



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

August 5, 2019 - Offered by Senators WANGGAARD, COWLES and WIRCH.

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) (be), (bf) and (bg), 281.36 (3r) (a) 1. b. and c.,
4 281.36 (3r) (ag), 281.36 (3t) (g) and 281.36 (3w) of the statutes; **relating to:**
5 wetland mitigation banks, providing an exemption from emergency rule
6 procedures, providing an exemption from rule-making procedures, and
7 requiring the exercise of rule-making authority.

Analysis by the Legislative Reference Bureau

This bill makes changes to requirements for wetland mitigation banks.

Under current law, the Department of Natural Resources 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. Under current law, before DNR may issue a wetland individual permit, it must require the restoration, enhancement,

creation, or preservation of other wetlands to compensate for adverse impacts to a wetland resulting from the discharge, also known as mitigation.

Under current law, there are three methods by which wetland mitigation may be accomplished: 1) purchasing credits from a mitigation bank located in this state; 2) participating in the in lieu fee subprogram; or 3) completing mitigation within the same watershed or within one-half mile of the site of the discharge. A mitigation bank is a system of accounting for wetland loss and compensation in which sites where wetlands are restored, enhanced, created, or preserved generate credits that may be applied or purchased in order to compensate for adverse impacts to other wetlands. Under current law, DNR must approve the establishment of a mitigation bank.

This bill changes the first method of wetland mitigation by limiting credit purchases to only a mitigation bank located in the same hydrologic unit code (HUC) 8 as the wetland impacted by the discharge, if available. Under the bill, an HUC 8 is a watershed delineated by the U.S. Geological Survey using a nationwide system based on surface hydrologic features at the 8-digit subbasin scale. If no available mitigation bank is located in the same HUC 8 as the wetland impacted by the discharge, the bill allows credit purchases to be made from a mitigation bank located within the same bank service area as the wetland impacted by the discharge. Under the bill, a bank service area is the geographic area corresponding to the HUC 6 within which impacts to a wetland from a discharge can be mitigated at a specific mitigation bank as determined in an agreement between DNR and the U.S. Army Corps of Engineers and referenced in a mitigation banking instrument. Under the bill, an HUC 6 is a watershed delineated by the U.S. Geological Survey using a nationwide system based on surface hydrologic features at the 6-digit basin scale. If no available mitigation bank is located in the same bank service area as the impacted wetland, the bill allows credit purchases to be made from a mitigation bank in the same basin as the wetland impacted by the discharge, meaning the Lake Michigan, Lake Superior, or Mississippi River basin that corresponds to the HUC 2. Under the bill, an HUC 2 is a watershed delineated by the U.S. Geological Survey using a nationwide system based on surface hydrologic features at the 2-digit region scale.

However, despite these limitations on the location of a mitigation bank, the bill allows DNR, in consultation with the U.S. Army Corps of Engineers, to allow credits to be purchased from a different mitigation bank than the one prescribed or allow mitigation to be done through the in lieu fee subprogram rather than by purchasing credits from a mitigation bank if DNR determines it would better serve natural resource goals, such as retaining flood water, improving or restoring wildlife habitat, or more closely matching the impacted wetland type.

This bill requires DNR to establish by rule financial assurance requirements for the construction of mitigation projects by mitigation banks. The bill also establishes the means by which a mitigation bank that has not yet completed construction of a mitigation project and has not been approved by DNR (developing mitigation bank) may sell the credits that the mitigation bank estimates it will have once the mitigation project is complete. Under the bill, a developing mitigation bank may sell these credits if it is in compliance with DNR's financial assurance

requirements and if it follows a specific schedule for release of the credits that is established in the bill. The bill allows DNR to authorize a developing mitigation bank to sell its estimated credits at a faster rate than the schedule allows if the bank provides an additional level of financial assurance or if the mitigation is of a type that is less prone to failure, such as wetland preservation or enhancement.

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

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

2 281.36 (1) (ad) “Bank service area” means the geographic area corresponding
3 to the HUC 6 within which impacts to a wetland from a discharge can be mitigated
4 at a specific mitigation bank as determined in an agreement between the department
5 and the U.S. army corps of engineers and referenced in a mitigation banking
6 instrument under sub. (3w).

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

8 281.36 (1) (ae) “Basin” means the Lake Michigan, Lake Superior, or Mississippi
9 River basin that corresponds to the HUC 2.

10 **SECTION 3.** 281.36 (1) (be), (bf) and (bg) of the statutes are created to read:

11 281.36 (1) (be) “HUC 2” means a watershed delineated by the U.S. geological
12 survey using a nationwide system based on surface hydrologic features at the 2-digit
13 region scale (the hydrologic unit code 2).

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

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

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

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

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

7 281.36 **(3r)** (a) 1. b. Except as provided in subd. 1. c. and par. (ag), if credits are
8 not available to be purchased as provided under subd. 1. a., credits may be purchased
9 from a mitigation bank within the same bank service area as the wetland impacted
10 by the discharge.

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

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

15 281.36 **(3r)** (a) 2. ~~Participating in the in lieu fee subprogram, if such a~~
16 ~~subprogram is established~~ under par. (e).

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

18 281.36 **(3r)** (ag) The department may, in consultation with the U.S. army corps
19 of engineers, allow credits to be purchased from a different mitigation bank than the
20 one prescribed under par. (a) 1. or allow mitigation to be done through the in lieu fee
21 subprogram rather than by purchasing credits from a mitigation bank if the
22 department determines it would better serve natural resource goals, such as
23 retaining flood water, improving or restoring wildlife habitat, or more closely
24 matching the impacted wetland type.

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

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

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

5 281.36 **(3r)** (e) As part of the mitigation program established under par. (a), the
6 department ~~may~~ shall establish an in lieu fee subprogram, under which payments
7 are made to the department or another entity for the purposes of restoring,
8 enhancing, creating, or preserving wetlands or other water resource features. The
9 subprogram must be approved by the U.S. army corps of engineers. The department
10 shall establish requirements for calculating the in lieu fee payments. Under the in
11 lieu fee subprogram, the wetlands that benefit from the subprogram shall be open
12 to the public for hunting, fishing, trapping, cross-country skiing, or hiking or any
13 combination thereof, but the department may establish reasonable restrictions on
14 the use of the land by the public in order to protect public safety or to protect a unique
15 plant or animal community. The subprogram shall be consistent with federal
16 regulations.

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

18 281.36 **(3t)** (g) Financial assurance requirements for the construction of
19 mitigation projects by mitigation banks.

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

21 281.36 **(3w)** RELEASE OF CREDITS. (a) In this subsection:

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

1 2. “Bank sponsor” means any public or private entity financially responsible
2 for establishing or operating a mitigation bank.

3 3. “Compensation site plan” means a comprehensive document prepared by an
4 applicant or bank sponsor that provides a thorough description of a proposed wetland
5 mitigation project.

6 4. “Developing mitigation bank” means a mitigation bank that has not
7 completed its mitigation project and that has not yet been established under an
8 agreement between the bank sponsor and the department or otherwise approved by
9 the department.

10 5. “Estimated credits” means the total number of credits that a developing
11 mitigation bank estimates it will have once its mitigation project is constructed.

12 6. “Mitigation banking instrument” means the legal document that governs the
13 establishment, operation, and use of a mitigation bank.

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

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

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

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

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

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

8 (d) After the department approves and executes a mitigation banking
9 instrument establishing the specifications for a developing mitigation bank, the
10 sponsor of the bank may not change the mitigation banking instrument without the
11 approval of the department. After the sponsor of a developing mitigation bank
12 submits to the department a proposed change to the mitigation banking instrument
13 for review, the mitigation bank may not sell any estimated credits under par. (b) until
14 one of the following occurs:

15 1. The department approves the change to the mitigation banking instrument,
16 and the mitigation bank sponsor and the department adjust the estimated credits
17 and make any necessary adjustments to the credit release schedule under par. (b),
18 if the department believes these adjustments are necessary based on the change to
19 the mitigation banking instrument.

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

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

23 295.60 (8) (dm) 4. Participation in the in lieu fee subprogram, ~~if such a~~
24 ~~subprogram is established~~ under s. 281.36 (3r) (e).

25 **SECTION 13. Nonstatutory provisions.**

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

8 (2) Notwithstanding s. 227.135 (2), the department of natural resources is not
9 required to present the statement of scope of the rules necessary to implement s.
10 281.36 (3t) (g) to the department of administration for review by the department of
11 administration and approval by the governor. Notwithstanding s. 227.135 (2), the
12 department of natural resources is not required to present the statement of scope,
13 as provided in s. 227.135 (2), to the natural resources board for approval.
14 Notwithstanding s. 227.24 (1) (c) and (2), emergency rules promulgated under sub.
15 (1) remain in effect until the date that is 2 years after the date of promulgation or
16 until the date on which permanent rules take effect, whichever is sooner.

17 **SECTION 14. Effective dates.** This act takes effect on the 90th day after the
18 day of publication, except as follows:

19 (1) The treatment of s. 281.36 (3t) (g) and SECTION 13 of this act take effect on
20 the day after publication.

21 (END)