



**WISCONSIN LEGISLATIVE COUNCIL
AMENDMENT MEMO**

2001 Senate Bill 37

**Senate Substitute
Amendment 1**

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Senate Bill 37 creates a water quality certification program for wetlands in Wisconsin. Senate Substitute Amendment 1 to the bill is described below.

WATER QUALITY CERTIFICATION

The substitute amendment provides that no person may discharge dredged or fill material into a “nonfederal wetland” without first receiving a water quality certification from the Department of Natural Resources (DNR) under this statute and that no person may violate any condition of a water quality certification issued by the DNR under this statute. It specifies that the DNR may not issue a water quality certification under this statute unless it determines that the discharge will comply with all applicable water quality standards.

As used in this certification requirement, a “nonfederal wetland” is a wetland to which the federal discharge permitting process under sec. 404 of the Clean Water Act (33 U.S.C. 1344) does not apply due to the SWANCC decision by the U.S. Supreme Court, but to which such permitting process did apply on January 8, 2001.¹

Thus, upon enactment of the substitute amendment, the DNR will be issuing wetland water quality certifications under two laws: one for nonfederal wetlands under the new statute created by the substitute amendment and the other for wetlands other than nonfederal wetlands under the Clean Water Act. The DNR will apply its water quality standards for wetlands in ch. NR 103, Wis. Adm. Code, in both certification processes.

¹ The Supreme Court issued its decision in the SWANCC case (*Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, No. 99-1178 (U.S. Jan. 9, 2001)) on January 9, 2001. Additional information on this decision is available in Legislative Council Legal Memorandum LM-2001-1, *U.S. Supreme Court Case on Wetlands*, January 25, 2001.

DELINEATION PROCEDURES

The substitute amendment establishes that, if there is a dispute between the DNR and a person who is applying for or holds a water quality certification issued under the new statute over the delineation of the boundary of a nonfederal wetland, the DNR and the person must use the procedures contained in the 1987 Wetlands Delineation Manual published by the U.S. Army Corps of Engineers (ACE) in resolving the dispute. If the ACE publishes an edition of this manual after the effective date of the provision, the DNR may, by rule, designate that the new edition be used to resolve nonfederal wetland boundary delineation disputes.

EXEMPTIONS

The substitute amendment provides two sets of exemptions from the nonfederal wetland water quality certification requirement: one based upon exemptions and limits on these exemptions set forth in sec. 404 (f) of the Clean Water Act and the other based upon exemptions in the DNR's current water quality standards for wetlands in ch. NR 103.

Clean Water Act Based Exemptions

Exemptions

The exemptions based on the Clean Water Act apply to discharges into a nonfederal wetland that is the result of any of the following activities:

- Normal farming, silviculture or ranching activities.
- Maintenance, emergency repair or reconstruction of existing structures.
- Construction and maintenance of farm ponds, stock ponds or irrigation ditches.
- Maintenance of drainage ditches.
- Construction and maintenance of farm roads, forest roads and temporary mining roads, if done in conformance with best management practices.

Limits on the Exemptions

The substitute amendment specifies that these exemptions do *not* apply if the discharge is incidental to an activity that would bring a wetland into a use to which it was not previously subject and if the activity may do any of the following:

- Impair the flow or circulation of any nonfederal wetland.
- Reduce the reach of any nonfederal wetland.

Implementation of the Exemptions; DNR Rule Making

The substitute amendment directs the DNR to promulgate rules to interpret and implement the exemptions and limits on the exemptions. These rules must be consistent with the corresponding provisions in the Clean Water Act and federal regulations, rules, memoranda of agreements, guidance letters and other provisions having the effect of law established by a federal agency under these Clean Water Act provisions in effect on the effective date of the substitute amendment. If any of these federal provisions are subsequently modified or amended, the DNR may, but is not required to, incorporate these amendments or modifications into the rules, but may not otherwise amend the rules.

The substitute amendment also directs the DNR to submit its final draft version of the rules to the Legislative Council Rules Clearinghouse no later than the first day of the 13th month beginning after the effective date of the substitute amendment. (In general, the DNR may not promulgate the rules until after the Rules Clearinghouse completes its review of the draft rules, the DNR holds one or more hearings on the rules, the Legislature reviews the rules and the Natural Resources Board adopts the final rules.)

Temporary Process

The substitute amendment creates a temporary process that applies between the effective date of the substitute amendment and when the DNR's rules interpreting and implementing the Clean Water Act based exemptions become effective. While the temporary process is in effect, no person may discharge dredged or fill material into a nonfederal wetland unless the person does either of the following:

- Demonstrates to the DNR's satisfaction that the activity which will result in the discharge will qualify for an exemption under the Clean Water Act.
- Receives a nonfederal wetland water quality certification issued under the new state program.

Chapter NR 103 Type Exemptions

The exemptions based on ch. NR 103 apply to artificial nonfederal wetlands in any of the following settings:

- Sedimentation and storm water detention basins.
- Active sewage lagoons, cooling ponds, waste disposal pits, fish rearing ponds and landscape ponds.
- Actively maintained farm drainage and roadside ditches.
- Active nonmetallic mining operations.

A person acting under one of these exemptions must give the DNR 15 days notice of the proposed activity. The person may proceed with the activity at the end of the 15-day period without any DNR approval unless notified by the DNR that the artificial nonfederal wetland has a significant functional value as a wetland.

GENERAL WATER QUALITY CERTIFICATIONS

The substitute amendment authorizes the DNR to issue general water quality certifications for types of activities that are similar in nature and that, individually and collectively, will have minimal adverse effects on the environment. General water quality certifications may have a term of no more than five years. This provision is based on a provision of the Clean Water Act.

RELATION TO OTHER DNR REGULATORY PROGRAMS

The substitute amendment establishes that the new nonfederal wetland water quality certification requirements created by the substitute amendment do not affect the authority of the DNR to do any of the following:

- Regulate the discharge of dredged or fill material in a nonfederal wetland under the specified regulatory programs. These programs are the programs subject to the interdepartmental coordination of environmental protection measures between the DNR and the Department of Transportation under s. 30.12 (4), Stats.
- Issue a water quality certification under rules promulgated under ch. 281, Stats., to implement the federal water quality certification program under sec. 401 of the Clean Water Act that is applicable to wetlands other than nonfederal wetlands.

DNR INSPECTION AUTHORITY

The substitute amendment gives the DNR inspection authority relating to the new nonfederal water quality certification program. It authorizes an employee or representative of the DNR, upon presenting his or her credentials and subject to the requirements identified below, to do any of the following for purposes of enforcing the new program:

- Enter and inspect any property on which a nonfederal wetland is located that is subject to a water quality certification issued under the new program.
- Enter and inspect any property to investigate a discharge of dredged or fill material if a wetland is located on the property and where the DNR has reasonable suspicion that a violation of the new program has occurred or is occurring.
- Gain access to and inspect any records that the DNR requires the holder of a water quality certification to keep.

A DNR employee or representative may exercise any of these three inspection authorities only during reasonable hours and only after the DNR has provided reasonable advance notice to the person owning the property involved or to the holder of the water quality certification. In addition, a DNR employee or representative may not inspect a record kept by a holder of a water quality certification unless the holder, or the holder's designee, is present or unless the holder waives this requirement.

OTHER ENFORCEMENT PROVISIONS

The substitute amendment also applies the penalties that generally apply to ch. 281, Stats. (*Water and Sewage*) to violations of the provisions of the substitute amendment. In addition, it gives the Department of Justice (DOJ) the same role in enforcing the provisions of the substitute amendment as the DOJ has in enforcing other environmental regulations.

OTHER PROVISIONS

The substitute amendment renumbers the existing statute regarding wetland compensatory mitigation to ch. 281 and makes a minor terminology change in this program. This change replaces “owner” with “proprietor” in this program, as ch. 281 currently defines and uses the term “owner” in a manner more restrictive than the term’s use in the mitigation statute.

EFFECTIVE DATE

The substitute amendment takes effect on the day after its date of publication, pursuant to s. 991.11, Stats.

BILL HISTORY

Adoption of Senate Substitute Amendment 1 was recommended by the Senate Committee on Environmental Resources, Ayes, 5, Noes, 0, on February 8, 2001. Passage of Senate Bill 37, as amended, was recommended by the Senate Committee on Environmental Resources, Ayes, 5, Noes, 0, February 8, 2001.

The Senate adopted Senate Substitute Amendment 1 on a voice vote on February 13, 2001 and passed Senate Bill 37, as amended, Ayes, 27, Noes, 6, on February 13, 2001.

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