

May 2001 Special Session
Senate Bill 1

Date of enactment: **May 7, 2001**
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AN ACT to repeal 23.321 (1) (c); to renumber 23.321 (title) and (1) (title), (a) and (b), 23.321 (1) (d) to (f) and 23.321 (2); to renumber and amend 23.321 (2m) to (5); to amend 281.22 (title), 281.22 (3), 281.69 (3) (b) 2., 281.98 (1), 299.95 and 814.04 (intro.); and to create 281.01 (21), 281.22 (4) and 281.36 of the statutes; relating to: water quality certification for nonfederal wetlands, time limits and procedures for processing applications for water quality certifications that are applicable to wetlands, granting rule-making authority, and providing a penalty.

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

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

SECTION 2. 23.321 (1) (c) of the statutes is repealed.

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

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

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

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

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

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

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

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

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

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

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

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

* Section 991.11, WISCONSIN STATUTES 1999-00 : Effective date of acts. "Every act and every portion of an act enacted by the legislature over the governor's partial veto which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication as designated" by the secretary of state [the date of publication may not be more than 10 working days after the date of enactment].

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

281.22 (4) **TIME LIMITS.** The department shall promulgate a rule to establish time limits for the steps involved in processing, approving, and denying applications for determinations that the department makes as to whether projects comply with the standards of water quality established by rules promulgated under s. 281.15 that are applicable to wetlands other than nonfederal wetlands, as defined in s. 281.36 (1) (c). Upon referral of any proposed rule under this subsection to the presiding officer of each house of the legislature under s. 227.19 (2), the presiding officers shall refer the proposed rule to a senate committee and an assembly committee concerned with the environment.

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

281.36 Water quality certification for nonfederal wetlands. (1) DEFINITIONS. In this section:

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

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

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

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

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

(am) “Area of special natural resource interest” has the meaning given in s. 281.37 (1) (a).

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

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

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

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

(bg) “Federal transportation agency” means the federal aviation administration, the federal highway administration, or the federal railroad administration.

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

(cm) “Political subdivision” means a city, village, town, or county.

(cr) “State transportation agency” means the department of transportation or the office of the commissioner of railroads.

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

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

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

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

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

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

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

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

(b) 1. The department shall approve or deny a complete application for a water quality certification under this section within 120 days after the date the department

determines that a complete application for the certification has been submitted unless the applicant and the department agree to extend the time period. The department may not determine an application to be complete until the requirements under s. 1.11 have been met and until all of the items of information for the water quality certification and for any associated permits or other approvals have been submitted to the department. If the department fails to approve or deny the complete application within the applicable time period, the applicant may bring an action for mandamus to compel the department to approve or deny the application. If the court grants the mandamus, the department shall approve or deny the application within 30 days after the mandamus is granted and the court shall award the applicant reasonable attorney fees and court costs incurred in bringing the action.

2. For purposes of subd. 1., the department shall initially determine whether a complete application has been submitted and, no later than 30 days after the application is submitted, notify the applicant in writing about the initial determination of completeness. If the department determines that the application is incomplete, the notice shall state the reason for the determination and the specific items of information necessary to make the application complete. An applicant may supplement and resubmit an application that the department has determined to be incomplete. There is no limit on the number of times that an applicant may resubmit an application that the department has determined to be incomplete under this subdivision. The department may not demand items of information that are not specified in the notice as a condition for determining whether the application is complete unless both the department and the applicant agree or unless the applicant makes material additions or alterations to the project for which the application has been submitted.

(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.

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

(d) Maintenance of drainage ditches.

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

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

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

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

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

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

(b) Reduce the reach of any nonfederal wetland.

(6) **RULES FOR EXEMPTIONS.** (a) The department shall promulgate rules to interpret and implement the provisions under subs. (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 applicable 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 is necessary, but the department may not otherwise amend or modify any of the rules promulgated under this subsection.

(7) **RULES PROHIBITION; DETERMINATIONS OF PUBLIC SAFETY.** (a) The department may not promulgate or enforce a rule requiring a person who submits an application for a water quality certification under this section for

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the discharge of dredged or fill material into a nonfederal wetland to submit a description of practicable alternatives to the discharge or to submit a description of any investigation conducted to determine the viability of such alternatives if all of the following apply:

1. The wetland is less than one acre in size.
2. The wetland is not in an area of special natural resource interest.
3. The application for the water quality certification includes a copy of a determination that the discharge is necessary for public safety that is made under par. (b) or that is made in response to a request made under par. (bn).

(b) 1. A political subdivision shall make a determination as to whether a discharge into a nonfederal wetland within the boundaries of the political subdivision is necessary for public safety if requested to do so by an applicant for a water quality certification under this section. A state transportation agency shall make a determination as to whether a discharge into a nonfederal wetlands is necessary for public safety if requested to do so by an applicant for a water quality certification under this section.

2. Before a political subdivision or a state transportation agency makes any determination under subd. 1., it shall publish appropriate notice, as determined by the political subdivision or the state transportation agency, to the public that describes the request and that states that it will be making the determination. On or before the date of the publication of the notice, the political subdivision or state transportation agency shall mail or otherwise provide a written copy of the notice to the department. After publication of the notice, the governing body of the political subdivision or the state transportation agency may hold a public hearing to determine whether the discharge is necessary for public safety. Any public hearing held under this subdivision shall be held no later than 30 days after the applicant for the water quality certification made the request for the determination. The governing body of the political subdivision or the state transportation agency shall issue the determination in writing, and the determination shall include a statement of the grounds for making the determination.

3. The department or any person whose substantial interests are adversely affected by a determination issued under subd. 2. by a governing body of a political subdivision or by a state transportation agency may file for judicial review of the determination. Section 68.13 shall apply to the judicial review of a determination made by a political subdivision. Sections 227.52 to 227.58 shall apply to the judicial review of a determination made by a state transportation agency.

(bn) An applicant for a water quality certification may submit a request to a federal transportation agency for a determination as to whether a discharge into a nonfederal wetland is necessary for public safety.

(c) 1. Notwithstanding the fact that an applicant for a water quality certification under this section has received a determination that the discharge is necessary for public safety, the department may conduct an examination of the practicable alternatives to the proposed discharge that will not adversely affect the nonfederal wetland and that will not result in other significant adverse environmental consequences.

2. If the department decides under subd. 1. to conduct an examination, the department shall conduct the examination by first determining, after consulting with the applicant for the water quality certification, whether an alternative to the discharge exists on the parcel of land on which the nonfederal wetland is located that would not conflict with the determination that the discharge is necessary for public safety. At the same time that the department is conducting the examination of the practicable alternatives under this subdivision, the department shall consider the functional value of the nonfederal wetland. If the department determines that such a practicable alternative exists, the department may deny the water quality certification.

3. If the department determines that no practicable alternative exists after conducting the examination under subd. 2., the department may proceed with the examination by determining, after consulting with the applicant for the water quality certification, whether an alternative to the discharge exists on the parcel of land on which the nonfederal wetland is not located that would not conflict with the determination that the discharge is necessary for public safety. At the same time that the department is conducting an examination of the practicable alternatives under this subdivision, the department shall consider the functional value of the nonfederal wetland. If the department determines that such a practicable alternative exists, the department may deny the water quality certification.

4. If the department determines that no practicable alternative exists after conducting the examination under subs. 2. and 3., the department may require that the applicant implement a mitigation project under s. 281.37 (2).

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

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

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

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

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

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

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

(e) Subsection (2) (b) does not apply to general water quality certifications issued under this subsection.

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

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

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

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

(am) An employee or representative of the department may not exercise the authority granted under par. (a) 1. before the date on which the application is submitted. If the application is denied or withdrawn, an employee or representative of the department may not exercise this authority after the date on which the application is denied or withdrawn. If the application is approved, an employee or representative of the department may not exercise this authority after the 30th day immediately following the completion date of the discharge of the

dredged or fill material or the completion date of any conditions imposed under the water quality certification, whichever date is later.

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

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

b. A request, 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 with 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 of natural resources may apply for, obtain, or execute a special inspection warrant under s. 66.0119 or 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.

3. Any employee or representative of the department may make the requests under subd. 1. or enter or inspect property under subd. 2. a. only during reasonable hours.

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

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

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

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

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

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

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

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

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

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

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

SECTION 14. 814.04 (intro.) of the statutes is amended to read:

814.04 Items of costs. (intro.) Except as provided in ss. 93.20, 100.30 (5m), 106.50 (6) (i) and (6m) (a),

115.80 (9), 281.36 (2) (b) 1., 769.313, 814.025, 814.245, 895.035 (4), 895.10 (3), 895.75 (3), 895.77 (2), 895.79 (3), 895.80 (3), 943.212 (2) (b), 943.245 (2) (d) and 943.51 (2) (b), when allowed costs shall be as follows:

SECTION 15. Nonstatutory provisions.

(1) TEMPORARY PROCESS.

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

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

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

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

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

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

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

(3) LEGISLATIVE COUNCIL STUDY. The joint legislative council is requested to establish a committee to study the regulation of wetlands.

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

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