of whether the permittee is in compliance with the permit terms. Generally, a permit does not include language requiring ACE to give reasonable notice before conducting an inspection; however, according to an ACE attorney, the general practice is to provide a permit holder with advance notice of an inspection. The ACE lacks explicit inspection authority in the absence of a s. 404 permit.

Discharges Without a Permit

According to an attorney at the ACE, the ACE is typically notified of a suspected s. 404 Clean Water Act violation by the DNR, someone who lives adjacent to the property where a suspected violation has or is occurring, or an environmental group. If the reported activity is occurring on property owned by a person who has a history of previous violations, the ACE may elect to immediately notify the EPA or the U.S. Department of Justice of a suspected s. 404 violation.

Generally, if the ACE is notified of a suspicious activity, and ACE field staff are not in the vicinity of the property, the ACE may call the property owner and inquire about the activities which are or have been occurring on the property. In the alternative, the ACE may elect to send a written information request to the property owner. The property owner then has an opportunity to send information back to the ACE explaining the activities which may have aroused suspicion. According to an ACE attorney, the majority of people are willing to cooperate with the ACE and provide information regarding any activities in order to clear up any confusion.

When ACE field staff are in the area, an ACE field staff person may ask the property owner if the ACE can enter and inspect the property. If the request is denied, the ACE will notify the EPA. The EPA may then go to court and request an administrative warrant to enter the property. An administrative warrant is similar to an inspection warrant under s. 66.0119, Stats.⁴ According to the contacted ACE attorney, this process is used very rarely, as most people tend to cooperate by allowing access to the property.

⁴ A lesser degree of probable cause is necessary for the issuance of an inspection warrant than is required in a criminal case. The probable cause necessary to support an administrative search warrant is established upon a showing that, in the applicable factual context, the inspection is based upon a reasonable belief that a violation has been or is being committed by showing evidence sufficient to support a reasonable suspicion of a violation. [See *West Point-Pepperell, Inc. v. Donovan*, 689 F.2d 950 (11th Cir. 1982).]

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EPA INSPECTION AUTHORITY

EPA inspection authority regarding s. 404 of the Clean Water Act is provided in s. 308 [33 U.S.C. s. 1318] of the Clean Water Act. Under s. 308 (a) (B), for the purposes of carrying out s. 404, the EPA administrator or authorized EPA representative, upon presentation of his or her credentials, "must have a right of entry to, upon, or through any premises in which an effluent source is located or in which any records required to be maintained are located." However, as it applies to discharges into a wetland, the manner in which s. 308 was drafted does not give rise to a clear interpretation of the EPA inspection authority, as an "effluent source" generally connotes a discharge of pollutants from a treatment facility.

In the absence of more explicit authority under the Clean Water Act to enter and inspect property, EPA has alternative methods to determine whether a Clean Water Act violation is occurring. According to a contacted EPA attorney, if EPA receives a report of a suspected s. 404 violation and no s. 404 permit has been issued, EPA will initiate a "section 308 information request." Under s. 308 (a) (A) (v) [33 U.S.C. s. 1318 (a) (A) (v)], the EPA "can direct the owner or operator of any point source to provide information that the EPA reasonably requires." Generally, the information request inquires about the nature of the reported activities. If the EPA receives a response from the property owner, the EPA may elect to initiate an enforcement action in court based upon the contents of the answer. In the alternative, the EPA may use the answer to obtain an administrative warrant to enter the property.

The EPA also has other methods of enforcing s. 404, depending upon the circumstances. Under the "open fields" exception to the Fourth Amendment, entry by law enforcement officials on private land is allowed without a warrant to conduct searches and seizures if the search occurs in "open fields" (an area away from the home and "curtilage" surrounding it). [See *State v. Martwick*, 604 N.W.2d 552 (2000).] The EPA may also ask neighbors to take photographs of the owner's land that is visible from the neighbor's property in order to obtain evidence necessary to bring an enforcement action in court. Depending upon the circumstances of a particular case, it may not be necessary for the EPA to go on the suspected violator's land in order to initiate a court action.

DNR INSPECTION AUTHORITY

Wetlands With ACE Jurisdiction

The DNR does not have independent inspection authority over wetlands regulated under the s. 404 program. For those wetlands which are under ACE jurisdiction, the DNR notifies the ACE and asks ACE field or administrative staff to investigate a s. 404 violation reported to the DNR. Typically, the DNR is apprised of suspected environmental violations by calls from citizens or environmental groups. If ACE staff respond to a DNR investigation request, the ACE and DNR may attempt to enter the property under the ACE s. 404 Clean Water Act authority as described previously.

Wetlands Without ACE Jurisdiction

In the aftermath of the *SWANCC* decision, the ACE determines on a case-by-case basis whether it has the statutory authority to apply the s. 404 process to a wetland isolated from navigable waters. In the absence of ACE jurisdiction, the DNR loses the opportunity to apply its water quality certification process to an isolated wetland and to rely upon the ACE to inspect property where such wetlands are

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located. The DNR may have state authority under ch. 30 or 31, for example, to enter and inspect a property where an isolated wetland is located. However, if no other state authority provides inspection authority, the DNR has no independent inspection authority regarding isolated wetlands.

If you have any questions regarding this memorandum, please contact me at the Legislative Council Staff offices.

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2001 ASSEMBLY BILL 322

April 18, 2001 - Introduced by Representatives KEDZIE, GRONEMUS, JOHNSKUD, OTT, VRAKAS, GUNDERSON and JENSEN. Referred to Committee on Environment.

time limits for processing applications for water quality certifications,

GEN. CAT.

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

Analysis by the Legislative Reference Bureau

Nonfederal wetlands

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

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

A recent U.S. supreme court decision, *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 69 U.S.L.W. 4048 (2001), limited the types of

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

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

Parallel to the general permitting procedures under federal law, this bill provides that DNR may issue general certifications for types of discharges that are similar in nature. A general certification allows any person to carry out the type of discharge subject to the general certification as opposed to an individual permit that is issued to a specific person. The bill requires that DNR issue general water quality certifications that are consistent with the general permits issued by ACE that applied to nonfederal wetlands before the U.S. supreme court decision.

The bill also prohibits DNR from promulgating a rule that requires a person who is applying for a water quality certification for a nonfederal wetland to submit information concerning practicable alternatives to the discharge that exist or that

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may be viable if the discharge is necessary to comply with a requirement imposed by a federal, state, or local government as a condition for approval by the federal, state, or local government of an activity that serves a public purpose or if the discharge is necessary to insure public safety.

The bill contains provisions for identifying nonfederal wetlands. Under the bill, if ACE has issued a determination as to whether a wetland is a nonfederal wetland, DNR must adopt that determination. If ACE has not issued a determination, then DNR makes the determination.

The bill authorizes DNR to inspect any property on which there is located a nonfederal wetland beginning on the date on which an application for water quality certification is submitted and ending on the 20th day immediately following completion of the discharge subject to the certification, or, if the application is denied, on the date of denial. DNR may also inspect any property to investigate a discharge of dredged or fill material that DNR has probable cause to believe is in violation of the statutes regulating nonfederal wetlands. The bill also authorizes DNR to gain access to inspect any records that must be kept by a holder of a water quality certification for a nonfederal wetland.

The bill also requires that certain procedures be used to delineate the boundaries of nonfederal wetlands.

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

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

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

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

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

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

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

10 281.37 (2m) (a) 1. A person who is the holder of a permit or other approval that
11 authorizes a mitigation project shall grant a conservation easement under s. 700.40

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SECTION 5

1 to the department to ensure that a wetland that is being restored, enhanced, or
 2 created will not be destroyed or substantially degraded by any subsequent ~~owner~~
 3 proprietor of or holder of interest in the property on which the wetland is located.

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

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

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

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

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

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

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

18 DEFINITIONS. In this section:

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

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

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

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

INSERT
4-16

interpretive document,

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

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

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

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

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

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

17 (bn) "~~Local~~ governmental unit" means *the federal government, the* a city, village, town, county, or special *state, a city, a village, a*
18 ~~purpose district; and agency or corporation of a city, village, town, county, or special~~ *county*
19 ~~purpose district; or a combination or subunit of any of the foregoing.~~ *or a town.*

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

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

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

ASSEMBLY BILL 322

SECTION 7

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

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

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

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

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

18 (2) CERTIFICATION REQUIREMENT. ~~(1)~~ No person may discharge dredged or fill
19 material into a nonfederal wetland unless the discharge is authorized by a water
20 quality certification issued by the department under this section. No person may
21 violate any condition imposed by the department in a water quality certification
22 under this section. The department may not issue a water quality certification under
23 this section unless it determines that the discharge will comply with all applicable
24 water quality standards.

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~~(5) The department shall promulgate a rule to establish time limits for the steps involved in processing applications and issuing determinations that approve or deny applications for water quality certifications issued under this section.~~

(3) DELINEATION PROCEDURES. 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 and any document that the U.S. army corps of engineers issues interpreting that manual, unless the U.S. army corps of engineers publishes an edition of the manual after January 9, 2001, and the department by rule designates that edition as the one to be used under this subsection. If the U.S. army corps of engineers issues a guidance document interpreting the edition of the wetlands delineation manual that the department is required to use under this subsection and if that guidance document is issued after the effective date of this paragraph [revisor inserts date], the department shall notify the appropriate standing committee of each house of the legislature, as determined by the speaker of the assembly and the president of the senate, of the issuance of the guidance document and whether the department intends to promulgate a rule incorporating the provisions of the guidance document.

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

- (a) Normal farming, silviculture, or ranching activities.
- (b) Maintenance, emergency repair, or reconstruction of damaged parts of structures that are in use in a nonfederal wetland.

ASSEMBLY BILL 322

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

3 (d) Maintenance of drainage ditches.

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

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

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

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

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

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

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

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

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

INSERT
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ASSEMBLY BILL 322

1 this section for the discharge of dredged or fill material into a nonfederal wetland to
2 submit a description of practicable alternatives to the discharge or to submit a
3 description of any investigation conducted to determine the viability of such
4 alternatives if ~~any of the following apply~~ ^{INSERT 9-4}

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

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

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

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

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

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

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

ASSEMBLY BILL 322

SECTION 7

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

5 (c) If the department determines that any of the discharges under a general
 6 water quality certification issued under ^{par. (a)} ~~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 ^{issued} under ^{par. (a)} ~~this subsection~~, the department shall provide notice and a hearing under ss.
 14 227.17 and 227.18.

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

18 1. Enter and inspect any property on which is located a nonfederal wetland, or
 19 part of a nonfederal wetland, for which an application for a water quality
 20 certification has been submitted to the department.

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

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

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ASSEMBLY BILL 322

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

8 (b) Any employee or representative of the department may exercise the
 9 authority granted under par. (a) 1. ~~2.~~ ^{or} 3. only during reasonable hours and only
 10 after the department has provided reasonable advance notice to the ^{proprietor} ~~person owning~~ INS
11-7
 11 ^{of} the property involved or to the holder of the water quality certification.

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

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

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

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

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

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

ASSEMBLY BILL 322

SECTION 9

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

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

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

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

25 **SECTION 11. Nonstatutory provisions.**

ASSEMBLY BILL 322

1 (1) TEMPORARY PROCESS.

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

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

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

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

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

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

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

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

2001-2002 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRBs00977?ins
Mleg:.....

Insert 4-16

ⓑ and time limits

SECTION 1. 281.22 (title) of the statutes is amended to read:

281.22 (title) Fees for water quality determinations for wetlands.

History: 1995 a. 27; 1995 a. 227 s. 398; Stats. 1995 s. 281.22; 1997 a. 27.

SECTION 2. 281.22 (3) of the statutes is amended to read:

281.22 (3) EXEMPTIONS FROM FEES. This section does Subsections (2) and (3) do not apply to any federal agency or state agency.

(1)
✓
✓
2m

History: 1995 a. 27; 1995 a. 227 s. 398; Stats. 1995 s. 281.22; 1997 a. 27.

SECTION 3. 281.22 (4) of the statutes is created to read:

ⓐ Application Time limits.

281.22 (4) The department shall promulgate a rule to establish time limits for

ⓧ the steps involved in processing, approving, and denying applications for water quality certifications under s. 281.36 and for other determinations that the department makes as to whether projects comply with the standards of water quality established by rules promulgated by rule under s. 281.15 that are applicable to wetlands. Upon referral of any proposed rule under this subsection to the presiding officers of each house of the legislature under s. 227.19 (2), the presiding officers shall refer to a senate committee and an assembly committee concerned with the environment.

Insert 8-23

Ⓝ(a) The department shall promulgate rules to interpret and implement the provisions under sub. (4) and (5). In promulgating these rules, the department shall do all of the following:

1. Make the rules consistent with existing federal law.
2. Incorporate any additional federal law or interpretation into the rules.

(b) Whenever an additional federal law or interpretation is initially incorporated into the rules, the department may modify the additional federal law

or interpretation as it determines necessary but the department may not otherwise amend or modify any of the rules promulgated under this subsection.

Insert 9-4

~~the~~ ^{Not} the area to be filled is less than one acre in size and ~~the federal government~~ ^{state or a local} governmental unit has determined that the discharge is necessary for public safety.

Insert 10-23

2. Enter and inspect any property on which is located a nonfederal wetland to investigate a discharge of dredged or fill material ~~which~~ ^{that} the department has reason to believe is in violation of this section.

Insert 11-7

(ar) 1. Before entering and inspecting a property under par. (a) 2., the department shall make at least one of the following requests:

- a. Request ^{A for} consent from the proprietor to enter and inspect the property.
- b. Request ^A orally or in writing that the proprietor provide an oral or written explanation, as elected by the department, concerning the activity that the department has reason to believe may constitute a violation of this section.

2. a. If the proprietor grants consent for the entry on, and the inspection of, the property to investigate a discharge as authorized under par. (a) 2., the department, upon reasonable advance notice, may enter and inspect the property in compliance the terms of the consent granted by the proprietor.

b. If the proprietor refuses to grant consent for ^{the} entry on, or the inspection of, the property or if the proprietor's explanation or terms of consent are not acceptable to the department, ^{of natural resources} the department may refer the matter to the department of justice for enforcement under s. 299.95.

c. If the proprietor fails to respond to all requests made under subd. 1., an agent of the department ^{of natural resources} may apply for, obtain, and execute a special inspection warrant under s. 66.0119. The department shall give the proprietor reasonable advance notice of its intent to apply for the warrant.

3. Any employee or representative of the department may make the requests under subd. 1., enter or inspect property under subd. 2. a. ^{or} execute a warrant under subd. 2. c. only during reasonable hours.

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRBs0097/dn

P1
Mob... King

Attention: Dan Johnson

SPS: delete this comma

1. I have made this a preliminary draft because it is easier to quickly redraft (no stripes to return) and I assume that you may well want some changes.
2. Based on a conversation with John Stolzenberg, I corrected the draft by changing the word "amendment" to "statute" under s. 281.36 (1) (b) 3, since we are dealing with "existing" law and not "additional" law. If you have any questions concerning this, please call me.

②

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



3. Note that I also changed the cross-reference in s. 281.36(8)(b) from "under this section" to "under par. (a)." OK?

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRBs0097/P1dn
MGG:kmg:jf

April 23, 2001

Attention: Dan Johnson

1. I have made this a preliminary draft because it is easier to quickly redraft (no stripes to return) and I assume that you may well want some changes.
2. Based on a conversation with John Stolzenberg, I corrected the draft by changing the word "amendment" to "statute" under s. 281.36 (1) (b) 3. since we are dealing with "existing" law and not "additional" law. If you have any questions concerning this, please call me.
3. Note that I also changed the cross-reference in s. 281.36 (8) (b) from "under this section" to "under par. (a)." OK?

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

Barman, Mike

From: Barman, Mike
Sent: Monday, April 23, 2001 8:34 AM
To: Stolzenberg, John; Letzing, Rachel
Subject: LRBs0097/P1 (attached per MGG)

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



State of Wisconsin
2001 - 2002 LEGISLATURE

LRBs0097/B1
MGG&RNK:kmg:jf

1 RMR

Now

~~changes~~
SENT TO LPS 25

~~PRELIMINARY DRAFT NOT READY FOR INTRODUCTION~~

**ASSEMBLY SUBSTITUTE AMENDMENT,
TO 2001 ASSEMBLY BILL 322**

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** 281.22 (title), 281.22 (3), 281.69 (3) (b) 2., 281.98 (1) and
4 299.95; and **to create** 281.01 (21), 281.22 (4) and 281.36 of the statutes;
5 **relating to:** water quality certification for nonfederal wetlands, time limits for
6 processing applications for water quality certifications, granting rule-making
7 authority, and providing a penalty.

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

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

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

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

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

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

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

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

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

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

23 281.01 (21) "Wetland" has the meaning given in s. 23.32 (1).

24 **SECTION 7.** 281.22 (title) of the statutes is amended to read:

1 **281.22** (title) **Fees and time limits for water quality determinations for**
2 **wetlands.**

3 **SECTION 8.** 281.22 (3) of the statutes is amended to read:

4 281.22 (3) **EXEMPTIONS FROM FEES.** ~~This section does~~ Subsections (1), (2) and
5 (2m) do not apply to any federal agency or state agency.

6 **SECTION 9.** 281.22 (4) of the statutes is created to read:

7 281.22 (4) **TIME LIMITS.** The department shall promulgate a rule to establish
8 time limits for the steps involved in processing, approving, and denying applications
9 for water quality certifications under s. 281.36 and for other determinations that the
10 department makes as to whether projects comply with the standards of water quality
11 established by rules promulgated under s. 281.15 that are applicable to wetlands.
12 Upon referral of any proposed rule under this subsection to the presiding officers of
13 each house of the legislature under s. 227.19 (2), the presiding officers shall refer the
14 proposed rule to a senate committee and an assembly committee concerned with the
15 environment.

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

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

18 **DEFINITIONS.** In this section:

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

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

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

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

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

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

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

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

9 2. A regulation, rule, memorandum of agreement, guidance letter, interpretive
10 document, or other provision established by a federal agency that is promulgated or
11 adopted pursuant to 33 USC 1344 (f) or that is used to interpret or implement 33 USC
12 1344 (f), that applies to wetlands located in this state, and that is in effect on January
13 8, 2001.

14 3. A decision issued by a federal district or federal appellate court that affects
15 the application of a federal statute or provision described in subd. 1. or 2., that
16 applies to wetlands located in this state, and that is issued on or before January 8,
17 2001.

18 (bn) “Governmental unit” means the federal government, the state, a city, a
19 village, a county, or a town.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 (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 an 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. (a) The department shall promulgate rules to
17 interpret and implement the provisions under subs. (4) and (5). In promulgating
18 these rules, the department shall do all of the following:

19 1. Make the rules consistent with existing federal law.

20 2. Incorporate any additional federal law or interpretation into the rules.

21 (b) Whenever an additional federal law or interpretation is initially
22 incorporated into the rules, the department may modify the additional federal law
23 or interpretation as it determines is necessary, but the department may not
24 otherwise amend or modify any of the rules promulgated under this subsection.

1 (7) RULES PROHIBITION. The department may not promulgate or enforce a rule
2 requiring a person who submits an application for a water quality certification under
3 this section for the discharge of dredged or fill material into a nonfederal wetland to
4 submit a description of practicable alternatives to the discharge or to submit a
5 description of any investigation conducted to determine the viability of such
6 alternatives if the area to be filled is less than one acre in size and a governmental
7 unit has determined that the discharge is necessary for public safety.

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

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

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

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

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

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

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

8 (d) Before issuing, modifying, or revoking a general water quality certification
9 issued under par. (a), the department shall provide notice and a hearing under ss.
10 227.17 and 227.18.

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

14 1. Enter and inspect any property on which is located a nonfederal wetland, or
15 part of a nonfederal wetland, for which an application for a water quality
16 certification has been submitted to the department.

17 2. Enter and inspect any property on which is located a nonfederal wetland to
18 investigate a discharge of dredged or fill material that the department has reason
19 to believe is in violation of this section.

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

22 (am) An employee or representative of the department may not exercise the
23 authority granted under par. (a) 1. before the date on which the application is
24 submitted. If the application is denied or withdrawn, an employee or representative
25 of the department may not exercise this authority after the date on which the

1 application is denied or withdrawn. If the application is approved, an employee or
2 representative of the department may not exercise this authority after the 20th day
3 immediately following the completion of the discharge of the dredged or fill material.

4 (ar) 1. Before entering and inspecting a property under par. (a) 2., the
5 department shall make at least one of the following requests:

6 a. A request for consent from the proprietor to enter and inspect the property.

7 b. A request, orally or in writing, that the proprietor provide an oral or written
8 explanation, as elected by the department, concerning the activity that the
9 department has reason to believe may constitute a violation of this section.

10 2. a. If the proprietor grants consent for the entry on, and the inspection of, the
11 property to investigate a discharge as authorized under par. (a) 2., the department,
12 upon reasonable advance notice, may enter and inspect the property in compliance
13 the terms of the consent granted by the proprietor.

14 b. If the proprietor refuses to grant consent for the entry on, or the inspection
15 of, the property or if the proprietor's explanation or terms of consent are not
16 acceptable to the department of natural resources, the department of natural
17 resources may refer the matter to the department of justice for enforcement under
18 s. 299.95.

19 c. If the proprietor fails to respond to all requests made under subd. 1., an agent
20 of the department of natural resources may apply for, obtain, and execute a special
21 inspection warrant under s. 66.0119. The department shall give the proprietor
22 reasonable advance notice of its intent to apply for the warrant.

23 3. Any employee or representative of the department may make the requests
24 under subd. 1., enter or inspect property under subd. 2. a., or execute a warrant under
25 subd. 2. c. only during reasonable hours.

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

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

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

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

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

16 **SECTION 11.** 281.69 (3) (b) 2. of the statutes is amended to read:

17 281.69 (3) (b) 2. The restoration of a wetland, ~~as defined in s. 23.32(1)~~, if the
18 restoration will protect or improve a lake's water quality or its natural ecosystem.

19 **SECTION 12.** 281.98 (1) of the statutes is amended to read:

20 281.98 (1) Except as provided in ss. 281.47 (1) (d), 281.75 (19), and 281.99 (2),
21 any person who violates this chapter or any rule promulgated or any plan approval,
22 license ~~or~~ special order, or water quality certification issued under this chapter shall
23 forfeit not less than \$10 nor more than \$5,000 for each violation. Each day of
24 continued violation is a separate offense. While an order is suspended, stayed, or
25 enjoined, this penalty does not accrue.

1 **SECTION 13.** 299.95 of the statutes is amended to read:

2 **299.95 Enforcement; duty of department of justice; expenses.** The
3 attorney general shall enforce chs. 281 to 285 and 289 to 295 and this chapter, except
4 ss. 281.48, 285.57, 285.59, and 299.64, and all rules, special orders, licenses, plan
5 approvals and, permits, and water quality certifications of the department, except
6 those promulgated or issued under ss. 281.48, 285.57, 285.59, and 299.64 and except
7 as provided in s. 285.86. The circuit court for Dane county or for any other county
8 where a violation occurred in whole or in part has jurisdiction to enforce chs. 281 to
9 285 and 289 to 295 or this chapter or the rule, special order, license, plan approval
10 ~~or, permit, or certification~~ by injunctive and other relief appropriate for
11 enforcement. For purposes of this proceeding where chs. 281 to 285 and 289 to 295
12 or this chapter or the rule, special order, license, plan approval ~~or, permit or~~
13 certification prohibits in whole or in part any pollution, a violation is considered a
14 public nuisance. The department of natural resources may enter into agreements
15 with the department of justice to assist with the administration of chs. 281 to 285 and
16 289 to 295 and this chapter. Any funds paid to the department of justice under these
17 agreements shall be credited to the appropriation account under s. 20.455 (1) (k).

18 **SECTION 14. Nonstatutory provisions.**

19 (1) **TEMPORARY PROCESS.**

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

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

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

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

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

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

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

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

18 (1) The treatment of section 23.321 (2) of the statutes takes effect on August
19 1, 2001, or on the day after publication, whichever is later.

20

(END)



State of Wisconsin
2001 - 2002 LEGISLATURE

LRB 0099/1
LRBs0097/1
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New

**ASSEMBLY SUBSTITUTE AMENDMENT ,
TO 2001 ASSEMBLY BILL 322**

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* 281.22 (title), 281.22 (3), 281.69 (3) (b) 2., 281.98 (1) and
4 299.95; and *to create* 281.01 (21), 281.22 (4) and 281.36 of the statutes;
5 **relating to:** water quality certification for nonfederal wetlands, time limits for
6 processing applications for water quality certifications, granting rule-making
7 authority, and providing a penalty.

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

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

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

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

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

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

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

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

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

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

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

22 **SECTION 7.** 281.22 (title) of the statutes is amended to read:

23 **281.22 (title) Fees and time limits for water quality determinations for**
24 **wetlands.**

25 **SECTION 8.** 281.22 (3) of the statutes is amended to read:

1 281.22 (3) EXEMPTIONS FROM FEES. ~~This section does~~ Subsections (1), (2) and
2 (2m) do not apply to any federal agency or state agency.

3 **SECTION 9.** 281.22 (4) of the statutes is created to read:

4 281.22 (4) **TIME LIMITS.** The department shall promulgate a rule to establish
5 time limits for the steps involved in processing, approving, and denying applications
6 for water quality certifications under s. 281.36 and for other determinations that the
7 department makes as to whether projects comply with the standards of water quality
8 established by rules promulgated under s. 281.15 that are applicable to wetlands.
9 Upon referral of any proposed rule under this subsection to the presiding officers of
10 each house of the legislature under s. 227.19 (2), the presiding officers shall refer the
11 proposed rule to a senate committee and an assembly committee concerned with the
12 environment.

13 **SECTION 10.** 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) “Additional federal law or interpretation” means any of the following:

17 1. An amendment to 33 USC 1344 (f) that becomes effective after January 9,
18 2001.

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

21 3. A regulation, rule, memorandum of agreement, guidance letter, interpretive
22 document, or other provision established by a federal agency that is promulgated or
23 adopted pursuant to 33 USC 1344 (f) or that is used to interpret or implement 33 USC
24 1344 (f), that applies to wetlands located in this state, and that becomes effective
25 after January 9, 2001.

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

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

5 1. 33 USC 1344 (f), as amended to January 8, 2001.

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

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

15 (bn) “Governmental unit” means the federal government, the state, a city, a
16 village, a county, or a town.

17 (c) “Nonfederal wetland” means a wetland that is identified as such under sub.
18 (1m).

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

21 **(1m) DETERMINATION OF NONFEDERAL WETLANDS.** (a) A wetland is identified as
22 a nonfederal wetland if either of the following applies:

23 1. Any discharges of dredged or fill material into the wetland are determined
24 not to be subject to regulation under 33 USC 1344 due to the decision in Solid Waste
25 Agency of Northern Cook County v. U.S. Army Corps of Engineers, No. 99-1178 (U.S.

1 Jan. 9, 2001) or any subsequent interpretations of that decision by a federal agency
2 or by a federal district or federal appellate court that applies to wetlands located in
3 this state.

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

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

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

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

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. For purposes of delineating the boundary of a
23 nonfederal wetland, the department and the person who is applying for or who holds
24 a water quality certification under this section shall use the procedures contained
25 in the wetlands delineation manual published by the U.S. army corps of engineers.

1 The edition of the manual that shall be used shall be the 1987 edition of the manual
2 and any document that the U.S. army corps of engineers issues interpreting that
3 manual, unless the U.S. army corps of engineers publishes an edition of the manual
4 after January 9, 2001, and the department by rule designates that edition as the one
5 to be used under this subsection. If the U.S. army corps of engineers issues a
6 guidance document interpreting the edition of the wetlands delineation manual that
7 the department is required to use under this subsection and if that guidance
8 document is issued after the effective date of this paragraph [revisor inserts date],
9 the department shall notify the appropriate standing committee of each house of the
10 legislature, as determined by the speaker of the assembly and the president of the
11 senate, of the issuance of the guidance document and whether the department
12 intends to promulgate a rule incorporating the provisions of the guidance document.

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

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

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

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

21 (d) Maintenance of drainage ditches.

22 (e) Construction or maintenance of farm roads, forest roads, or temporary
23 mining roads that is performed in accordance with best management practices, as
24 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.** (a) The department shall promulgate rules to
14 interpret and implement the provisions under subs. (4) and (5). In promulgating
15 these rules, the department shall do all of the following:

16 1. Make the rules consistent with existing federal law.

17 2. Incorporate any additional federal law or interpretation into the rules.

18 (b) Whenever an additional federal law or interpretation is initially
19 incorporated into the rules, the department may modify the additional federal law
20 or interpretation as it determines is necessary, but the department may not
21 otherwise amend or modify any of the rules promulgated under this subsection.

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 to
25 submit a description of practicable alternatives to the discharge or to submit a

1 description of any investigation conducted to determine the viability of such
2 alternatives if the area to be filled is less than one acre in size and a governmental
3 unit has determined that the discharge is necessary for public safety.

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 par. (a) may be effective
14 for more than 5 years after the date of its issuance.

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

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

22 (c) If the department determines that any of the discharges under a general
23 water quality certification issued under par. (a) fails to meet any of the standards in
24 par. (a), the department shall modify the certification so that the discharges meet all
25 of the standards. If the department cannot modify the certification so that all of the

1 standards will be met or if the department determines that the discharges subject
2 to the general certification are more appropriately certified by using individual
3 water quality certifications, the department shall revoke the general certification.

4 (d) Before issuing, modifying, or revoking a general water quality certification
5 issued under par. (a), the department shall provide notice and a hearing under ss.
6 227.17 and 227.18.

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

10 1. Enter and inspect any property on which is located a nonfederal wetland, or
11 part of a nonfederal wetland, for which an application for a water quality
12 certification has been submitted to the department.

13 2. Enter and inspect any property on which is located a nonfederal wetland to
14 investigate a discharge of dredged or fill material that the department has reason
15 to believe is in violation of this section.

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

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

1 (ar) 1. Before entering and inspecting a property under par. (a) 2., the
2 department shall make at least one of the following requests:

3 a. A request for consent from the proprietor to enter and inspect the property.

4 b. A request, orally or in writing, that the proprietor provide an oral or written
5 explanation, as elected by the department, concerning the activity that the
6 department has reason to believe may constitute a violation of this section.

7 2. a. If the proprietor grants consent for the entry on, and the inspection of, the
8 property to investigate a discharge as authorized under par. (a) 2., the department,
9 upon reasonable advance notice, may enter and inspect the property in compliance
10 the terms of the consent granted by the proprietor.

11 b. If the proprietor refuses to grant consent for the entry on, or the inspection
12 of, the property or if the proprietor's explanation or terms of consent are not
13 acceptable to the department of natural resources, the department of natural
14 resources may refer the matter to the department of justice for enforcement under
15 s. 299.95.

16 c. If the proprietor fails to respond to all requests made under subd. 1., an agent
17 of the department of natural resources may apply for, obtain, and execute a special
18 inspection warrant under s. 66.0119. The department shall give the proprietor
19 reasonable advance notice of its intent to apply for the warrant.

20 3. Any employee or representative of the department may make the requests
21 under subd. 1., enter or inspect property under subd. 2. a., or execute a warrant under
22 subd. 2. c. only during reasonable hours.

23 (b) Any employee or representative of the department may exercise the
24 authority granted under par. (a) 1. or 3. only during reasonable hours and only after

1 the department has provided reasonable advance notice to the proprietor of the
2 property involved or to the holder of the water quality certification.

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

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

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

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

14 **SECTION 11.** 281.69 (3) (b) 2. of the statutes is amended to read:

15 281.69 (3) (b) 2. The restoration of a wetland, ~~as defined in s. 23.32 (1)~~, if the
16 restoration will protect or improve a lake's water quality or its natural ecosystem.

17 **SECTION 12.** 281.98 (1) of the statutes is amended to read:

18 281.98 (1) Except as provided in ss. 281.47 (1) (d), 281.75 (19), and 281.99 (2),
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20 license ~~or~~, special order, or water quality certification issued under this chapter shall
21 forfeit not less than \$10 nor more than \$5,000 for each violation. Each day of
22 continued violation is a separate offense. While an order is suspended, stayed, or
23 enjoined, this penalty does not accrue.

24 **SECTION 13.** 299.95 of the statutes is amended to read:

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

17 **SECTION 14. Nonstatutory provisions.**

18 (1) TEMPORARY PROCESS.

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

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

0150099/dn

M66: Km 9

12

This substitute amendment is identical to LRBs 0097.
A technical problem forced us to redraft the substitute amendment as a new LRB number.

M66

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRBs0099/1dn
MCG:kmg:ch

April 23, 2001

This substitute amendment is identical to LRBs0097/1. A technical problem forced us to redraft the substitute amendment as a new LRB number.

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State of Wisconsin
2001-2002 LEGISLATURE

CORRECTIONS IN:

ASSEMBLY SUBSTITUTE AMENDMENT 1,

TO 2001 ASSEMBLY BILL 322

Prepared by the Legislative Reference Bureau
(April 25, 2001)

1. Page 10, line 9: after "compliance" insert "with".

LRBS 0099/1
MGG & RNK:

CCC to ASA 1 to AB 322

#. Page 10, line 9: after
"compliance" insert "with".

cjs