



State of Wisconsin  
2019 - 2020 LEGISLATURE

LRBs0045/1  
CMH:amn

**SENATE SUBSTITUTE AMENDMENT 1,  
TO SENATE BILL 169**

1     **AN ACT** *to renumber and amend* 281.36 (3r) (a) 1.; *to amend* 281.36 (3r) (a) 2.,  
2           281.36 (3r) (b), 281.36 (3r) (e) and 295.60 (8) (dm) 4.; and *to create* 281.36 (1)  
3           (ad), 281.36 (1) (ae), 281.36 (1) (bf) and (bg), 281.36 (3r) (a) 1. b. and c., 281.36  
4           (3r) (ag), 281.36 (3t) (g) and 281.36 (3w) of the statutes; **relating to:** wetland  
5           mitigation banks, providing an exemption from emergency rule procedures,  
6           providing an exemption from rule-making procedures, and requiring the  
7           exercise of rule-making authority.

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*Analysis by the Legislative Reference Bureau*

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

8           **SECTION 1.** 281.36 (1) (ad) of the statutes is created to read:  
9           281.36 (1) (ad) “Bank service area” means the geographic area corresponding  
10          to the HUC 6 within which impacts to a wetland from a discharge can be mitigated

1 at a specific mitigation bank as determined in an agreement between the department  
2 and the U.S. army corps of engineers and referenced in a mitigation banking  
3 instrument under sub. (3w).

4 **SECTION 2.** 281.36 (1) (ae) of the statutes is created to read:

5 281.36 (1) (ae) “Basin” means the Lake Michigan, Lake Superior, or Mississippi  
6 River basin.

7 **SECTION 3m.** 281.36 (1) (bf) and (bg) of the statutes are created to read:

8 281.36 (1) (bf) “HUC 6” means a watershed delineated by the U.S. geological  
9 survey using a nationwide system based on surface hydrologic features at the 6-digit  
10 basin scale (the hydrologic unit code 6).

11 (bg) “HUC 8” means a watershed delineated by the U.S. geological survey using  
12 a nationwide system based on surface hydrologic features at the 8-digit subbasin  
13 scale (the hydrologic unit code 8).

14 **SECTION 4.** 281.36 (3r) (a) 1. of the statutes is renumbered 281.36 (3r) (a) 1. a.  
15 and amended to read:

16 281.36 (3r) (a) 1. a. ~~Purchasing~~ Except as provided in subd. 1. b. and par. (ag),  
17 purchasing credits from a mitigation bank located in ~~this state~~ the same HUC 8 as  
18 the wetland impacted by the discharge.

19 **SECTION 5.** 281.36 (3r) (a) 1. b. and c. of the statutes are created to read:

20 281.36 (3r) (a) 1. b. Except as provided in subd. 1. c. and par. (ag), if credits are  
21 not available to be purchased as provided under subd. 1. a., credits may be purchased  
22 from a mitigation bank within the same bank service area as the wetland impacted  
23 by the discharge.

1 c. Except as provided in par. (ag), if credits are not available to be purchased  
2 as provided under subd. 1. b., credits may be purchased from a mitigation bank in  
3 the same basin as the wetland impacted by the discharge.

4 **SECTION 6.** 281.36 (3r) (a) 2. of the statutes is amended to read:

5 281.36 (3r) (a) 2. Participating in the in lieu fee subprogram, ~~if such a~~  
6 ~~subprogram is established~~ under par. (e).

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

8 281.36 (3r) (ag) The department may, in consultation with the U.S. army corps  
9 of engineers, allow credits to be purchased from a different mitigation bank than the  
10 one prescribed under par. (a) 1. or allow mitigation to be done through the in lieu fee  
11 subprogram rather than by purchasing credits from a mitigation bank if the  
12 department determines it would better serve natural resource goals, such as  
13 retaining flood water, improving or restoring wildlife habitat, or more closely  
14 matching the impacted wetland type. The department may also consider economic  
15 factors when making this determination only if the HUC 8 has one approved  
16 mitigation bank and that bank is charging a price for credits in that watershed that  
17 is in excess of 150 percent of the price of a credit in that watershed under the in lieu  
18 fee subprogram.

19 **SECTION 8.** 281.36 (3r) (b) of the statutes is amended to read:

20 281.36 (3r) (b) Under the mitigation program, mitigation as specified in par.  
21 (a) 1. and participation in the in lieu fee subprogram, ~~if established under par. (a) 2.~~  
22 shall be the preferred types of mitigation.

23 **SECTION 9.** 281.36 (3r) (e) of the statutes is amended to read:

24 281.36 (3r) (e) As part of the mitigation program established under par. (a), the  
25 department ~~may~~ shall establish an in lieu fee subprogram, under which payments

1 are made to the department or another entity for the purposes of restoring,  
2 enhancing, creating, or preserving wetlands or other water resource features. The  
3 subprogram must be approved by the U.S. army corps of engineers. The department  
4 shall establish requirements for calculating the in lieu fee payments. Under the in  
5 lieu fee subprogram, the wetlands that benefit from the subprogram shall be open  
6 to the public for hunting, fishing, trapping, cross-country skiing, or hiking or any  
7 combination thereof, but the department may establish reasonable restrictions on  
8 the use of the land by the public in order to protect public safety or to protect a unique  
9 plant or animal community. The subprogram shall be consistent with federal  
10 regulations.

11 **SECTION 10.** 281.36 (3t) (g) of the statutes is created to read:

12 281.36 **(3t)** (g) Financial assurance requirements for the construction of  
13 mitigation projects by mitigation banks.

14 **SECTION 11.** 281.36 (3w) of the statutes is created to read:

15 281.36 **(3w)** RELEASE OF CREDITS. (a) In this subsection:

16 1. "Applicant" means the applicant for a wetland individual permit for which  
17 wetland mitigation is required under sub. (3n) (d) or the proponent of a wetland  
18 mitigation project required under sub. (3n) (d).

19 2. "Bank sponsor" means any public or private entity financially responsible  
20 for establishing or operating a mitigation bank.

21 3. "Compensation site plan" means a comprehensive document prepared by an  
22 applicant or bank sponsor that provides a thorough description of a proposed wetland  
23 mitigation project.

24 4. "Developing mitigation bank" means a mitigation bank that has not  
25 completed its mitigation project and that has not yet been established under an

1 agreement between the bank sponsor and the department or otherwise approved by  
2 the department.

3 5. "Estimated credits" means the total number of credits that a developing  
4 mitigation bank estimates it will have once its mitigation project is constructed.

5 6. "Mitigation banking instrument" means the legal document that governs the  
6 establishment, operation, and use of a mitigation bank.

7 (b) A developing mitigation bank may sell its estimated credits under the  
8 mitigation program under sub. (3r) only if the mitigation bank has met the financial  
9 assurance requirements established by the department under sub. (3t) (g) and,  
10 except as provided under par. (c), only in accordance with the following schedule:

11 1. No more than 20 percent of the estimated credits after the department  
12 approves and executes the mitigation banking instrument.

13 2. No more than 65 percent of the estimated credits after the department issues  
14 a letter of compliance stating that construction and all corrective actions are  
15 complete.

16 3. No more than 85 percent of the estimated credits after the department  
17 approves a monitoring report for the mitigation bank or after 2 years have passed  
18 after construction of the mitigation project is completed, whichever is later.

19 4. One hundred percent of the estimated credits after the department approves  
20 the final monitoring report for the mitigation bank and determines that all  
21 performance standards identified in the compensation site plan are met.

22 (c) The department may authorize a developing mitigation bank to sell its  
23 estimated credits at a faster rate than the schedule under par. (b) allows if the bank  
24 provides an additional level of financial assurance or if the mitigation is of a type that  
25 is less prone to failure, such as wetland preservation or enhancement.

1 (d) After the department approves and executes a mitigation banking  
2 instrument establishing the specifications for a developing mitigation bank, the  
3 sponsor of the bank may not change the mitigation banking instrument without the  
4 approval of the department. After the sponsor of a developing mitigation bank  
5 submits to the department a proposed change to the mitigation banking instrument  
6 for review, the mitigation bank may not sell any estimated credits under par. (b) until  
7 one of the following occurs:

8 1. The department approves the change to the mitigation banking instrument,  
9 and the mitigation bank sponsor and the department adjust the estimated credits  
10 and make any necessary adjustments to the credit release schedule under par. (b),  
11 if the department believes these adjustments are necessary based on the change to  
12 the mitigation banking instrument.

13 2. The department rejects the changes submitted by the mitigation bank  
14 sponsor, in which case the existing mitigation banking instrument remains effective.

15 **SECTION 12.** 295.60 (8) (dm) 4. of the statutes is amended to read:

16 295.60 (8) (dm) 4. Participation in the in lieu fee subprogram, ~~if such a~~  
17 ~~subprogram is established~~ under s. 281.36 (3r) (e).

18 **SECTION 13. Nonstatutory provisions.**

19 (1) Using the procedure under s. 227.24, the department of natural resources  
20 may promulgate the rules necessary to implement s. 281.36 (3t) (g) as emergency  
21 rules. Notwithstanding s. 227.24 (1) (a), (2) (b), and (3), the department of natural  
22 resources is not required to provide evidence that promulgating a rule under this  
23 subsection as an emergency rule is necessary for the preservation of the public peace,  
24 health, safety, or welfare and is not required to provide a finding of emergency for a  
25 rule promulgated under this subsection.

