

# State of Wisconsin



2017 Assembly Bill 547

Date of enactment: **March 28, 2018**

Date of publication\*: **March 29, 2018**

## 2017 WISCONSIN ACT 183

**AN ACT** *to repeal* 281.36 (3r) (a) 4. and 281.36 (3s); *to renumber and amend* 23.321 (1) and 23.321 (5); *to amend* 20.370 (9) (bm), 23.0917 (4) (c) 3., 23.321 (4) (a) 3., 281.36 (3b) (b), 281.36 (3m) (a), 281.36 (3n) (d) 1., 281.36 (3r) (a) (intro.), 281.36 (4) (title), 281.36 (6) (a) (intro.), 281.36 (9) (a) (intro.) and 281.36 (13m); and *to create* 15.347 (22), 23.099, 23.321 (1) (am), 23.321 (2) (d), 23.321 (4) (a) 4., 23.321 (5) (b), 281.12 (2), 281.36 (3r) (am), 281.36 (4n), 281.36 (12m) and 281.37 of the statutes; **relating to:** the regulation and study of wetlands; grants for wetland projects; and making an appropriation.

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

**SECTION 1.** 15.347 (22) of the statutes is created to read:

15.347 (22) **WETLAND STUDY COUNCIL.** (a) There is created in the department of natural resources a wetland study council consisting of the following members, appointed for staggered 6-year terms:

1. One member who is a representative of a statewide organization representing the business community.
2. One member who is a representative of a statewide organization representing waterfowl interests.
3. One member who is a representative of a statewide organization representing real estate and development interests.
4. One member who is a representative of a statewide organization representing municipal interests.
5. One member who is a representative of a statewide organization representing rural and agricultural interests.
6. One member who is a representative of a statewide land conservation group with a specific interest in wetlands.

7. One member who is a statewide wetland delineator.
8. One member who is a statewide wetland consultant.
9. One member who is a department of natural resources biologist or hydrologist and who is a wetland expert, appointed by the secretary of natural resources.
  - (b) The wetland study council shall research and develop recommendations on all of the following:
    1. The implementation and effectiveness of statewide wetland mitigation programs.
    2. Program elements that would be necessary for the department of natural resources to implement if the department assumes from the federal government the authority to administer the state's own individual and general permit program for the discharge of dredged or fill material into the navigable waters of the state under s. 281.12 (2).
    3. Issues related to the analysis of practicable alternatives that avoid and minimize the adverse impacts of a discharge into a wetland on wetland functional values

\* Section 991.11, WISCONSIN STATUTES: Effective date of acts. "Every act and every portion of an act enacted by the legislature over the governor's partial veto which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication."

and that will not result in any other significant adverse environmental consequences.

4. Storm water management ponds and their potential to serve a role in wetland mitigation.

5. Statewide incentive programs for creating, restoring, and enhancing wetlands.

6. Statewide wetland trainings for department of natural resources staff, wetland consultants, and wetland delineators.

7. The simplification of regulations associated with creating wetlands on farm drainage ditches for the purpose of phosphorus pollution retention.

8. Ways to improve the in lieu fee subprogram of the wetland mitigation program, under s. 281.36 (3r) (e), including subcontracting the management of a program to a nonprofit organization.

9. The possibility of a professional, whose wetland delineation work is assured under the department of natural resources' wetland delineation professional assurance initiative, performing a wetland delineation confirmation under s. 23.321 on behalf of the department.

10. Methods of financing wetland mitigation requirements for local units of government.

11. Any other item related to wetlands at the discretion of the council.

**SECTION 2.** 20.370 (9) (bm) of the statutes, as affected by 2017 Wisconsin Act 59, is amended to read:

20.370 (9) (bm) *Wetland restoration — fees; payments.* From the general fund, all moneys received as surcharge fees under s. 281.36 (11), all moneys received as transfers to the in lieu fee subprogram as provided in s. 281.36 (3s) (h), 2015 stats., and all moneys received under the in lieu fee subprogram under s. 281.36 (3r) (e) for the restoration or creation of wetlands, for the wetland mitigation grant program under s. 281.37. and for any other activities authorized under the in lieu fee subprogram.

**SECTION 3.** 23.0917 (4) (c) 3. of the statutes is amended to read:

23.0917 (4) (c) 3. Grants under ~~s. ss.~~ 23.098 and 23.099.

**SECTION 4.** 23.099 of the statutes is created to read:  
**23.099 Grants for property development relating to wetland mitigation.** (1) In this section:

(a) "Department land" has the meaning given under s. 281.37 (1) (a).

(b) "Nonprofit organization" means an organization that is described in section 501 (c) (3) of the Internal Revenue Code and that is exempt from federal income tax under section 501 (a) of the Internal Revenue Code.

(2) The department shall establish a program to make grants from the appropriation under s. 20.866 (2) (ta) to nonprofit organizations for property development activities relating to wetlands created, restored, or enhanced under a wetland mitigation grant under s. 281.37 on department land. Property development activities for

which a grant under this section may be awarded include those that increase public access to, awareness about, or recreational use of the new, restored, or enhanced wetland, or that improve habitat in, on, or near, the new, restored, or enhanced wetland.

(3) A nonprofit organization that applies for a grant under this section shall submit the application at the same time that it submits an application for a grant under s. 281.37. The department shall make its determination with respect to both grants at the same time, and may only award a grant under this section if it also awards a grant under s. 281.37.

(4) A grant awarded under this section may not exceed 10 percent of the amount of the related grant awarded under s. 281.37. The department may not issue the grant funding under this section to the grantee until the grantee has certified that the project funded by the grant under s. 281.37 is complete.

**SECTION 5.** 23.321 (1) of the statutes is renumbered 23.321 (1) (intro.) and amended to read:

23.321 (1) DEFINITION. (intro.) In this section, "~~wetland~~":

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

**SECTION 6.** 23.321 (1) (am) of the statutes is created to read:

23.321 (1) (am) "Nonfederal wetland" has the meaning given in s. 281.36 (1) (br).

**SECTION 7.** 23.321 (2) (d) of the statutes is created to read:

23.321 (2) (d) 1. In this paragraph, "qualified 3rd person" means an individual who has completed basic and advanced wetland training and has a minimum of one year of field experience in wetland delineation.

2. A wetland confirmation that consists of a written statement, based upon the department's review of the boundaries of a wetland as delineated by a qualified 3rd person and not based upon an on-site inspection of the land by the department, of whether the department concurs with the delineation. The delineation prepared by the qualified 3rd person shall include the exact location and boundaries of the wetland. The department shall concur with the boundaries of a wetland delineated by a qualified 3rd person unless the department determines that the location and boundaries of the wetland identified in the delineation are not accurate based on maps, aerial photographs, surveys, wetland delineations, or hydrophitic soil conditions. If the department concurs with the boundaries of a wetland delineated by a qualified 3rd person, the department's statement under this paragraph shall also include the exact location and boundaries of the wetland. A wetland confirmation under this paragraph is available only with respect to a nonfederal wetland.

**SECTION 8.** 23.321 (4) (a) 3. of the statutes is amended to read:

23.321 (4) (a) 3. Provide a wetland confirmation not later than 60 days after a person files a request, in the manner and form required by the department, for a wetland confirmation under sub. (2) (c).

**SECTION 9.** 23.321 (4) (a) 4. of the statutes is created to read:

23.321 (4) (a) 4. Provide a wetland confirmation not later than 15 days after a person files a request, in the manner and form required by the department, for a wetland confirmation under sub. (2) (d).

**SECTION 10.** 23.321 (5) of the statutes is renumbered 23.321 (5) (a) and amended to read:

23.321 (5) (a) ~~A~~ Except as provided in par. (b), a wetland identification provided by the department under sub. (2) (b) and a wetland confirmation provided by the department under sub. (2) (c) remain effective for 5 years from the date provided by the department.

**SECTION 11.** 23.321 (5) (b) of the statutes is created to read:

23.321 (5) (b) 1. A wetland identification provided by the department under sub. (2) (b) and a wetland confirmation provided by the department under sub. (2) (c) or (d) remain effective for 15 years from the date provided by the department if all of the following conditions are met:

a. The wetland is a nonfederal wetland.

b. The parcel of land is subject to a storm water management zoning ordinance enacted under s. 59.693, 60.627, 61.354, or 62.234 or a storm water discharge permit issued under s. 283.33.

2. The department may not invalidate or amend an existing wetland delineation, or require a new wetland delineation, for a parcel to which subd. 1. applies until the wetland identification or confirmation expires.

**SECTION 12.** 281.12 (2) of the statutes is created to read:

281.12 (2) The department, on behalf of and at the direction of the governor, may submit an application to the federal environmental protection agency under 33 USC 1344 (g) seeking the delegation of authority to this state to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters of this state. If the federal environmental protection agency delegates this authority to this state, the department may assume that authority.

**SECTION 13.** 281.36 (3b) (b) of the statutes, as affected by 2017 Wisconsin Acts 58 and 115, is amended to read:

281.36 (3b) (b) No person may discharge dredged material or fill material into a wetland unless the discharge is authorized by a wetland general permit or individual permit issued by the department under this section or the discharge is exempt under sub. (4), (4m) (a), ~~(4n)~~, or (4r). No person may violate any condition contained in a wetland general or individual permit issued by the department under this section. The department may not

issue a wetland general or individual permit under this section unless it determines that the discharge authorized pursuant to the wetland general or individual permit will comply with all applicable water quality standards.

**SECTION 14.** 281.36 (3m) (a) of the statutes, as affected by 2017 Wisconsin Acts 58 and 115, is amended to read:

281.36 (3m) (a) *When permit required.* Any person wishing to proceed with a discharge into any wetland shall submit an application for a wetland individual permit under this subsection unless the discharge has been authorized under a wetland general permit as provided in sub. (3g) or is exempt under sub. (4), (4m) (a), ~~(4n)~~, or (4r). Before submitting the application, the department shall hold a meeting with the applicant to discuss the details of the proposed discharge and the requirements for submitting the application and for delineating the wetland. An applicant may include in the application a request for a public informational hearing. The application shall be accompanied by the applicable fee specified in sub. (11) or (12) (a).

**SECTION 15.** 281.36 (3n) (d) 1. of the statutes, as affected by 2017 Wisconsin Act 118, is amended to read:

281.36 (3n) (d) 1. Except as provided in subd. 2., the department shall require mitigation under the program established under sub. (3r) for wetland individual permits it issues under this subsection and for a discharge that is exempt from permitting requirements under sub. (4n) (b) that affects more than 10,000 square feet of wetland or under sub. (4n) (c) that affects more than 1.5 acres of wetland. This subsection does not entitle an applicant to a wetland individual permit or any other approval in exchange for conducting mitigation.

**SECTION 16.** 281.36 (3r) (a) (intro.) of the statutes is amended to read:

281.36 (3r) (a) (intro.) The department shall establish a mitigation program that applies only to the issuance of wetland individual permits and that allows and, with respect to a discharge that is exempt from permitting requirements under sub. (4n) (b) that affects more than 10,000 square feet of wetland or under sub. (4n) (c) that affects more than 1.5 acres of wetland, the portion of the affected wetland that exceeds 10,000 square feet or 1.5 acres, respectively. Under the mitigation program, subject to par. (am), the department shall allow mitigation to be accomplished by any of the following methods:

**SECTION 17.** 281.36 (3r) (a) 4. of the statutes is repealed.

**SECTION 18.** 281.36 (3r) (am) of the statutes is created to read:

281.36 (3r) (am) For a discharge that is exempt from permitting requirements under sub. (4n) (b) or (c), any off-site mitigation, including any mitigation conducted by a mitigation bank or under the in lieu fee subprogram, shall be completed within the same compensation search

area, as defined by the department by rule, as the discharge.

**SECTION 19.** 281.36 (3s) of the statutes is repealed.

**SECTION 20.** 281.36 (4) (title) of the statutes is amended to read:

281.36 (4) (title) EXEMPTIONS; CERTAIN ACTIVITIES.

**SECTION 21.** 281.36 (4n) of the statutes is created to read:

281.36 (4n) EXEMPTIONS; CERTAIN NONFEDERAL WETLANDS AND ARTIFICIAL WETLANDS. (a) In this subsection:

1. "Artificial wetland" means a landscape feature where hydrophitic vegetation may be present as a result of human modification to the landscape or hydrology and for which the department has no definitive evidence showing a prior wetland or stream history that existed before August 1, 1991, but does not include any of the following:

a. A wetland that serves as a fish spawning area or a passage to a fish spawning area.

b. A wetland created as a result of a mitigation requirement under sub. (3r).

2. "Definitive evidence" means documentary evidence such as any of the following:

a. Maps.

b. Aerial photographs.

c. Surveys that use a scale of not more than 100 feet per inch.

d. Wetland delineations.

3. "Rare and high quality wetland" means a wetland that is directly adjacent or contiguous to a class I or class II trout stream or that consists of 75 percent or more of any of the following wetland types:

a. Alder thicket.

b. Calcareous fen.

c. Coniferous swamp.

d. Coniferous bog.

e. Floodplain forest.

f. Hardwood swamp.

g. Interdunal wetland.

h. Open bog.

i. Ridge and swail complex.

j. Deep marsh.

k. Sedge meadow.

4. "Sewerage system" has the meaning given in s. 281.01 (14).

5. "Urban area" means any of the following:

a. An incorporated area.

b. An area within one-half mile of an incorporated area.

c. An area in a town that is served by a sewerage system.

(b) Subject to par. (e), the permitting requirement under sub. (3b) does not apply to any discharge into a nonfederal wetland that occurs in an urban area and to which all of the following apply:

1. The discharge does not affect more than one acre of wetland per parcel.

2. The discharge does not affect a rare and high quality wetland.

3. The development related to the discharge is carried out in compliance with any applicable storm water management zoning ordinance enacted under s. 59.693, 60.627, 61.354, or 62.234 or storm water discharge permit issued under s. 283.33.

(c) Subject to par. (e), the permitting requirement under sub. (3b) does not apply to any discharge into a nonfederal wetland that occurs outside an urban area and to which all of the following apply:

1. The discharge does not affect more than 3 acres of wetland per parcel.

2. The discharge does not affect a rare and high quality wetland.

3. The development related to the discharge is a structure, such as a building, driveway, or road, with an agricultural purpose.

(d) Subject to par. (e), the permitting requirement under sub. (3b) does not apply to any discharge into an artificial wetland.

(e) 1. A person who proposes a project that may affect a wetland or landscape feature under par. (b), (c), or (d) shall notify the department no fewer than 15 working days before initiating the project. The notice shall include one of the following to show that the wetland or landscape feature is eligible for the relevant exemption:

a. A statement issued by a professional who has investigated the wetland and who is qualified to give such an opinion.

b. A wetland delineation prepared by a qualified professional showing the exact location and boundaries of the wetland.

2. Except as provided in subd. 3., if the department receives the notice and information required under subd. 1., the department shall presume that the wetland or landscape feature is eligible for the exemption unless the department, within 15 working days after receiving notification of the proposed project under subd. 1., notifies the person that one of the following conditions applies:

a. The eligibility requirements are not met.

b. The location and boundaries of the wetland identified in a wetland delineation included with the notification under subd. 1. are not accurate.

c. With respect to an exemption under par. (d) only, the department determines that the landscape feature is providing significant functions that either protect adjacent or downstream property or infrastructure from flooding or significantly improve the water quality of an adjacent or downstream water body.

3. If the department receives the notice and information required under subd. 1. but is unable to determine based on that information whether the eligibility require-

ments are met, the department may, within 15 working days after the notification under subd. 1., notify the person one time to request additional information about the parcel of land. The person shall cooperate with the department's efforts to obtain information about the relevant parcel of land and may proceed with the project only upon notification that the department has determined the landscape feature to be eligible for the exemption based on the definitive evidence.

4. If, within 15 working days after the notification is delivered to the department, the department notifies the person that subd. 2. a., b., or c. applies, the person may not proceed with the project unless authorized by, or otherwise exempted from, a wetland general or individual permit under this section.

**SECTION 22.** 281.36 (6) (a) (intro.) of the statutes, as affected by [2017 Wisconsin Act 115](#), is amended to read:

281.36 (6) (a) (intro.) The department shall promulgate rules to interpret and implement the provisions under subs. (4), [\(4n\)](#), (4r), and (5). In promulgating these rules, the department shall do all of the following:

**SECTION 23.** 281.36 (9) (a) (intro.) of the statutes, as affected by [2017 Wisconsin Act 115](#), is amended to read:

281.36 (9) (a) (intro.) For purposes of determining whether to issue a wetland individual permit, whether authorization to proceed as authorized under a wetland general permit is appropriate, or whether an exemption under sub. (4), [\(4n\)](#), or (4r) is appropriate, and for purposes of enforcing this section, any employee or other representative of the department, upon presenting his or her credentials, may do any of the following:

**SECTION 24.** 281.36 (12m) of the statutes is created to read:

281.36 (12m) LOCAL REGULATION OF NONFEDERAL OR ARTIFICIAL WETLANDS. A local government may not enact an ordinance or adopt a resolution regulating a matter regulated under sub. (3n) (d) 1. or (3r) (a) (intro.) or (am), with respect to a discharge exempt from permitting requirements under sub. (4n) (b) or (c), or a matter regulated under sub. (4n). If a local government has in effect on the effective date of this subsection .... [LRB inserts date], an ordinance or resolution regulating nonfederal wetlands or artificial wetlands, the ordinance or resolution does not apply and may not be enforced.

**SECTION 25.** 281.36 (13m) of the statutes is amended to read:

281.36 (13m) REPORT TO LEGISLATURE. No later than January 31, 2003, and no later than January 31 of each subsequent odd-numbered year, the department shall submit to the legislature under s. 13.172 (2) a report that provides an analysis of the impact of the implementation of mitigation on wetland resources and on the issuance of permits or other approvals under ss. 59.692, 61.351, 61.353, 62.231, 62.233, 87.30, 281.11 to 281.47 or 281.49 to 281.85 or ch. 30, 31, 283, 289, 291, 292, 293, 295, or 299. The department shall include in its report a

discussion of proposals and projects under the property development grant program under s. 23.099.

**SECTION 26.** 281.37 of the statutes is created to read:  
**281.37 Wetland mitigation grant program.** (1) In this subsection:

(a) "Department land" means land owned by or under easement to the state that is under the jurisdiction of the department and used for one of the purposes specified in s. 23.09 (2) (d).

(b) "Mitigation program" means the wetland mitigation grant program established under sub. (2).

(c) "Nonprofit organization" means an organization that is described in section 501 (c) (3) of the Internal Revenue Code and that is exempt from federal income tax under section 501 (a) of the Internal Revenue Code.

(2) The department shall establish a wetland mitigation grant program under which it awards grants to nonprofit organizations to conduct projects to create, restore, or enhance wetlands under the in lieu fee subprogram in s. 281.36 (3r) (e) on department land as provided in this subsection.

(3) No later than 6 months after the effective date of this subsection .... [LRB inserts date], the department shall identify department land that is appropriate to include in the mitigation program. The department shall identify no less than 25 percent of department land for this purpose. The land identified shall include land in every watershed in the state.

(4) (a) No later than 3 months after completion of the land identification stage under sub. (3) or at the beginning of the following fiscal year, whichever is earlier, and no later than July 1 of each subsequent year, the department shall issue a request for proposals from nonprofit organizations for grants to conduct wetland mitigation projects on department land identified under sub. (3). The issuance of each new request for proposal begins a new grant cycle.

(b) The department shall require applications for grants under this section to include all of the following:

1. The scope of the proposed project.
2. A project timeline.
3. If possible, a specification of the functional values or uses listed in s. NR 103.03 (1), Wis. Adm. Code, that the project area does not provide or only sparsely provides.

4. A specification of the functional values or uses listed in s. NR 103.03 (1), Wis. Adm. Code, that the proposed project would create, restore, or enhance.

5. All information required to be submitted for approval to the U.S. army corps of engineers under [33 CFR part 332](#) and the Wisconsin Wetland Conservation Trust program instrument.

(c) After issuing the request for proposals under par. (a), the department shall accept grant applications on a rolling basis over the course of a fiscal year. The department shall select and announce grant recipients under this

subsection at the end of each quarter as funds are available.

(5) (a) If an application under sub. (4) is approved, the grantee and the department, in consultation, shall identify all department permits required for the grantee to conduct the project. The department shall waive all permit fees for the grantee in relation to department permits required to conduct the project.

(b) Notwithstanding timelines otherwise established for individual permits, within 60 days of receiving the grantee's application for an individual permit that is required to conduct the project, the department shall render a decision issuing, denying, or modifying the permit, and the department shall adjust all other deadlines relating to the review of the application accordingly.

(7) (a) The department shall pay out a grant under the mitigation program quarterly unless the department determines that more frequent payments are necessary to fulfill the objectives of the grant program. The department shall withhold the final payment until the grantee certifies that the project is complete.

(b) If the grantee fails to certify that the project is complete by the date indicated for completion in its application, the department shall use the remaining unpaid grant amount to either complete the project or contract with or issue a grant to another nonprofit organization to complete the project. An organization that fails to certify completion of a project by the date indicated in its application for completion is not eligible for a new grant under the mitigation program for 2 grant cycles.

(c) The department may agree to a modified deadline for the project if unusual or unforeseen circumstances cause a delay. If the department agrees to a modified deadline, the consequences under par. (b) apply only if the grantee fails to certify that a project is complete by the date indicated in that agreement.

(8) Before 6 months have elapsed after the 5th anniversary of the department's first issuance of a request for proposals under sub. (4), the department shall submit to the legislature under s. 13.172 (2) a report analyzing the effectiveness of the first 5 years of the mitigation program and making recommendations for changes to the program.

#### **SECTION 27. Nonstatutory provisions.**

(1) FEDERAL REVIEW OF MITIGATION PROJECTS. The department of natural resources may submit a request to the U.S. army corps of engineers that the U.S. army corps of engineers move up all deadlines relating to its review and approval of wetland mitigation project proposals under the in lieu fee subprogram under section 281.36 (3r) of the statutes so that the time it takes for the U.S.

army corps of engineers to approve such a proposal is shortened. The department of natural resources may submit a request to the U.S. army corps of engineers to approve a modification to the Wisconsin Wetland Conservation Trust program instrument in order to implement the mitigation grant program established under section 281.37 of the statutes.

(2) APPOINTMENT OF MEMBERS OF WETLAND STUDY COUNCIL. The governor shall appoint the members of the wetland study council under section 15.347 (22) (a) 1. to 8. of the statutes and the secretary of natural resources shall appoint the member of the wetland study council under section 15.347 (22) (a) 9. of the statutes no later than 6 months after the effective date of this subsection.

(3) INITIAL TERMS FOR WETLAND STUDY COUNCIL MEMBERS. Notwithstanding section 15.347 (22) of the statutes, of the members of the wetland study council who are appointed as initial members, 3 members shall serve for a 2-year term and 3 members shall serve for a 4-year term.

#### **SECTION 28. Initial applicability.**

(1) NONFEDERAL WETLAND DELINEATIONS.

(a) Except as provided in paragraph (b), the renumbering and amendment of section 23.321 (1) and (5) of the statutes and the creation of section 23.321 (1) (am) and (5) (b) of the statutes first apply to a wetland identification provided by the department of natural resources under section 23.321 (2) (b) of the statutes and a wetland confirmation provided by the department of natural resources under section 23.321 (2) (c) of the statutes for a nonfederal wetland on January 1, 2003.

(b) The renumbering and amendment of section 23.321 (1) and (5) of the statutes and the creation of section 23.321 (1) (am) and (5) (b) of the statutes first apply to a wetland identification and wetland confirmation under paragraph (a) even if the wetland identification or wetland confirmation expired prior to the effective date of this paragraph unless a more recent wetland identification or wetland confirmation was provided by the department of natural resources showing a wetland on the parcel and a discharge was carried out in the wetland in compliance with a permit under section 281.36 of the statutes prior to the effective date of this paragraph.

**SECTION 29. Effective dates.** This act takes effect on the day after publication, except as follows:

(1) PERMIT EXEMPTIONS FOR CERTAIN NONFEDERAL WETLANDS AND ARTIFICIAL WETLANDS. The treatment of section 281.36 (3b) (b), (3m) (a), (3n) (d) 1., (3r) (a) (intro.) and (am), (4) (title), (4n), (6) (a) (intro.), and (9) (a) (intro.) of the statutes takes effect on July 1, 2018.