

2001 My1 DRAFTING REQUEST

Bill

Received: 04/13/2001

Received By: gibsom

Wanted: As time permits

Identical to LRB:

For: Governor

By/Representing: Scott Kelly

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: NO

Requester's email:

Pre Topic:

No specific pre topic given

Topic:

Wetlands certification, change in rule prohibition

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 04/13/2001	csicilia 04/13/2001		_____			S&L
/1			martykr 04/13/2001	_____	lrb_docadmin 04/13/2001		S&L
/2	gibsom	gilfokm	haugeca	_____	lrb_docadmin	_____	S&L

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
	04/16/2001	04/16/2001	04/16/2001	_____	04/16/2001	04/16/2001	
				_____	lrb_docadmin		
				_____	04/16/2001		
/3	gibsom 04/16/2001	gilfokm 04/16/2001	jfrantze 04/17/2001	_____	lrb_docadmin 04/17/2001		S&L
/4	gibsom 04/17/2001	gilfokm 04/17/2001	jfrantze 04/18/2001	_____	lrb_docadmin 04/18/2001		S&L
/5	gibsom 04/24/2001	csicilia 04/24/2001	rschluct 04/24/2001	_____	lrb_docadmin 04/24/2001		S&L
	gibsom 04/24/2001		kfollet 04/24/2001	_____			
/6	gibsom 04/25/2001	gilfokm 04/25/2001	jfrantze 04/26/2001	_____	lrb_docadmin 04/26/2001		S&L
/7	gibsom 04/29/2001	csicilia 04/29/2001	jfrantze 04/30/2001	_____	lrb_docadmin 04/30/2001		S&L
/8	gibsom 04/30/2001	gilfokm 04/30/2001	jfrantze 04/30/2001	_____	lrb_docadmin 05/01/2001	lrb_docadmin 05/01/2001	
				_____		lrb_docadmin	
				_____		05/01/2001	

FE Sent For: 05/01/2001.

<END>

2001 My1 DRAFTING REQUEST

Bill

Received: 04/13/2001

Received By: gibsom

Wanted: As time permits

Identical to LRB:

For: Governor

By/Representing: Scott Kelly

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: NO

Requester's email:

Pre Topic:

No specific pre topic given

Topic:

Wetlands certification, change in rule prohibition

Instructions:

See Attached

See previous

*Mike
e-mail to
previous list
plus Chad Taylor
in Gov's office
JACKET IMMEDIATELY*

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	gibsom 04/13/2001	csicilia 04/13/2001					S&L
/1			martykr 04/13/2001		lrb docadmin 04/13/2001		S&L
/2	gibsom 04/16/2001	gilfokm 04/16/2001	haugeca 04/16/2001		lrb docadmin 04/16/2001 lrb docadmin 04/16/2001	XXXXXXXXXX	S&L
/3	gibsom 04/16/2001	gilfokm 04/16/2001	jfrantze 04/17/2001		lrb docadmin 04/17/2001		S&L
/4	gibsom 04/17/2001	gilfokm 04/17/2001	jfrantze 04/18/2001		lrb docadmin 04/18/2001		S&L

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/5	gibsom 04/24/2001	csicilia 04/24/2001	rschluet 04/24/2001	_____	lrb_docadmin 04/24/2001		S&L
	gibsom 04/24/2001		kfollet 04/24/2001	_____			
/6	gibsom 04/25/2001	gilfokm 04/25/2001	jfrantze 04/26/2001	_____	lrb_docadmin 04/26/2001		S&L
/7	gibsom 04/29/2001	csicilia 04/29/2001	jfrantze 04/30/2001	_____	lrb_docadmin 04/30/2001		

FE Sent For:

<END>

2001 My1 DRAFTING REQUEST

Bill

Received: **04/13/2001**

Received By: **gibsom**

Wanted: **As time permits**

Identical to LRB:

For: **Governor**

By/Representing: **Scott Kelly**

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: **NO**

(e-mails (see attached))

Requester's email:

Pre Topic:

No specific pre topic given

Topic:

Wetlands certification, change in rule prohibition

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 04/13/2001	csicilia 04/13/2001					S&L
/1			martykr 04/13/2001		lrb_docadmin 04/13/2001		S&L
/2	gibsom	gilfokm	haugeca		lrb_docadmin	lrb_docadmin	S&L

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
	04/16/2001	04/16/2001	04/16/2001	_____	04/16/2001 lrb_docadmin 04/16/2001		
/3	gibsom 04/16/2001	gilfokm 04/16/2001	jfrantze 04/17/2001	_____	lrb_docadmin 04/17/2001		S&L
/4	gibsom 04/17/2001	gilfokm 04/17/2001	jfrantze 04/18/2001	_____	lrb_docadmin 04/18/2001		S&L
/5	gibsom 04/24/2001 gibsom 04/24/2001	csicilia 04/24/2001	rschluet 04/24/2001 kfollet 04/24/2001	_____	lrb_docadmin 04/24/2001		S&L
/6	gibsom 04/25/2001	gilfokm 04/25/2001	jfrantze 04/26/2001	_____	lrb_docadmin 04/26/2001		S&L
/7	gibsom 04/29/2001	csicilia 04/29/2001	jfrantze 04/30/2001	_____	lrb_docadmin 04/30/2001		S&L
/8	gibsom 04/30/2001	gilfokm 04/30/2001	jfrantze 04/30/2001	_____	lrb_docadmin 05/01/2001	lrb_docadmin 05/01/2001	

FE Sent For:

05-01-01
11/8"

<END>

2001 Ap1 DRAFTING REQUEST

Bill

Received: **04/13/2001**

Received By: **gibsom**

Wanted: **As time permits**

Identical to LRB:

For: **Governor**

By/Representing: **Scott Kelly**

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

Drafter: **gibsom**

May Contact:

Addl. Drafters:

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

Extra Copies: **KMG**

Submit via email: **NO**

Requester's email:

11:50
4/30/01
Also e-mail to
Chad Taylor
Governor's office

plus e-mail
17 to
John Stolzenberg
Kedzie Office
Baumgarts
office

Pre Topic:

No specific pre topic given

Topic:

Wetlands certification, change in rule prohibition

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 04/13/2001	csicilia 04/13/2001					S&L
/1		18-4/KMG /30-01	martykr 04/13/2001		lrb_docadmin 04/13/2001		S&L
/2	gibsom 04/16/2001	gilfokm 04/16/2001	haugeca 04/16/2001		lrb_docadmin 04/16/2001	lrb_docadmin	S&L

4/30
4/30

<u>Vers:</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofcd</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
				_____	lrb_docadmin 04/16/2001		
/3	gibsom 04/16/2001	gilfokm 04/16/2001	jfrantze 04/17/2001	_____	lrb_docadmin 04/17/2001		S&L
/4	gibsom 04/17/2001	gilfokm 04/17/2001	jfrantze 04/18/2001	_____	lrb_docadmin 04/18/2001		S&L
/5	gibsom 04/24/2001 gibsom 04/24/2001	csicilia 04/24/2001	rschluet 04/24/2001 kfollet 04/24/2001	_____	lrb_docadmin 04/24/2001		S&L
/6	gibsom 04/25/2001	gilfokm 04/25/2001	jfrantze 04/26/2001	_____	lrb_docadmin 04/26/2001		

FE Sent For:

17 cjs 4/29
01

<END>

2001 Ap1 DRAFTING REQUEST

Bill

Received: **04/13/2001**

Received By: **gibsom**

Wanted: **As time permits**

Identical to LRB:

For: **Governor**

By/Representing: **Scott Kelly**

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: **NO**

Handwritten: e-mail to (circled) with an arrow pointing to 'By/Representing: Scott Kelly'

Requester's email:

Pre Topic:

No specific pre topic given

Topic:

Wetlands certification, change in rule prohibition

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 04/13/2001	csicilia 04/13/2001		_____			S&L
/1			martykr 04/13/2001	_____	lrb_docadmin 04/13/2001		S&L
/2	gibsom 04/16/2001	gilfokm 04/16/2001	haugeca 04/16/2001	_____	lrb_docadmin 04/16/2001	lrb_docadmin 04/16/2001	S&L

Handwritten: 16-4/KMG 4/25-01, 4/26, 4/26

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
				_____	lrb_docadmin 04/16/2001		
/3	gibsom 04/16/2001	gilfokm 04/16/2001	jfrantze 04/17/2001	_____	lrb_docadmin 04/17/2001		S&L
/4	gibsom 04/17/2001	gilfokm 04/17/2001	jfrantze 04/18/2001	_____	lrb_docadmin 04/18/2001		S&L
/5	gibsom 04/24/2001	csicilia 04/24/2001	rschluet 04/24/2001	_____	lrb_docadmin 04/24/2001		
	gibsom 04/24/2001		kfollet 04/24/2001	_____			

FE Sent For:

<END>

2001 Ap1 DRAFTING REQUEST

Bill

Received: **04/13/2001**

Received By: **gibson**

Wanted: **As time permits**

Identical to LRB:

For: **Governor**

By/Representing: **Scott Kelly**

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

Drafter: **gibson**

May Contact:

Addl. Drafters:

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

Extra Copies: *e-mail to
Scott Kelly in Governor's
office*

6-3516

Submit via email: **NO**

Requester's email:

Pre Topic:

No specific pre topic given

Topic:

Wetlands certification, change in rule prohibition

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>
/?	gibson 04/13/2001	csicilia 04/13/2001					S&L
/1			martykr 04/13/2001		lrb_docadmin 04/13/2001		S&L
/2	gibson 04/16/2001	gilfokm 04/16/2001	haugeca 04/16/2001		lrb_docadmin 04/16/2001	 	S&L

4-24-01
4-24-01

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofcd</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
				_____	lrb_docadmin 04/16/2001		
/3	gibsom 04/16/2001	gilfokm 04/16/2001	jfrantze 04/17/2001	_____	lrb_docadmin 04/17/2001		S&L
/4	gibsom 04/17/2001	gilfokm 04/17/2001	jfrantze 04/18/2001	_____	lrb_docadmin 04/18/2001		

FE Sent For:

15 cjs 4/24
01

KA
4/24

ES
KA
<END> 4/24

2001 Ap1 DRAFTING REQUEST

Bill

Received: 04/13/2001

Received By: gibsom

Wanted: As time permits

Identical to LRB:

For: Governor

By/Representing: Scott Kelly

This file may be shown to any legislator: NO

Drafter: gibsom

May Contact:

Addl. Drafters:

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

Extra Copies:

*e mail to
Scott Kelly
Governor's off
Draft + DN*

Submit via email: NO

Requester's email:

Pre Topic:

No specific pre topic given

Topic:

Wetlands certification, change in rule prohibition

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 04/13/2001	csicilia 04/13/2001		_____			S&L
/1			martykr 04/13/2001	_____	lrb_docadmin 04/13/2001		S&L
/2	gibsom 04/16/2001	gilfokm 04/16/2001	haugeca 04/16/2001	_____	lrb_docadmin 04/16/2001	lrb_docadmin 04/16/2001	S&L

*14-4/KMG
1/12-01
Jo 4/18
Jo/KMG
4/18*

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
				_____	lrb_docadmin		
				_____	04/16/2001		
/3	gibsom	gilfokm	jfrantze	_____	lrb_docadmin		
	04/16/2001	04/16/2001	04/17/2001	_____	04/17/2001		

FE Sent For:

<END>

2001 Ap1 DRAFTING REQUEST

Bill

Received: 04/13/2001

Received By: gibsom

Wanted: As time permits

Identical to LRB:

For: Governor

By/Representing: Scott Kelly

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: NO

Requester's email:

Pre Topic:

No specific pre topic given

Topic:

Wetlands certification, change in rule prohibition

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 04/13/2001	csicilia 04/13/2001		_____			S&L
/1			martykr 04/13/2001	_____	lrb_docadmin 04/13/2001		S&L
/2	gibsom 04/16/2001	gilfokm 04/16/2001	haugeca 04/16/2001	_____	lrb_docadmin 04/16/2001	lrb_docadmin 04/16/2001	

B-4/Kms
116-01

Jb 4/17

Self
4/17

Vers. Drafted Reviewed Typed Proofed Submitted Jacketed Required

lrb_docadmin
04/16/2001

FE Sent For:

<END>

2001 Ap1 DRAFTING REQUEST

Bill

Received: **04/13/2001**

Received By: **gibsom**

Wanted: **As time permits**

Identical to LRB:

For: **Governor**

By/Representing: **Scott Kelly**

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

Drafter: **gibsom**

May Contact:

Addl. Drafters:

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

Extra Copies: *KMG*

Submit via email: **NO**

Requester's email:

Pre Topic:

No specific pre topic given

Topic:

Wetlands certification, change in rule prohibition

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 04/13/2001	csicilia 04/13/2001		_____			S&L
/1		<i>12-4/KMG</i> 1/16-01	martykr 04/13/2001	<i>CH 4/16</i> <i>out</i>	lrb_docadmin 04/13/2001		

FE Sent For:

CH 4/16

[Scribble of names]

2001 Ap1 DRAFTING REQUEST

Bill

Received: **04/13/2001**

Received By: **gibsom**

Wanted: **As time permits**

Identical to LRB:

For: **Governor**

By/Representing: **Scott Kelly**

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: **NO**

Requester's email:

Pre Topic:

No specific pre topic given

Topic:

Wetlands certification, change in rule prohibition

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	1 cjs 4/13 01	km 4/13	gch km 4/13			

FE Sent For:

<END>

Gibson-Glass, Mary

From: Kelly, Scott
Sent: Friday, April 13, 2001 11:25 AM
To: Gibson-Glass, Mary
Subject: FW: "Public Purpose" language

As I read the bill...this language would be inserted after the word "size" on page 9, line 16.

for an activity that is necessary to accomplish a ^{public} purpose required by a local government as a condition of plat approval, building permit requirement, infrastructure standard or other approval.

3093 M Mot R
LRB-3091/1
MGG:kmg/wlj/hmh/cs:jf
3093/1

BILL

D-N
Mon am

vege

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, rules for wetland compensatory mitigation, granting
6 rule-making authority, providing an exemption from emergency rule
7 procedures, 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.

BILL

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

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

delete period - 3 -
INS ANL ✓

For an individual certification, DNR must determine whether it will approve or deny the certification within 90 days after the application for the certification is submitted.

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

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

The bill authorizes DNR to inspect any property on which 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 or withdrawn, on the date of denial or withdrawal. 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:

BILL

SECTION 5

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

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

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

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

17 281.01 (21) “Wetland” has the meaning given in s. 23.32 (1).

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

19 **281.36 Water quality certification for nonfederal wetlands. (1)**

20 DEFINITIONS. In this section:

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

22 1. An amendment to 33 USC 1344 (f) that becomes effective after January 9,
23 2001.

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

1 3. A regulation, rule, memorandum of agreement, guidance letter, interpretive
2 document, or other provision established by a federal agency that is promulgated or
3 adopted pursuant to 33 USC 1344 (f) or that is used to interpret or implement 33 USC
4 1344 (f), that applies to wetlands located in this state, and that becomes effective
5 after January 9, 2001.

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

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

10 1. 33 USC 1344 (f), as amended to January 8, 2001.

11 2. A regulation, rule, memorandum of agreement, guidance letter, interpretive
12 document, or other provision established by a federal agency that is promulgated or
13 adopted pursuant to 33 USC 1344 (f) or that is used to interpret or implement 33 USC
14 1344 (f), that applies to wetlands in this state, and that is in effect on January 8, 2001.

15 3. A decision issued by a federal district or federal appellate court that affects
16 the application of a federal amendment or provision described in subds. 1. and 2.,
17 that applies to wetlands located in this state, and that is issued on or before January
18 8, 2001.

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

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

23 **(1m) DETERMINATION OF NONFEDERAL WETLANDS.** (a) A wetland is identified as
24 a nonfederal wetland if either of the following applies:

✓
INS
5-18
←

BILL

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.** (a) 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 (b) The department shall determine whether to approve or deny an application
2 for a water quality certification under this section within 90 days after the
3 application for the certification is initially submitted.

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

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

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

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

BILL

SECTION 7

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

BILL

delete period

INS
9-4

✓

1 this section for the discharge of dredged or fill material into a nonfederal wetland
2 that is less than one acre in size to submit a description of practicable alternatives
3 to the discharge or to submit a description of any investigation conducted to
4 determine the viability of such alternatives

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

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

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

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

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

23 (d) Before issuing, modifying, or revoking a general water quality certification
24 under this subsection, the department shall provide notice and a hearing under ss.
25 227.17 and 227.18.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 **SECTION 11. Nonstatutory provisions.**

13 (1) TEMPORARY PROCESS.

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

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

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

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

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

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

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

11 (3) EMERGENCY RULES FOR WETLAND MITIGATION. Using the procedure under
12 section 227.24 of the statutes, the department of natural resources may promulgate
13 the rules required under section 281.37 (3) of the statutes, as affected by by this act,
14 for the period before the effective date of the rules submitted under 1999 Wisconsin
15 Act 147, section 5 (1), but not to exceed the period authorized under section 227.24
16 (1) (c) and (2) of the statutes. Notwithstanding section 227.24 (1) (a), (2) (b), and (3)
17 of the statutes, the department is not required to provide evidence that promulgating
18 a rule under this subsection as an emergency rule is necessary for the preservation
19 of the public peace, health, safety, or welfare and is not required to provide a finding
20 of emergency for a rule promulgated under this subsection.

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

23 (1) The treatment of section 23.321 (2) of the statutes takes effect on August
24 1, 2001, or on the day after publication, whichever is later.

25 (END)

BILL

NO F

INS
ANL

~~may be required~~ if the discharge is necessary to comply with a requirement imposed by a ~~local government~~ local government as a condition for approval by the ~~local government~~ local government of an activity that serves a public purpose ~~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

BILL

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 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, 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 or provision described in subds. 1. and 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 a city, village, town, county, or special
18 purpose district; ^{ve} and agency or corporation of a city, village, town, county, or special
19 purpose district; or a combination or subunit of any of the foregoing.

INS
518

20 (e) "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:

BILL

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:

5 ~~if~~ ^{NO} ~~(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 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.

INS
9-4

D-Note

LRB-3093/1

MGG:cjs

~~I know that the~~
If you have any questions as to ~~what~~ why
I drafted the provision in S. 281.36(7) in more
general terms, please call me.

MBB

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3093/1dn
MGG:cjs:km

April 13, 2001

If you have any questions as to why I drafted the provision in s. 281.36 (7) in more general terms, please call me.

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



State of Wisconsin
2001 - 2002 LEGISLATURE

April 2001 Special Session

LRB-3093/1²

MGG:kmg/wlj/hmh/cs:km

Now

Stays

BILL

1 *Yen Cat.*
2 **AN ACT to repeal** 23.321 (1) (c); **to renumber** 23.321 (title) and (1) (title), (a) and
3 (b), 23.321 (1) (d) to (f) and 23.321 (2); **to renumber and amend** 23.321 (2m)
4 to (5); **to amend** 281.69 (3) (b) 2., 281.98 (1) and 299.95; and **to create** 281.01
5 (21) and 281.36 of the statutes; **relating to:** water quality certification for
6 nonfederal wetlands, rules for wetland compensatory mitigation, granting
7 rule-making authority, providing an exemption from emergency rule
procedures, 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.

BILL

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

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

BILL

For an individual certification, DNR must determine whether it will approve or deny the certification within 90 days after the application for the certification is submitted.

The bill also prohibits DNR from promulgating a rule that requires a person who is applying for a water quality certification for a nonfederal wetland that is less than one acre in size to submit information concerning practicable alternatives to the discharge that exist or that may be viable if the discharge is necessary to comply with a requirement imposed by a local government as a condition for approval by the local government of an activity that serves a public purpose.

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 or withdrawn, on the date of denial or withdrawal. 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).

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

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

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

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

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

19 281.01 (21) “Wetland” has the meaning given in s. 23.32 (1).

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

21 **281.36 Water quality certification for nonfederal wetlands. (1)**

22 DEFINITIONS. In this section:

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

24 1. An amendment to 33 USC 1344 (f) that becomes effective after January 9,
25 2001.

BILL

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

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

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

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

12 1. 33 USC 1344 (f), as amended to January 8, 2001.

13 2. A regulation, rule, memorandum of agreement, guidance letter, interpretive
14 document, or other provision established by a federal agency that is promulgated or
15 adopted pursuant to 33 USC 1344 (f) or that is used to interpret or implement 33 USC
16 1344 (f), that applies to wetlands in this state, and that is in effect on January 8, 2001.

17 3. A decision issued by a federal district or federal appellate court that affects
18 the application of a federal amendment or provision described in subds. 1. and 2.,
19 that applies to wetlands located in this state, and that is issued on or before January
20 8, 2001.

21 (bn) “Local governmental unit” means a city, village, town, county, or special
22 purpose district; an agency or corporation of a city, village, town, county, or special
23 purpose district; or a combination or subunit of any of the foregoing.

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

25 (1m).

BILL

SECTION 7

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

3 (1m) DETERMINATION OF NONFEDERAL WETLANDS. (a) A wetland is identified as
4 a nonfederal wetland if either of the following applies:

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

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

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

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

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

22 (2) CERTIFICATION REQUIREMENT. (a) No person may discharge dredged or fill
23 material into a nonfederal wetland unless the discharge is authorized by a water
24 quality certification issued by the department under this section. No person may
25 violate any condition imposed by the department in a water quality certification

1 under this section. The department may not issue a water quality certification under
2 this section unless it determines that the discharge will comply with all applicable
3 water quality standards.

4 (b) The department shall determine whether to approve or deny an application
5 for a water quality certification under this section within 90 days after the
6 application for the certification is initially submitted.

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

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

BILL

SECTION 7

- 1 (a) Normal farming, silviculture, or ranching activities.
- 2 (b) Maintenance, emergency repair, or reconstruction of damaged parts of
3 structures that are in use in a nonfederal wetland.
- 4 (c) Construction or maintenance of farm ponds, stock ponds, or irrigation
5 ditches.
- 6 (d) Maintenance of drainage ditches.
- 7 (e) Construction or maintenance of farm roads, forest roads, or temporary
8 mining roads that is performed in accordance with best management practices, as
9 determined by the department, to ensure all of the following:
 - 10 1. That the flow and circulation patterns and chemical and biological
11 characteristics of the affected nonfederal wetland are not impaired.
 - 12 2. That the reach of the affected nonfederal wetland is not reduced.
 - 13 3. That any adverse effect on the aquatic environment of the affected
14 nonfederal wetland is minimized to the degree required by the department.
- 15 (5) INAPPLICABILITY OF EXEMPTIONS. Notwithstanding sub. (4), a discharge that
16 would be exempt under sub. (4) is subject to the certification requirement under sub.
17 (2) if the discharge is incidental to an activity that has as its purpose bringing a
18 nonfederal wetland, or part of a nonfederal wetland, into a use for which it was not
19 previously subject and if the activity may do any of the following:
 - 20 (a) Impair the flow or circulation of any nonfederal wetland.
 - 21 (b) Reduce the reach of any nonfederal wetland.
- 22 (6) RULES FOR EXEMPTIONS. The department shall promulgate rules to interpret
23 and implement the provisions under subs. (4) and (5). The rules shall be consistent
24 with all existing federal laws or interpretations. The department shall incorporate

1 all additional federal laws or interpretations into the rules that the department
2 promulgates under this subsection and may not otherwise amend the rules.

3 (7) RULES PROHIBITION. The department may not promulgate or enforce a rule
4 requiring a person who submits an application for a water quality certification under
5 this section for the discharge of dredged or fill material into a nonfederal wetland
6 that is less than one acre in size to submit a description of practicable alternatives
7 to the discharge or to submit a description of any investigation conducted to
8 determine the viability of such alternatives if the discharge ~~is required by a local~~
9 ~~governmental unit in order for the person submitting the application for the water~~

10 ~~quality certification to receive approval from the local governmental unit for an~~
11 ~~activity that serves a public purpose.~~ *is determined by a local governmental unit*
to be necessary for public safety

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

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

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

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

23 (c) If the department determines that any of the discharges under a general
24 water quality certification issued under this section fails to meet any of the standards
25 in par. (a), the department shall modify the certification so that the discharges meet

BILL

SECTION 7

1 all of the standards. If the department cannot modify the certification so that all of
2 the standards will be met or if the department determines that the discharges subject
3 to the general certification are more appropriately certified by using individual
4 water quality certifications, the department shall revoke the general certification.

5 (d) Before issuing, modifying, or revoking a general water quality certification
6 under this subsection, the department shall provide notice and a hearing under ss.
7 227.17 and 227.18.

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

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

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

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

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

1 (b) Any employee or representative of the department may exercise the
2 authority granted under par. (a) 1., 2., or 3. only during reasonable hours and only
3 after the department has provided reasonable advance notice to the person owning
4 the 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 8.** 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 9.** 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.

BILL

SECTION 10

1 **SECTION 10.** 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 11. 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 (3) **EMERGENCY RULES FOR WETLAND MITIGATION.** Using the procedure under
17 section 227.24 of the statutes, the department of natural resources may promulgate
18 the rules required under section 281.37 (3) of the statutes, as affected by by this act,
19 for the period before the effective date of the rules submitted under 1999 Wisconsin
20 Act 147, section 5 (1), but not to exceed the period authorized under section 227.24
21 (1) (c) and (2) of the statutes. Notwithstanding section 227.24 (1) (a), (2) (b), and (3)
22 of the statutes, the department is not required to provide evidence that promulgating
23 a rule under this subsection as an emergency rule is necessary for the preservation
24 of the public peace, health, safety, or welfare and is not required to provide a finding
25 of emergency for a rule promulgated under this subsection.



State of Wisconsin
2001 - 2002 LEGISLATURE

April 2001 Special Session

RMR
LRB-3093/23

MGG:kmg/wlj/hmh/cs:ch

BILL

Tues
9am

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, rules for wetland compensatory mitigation, granting
6 rule-making authority, providing an exemption from emergency rule
7 procedures, 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.

BILL

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

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

BILL

For an individual certification, DNR must determine whether it will approve or deny the certification within 90 days after the application for the certification is submitted.

The bill also prohibits DNR from promulgating a rule that requires a person who is applying for a water quality certification for a nonfederal wetland that is less than one acre in size to submit information concerning practicable alternatives to the discharge that exist or that may be viable if the discharge ~~is necessary to comply with a requirement imposed by a local government as a condition for approval by the local government of an activity that serves a public purpose.~~ *INS*

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 or withdrawn, on the date of denial or withdrawal. 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).

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

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

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

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

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

19 281.01 (21) “Wetland” has the meaning given in s. 23.32 (1).

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

21 **281.36 Water quality certification for nonfederal wetlands. (1)**

22 DEFINITIONS. In this section:

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

24 1. An amendment to 33 USC 1344 (f) that becomes effective after January 9,
25 2001.

BILL

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

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

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

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

12 1. 33 USC 1344 (f), as amended to January 8, 2001.

13 2. A regulation, rule, memorandum of agreement, guidance letter, interpretive
14 document, or other provision established by a federal agency that is promulgated or
15 adopted pursuant to 33 USC 1344 (f) or that is used to interpret or implement 33 USC
16 1344 (f), that applies to wetlands in this state, and that is in effect on January 8, 2001.

17 3. A decision issued by a federal district or federal appellate court that affects
18 the application of a federal amendment or provision described in subds. 1. and 2.,
19 that applies to wetlands located in this state, and that is issued on or before January
20 8, 2001.

21 (bn) “Local governmental unit” means a city, village, town, county, or special
22 purpose district; an agency or corporation of a city, village, town, county, or special
23 purpose district; or a combination or subunit of any of the foregoing.

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

25 (1m).

BILL

SECTION 7

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

3 **(1m) DETERMINATION OF NONFEDERAL WETLANDS.** (a) A wetland is identified as
4 a nonfederal wetland if either of the following applies:

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

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

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

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

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

22 **(2) CERTIFICATION REQUIREMENT.** (a) No person may discharge dredged or fill
23 material into a nonfederal wetland unless the discharge is authorized by a water
24 quality certification issued by the department under this section. No person may
25 violate any condition imposed by the department in a water quality certification

1 under this section. The department may not issue a water quality certification under
2 this section unless it determines that the discharge will comply with all applicable
3 water quality standards.

4 (b) The department shall determine whether to approve or deny an application
5 for a water quality certification under this section within 90 days after the
6 application for the certification is initially submitted.

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

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

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

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

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

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

22 **(6) RULES FOR EXEMPTIONS.** The department shall promulgate rules to interpret
23 and implement the provisions under subs. (4) and (5). The rules shall be consistent
24 with all existing federal laws or interpretations. The department shall incorporate

1 all additional federal laws or interpretations into the rules that the department
2 promulgates under this subsection and may not otherwise amend the rules.

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

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

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

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

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

21 (c) If the department determines that any of the discharges under a general
22 water quality certification issued under this section fails to meet any of the standards
23 in par. (a), the department shall modify the certification so that the discharges meet
24 all of the standards. If the department cannot modify the certification so that all of
25 the standards will be met or if the department determines that the discharges subject

BILL

1 to the general certification are more appropriately certified by using individual
2 water quality certifications, the department shall revoke the general certification.

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

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

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

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

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

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

24 (b) Any employee or representative of the department may exercise the
25 authority granted under par. (a) 1., 2., or 3. only during reasonable hours and only

1 after the department has provided reasonable advance notice to the person owning
2 the 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 8.** 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 9.** 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),
19 any person who violates this chapter or any rule promulgated or any plan approval,
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 10.** 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 11. 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:

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 (3) **EMERGENCY RULES FOR WETLAND MITIGATION.** Using the procedure under
17 section 227.24 of the statutes, the department of natural resources may promulgate
18 the rules required under section 281.37 (3) of the statutes, as affected by by this act,
19 for the period before the effective date of the rules submitted under 1999 Wisconsin
20 Act 147, section 5 (1), but not to exceed the period authorized under section 227.24
21 (1) (c) and (2) of the statutes. Notwithstanding section 227.24 (1) (a), (2) (b), and (3)
22 of the statutes, the department is not required to provide evidence that promulgating
23 a rule under this subsection as an emergency rule is necessary for the preservation
24 of the public peace, health, safety, or welfare and is not required to provide a finding
25 of emergency for a rule promulgated under this subsection.

BILL

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

3 (1) The treatment of section 23.321 (2) of the statutes takes effect on August
4 1, 2001, or on the day after publication, whichever is later.

5 **(END)**

11/15

no 4

is determined by a local governmental unit to be necessary for public safety.



State of Wisconsin

2001 - 2002 LEGISLATURE

April 2001 Special Session

RMR

LRB-3093/34

MGG:kmg/wlj/hmh/es:jf

D-Note

BILL

Wed a.m. STAYS ASAP

John. 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, rules for wetland compensatory mitigation, granting
 6 rule-making authority, providing an exemption from emergency rule
 7 procedures, 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.

BILL

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

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

INS
ANL

3 of
certain conditions
imposed under

insert

~~For an individual certification, DNR must determine whether it will approve or deny the certification within 90 days after the application for the certification is submitted.~~

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

30th ✓

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 ~~30th~~ day immediately following completion of the discharge ~~subject to~~ the certification, or, if the application is denied or withdrawn, on the date of denial or withdrawal. 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).

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

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

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

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

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

19 **281.01 (21)** “Wetland” has the meaning given in s. 23.32 (1).

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

21 **281.36 Water quality certification for nonfederal wetlands. (1)**

22 **DEFINITIONS.** In this section:

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

24 **1.** An amendment to 33 USC 1344 (f) that becomes effective after January 9,
25 2001.

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

3 3. A regulation, rule, memorandum of agreement, guidance letter, interpretive
4 document, or other provision established by a federal agency that is promulgated or
5 adopted pursuant to 33 USC 1344 (f) or that is used to interpret or implement 33 USC
6 1344 (f), that applies to ~~wetlands~~^{nonfederal} located in this state, and that becomes effective
7 after January 9, 2001.

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

11 (b) "Existing federal law or interpretation" means any of the following: ^{with}

12 1. 33 USC 1344 (f), as amended to January 8, 2001.

13 2. A regulation, rule, memorandum of agreement, guidance letter, interpretive
14 document, or other provision established by a federal agency that is promulgated or
15 adopted pursuant to 33 USC 1344 (f) or that is used to interpret or implement 33 USC
16 1344 (f), that applies to ~~wetlands~~^{nonfederal} in this state, and that is in effect on January 8, 2001.

17 3. A decision issued by a federal district or federal appellate court that affects
18 the application of a federal amendment or provision described in subds. 1. and 2.,
19 that applies to ~~wetlands~~^{nonfederal} located in this state, and that is issued on or before January
20 8, 2001.

21 (bn) "Local governmental unit" means a city, village, town, county, or special
22 purpose district; an agency or corporation of a city, village, town, county, or special
23 purpose district; or a combination or subunit of any of the foregoing.

24 (c) "Nonfederal wetland" means a wetland that is identified as such under sub.
25 (1m).

BILL

SECTION 7

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

3 **(1m) DETERMINATION OF NONFEDERAL WETLANDS.** (a) A wetland is identified as
4 a nonfederal wetland if either of the following applies:

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

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

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

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

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

22 **(2) CERTIFICATION REQUIREMENT.** (a) No person may discharge dredged or fill
23 material into a nonfederal wetland unless the discharge is authorized by a water
24 quality certification issued by the department under this section. No person may
25 violate any condition imposed by the department in a water quality certification

1 under this section. The department may not issue a water quality certification under
2 this section unless it determines that the discharge will comply with all applicable
3 water quality standards.

4 (b) The department shall determine whether to approve or deny an application
5 for a water quality certification under this section within 90 days after the
6 application for the certification is initially submitted.

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

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

INS
ERT
7-6

BILL

- 1 (a) Normal farming, silviculture, or ranching activities.
- 2 (b) Maintenance, emergency repair, or reconstruction of damaged parts of
3 structures that are in use in a nonfederal wetland.
- 4 (c) Construction or maintenance of farm ponds, stock ponds, or irrigation
5 ditches.
- 6 (d) Maintenance of drainage ditches.
- 7 (e) Construction or maintenance of farm roads, forest roads, or temporary
8 mining roads that is performed in accordance with best management practices, as
9 determined by the department, to ensure all of the following:
- 10 1. That the flow and circulation patterns and chemical and biological
11 characteristics of the affected nonfederal wetland are not impaired.
- 12 2. That the reach of the affected nonfederal wetland is not reduced.
- 13 3. That any adverse effect on the aquatic environment of the affected
14 nonfederal wetland is minimized to the degree required by the department.
- 15 **(5) INAPPLICABILITY OF EXEMPTIONS.** Notwithstanding sub. (4), a discharge that
16 would be exempt under sub. (4) is subject to the certification requirement under sub.
17 (2) if the discharge is incidental to an activity that has as its purpose bringing a
18 nonfederal wetland, or part of a nonfederal wetland, into a use for which it was not
19 previously subject and if the activity may do any of the following:
- 20 (a) Impair the flow or circulation of any nonfederal wetland.
- 21 (b) Reduce the reach of any nonfederal wetland.
- 22 **(6) RULES FOR EXEMPTIONS.** The department shall promulgate rules to interpret
23 and implement the provisions under subs. (4) and (5). The rules shall be consistent
24 with all existing federal laws or interpretations. The department shall incorporate

1 all additional federal laws or interpretations into the rules that the department
2 promulgates under this subsection and may not otherwise amend the rules.

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

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

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

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

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

21 (c) If the department determines that any of the discharges under a general
22 water quality certification issued under this section fails to meet any of the standards
23 in par. (a), the department shall modify the certification so that the discharges meet
24 all of the standards. If the department cannot modify the certification so that all of
25 the standards will be met or if the department determines that the discharges subject

1 to the general certification are more appropriately certified by using individual
2 water quality certifications, the department shall revoke the general certification.

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

INSERT
10-5

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

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

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

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

17 (am) An employee or representative of the department may not exercise the
18 authority granted under par. (a) 1. before the date ^{on} upon which the application is
19 submitted. If the application is withdrawn or denied, an employee or representative
20 of the department may not exercise this authority after the date on which the
21 application is withdrawn or denied. If the application is approved, an employee or
22 representative of the department may not exercise this authority after the ^{30th} ~~20th~~ day
23 immediately following the completion ^{date} of the discharge of the dredged or fill material.

24 (b) Any employee or representative of the department may exercise the
25 authority granted under par. (a) 1., 2., or 3. only during reasonable hours and only

or the completion of any conditions imposed ~~by~~ under
the water quality certification, whichever ^{date} is later.

1 after the department has provided reasonable advance notice to the person owning
2 the 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 8.** 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 9.** 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),
19 any person who violates this chapter or any rule promulgated or any plan approval,
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 10.** 299.95 of the statutes is amended to read:

BILL

SECTION 10

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 11. 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:

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 (3) **EMERGENCY RULES FOR WETLAND MITIGATION.** Using the procedure under
17 section 227.24 of the statutes, the department of natural resources may promulgate
18 the rules required under section 281.37 (3) of the statutes, as affected by by this act,
19 for the period before the effective date of the rules submitted under 1999 Wisconsin
20 Act 147, section 5 (1), but not to exceed the period authorized under section 227.24
21 (1) (c) and (2) of the statutes. Notwithstanding section 227.24 (1) (a), (2) (b), and (3)
22 of the statutes, the department is not required to provide evidence that promulgating
23 a rule under this subsection as an emergency rule is necessary for the preservation
24 of the public peace, health, safety, or welfare and is not required to provide a finding
25 of emergency for a rule promulgated under this subsection.

2001-2002 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3093/4ins
MGG:.....

for an additional 60 days

Insert ANL

~~(b) (1)~~ For an individual certification, DNR must determine whether it will approve or deny the certification within 90 days after the application for the certification is submitted unless the deadline is extended for good cause. If DNR fails to meet that deadline, the application is considered to be approved.

the applicable

Insert 7-6

(b) 1. The department shall determine whether to approve or deny a complete application for a water quality certification under this section within 90 days after the application for the certification is initially submitted. The department ~~may~~ ^{shall} extend the time period for an additional 60 days upon request of the applicant or upon its own initiative if the department ~~determines~~ ^{finds} that good cause exists for the extension. If the department fails to ~~make the determination~~ ^{STE T} within the applicable time period, the application shall be considered to be approved and the department shall immediately issue the water quality certification.

2. For purposes of subd. 1., the department shall determine when a complete application has been submitted. The department shall review an application for completeness within 30 days after receiving the application and shall notify the ~~applicant~~ ^{applicant} within 10 days after that review of any information that is necessary to complete the application. The department may not consider an application complete until the requirements under s. 1.11 have been met and until all ~~the~~ ^{of} information necessary for the water quality certification and any associated permits or other approvals have been submitted to the department.

Insert 10-5

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

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3093/4dn

MGG/.....
KMG

1. In the paragraph in the analysis ^{beginning} with "Parallel to the general permitting procedures" I deleted the last sentence that was in LRB-3093/3. ~~This~~ sentence was included in error. The text of the bill does not require DNR to issue general water quality certifications that are consistent with the general ACE permits in existence before the U.S. Supreme Court decision. ^{that begins}
2. Please review the language on determining when an application is complete. It varies somewhat from the language found in NR 299.03 (2) Adm. Code. If you have any questions as to how I drafted this language please call me. ^{That}
3. Please note that I have added s. 281.36 (8) (e). ^{So}

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

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3093/4dn
MGG:kmg:jf

April 18, 2001

1. In the paragraph, in the analysis, that begins with "Parallel to the general permitting procedures," I deleted the last sentence that was in LRB-3093/3. That sentence was included in error. The text of the bill does not require DNR to issue general water quality certifications that are consistent with the general ACE permits in existence before the U.S. Supreme Court decision.
2. Please review the language on determining when an application is complete. It varies somewhat from the language found in s. NR 299.03 (2), Wis. Adm. Code. If you have any questions as to how I drafted this language please call me.
3. Please note that I have added s. 281.36 (8) (e).

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

Barman, Mike

From: Barman, Mike
Sent: Wednesday, April 18, 2001 10:10 AM
To: Kelly, Scott
Subject: LRB-3093/4 (attached)

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

Gibson-Glass, Mary

From: Kelly, Scott
Sent: Monday, April 23, 2001 5:27 PM
To: Gibson-Glass, Mary
Subject: FW: Wetlands Language

← Redraft instructions

-----Original Message-----

From: Larson, Tom [mailto:tlarson@wra.org]
Sent: Monday, April 23, 2001 5:13 PM
To: 'scott.kelly@gov.state.wi.us'; 'sdilweg@patrickessie.com'
Subject: Wetlands Language

- mandamus lang.
- technical changes in 281.36(1)(b)3.
- local government limited to county or city town area of special resource interest (ANRSI) in 281.36(7) language from 50097/P1 for inspections and (b)(b), and (b) applicable before additional in sub (b)

Here are the suggested changes to LRB 3093/4:

Page 7, after line 16 -- "The department shall determine whether an application under this section is complete and, no later than thirty (30) days after the application is filed, notify the applicant in writing about the determination. If the department determines that the application is incomplete, the department shall state, in writing, the reason for the determination and the specific items of information necessary to make the application complete. An applicant may supplement and refile an application that the department has determined to be incomplete. There is no limit on the number of times that an applicant may refile an application under this section. If the department fails to determine whether an application is complete within 30 days after the application is filed, the application is deemed approved. The department shall not be entitled to subsequently demand additional information not specified in the notice as a condition of completeness unless both the department and the applicant agree or the applicant makes material additions or alterations to the project." (this language is taken from Wis. Stat. sec. 196.491(3)(b)) (3)(a) 2.

Page 9, after the language from Sean Dilweg's memo -- "If the local unit of government decides to hold a public hearing, it shall do so no later than 30 days after the permit applicant submits a request for a public safety determination to the local unit of government." *may hold a hearing notice of* *must state grounds for determining its public safety*

Thomas D. Larson - Director of Land Use and Environmental Affairs
Wisconsin REALTORS* Association
4801 Forest Run Road Suite 201
Madison, WI 53704-7337
Phone 608-241-2047
Fax 608-241-2901
<<http://www.wra.org>>

This e-mail message is intended solely for the person to whom it is addressed and may contain confidential and/or privileged information. If you have received this e-mail message in error, but are affiliated with the person to whom it is addressed, please notify the addressee that the e-mail has been received (otherwise delete it). Any review, dissemination, copying, printing or other use of this email message by persons other than the addressee is prohibited.

~~60~~ 90 → 120 days unless extended by parties

{ the applicant can petition the court
for a writ of mandamus within no
more than 30 days after ^{issuing the mandamus.} hearing date.
Attorneys + costs and fees.

{ reasonable attorneys fees
and actual cause ^{incurred} _{incurred}
pending the action

bring
an
action
for
mandamus