

May 2001 Special Session

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and procedures
time limits for processing applications
for water quality certifications that
are applicable to wetlands,

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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), 299.95 and 814.04 (intro.); and to
 4 create 281.01 (21) and 281.36 of the statutes; relating to: water quality
 5 certification for nonfederal wetlands, ~~rules for wetland compensatory~~
 6 ~~mitigation~~, granting rule-making authority, ~~providing an exemption from~~
 7 ~~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.

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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.

certification

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for a non-federal wetland

for determining

INS ANL 1

For an individual certification, DNR must approve or deny the certification within 120 days after the completed application for the certification is submitted unless the applicant and DNR agree to an extension. The bill imposes specific requirements on the method DNR uses to determine whether the application is complete. If DNR fails to meet the applicable deadline, the applicant may petition a court to compel DNR to approve or deny the application. If the court grants the petition, DNR must comply within 30 days after the granting of the petition, and the applicant shall be awarded reasonable attorney fees and court costs.

an applicant

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 and that is not in an "area of special natural resource interest" 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. A local governmental unit is authorized, but not required, to make such a determination if requested to do so by an applicant for a water quality certification for a nonfederal wetland. The bill imposes specific procedural requirements on a local governmental unit that makes such a determination.

required

INS ANL 2

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Current law defines "an area of special natural resource interest" as being an area that has significant ecological, cultural, aesthetic, educational, recreational, or scientific values and specifically lists certain areas. The areas listed include Lake Superior, Lake Michigan, the Mississippi River, the Lower Wisconsin State Riverway, fish and wildlife refuges, and state parks and forests.

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 30th day immediately following completion of the discharge or of any conditions imposed under 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 reason to believe is in violation of the statutes ~~regulation~~ nonfederal wetlands. The bill specifies a procedure DNR must follow in investigating these possible violations. 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.

that applies to that wetland

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

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

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

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

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

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

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

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

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

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

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

5 281.01 (21) "Wetland" has the meaning given in s. 23.32 (1).

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

7 **281.36 Water quality certification for nonfederal wetlands. (1)**

8 **DEFINITIONS.** In this section:

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

10 1. An amendment to 33 USC 1344 (f) that becomes effective after January 9,
11 2001.

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

14 3. A regulation, rule, memorandum of agreement, guidance letter, interpretive
15 document, or other provision established by a federal agency that is promulgated or
16 adopted pursuant to 33 USC 1344 (f) or that is used to interpret or implement 33 USC
17 1344 (f), that applies to wetlands located in this state, and that becomes effective
18 after January 9, 2001.

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

22 (am) "Area of special natural resource interest" has the meaning given in s.
23 281.37 (1) (a).

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

25 1. 33 USC 1344 (f), as amended to January 8, 2001.

INS 5-5 ✓

BILL

SECTION 7

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

the federal highway administration or the federal railroad administration

1 2. 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 is in effect on January
5 8, 2001.

6 3. A decision issued by a federal district or federal appellate court that affects
7 the application of a federal statute or provision described in subd. 1. or 2., that
8 applies to wetlands located in this state, and that is issued on or before January 8,
9 2001.

¶ (cm)

"Political subdivision"

~~(m)~~ "Local governmental unit" means a city, village, town, or county.

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

(1m).

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

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

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

2. The wetland is determined to be a nonnavigable, intrastate, and isolated wetland under the decision in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, No. 99-1178 (U.S. Jan. 9, 2001) or any subsequent

¶ (cr) "State transportation agency" means the department of transportation or the office of the commissioner of railroads.

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

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

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

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

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

16 (b) 1. The department shall approve or deny a complete application for a water
17 quality certification under this section within 120 days after the complete
18 application for the certification ~~is~~ ^{has been} submitted unless the applicant and the
19 department agree to extend the time period. If the department fails to approve or
20 deny the complete application within the applicable time period, the applicant may
21 bring an action for mandamus to compel the department to approve or deny the
22 application. If the court grants the mandamus, the department shall approve or
23 deny the application within 30 days after the mandamus is granted and the court
24 shall award the applicant reasonable attorney fees and court costs incurred in
25 bringing the action.

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

15 **(3) DELINEATION PROCEDURES.** For purposes of delineating the boundary of a
16 nonfederal wetland, the department and the person who is applying for or who holds
17 a water quality certification under this section shall use the procedures contained
18 in the wetlands delineation manual published by the U.S. army corps of engineers.
19 The edition of the manual that shall be used shall be the 1987 edition of the manual
20 and any document that the U.S. army corps of engineers issues interpreting that
21 manual, unless the U.S. army corps of engineers publishes an edition of the manual
22 after January 9, 2001, and the department by rule designates that edition as the one
23 to be used under this subsection. If the U.S. army corps of engineers issues a
24 guidance document interpreting the edition of the wetlands delineation manual that
25 the department is required to use under this subsection and if that guidance

1 document is issued after the effective date of this paragraph [revisor inserts date],
2 the department shall notify the appropriate standing committee of each house of the
3 legislature, as determined by the speaker of the assembly and the president of the
4 senate, of the issuance of the guidance document and whether the department
5 intends to promulgate a rule incorporating the provisions of the guidance document.

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

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

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

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

14 (d) Maintenance of drainage ditches.

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

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

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

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

23 (5) INAPPLICABILITY OF EXEMPTIONS. Notwithstanding sub. (4), a discharge that
24 would be exempt under sub. (4) is subject to the certification requirement under sub.
25 (2) if the discharge is incidental to an activity that has as its purpose bringing a

BILL

SECTION 7

1 nonfederal wetland, or part of a nonfederal wetland, into a use for which it was not
2 previously subject and if the activity may do any of the following:

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

5 (6) RULES FOR EXEMPTIONS. (a) The department shall promulgate rules to
6 interpret and implement the provisions under subs. (4) and (5). In promulgating
7 these rules, the department shall do all of the following:

- 8 1. Make the rules consistent with existing federal law.
- 9 2. Incorporate any applicable additional federal law or interpretation into the
10 rules.

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

15 (7) RULES PROHIBITION; DETERMINATIONS OF PUBLIC SAFETY. (a) The department
16 may not promulgate or enforce a rule requiring a person who submits an application
17 for a water quality certification under this section for the discharge of dredged or fill
18 material into a nonfederal wetland ~~that is less than one acre in size and that is not~~
19 ~~in an area of special natural resource interest to submit a description of practicable~~
20 alternatives to the discharge or to submit a description of any investigation
21 conducted to determine the viability of such alternatives if ~~the discharge is~~
22 ~~determined by a local governmental unit to be necessary for public safety as provided~~
23 in par. (b).

24 (b) A local governmental unit ~~may~~ make a determination as to whether a
25 discharge is necessary for public safety if requested to do so by an applicant for a

all of the following apply:

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*appropriate notice
as determined by the
local governmental unit*

shall make

1 water quality certification under this section. ~~the~~ local governmental unit makes
2 the determination, it shall do so in writing. Before making any such determination,
3 a local governmental unit shall publish a class 1 notice under ch. 985 describing the
4 request and stating it will be making the determination. The local governmental
5 unit may hold a public hearing after publishing the notice to determine whether the
6 discharge is necessary for public safety. If the local governmental unit holds a public
7 hearing, it shall hold the hearing no later than 30 days after the applicant for the
8 water quality certification made the request. A written determination by a local
9 governmental unit under this paragraph shall include a statement of the grounds for
10 making the determination.

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

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

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

20 (b) No general water quality certification issued under par. (a) may be effective
21 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.

BILL

SECTION 7

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

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

12 (d) Before issuing, modifying, or revoking a general water quality certification
13 issued under par. (a), the department shall provide notice and a hearing under ss.
14 227.17 and 227.18.

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

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

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

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

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

3 (am) An employee or representative of the department may not exercise the
4 authority granted under par. (a) 1. before the date on which the application is
5 submitted. If the application is denied or withdrawn, an employee or representative
6 of the department may not exercise this authority after the date on which the
7 application is denied or withdrawn. If the application is approved, an employee or
8 representative of the department may not exercise this authority after the 30th day
9 immediately following the completion date of the discharge of the dredged or fill
10 material or the completion date of any conditions imposed under the water quality
11 certification, whichever date is later.

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

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

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

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

22 b. If the proprietor refuses to grant consent for the entry on, or the inspection
23 of, the property or if the proprietor's explanation or terms of consent are not
24 acceptable to the department of natural resources, the department of natural

BILL

SECTION 7

1 resources may ^{apply for, obtain, or execute a special inspection warrant} refer the matter to the department of justice for enforcement under ^{under}
2 s. 299.95. ^{S. 660119}
^{or}

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

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

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

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

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

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

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

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

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

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

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

10 **SECTION 10.** 299.95[✓] of the statutes is amended to read:

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

BILL

SECTION 10

1 289 to 295 and this chapter. Any funds paid to the department of justice under these
2 agreements shall be credited to the appropriation account under s. 20.455 (1) (k).

3 **SECTION 11.** 814.04 (intro.) of the statutes is amended to read:

4 **814.04 Items of costs.** (intro.) Except as provided in ss. 93.20, 100.30 (5m),
5 106.50 (6) (i) and (6m) (a), 115.80 (9), 281.36 (2) (b) 1., 769.313, 814.025, 814.245,
6 895.035 (4), 895.10 (3), 895.75 (3), 895.77 (2), 895.79 (3), 895.80 (3), 943.212 (2) (b),
7 943.245 (2) (d) and 943.51 (2) (b), when allowed costs shall be as follows:

8 **SECTION 12. Nonstatutory provisions.**

9 (1) TEMPORARY PROCESS.

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

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

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

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

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

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

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no #
The bill also requires DNR to promulgate a rule to establish time limits for determinations that DNR makes as to whether projects comply with water quality standards that are applicable to wetlands that are not nonfederal wetlands.

→ no # or that may be viable if the discharge is determined by a local governmental unit, a state transportation agency, or a federal transportation agency to be necessary for public safety. The bill defines a state transportation agency to be the state department of transportation or the office of the commissioner of railroads, defines a federal transportation agency to be the federal aviation administration, the federal highway administration, or the federal railroad administration. Under the bill, a local governmental unit or a state transportation agency must make such a determination if requested to do so by an applicant for a water quality certification for a nonfederal wetland. The bill provides specific procedural and judicial review provisions for these determinations. The bill also authorizes an applicant to seek such a determination from a federal transportation agency.

→ The bill also provides that even if an applicant for a water quality certification for a nonfederal wetlands receives such a determination, DNR may proceed on its own to determine whether there is a practical alternative if DNR determines the nonfederal wetland has sufficient functional value to warrant an examination by DNR of the practicable alternatives. Under this procedure, DNR must first look for a practical alternative that will not conflict with the determination that the discharge is necessary for public safety on the land where the nonfederal wetland is located. If there is no practical alternative on that land, DNR may look for a nonconflicting practical alternative on land where the nonfederal wetland is not located. If the DNR finds that no such practical alternative exists, it may require the applicant to implement a wetland mitigation project. A wetland mitigation project is one that restores, enhances, or creates another wetland to compensate for the adverse impact to the nonfederal wetland.

- (b)
- INS
10-23
1. The wetland is less than one acre in size.
 2. The wetland is not in an area of special natural resource interest.
 3. The application for the water quality certification includes a copy of ^{final} ~~written~~ determination that the discharge is necessary for public safety ^a and that is ^{made} under par. (b) by a political subdivision or a state transportation agency, or that is made in response to a request to a federal transportation agency made under par.

(bn) ^{no #} For purposes of this subdivision, a determination is not final until all judicial review has been exhausted.

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

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

for the water quality certification made the request for the determination. The political subdivision or the state transportation agency shall issue the determination in writing, and the determination shall include a statement of the grounds for making the determination.

3. If an applicant for a water quality certification who made a request for a determination issued by the governing body of a political subdivision under subd. 2. is not satisfied with the determination, the applicant may file a petition for judicial review in the circuit court having jurisdiction over the political subdivision. If an applicant

governing body of the

Any person, including the department, who is adversely affected receives benefits
by a ~~department or any person~~ *issu* ~~the department~~ *or the department* ~~is not~~ *of the* ~~is not~~ *deter-* ~~may file a petition for judicial review~~ *mination* ~~in the circuit court having jurisdiction over the political subdivision. If an applicant~~ *tion*

The department or any person who

under subd. 2, or the department,

for a water quality certification who ^{receives} made a request for a determination from a state transportation agency ^{who is adversely affected by} is not satisfied with the determination, the applicant may seek independent judicial review in circuit court and the facts and issues of law shall be subject to trial de novo by the reviewing court. Sections 227.52 to 227.58 do not apply to any determination by a state transportation agency under this paragraph. issued by a state transportation agency

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

(c) 1. Notwithstanding the fact that an applicant for a water quality certification under this section has received a determination made by a political subdivision, a state transportation agency, or a federal transportation agency that the discharge is necessary for public safety under par. (b), the department may determine that the nonfederal wetland has sufficient functional value to warrant an examination by the department of the practicable alternatives to the proposed discharge that will not adversely affect the nonfederal wetland and that will not result in other significant adverse environmental consequences. keep comma

2. If the department determines under subd. 1. that an examination is warranted, the department shall conduct the examination by first determining, after consulting with the applicant for the water quality certification, whether an alternative to the discharge exists ^{on which the nonfederal wetland is located} that would not conflict with the determination ^{made under par. (b)} that the discharge is necessary for public safety. If the department determines that such a practical alternative exists, the department may ^{deny} impose as a condition to the water quality certification ^{practical} the implementation of the alternative.

the implementation of the alternative ^{or may deny the application if not}

3. If the department determines that no practical alternative exists after conducting the examination under subd 2., the department may proceed with the examination by determining, after consulting with the applicant for the water quality certification, whether an alternative to the discharge exists ^{of} on which the nonfederal wetland is not located ~~and~~ that would not conflict with the determination ~~under par. (b)~~ that the discharge is necessary for public safety. If the department determines that such a practical alternative exists, the department may ~~impose~~ ^{deny} as a condition ~~of~~ the water quality certification the ~~implementation of the alternative.~~

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

Insert 17-15

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

NON-STAT

Use auto number



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

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

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

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

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

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

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

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

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

INSERT
5-5

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

INS
5-5

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

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

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

Other than non-federal wetlands

as defined in s. 281.36 (1)(c).

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

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

15 DEFINITIONS. In this section:

- 16 (a) "Additional federal law or interpretation" means any of the following:
 - 17 1. An amendment to 33 USC 1344 (f) that becomes effective after January 9,
 - 18 2001.
 - 19 2. Any other federal statutory provision that affects the exemptions under 33
 - 20 USC 1344 (f) and that becomes effective after January 9, 2001.
 - 21 3. A regulation, rule, memorandum of agreement, guidance letter, interpretive
 - 22 document, or other provision established by a federal agency that is promulgated or
 - 23 adopted pursuant to 33 USC 1344 (f) or that is used to interpret or implement 33 USC
 - 24 1344 (f), that applies to wetlands located in this state, and that becomes effective
 - 25 after January 9, 2001.

1 department determines that the application is incomplete, the notice shall state the
2 reason for the determination and the specific items of information necessary to make
3 the application complete. An applicant may supplement and resubmit an
4 application that the department has determined to be incomplete. There is no limit
5 on the number of times that an applicant may resubmit an application that the
6 department has determined to be incomplete under this subdivision. The
7 department may not demand items of information that are not specified in the notice
8 as a condition for determining whether the application is complete unless both the
9 department and the applicant agree or unless the applicant makes material
10 additions or alterations to the project for which the the application has been
11 submitted. ^{no if} The department may not ~~consider~~ ^{determine} an application ^{to be} complete until the
12 requirements under s. 1.11 have been met and until all of the items of information
13 for the water quality certification and for any associated permits or other approvals
14 have been submitted to the department.

INSERT
7-19
✓

15 (3) DELINEATION PROCEDURES. For purposes of delineating the boundary of a
16 nonfederal wetland, the department and the person who is applying for or who holds
17 a water quality certification under this section shall use the procedures contained
18 in the wetlands delineation manual published by the U.S. army corps of engineers.
19 The edition of the manual that shall be used shall be the 1987 edition of the manual
20 and any document that the U.S. army corps of engineers issues interpreting that
21 manual, unless the U.S. army corps of engineers publishes an edition of the manual
22 after January 9, 2001, and the department by rule designates that edition as the one
23 to be used under this subsection. If the U.S. army corps of engineers issues a
24 guidance document interpreting the edition of the wetlands delineation manual that
25 the department is required to use under this subsection and if that guidance

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3093/7dn

MGG:.....

ejs

1. This bill gives persons seeking determinations of public safety various forums for making their request. Each nonfederal wetland is going to be in a county as well as in a city, village, or town. Also, such a person may seek a determination at the state and federal levels as well as the local levels. OK?
2. I recommend deleting the phrase "may not promulgate or enforce a rule requiring" to "may not require" to simplify the prohibition and because it is now carrying so many statutory requirements.
3. Our municipalities drafter informs me that the correct term to use when we are referring only to cities, villages, towns, and counties is "political subdivision" and not "local governmental unit". I have made those changes accordingly.
4. Do you want a deadline for the legislative council study committee? /

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



State of Wisconsin
2001 - 2002 LEGISLATURE

May 2001 Special Session

LRB-3093/7

MGG:kg/wlj/hmh/cs:jf

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Now

D-NOTE

INSERT

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

Analysis by the Legislative Reference Bureau

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

Federal law defines "navigable waters" to be "the waters of the United States." ACE in turn has interpreted "the waters of the United States" to include

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nonnavigable, isolated, intrastate waters if they serve as habitat for migratory birds that cross state lines.

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

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

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*makes a determination
that the discharge is*

quality certifications that are consistent with the general permits issued by ACE that applied to nonfederal wetlands before the U.S. supreme court decision.

For an individual certification for a non-federal wetland, DNR must approve or deny the certification within 120 days after the completed application for the certification is submitted unless the applicant and DNR agree to an extension. The bill imposes specific requirements on DNR for determining whether the application is complete. If DNR fails to meet the applicable deadline, the applicant may petition a court to compel DNR to approve or deny the application. If the court grants the petition, DNR must comply within 30 days after the granting of the petition, and the applicant shall be awarded reasonable attorney fees and court costs. The bill also requires DNR to promulgate a rule to establish time limits for determinations that DNR makes as to whether projects comply with water quality standards that are applicable to wetlands that are not nonfederal wetlands.

*and all
judicial
review
of the
determination
has been
exhausted*

The bill also prohibits DNR from promulgating a rule that requires an applicant for a water quality certification for a nonfederal wetland that is less than one acre in size and that is not in an "area of special natural resource interest" 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, a state transportation agency, or a federal transportation agency ~~to be~~ necessary for public safety.

no A

Current law defines "an area of special natural resource interest" as being an area that has significant ecological, cultural, aesthetic, educational, recreational, or scientific values and specifically lists certain areas. The areas listed include Lake Superior, Lake Michigan, the Mississippi River, the Lower Wisconsin State Riverway, fish and wildlife refuges, and state parks and forests. The bill defines a state transportation agency to be the state department of transportation or the office of the commissioner of railroads, and defines a federal transportation agency to be the federal aviation administration, the federal highway administration, or the federal railroad administration. Under the bill, a local governmental unit or a state transportation agency must make ~~such~~ a determination if requested to do so by an applicant for a water quality certification for a nonfederal wetland. The bill provides specific procedural and judicial review provisions for these determinations. The bill also authorizes an applicant to seek such a determination from a federal transportation agency.

of public safety

*INS
ANL*

The bill also provides that even if an applicant for a water quality certification for a nonfederal wetlands receives such a determination, DNR may proceed on its own to determine whether there is a practical alternative if DNR determines the nonfederal wetland has sufficient functional value to warrant an examination by DNR of the practicable alternatives. Under this procedure, DNR must first look for a practical alternative that will not conflict with the determination that the discharge is necessary for public safety on the land where the nonfederal wetland is located. If there is no practical alternative on that land, DNR may look for a nonconflicting practical alternative on land where the nonfederal wetland is not located. If the DNR finds that no such practical alternative exists, it may require the applicant to implement a wetland mitigation project. A wetland mitigation project

BILL

is one that restores, enhances, or creates another wetland to compensate for the adverse impact to the nonfederal wetland.

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

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 that applies to that wetland is submitted and ending on the 30th day immediately following completion of the discharge or of any conditions imposed under 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 reason to believe is in violation of the statutes regulating nonfederal wetlands. The bill specifies a procedure DNR must follow in investigating these possible violations. 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.

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

1 to the department to ensure that a wetland that is being restored, enhanced, or
2 created will not be destroyed or substantially degraded by any subsequent ~~owner~~
3 proprietor of or holder of interest in the property on which the wetland is located.
4 The department shall revoke the permit or other approval if the holder of the permit
5 or other approval fails to take these measures.

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

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

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

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

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

17 **281.22 (title) Fees and time limits for water quality determinations for**
18 **wetlands.**

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

20 281.22 (3) **EXEMPTIONS FROM FEES.** ~~This section does~~ Subsections (1), (2) and
21 (2m) do not apply to any federal agency or state agency.

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

23 281.22 (4) **TIME LIMITS.** The department shall promulgate a rule to establish
24 time limits for determinations that the department makes as to whether projects
25 comply with the standards of water quality established by rules promulgated under

1 s. 281.15 that are applicable to wetlands other than non-federal wetlands, as defined
2 in s. 281.36 (1) (c). Upon referral of any proposed rule under this subsection to the
3 presiding officer of each house of the legislature under s. 227.19 (2), the presiding
4 officers shall refer the proposed rule to a senate committee and an assembly
5 committee concerned with the environment.

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

7 **281.36 Water quality certification for nonfederal wetlands. (1)**

8 DEFINITIONS. In this section:

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

10 1. An amendment to 33 USC 1344 (f) that becomes effective after January 9,
11 2001.

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

14 3. A regulation, rule, memorandum of agreement, guidance letter, interpretive
15 document, or other provision established by a federal agency that is promulgated or
16 adopted pursuant to 33 USC 1344 (f) or that is used to interpret or implement 33 USC
17 1344 (f), that applies to wetlands located in this state, and that becomes effective
18 after January 9, 2001.

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

22 (am) “Area of special natural resource interest” has the meaning given in s.
23 281.37 (1) (a).

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

25 1. 33 USC 1344 (f), as amended to January 8, 2001.

1 2. 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 is in effect on January
5 8, 2001.

6 3. A decision issued by a federal district or federal appellate court that affects
7 the application of a federal statute or provision described in subd. 1. or 2., that
8 applies to wetlands located in this state, and that is issued on or before January 8,
9 2001.

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

13 (c) “Nonfederal wetland” means a wetland that is identified as such under sub.
14 (1m).

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

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

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

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

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

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

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

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

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

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

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

21 (b) 1. The department shall approve or deny a complete application for a water
22 quality certification under this section within 120 days after the date the department
23 determines that a complete application for the certification has been submitted
24 unless the applicant and the department agree to extend the time period. The
25 department may not determine an application to be complete until the requirements

1 under s. 1.11 have been met and until all of the items of information for the water
2 quality certification and for any associated permits or other approvals have been
3 submitted to the department. If the department fails to approve or deny the complete
4 application within the applicable time period, the applicant may bring an action for
5 mandamus to compel the department to approve or deny the application. If the court
6 grants the mandamus, the department shall approve or deny the application within
7 30 days after the mandamus is granted and the court shall award the applicant
8 reasonable attorney fees and court costs incurred in bringing the action.

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

23 (3) **DELINEATION PROCEDURES.** For purposes of delineating the boundary of a
24 nonfederal wetland, the department and the person who is applying for or who holds
25 a water quality certification under this section shall use the procedures contained

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SECTION 10

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

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

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

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

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

22 (d) Maintenance of drainage ditches.

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

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

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

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

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

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

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

13 **(6) RULES FOR EXEMPTIONS.** (a) The department shall promulgate rules to
14 interpret and implement the provisions under subs. (4) and (5). In promulgating
15 these rules, the department shall do all of the following:

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

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

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

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

BILL

SECTION 10

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

4 1. The wetland is less than one acre in size.

5 2. The wetland is not in an area of special natural resource interest.

6 3. The application for the water quality certification includes a copy of a final
7 determination that the discharge is necessary for public safety that is made under
8 par. (b) ~~by a political subdivision or a state transportation agency~~ ^{STET: leave as} or that is made in
9 response to a request ~~to a federal transportation agency~~ ^{typed} made under par. (bn). For
10 purposes of this subdivision, ^{and par. (c)} a determination is not final until all judicial review has
11 been exhausted.

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

19 2. Before a political subdivision or a state transportation agency makes any
20 determination under subd. 1., it shall publish appropriate notice, as determined by
21 the political subdivision or the state transportation agency, to the public that
22 describes the request and that states that it will be making the determination. On
23 or before the date of the publication of the notice, the political subdivision or state
24 transportation agency shall mail or otherwise provide a written copy of the notice to
25 the department. After publication of the notice, the governing body of the political

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1 subdivision or the state transportation agency may hold a public hearing to
2 determine whether the discharge is necessary for public safety. Any public hearing
3 held under this subdivision shall be held no later than 30 days after the applicant
4 for the water quality certification made the request for the determination. The
5 governing body of the political subdivision or the state transportation agency shall
6 issue the determination in writing, and the determination shall include a statement
7 of the grounds for making the determination.

8 ^{The department or} 3. Any person ~~whose~~ ^{whose substantial interests are} adversely affected by a determination issued by a
9 governing body of a political subdivision under subd. 2. ~~of the department,~~ may file
10 a petition for judicial review of the determination in the circuit court having
11 jurisdiction over the political subdivision. ^{The department or} Any person ~~whose~~ ^{whose substantial} adversely affected by ^{interests}

12 a determination issued by a state transportation agency under subd. 2. ~~of the~~
13 ~~department,~~ may seek judicial review in circuit court and the facts and issues of law
14 shall be subject to trial de novo by the reviewing court. Sections 227.52 to 227.58 do
15 not apply to any determination by a state transportation agency under this
16 paragraph.

17 ~~(3.1)~~ ~~(3.1)~~ An applicant for a water quality certification may submit a request to a
18 federal transportation agency for a determination as to whether a discharge into a
19 nonfederal wetland is necessary for public safety.

STET:
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as
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20 (c) 1. Notwithstanding the fact that an applicant for a water quality
21 certification under this section has received a ^{final} determination ~~made by a political~~
22 ~~subdivision, a state transportation agency, or a federal transportation agency,~~ that
23 the discharge is necessary for public safety, the department may determine that the
24 nonfederal wetland has sufficient functional value to warrant an examination by the
25 department of the practicable alternatives to the proposed discharge that will not

BILL

SECTION 10

1 adversely affect the nonfederal wetland and that will not result in other significant
2 adverse environmental consequences.

3 2. If the department determines under subd. 1. that an examination is
4 warranted, the department shall conduct the examination by first determining, after
5 consulting with the applicant for the water quality certification, whether an
6 alternative to the discharge exists on the parcel of land on which the nonfederal
7 wetland is located that would not conflict with the ^{final.} determination that the discharge
8 is necessary for public safety. If the department determines that such a practical
9 alternative exists, the department may deny the water quality certification.

10 3. If the department determines that no practical alternative exists after
11 conducting the examination under subd 2., the department may proceed with the
12 examination by determining, after consulting with the applicant for the water
13 quality certification, whether an alternative to the discharge exists on the parcel of
14 land on which the nonfederal wetland is not located that would not conflict with the
15 ^{final} determination that the discharge is necessary for public safety. If the department
16 determines that such a practical alternative exists, the department may deny the
17 water quality certification.

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

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

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

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

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

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

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

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

21 (d) Before issuing, modifying, or revoking a general water quality certification
22 issued under par. (a), the department shall provide notice and a hearing under ss.
23 227.17 and 227.18.

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

BILL

SECTION 10

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 to
8 investigate a discharge of dredged or fill material that the department has reason
9 to believe is in violation of this section.

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 on which the application is
14 submitted. If the application is denied or withdrawn, an employee or representative
15 of the department may not exercise this authority after the date on which the
16 application is denied or withdrawn. If the application is approved, an employee or
17 representative of the department may not exercise this authority after the 30th day
18 immediately following the completion date of the discharge of the dredged or fill
19 material or the completion date of any conditions imposed under the water quality
20 certification, whichever date is later.

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

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

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

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

8 b. If the proprietor refuses to grant consent for the entry on, or the inspection
9 of, the property or if the proprietor's explanation or terms of consent are not
10 acceptable to the department of natural resources, the department of natural
11 resources may apply for, obtain, or execute a special inspection warrant under s.
12 66.0119 or refer the matter to the department of justice for enforcement under s.
13 299.95.

14 c. If the proprietor fails to respond to all requests made under subd. 1., an agent
15 of the department of natural resources may apply for, obtain, and execute a special
16 inspection warrant under s. 66.0119.

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

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

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

BILL

SECTION 10

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 11.** 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 12.** 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 13.** 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 14.** 814.04 (intro.) of the statutes is amended to read:

13 **814.04 Items of costs.** (intro.) Except as provided in ss. 93.20, 100.30 (5m),
14 106.50 (6) (i) and (6m) (a), 115.80 (9), 281.36 (2) (b) 1., 769.313, 814.025, 814.245,
15 895.035 (4), 895.10 (3), 895.75 (3), 895.77 (2), 895.79 (3), 895.80 (3), 943.212 (2) (b),
16 943.245 (2) (d) and 943.51 (2) (b), when allowed costs shall be as follows:

17 **SECTION 15. 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:

BILL

SECTION 15

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

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

20 (1) The treatment of section 23.321 (2) of the statutes takes effect on August
21 1, 2001, or on the day after publication, whichever is later.

22

(END)

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aggrieved

DNR

and allows any aggrieved party or the department
to seek judicial review of these determinations.

~~A determination is not final until all judicial
remedies have been exhausted~~

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3093/7dn
MGG:ejj:jf

April 30, 2001

1. This bill gives persons seeking determinations of public safety various forums for making their request. Each nonfederal wetland is going to be in a county as well as in a city, village, or town. Also, such a person may seek a determination at the state and federal levels as well as the local levels. OK?
2. I recommend deleting the phrase "may not promulgate or enforce a rule requiring" to "may not require" to simplify the prohibition and because it is now carrying so many statutory requirements.
3. Our municipalities drafter informs me that the correct term to use when we are referring only to cities, villages, towns, and counties is "political subdivision" and not "local governmental unit." I have made those changes accordingly.
4. Do you want a deadline for the legislative council study committee?

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

Gibson-Glass, Mary

From: Stolzenberg, John
Sent: Monday, April 30, 2001 5:39 PM
To: Gibson-Glass, Mary
Subject: FW: Drafting Instructions for /8

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

From: Henderson, Patrick
Sent: Monday, April 30, 2001 5:36 PM
To: Stolzenberg, John; 'tlarson@wra.org'
Subject: Drafting Instructions for /8

If there are any other instructions that we missed in this list. It does not reflect the judicial review intent but I believe John had that clear.

After reviewing LRB 3093/7 we have the following changes:

Judicial Review intent: is to have the decision reviewable under existing judicial review provisions for those decisions.

Page 13 ln 8 add "state transportation agency"

Page 13 ln 10 add "state transportation agency" after political subdivision

Page 13 ln 10 add language to limit the opportunity for petitioning for judicial review to the current statutory limit of 30 days

Page 13 ln 10 to 15 delete starting with "The department...."

Concurrent analysis of practicable alternatives and functionality. Our understanding is this is similar to ACT 147 language.

Page 13 Lines 21-25: "... is necessary for public safety, the department may conduct an examination of ((delete parts of ln 21-23) practicable alternatives to the proposed discharge that will not adversely affect the nonfederal wetland and that will not result in other significant adverse environmental consequences.

Page 14 ln 6 after public safety "The department shall consider practicable alternatives concurrently with functional values of the nonfederal wetland."

Page 14 ln 14 after public safety "The department shall consider practicable alternatives concurrently with functional values of the nonfederal wetland."

Page 14 lines 7, 9, 15, 17 change practical to "practicable"

68.13

Thanks,

Pat



State of Wisconsin
2001 - 2002 LEGISLATURE

May 2001 Special Session

RMR
LRB-3093/17-8
MGG:kg/wlj/hmh/cs:jf

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Due

8 a.m. on
5/1

Sen. Cost.

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

Analysis by the Legislative Reference Bureau

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

Federal law defines "navigable waters" to be "the waters of the United States." ACE in turn has interpreted "the waters of the United States" to include

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nonnavigable, isolated, intrastate waters if they serve as habitat for migratory birds that cross state lines.

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

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

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nonfederal

quality certifications that are consistent with the general permits issued by ACE that applied to nonfederal wetlands before the U.S. supreme court decision.

For an individual certification for a ~~non-federal~~ wetland, DNR must approve or deny the certification within 120 days after the completed application for the certification is submitted unless the applicant and DNR agree to an extension. The bill imposes specific requirements on DNR for determining whether the application is complete. If DNR fails to meet the applicable deadline, the applicant may petition a court to compel DNR to approve or deny the application. If the court grants the petition, DNR must comply within 30 days after the granting of the petition, and the applicant shall be awarded reasonable attorney fees and court costs. The bill also requires DNR to promulgate a rule to establish time limits for determinations that DNR makes as to whether projects comply with water quality standards that are applicable to wetlands that are not nonfederal wetlands.

The bill also prohibits DNR from promulgating a rule that requires an applicant for a water quality certification for a nonfederal wetland that is less than one acre in size and that is not in an "area of special natural resource interest" to submit information concerning practicable alternatives to the discharge that exist or that may be viable if a local governmental unit, a state transportation agency, or a federal transportation agency makes a determination that the discharge is necessary for public safety, ~~and all judicial review of the determination has been exhausted.~~ Current law defines "an area of special natural resource interest" as being an area that has significant ecological, cultural, aesthetic, educational, recreational, or scientific values and specifically lists certain areas. The areas listed include Lake Superior, Lake Michigan, the Mississippi River, the Lower Wisconsin State Riverway, fish and wildlife refuges, and state parks and forests. The bill defines a state transportation agency to be the state department of transportation or the office of the commissioner of railroads, and defines a federal transportation agency to be the federal aviation administration, the federal highway administration, or the federal railroad administration.

Under the bill, a local governmental unit or a state transportation agency must make a determination of public safety if requested to do so by an applicant for a water quality certification for a nonfederal wetland. The bill provides specific procedural and judicial review provisions for these determinations and allows any aggrieved party or DNR to seek judicial review of these determinations. The bill also authorizes an applicant to seek such a determination from a federal transportation agency.

The bill also provides that even if an applicant for a water quality certification for a nonfederal wetland receives such a determination, DNR may proceed on its own to determine whether there is a practical alternative. ~~If DNR determines the nonfederal wetland has sufficient functional value to warrant an examination by DNR of the practicable alternatives.~~ Under this procedure, DNR must first look for a practical alternative that will not conflict with the determination that the discharge is necessary for public safety on the land where the nonfederal wetland is located. If there is no practical alternative on that land, DNR may look for a nonconflicting practical alternative on land where the nonfederal wetland is not located. ~~If DNR finds that no such practical alternative exists, it may require the~~

(X)

both courts are needed

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applicant to implement a wetland mitigation project. A wetland mitigation project is one that restores, enhances, or creates another wetland to compensate for the adverse impact to the nonfederal wetland.

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

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 that applies to that wetland is submitted and ending on the 30th day immediately following completion of the discharge or of any conditions imposed under 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 reason to believe is in violation of the statutes regulating nonfederal wetlands. The bill specifies a procedure DNR must follow in investigating these possible violations. 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.

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

1 to the department to ensure that a wetland that is being restored, enhanced, or
2 created will not be destroyed or substantially degraded by any subsequent ~~owner~~
3 proprietor of or holder of interest in the property on which the wetland is located.
4 The department shall revoke the permit or other approval if the holder of the permit
5 or other approval fails to take these measures.

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

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

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

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

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

17 **281.22 (title) Fees and time limits for water quality determinations for**
18 **wetlands.**

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

20 281.22 (3) **EXEMPTIONS FROM FEES.** ~~This section does Subsections (1), (2) and~~
21 ~~(2m) do not apply to any federal agency or state agency.~~

INS 5-24

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

23 281.22 (4) **TIME LIMITS.** The department shall promulgate a rule to establish
24 time limits for determinations that the department makes as to whether projects
25 comply with the standards of water quality established by rules promulgated under

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BILL

SECTION 9

1 s. 281.15 that are applicable to wetlands other than non~~f~~ederal wetlands, as defined
2 in s. 281.36 (1) (c). Upon referral of any proposed rule under this subsection to the
3 presiding officer of each house of the legislature under s. 227.19 (2), the presiding
4 officers shall refer the proposed rule to a senate committee and an assembly
5 committee concerned with the environment.

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

7 **281.36 Water quality certification for nonfederal wetlands. (1)**

8 DEFINITIONS. In this section:

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

10 1. An amendment to 33 USC 1344 (f) that becomes effective after January 9,
11 2001.

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

14 3. A regulation, rule, memorandum of agreement, guidance letter, interpretive
15 document, or other provision established by a federal agency that is promulgated or
16 adopted pursuant to 33 USC 1344 (f) or that is used to interpret or implement 33 USC
17 1344 (f), that applies to wetlands located in this state, and that becomes effective
18 after January 9, 2001.

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

22 (am) "Area of special natural resource interest" has the meaning given in s.
23 281.37 (1) (a).

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

25 1. 33 USC 1344 (f), as amended to January 8, 2001.

1 2. 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 is in effect on January
5 8, 2001.

6 3. A decision issued by a federal district or federal appellate court that affects
7 the application of a federal statute or provision described in subd. 1. or 2., that
8 applies to wetlands located in this state, and that is issued on or before January 8,
9 2001.

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

13 (c) “Nonfederal wetland” means a wetland that is identified as such under sub.
14 (1m).

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

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

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

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

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

BILL

SECTION 10

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

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

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

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

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

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

21 (b) 1. The department shall approve or deny a complete application for a water
22 quality certification under this section within 120 days after the date the department
23 determines that a complete application for the certification has been submitted
24 unless the applicant and the department agree to extend the time period. The
25 department may not determine an application to be complete until the requirements

1 under s. 1.11 have been met and until all of the items of information for the water
2 quality certification and for any associated permits or other approvals have been
3 submitted to the department. If the department fails to approve or deny the complete
4 application within the applicable time period, the applicant may bring an action for
5 mandamus to compel the department to approve or deny the application. If the court
6 grants the mandamus, the department shall approve or deny the application within
7 30 days after the mandamus is granted and the court shall award the applicant
8 reasonable attorney fees and court costs incurred in bringing the action.

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

23 **(3) DELINEATION PROCEDURES.** For purposes of delineating the boundary of a
24 nonfederal wetland, the department and the person who is applying for or who holds
25 a water quality certification under this section shall use the procedures contained

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

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

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

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

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

22 (d) Maintenance of drainage ditches.

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

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

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

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

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

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

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

13 **(6) RULES FOR EXEMPTIONS.** (a) The department shall promulgate rules to
14 interpret and implement the provisions under subs. (4) and (5). In promulgating
15 these rules, the department shall do all of the following:

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

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

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

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

BILL

SECTION 10

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

4 1. The wetland is less than one acre in size.

5 2. The wetland is not in an area of special natural resource interest.

6 3. The application for the water quality certification includes a copy of a ~~final~~
7 determination that the discharge is necessary for public safety that is made under
8 par. (b) or that is made in response to a request made under par. (bn). For purposes
9 of this subdivision and par. (c), a determination is not final until all judicial review
10 has been exhausted.

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

18 2. Before a political subdivision or a state transportation agency makes any
19 determination under subd. 1., it shall publish appropriate notice, as determined by
20 the political subdivision or the state transportation agency, to the public that
21 describes the request and that states that it will be making the determination. On
22 or before the date of the publication of the notice, the political subdivision or state
23 transportation agency shall mail or otherwise provide a written copy of the notice to
24 the department. After publication of the notice, the governing body of the political
25 subdivision or the state transportation agency may hold a public hearing to

1 determine whether the discharge is necessary for public safety. Any public hearing
2 held under this subdivision shall be held no later than 30 days after the applicant
3 for the water quality certification made the request for the determination. The
4 governing body of the political subdivision or the state transportation agency shall
5 issue the determination in writing, and the determination shall include a statement
6 of the grounds for making the determination.

7 3. The department or any person whose substantial interests are adversely
8 affected by a determination issued ^{under subd. 2.} by a governing body of a political subdivision
9 ^{or by a state transportation agency} ~~under subd. 2.~~ may file ~~a petition~~ for judicial review of the determination ~~in the~~
10 ~~circuit court having jurisdiction over the political subdivision.~~ The department or
11 any person whose substantial interests are adversely affected by a determination
12 issued by a state transportation agency under subd. 2. may seek judicial review in
13 ~~circuit court and~~ ^I ~~the facts and issues of law shall be subject to trial de novo by the~~
14 ~~reviewing court. Sections 227.52 to 227.58 do not apply to any determination by a~~
15 ~~state transportation agency under this paragraph.~~ INS. 13-10

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

19 (c) 1. Notwithstanding the fact that an applicant for a water quality
20 certification under this section has received a ^{final} determination that the discharge
21 is necessary for public safety, the department may ^{conduct} ~~determine~~ that the nonfederal
22 ~~wetland has sufficient functional value to warrant an examination by the~~
23 ~~department~~ of the practicable alternatives to the proposed discharge that will not
24 adversely affect the nonfederal wetland and that will not result in other significant
25 adverse environmental consequences.

~~under subd 1~~

decides

to conduct

1 2. If the department ~~determines~~ ^{decides} under subd. 1. ~~that~~ ^{to conduct} an examination

2 ~~warranted~~, the department shall conduct the examination by first determining, after

3 consulting with the applicant for the water quality certification, whether an

4 alternative to the discharge exists on the parcel of land on which the nonfederal

5 wetland is located that would not conflict with the ~~final~~ ^{final} determination that the

6 discharge is necessary for public safety. If the department determines that such a

7 ~~practical~~ ^{practicable} alternative exists, the department may deny the water quality

8 certification.

INS
17-6

9 3. If the department determines that no ~~practical~~ ^{practicable} alternative exists after

10 conducting the examination under subd 2., the department may proceed with the

11 examination by determining, after consulting with the applicant for the water

12 quality certification, whether an alternative to the discharge exists on the parcel of

13 land on which the nonfederal wetland is not located that would not conflict with the

14 ~~final~~ determination that the discharge is necessary for public safety. If the

15 department determines that such a ~~practical~~ ^{practicable} alternative exists, the department may

16 deny the water quality certification.

INS
17-14

17 4. If the department determines that no ~~practical~~ ^{practicable} alternative exists after

18 conducting the examination under subds. 2. and 3., the department may require that

19 the applicant implement a mitigation project under s. 281.37 (2).

20 **(8) GENERAL WATER QUALITY CERTIFICATIONS.** (a) In lieu of issuing individual

21 water quality certifications under this section, the department may issue a general

22 water quality certification for types of discharges that the department determines

23 are similar in nature or for the purpose of simplifying the certification process if the

24 discharges meet all of the following standards:

Ins at this sub... same... under...

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

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

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

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

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

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

21 (d) Before issuing, modifying, or revoking a general water quality certification
22 issued under par. (a), the department shall provide notice and a hearing under ss.
23 227.17 and 227.18.

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

BILL

SECTION 10

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 to
8 investigate a discharge of dredged or fill material that the department has reason
9 to believe is in violation of this section.

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 on which the application is
14 submitted. If the application is denied or withdrawn, an employee or representative
15 of the department may not exercise this authority after the date on which the
16 application is denied or withdrawn. If the application is approved, an employee or
17 representative of the department may not exercise this authority after the 30th day
18 immediately following the completion date of the discharge of the dredged or fill
19 material or the completion date of any conditions imposed under the water quality
20 certification, whichever date is later.

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

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

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

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

8 b. If the proprietor refuses to grant consent for the entry on, or the inspection
9 of, the property or if the proprietor's explanation or terms of consent are not
10 acceptable to the department of natural resources, the department of natural
11 resources may apply for, obtain, or execute a special inspection warrant under s.
12 66.0119 or refer the matter to the department of justice for enforcement under s.
13 299.95.

14 c. If the proprietor fails to respond to all requests made under subd. 1., an agent
15 of the department of natural resources may apply for, obtain, and execute a special
16 inspection warrant under s. 66.0119.

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

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

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

BILL

SECTION 10

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 11.** 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 12.** 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 13.** 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 14.** 814.04 (intro.) of the statutes is amended to read:

13 **814.04 Items of costs.** (intro.) Except as provided in ss. 93.20, 100.30 (5m),
14 106.50 (6) (i) and (6m) (a), 115.80 (9), 281.36 (2) (b) 1., 769.313, 814.025, 814.245,
15 895.035 (4), 895.10 (3), 895.75 (3), 895.77 (2), 895.79 (3), 895.80 (3), 943.212 (2) (b),
16 943.245 (2) (d) and 943.51 (2) (b), when allowed costs shall be as follows:

17 **SECTION 15. 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:

BILL

SECTION 15

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

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

20 (1) The treatment of section 23.321 (2) of the statutes takes effect on August
21 1, 2001, or on the day after publication, whichever is later.

22

(END)

2001-2002 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3093/7ins
MGG:kg/wlj/hmh/cs:jf

Insert 5-24 ✓

No ff

the steps involved in process, approving, and deny applications for

Insert 13-10 ✓

No ff

Section 68.13 shall apply to the judicial review of a determination made by a political subdivision. Sections 227.52 to 227.58 shall apply to the judicial review of a determination made by a state transportation agency.

Insert 14-6 ✓

No ff

At the same time that the department is conducting the examination of the practicable alternatives under this subdivision, the department shall consider the functional value of the nonfederal wetland.

Insert 14-14 ✓

No ff

At the same time that the department is conducting an examination of the practicable alternatives under this subdivision, the department shall consider the functional value of the nonfederal wetland.

Mike - Mary Gibson
Glass called. She
asked me to
tell you to jacket
LRB-3093 for
the Senate special
session. Sounds
like she'd like it
done immediately.

Thanks from
Mary! ☺

Joy

Barman, Mike

From: Barman, Mike

Sent: Tuesday, May 01, 2001 7:56 AM

To: Kelly, Scott; Taylor, Chad; Stolzenberg, John; Rep.Kedzie; Sen.Baumgart

Subject: LRB-3093/8 (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

Barman, Mike

From: Barman, Mike
Sent: Tuesday, May 01, 2001 12:05 PM
To: Kelly, Scott; Taylor, Chad
Subject: LRB-3093/8 (FE by DNR attached for your review)



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