



## 2017 ASSEMBLY BILL 547

October 18, 2017 - Introduced by Representatives STEINEKE, STAFSHOLT, E. BROOKS, R. BROOKS, FELZKOWSKI, HORLACHER, JAGLER, JARCHOW, KNODL, KREMER, KUGLITSCH, RODRIGUEZ, ALLEN and HUTTON, cosponsored by Senators ROTH, CRAIG, FEYEN, KAPENGA, LEMAHIEU and LASEE. Referred to Committee on Regulatory Licensing Reform.

1     **AN ACT** *to repeal* 281.36 (3r) (a) 4. and 281.36 (3s); *to amend* 20.370 (9) (bm),  
2           281.36 (3b) (b), 281.36 (3m) (a), 281.36 (3n) (d), 281.36 (3r) (a) (intro.), 281.36  
3           (3r) (e), 281.36 (4) (title), 281.36 (6) (a) (intro.) and 281.36 (9) (a) (intro.); and  
4           **to create** 281.12 (2), 281.36 (1) (ad), 281.36 (1) (e), 281.36 (3r) (f) and 281.36 (4n)  
5           of the statutes; **relating to:** permitting and mitigation requirements for  
6           nonfederal and artificial wetlands and state assumption of the federal  
7           regulatory program governing the discharge of dredged or fill material into  
8           navigable waters.

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### *Analysis by the Legislative Reference Bureau*

This bill exempts nonfederal and artificial wetlands from certain Department of Natural Resources wetland permitting requirements and, if the Environmental Protection Agency delegates to the state the authority to administer its own permit program for the discharge of dredge or fill material into navigable waters, authorizes DNR to assume that authority.

Under current federal law, generally, a person must obtain a permit from the federal government for discharges to wetlands that are under the jurisdiction of the federal government. Federal law requires an applicant to submit with a permit application a certification from the state that the proposed discharge will comply

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with state water quality standards or that the state has waived such certification. In this state, DNR grants this certification by issuing a state wetland permit. Under current law, DNR must issue wetland general permits for discharges of dredged or fill material into certain wetlands and may require a person to apply for and obtain a wetland individual permit if DNR determines that conditions specific to the site require additional restrictions on the discharge in order to provide reasonable assurance that no significant adverse impacts to wetland functional values will occur.

The bill exempts wetlands that are not subject to federal jurisdiction (nonfederal wetlands) from state wetland permitting requirements. Generally speaking, only wetlands that are adjacent to navigable waters are subject to federal jurisdiction. The bill continues to require the mitigation of impacts from a discharge to a nonfederal wetland, which under current law is required before DNR may issue a wetland individual permit.

The bill also excludes artificial wetlands from the definition of a wetland, thereby exempting these wetlands from the permitting and mitigation requirements that apply to the discharge of dredged or fill material into a wetland. Under the bill, an artificial wetland is a nonfederal wetland created by human modifications to the landscape or hydrology and for which DNR has no definitive evidence showing a prior wetland or stream history, but does not include a wetland created under a mitigation requirement. Under current rules promulgated by DNR, only certain artificial wetlands are exempt from the wetland permitting requirements and only if DNR determines that significant functional values are not present.

Under current federal law, a state's governor may apply to the EPA requesting that the state be delegated the authority to administer its own individual and general permit program for the discharge of dredged or fill material into navigable waters, including federal wetlands, in place of the federal regulatory program. This bill authorizes DNR to submit such an application on behalf of and at the direction of the governor and authorizes DNR to assume that authority if the EPA delegates it to the state.

The bill also requires DNR to expend all moneys received prior to the effective date of this bill for the in lieu fee subprogram no later than June 30, 2019, and, effective January 7, 2019, to expend moneys received for the in lieu fee subprogram within 24 months of being credited the moneys. The bill provides that, no later than the third month of each legislative session, DNR is required to provide a report to the governor and the appropriate standing committees of the legislature explaining how the department expended the moneys and, if necessary, why the department failed to expend all of the moneys. Under current law, as part of the mitigation program, DNR may establish an in lieu fee subprogram, under which payments are made to DNR for the purposes of restoring, enhancing, creating, or preserving wetlands or other water resource features.

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

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

1           **SECTION 1.** 20.370 (9) (bm) of the statutes, as affected by 2017 Wisconsin Act  
2 59, is amended to read:

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

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

10           281.12 (2) The department, on behalf of and at the direction of the governor,  
11 may submit an application to the federal environmental protection agency under 33  
12 USC 1344 (g) seeking the delegation of authority to this state to administer its own  
13 individual and general permit program for the discharge of dredged or fill material  
14 into the navigable waters of this state. If the federal environmental protection  
15 agency delegates this authority to this state, the department may assume that  
16 authority.

17           **SECTION 3.** 281.36 (1) (ad) of the statutes is created to read:

18           281.36 (1) (ad) “Artificial wetland” means a wetland created by human  
19 modifications to the landscape or hydrology and for which the department has no  
20 definitive evidence showing a prior wetland or stream history. “Artificial wetland”

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1 does not include a wetland that is subject to federal jurisdiction under 33 USC 1344  
2 or a wetland created as a result of the mitigation program under sub. (3r).

3 **SECTION 4.** 281.36 (1) (e) of the statutes is created to read:

4 281.36 (1) (e) "Wetland" has the meaning given in s. 23.32 (1) but does not  
5 include an artificial wetland.

6 **SECTION 5.** 281.36 (3b) (b) of the statutes, as affected by 2017 Wisconsin Act 58,  
7 is amended to read:

8 281.36 (3b) (b) No person may discharge dredged material or fill material into  
9 a wetland unless the discharge is authorized by a wetland general permit or  
10 individual permit issued by the department under this section or the discharge is  
11 exempt under sub. (4) ~~or~~, (4m) (a), or (4n). No person may violate any condition  
12 contained in a wetland general or individual permit issued by the department under  
13 this section. The department may not issue a wetland general or individual permit  
14 under this section unless it determines that the discharge authorized pursuant to the  
15 wetland general or individual permit will comply with all applicable water quality  
16 standards.

17 **SECTION 6.** 281.36 (3m) (a) of the statutes, as affected by 2017 Wisconsin Act  
18 58, is amended to read:

19 281.36 (3m) (a) *When permit required.* Any person wishing to proceed with a  
20 discharge into any wetland shall submit an application for a wetland individual  
21 permit under this subsection unless the discharge has been authorized under a  
22 wetland general permit as provided in sub. (3g) or is exempt under sub. (4) ~~or~~, (4m)  
23 (a), or (4n). Before submitting the application, the department shall hold a meeting  
24 with the applicant to discuss the details of the proposed discharge and the  
25 requirements for submitting the application and for delineating the wetland. An

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1 applicant may include in the application a request for a public informational hearing.  
2 The application shall be accompanied by the applicable fee specified in sub. (11) or  
3 (12) (a).

4 **SECTION 7.** 281.36 (3n) (d) of the statutes is amended to read:

5 281.36 **(3n)** (d) *Mitigation required.* The department shall require mitigation  
6 under the program established under sub. (3r) for wetland individual permits it  
7 issues under this subsection and for any discharge exempt from permitting  
8 requirements under sub. (4n). This subsection does not entitle an applicant to a  
9 wetland individual permit or any other approval in exchange for conducting  
10 mitigation.

11 **SECTION 8.** 281.36 (3r) (a) (intro.) of the statutes is amended to read:

12 281.36 **(3r)** (a) (intro.) The department shall establish a mitigation program  
13 that applies only to the issuance of wetland individual permits and to discharges that  
14 are exempt from permitting requirements under sub. (4n) and that allows mitigation  
15 to be accomplished by any of the following methods:

16 **SECTION 9.** 281.36 (3r) (a) 4. of the statutes is repealed.

17 **SECTION 10.** 281.36 (3r) (e) of the statutes is amended to read:

18 281.36 **(3r)** (e) As part of the mitigation program established under par. (a), the  
19 department may establish an in lieu fee subprogram, under which payments are  
20 made to the department or another entity for the purposes of restoring, enhancing,  
21 creating, or preserving wetlands or other water resource features. The subprogram  
22 must be approved by the U.S. army corps of engineers. The department shall  
23 establish requirements for calculating the in lieu fee payments. Under the in lieu  
24 fee subprogram, the wetlands that benefit from the subprogram shall be open to the  
25 public for hunting, fishing, trapping, cross-country skiing, or hiking or any

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1 combination thereof, but the department may establish reasonable restrictions on  
2 the use of the land by the public in order to protect public safety or to protect a unique  
3 plant or animal community. The subprogram shall be consistent with federal  
4 regulations and the department may not impose requirements or conditions under  
5 the subprogram that exceed the requirements and conditions established by the U.S.  
6 army corps of engineers under 33 CFR 332.

7 **SECTION 11.** 281.36 (3r) (f) of the statutes is created to read:

8 281.36 (3r) (f) The department shall expend moneys received for the in lieu fee  
9 subprogram under par. (e) within 24 months of being credited the moneys. No later  
10 than the 3rd month of each legislative session, the department shall provide to the  
11 governor and the appropriate standing committees of the legislature a report  
12 explaining how the department expended the moneys and, if necessary, why the  
13 department failed to expend all of the moneys.

14 **SECTION 12.** 281.36 (3s) of the statutes is repealed.

15 **SECTION 13.** 281.36 (4) (title) of the statutes is amended to read:

16 281.36 (4) (title) EXEMPTIONS; CERTAIN ACTIVITIES.

17 **SECTION 14.** 281.36 (4n) of the statutes is created to read:

18 281.36 (4n) EXEMPTION; NONFEDERAL WETLANDS. The permitting requirement  
19 under sub. (3b) does not apply to any discharge into a nonfederal wetland.

20 **SECTION 15.** 281.36 (6) (a) (intro.) of the statutes is amended to read:

21 281.36 (6) (a) (intro.) The department shall promulgate rules to interpret and  
22 implement the provisions under subs. (4), (4n), and (5). In promulgating these rules,  
23 the department shall do all of the following:

24 **SECTION 16.** 281.36 (9) (a) (intro.) of the statutes is amended to read:

