

2001 SENATE BILL 37

January 31, 2001 – Introduced by COMMITTEE ON ENVIRONMENTAL RESOURCES.
Referred to Committee on Environmental Resources.

1 **AN ACT** *to repeal* 23.321 (1) (c) and 281.17 (10); *to renumber* 23.321 (title) and
2 (1) (title), (a) and (b); *to renumber and amend* 23.321 (1) (d) to (f) and (2) to
3 (5); *to amend* 281.01 (18), 281.69 (3) (b) 2., 281.98 (1) and 299.95; and *to create*
4 281.01 (21) and 281.36 of the statutes; **relating to:** water quality certification
5 for wetlands.

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

A recent U.S. Supreme Court decision, *Solid Water 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

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birds cannot be interpreted by ACE to be navigable waters and that, therefore, no ACE discharge permits are required to discharge dredged or fill material into these bodies of water.

For discharges into wetlands, this bill incorporates into state law the content of some of the federal provisions governing the issuance of ACE discharge permits. Under the bill, no one may discharge dredged or fill material into a 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, an activity that would be exempt loses its exemption if it is incidental to certain activities. Under the bill, these activities include using a wetland for a use for which it was not previously used, an activity that may impair the flow of any body of water in this state, and activity that may reduce the reach of any body of water in this state. Finally, as under federal law, there are provisions allowing DNR to issue general permits for types of discharges that are similar in nature. A general permit allows anyone to carry out the type of discharge subject to the general permit as opposed to an individual permit authorizing the discharge being issued to a specific person.

Under current rules promulgated by DNR, discharges into certain artificial wetlands are exempt from meeting the water quality standards that apply to wetlands if the person seeking permission for the discharge notifies DNR at least 15 days before beginning the discharge and DNR does not notify the person within 15 days after receiving the notification that the artificial wetland has a significant functional value as a wetland. Under these rules, an artificial wetland is an area where water-based vegetation is present and for which there is no prior wetland or stream history. Wetlands that are eligible for this exemption include certain sedimentation and storm water detention basins, sewage lagoons, and farm drainage and roadside ditches. This bill incorporates these provisions into the statutes and expands the exemption to include all water quality standards.

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.

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

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

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

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

19 **SECTION 4.** 281.01 (18) of the statutes is amended to read:

20 281.01 **(18)** “Waters of the state” includes those portions of Lake Michigan and
21 Lake Superior within the boundaries of this state, and all lakes, bays, rivers,
22 streams, springs, ponds, wells, impounding reservoirs, ~~marshes,~~ wetlands,
23 watercourses, drainage systems and other surface water or groundwater, natural or
24 artificial, public or private, within this state or its jurisdiction.

25 **SECTION 5.** 281.01 (21) of the statutes is created to read:

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

2 **SECTION 6.** 281.17 (10) of the statutes is repealed.

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

4 **281.36 Water quality certification for wetlands. (1) DEFINITIONS.** In this
5 section:

6 (a) “Artificial wetland” has the meaning specified by the department by rule.

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

9 (c) “Working day” has the meaning given in s. 227.01 (14).

10 **(2) CERTIFICATION REQUIREMENT.** No person may discharge dredged or fill
11 material into a wetland unless the discharge is authorized by a water quality
12 certification issued by the department. No person may violate any condition imposed
13 by the department in a water quality certification. The department may not issue
14 a water quality certification unless it determines that the discharge will comply with
15 all applicable water quality standards. The water quality certification requirement
16 under this section is in addition to and is not superseded by any other requirement
17 under any law, rule, ordinance, or other regulation governing the discharge of
18 dredged or fill material into a wetland.

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

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

23 (b) Maintenance, emergency repair, or reconstruction of damaged parts of
24 structures that are in use in the waters of the state.

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

3 (d) Maintenance of drainage ditches.

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

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

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

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

12 **(4) DISCHARGES AFFECTING WATERS.** Notwithstanding sub. (3), a discharge that
13 would be exempt under sub. (3) is subject to the certification requirement under sub.
14 (2) if the discharge is incidental to any of the following activities:

15 (a) An activity that has as its purpose bringing a wetland, or part of a wetland,
16 into a use for which it was not previously subject.

17 (b) An activity that may impair the flow or circulation of any waters of the state.

18 (c) An activity that may reduce the reach of any waters of the state.

19 **(5) EXEMPTIONS; ARTIFICIAL WETLANDS.** (a) The certification requirement under
20 sub. (2) does not apply to a discharge into an artificial wetland identified in par. (b)
21 if all of the following apply:

22 1. The person who proposes to make the discharge notifies the department of
23 the discharge at least 15 working days before beginning the discharge.

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1 2. Within 15 working days after the date on which the department receives the
2 notice under subd. 1., the department does not notify the person that the artificial
3 wetland has a significant functional value as a wetland.

4 (b) To qualify for the exemption under par. (a), an artificial wetland must be one
5 or more of the following:

6 1. A sedimentation or storm water detention basin or associated conveyance
7 feature that is operated and maintained only for sediment detention or flood storage
8 purposes.

9 2. An active sewage lagoon, cooling pond, waste disposal pit, fish rearing pond,
10 or landscape pond.

11 3. An actively maintained farm drainage or roadside ditch.

12 4. An active nonmetallic mining operation.

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

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

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

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

24 (c) If the department determines that any of the discharges under a general
25 water quality certification fails to meet any of the standards in par. (a), the

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

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

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

11 (a) Enter and inspect any property on which is located a wetland, or part of a
12 wetland, that is subject to a water quality certification issued under this section.

13 (b) Enter and inspect any property to investigate a discharge of dredged or fill
14 material.

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

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

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

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

21 281.98 **(1)** Except as provided in ss. 281.47 (1) (d), 281.75 (19), and 281.99 (2),
22 any person who violates this chapter or any rule promulgated or any plan approval,
23 license or, special order, or water quality certification issued under this chapter shall
24 forfeit not less than \$10 nor more than \$5,000 for each violation. Each day of

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1 continued violation is a separate offense. While an order is suspended, stayed, or
2 enjoined, this penalty does not accrue.

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

4 **299.95 Enforcement; duty of department of justice; expenses.** The
5 attorney general shall enforce chs. 281 to 285 and 289 to 295 and this chapter, except
6 ss. 281.48, 285.57, 285.59, and 299.64, and all rules, special orders, licenses, plan
7 approvals and, permits, and water quality certifications of the department, except
8 those promulgated or issued under ss. 281.48, 285.57, 285.59, and 299.64 and except
9 as provided in s. 285.86. The circuit court for Dane county or for any other county
10 where a violation occurred in whole or in part has jurisdiction to enforce chs. 281 to
11 285 and 289 to 295 or this chapter or the rule, special order, license, plan approval
12 or, permit, or certification by injunctive and other relief appropriate for
13 enforcement. For purposes of this proceeding where chs. 281 to 285 and 289 to 295
14 or this chapter or the rule, special order, license, plan approval or, permit or
15 certification prohibits in whole or in part any pollution, a violation is considered a
16 public nuisance. The department of natural resources may enter into agreements
17 with the department of justice to assist with the administration of chs. 281 to 285 and
18 289 to 295 and this chapter. Any funds paid to the department of justice under these
19 agreements shall be credited to the appropriation account under s. 20.455 (1) (k).

20 (END)