
Wisconsin Legislative Council

ACT MEMO



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2019 Wisconsin Act 59
[2019 Senate Bill 169]

Wetland Mitigation Banking

BACKGROUND

Wisconsin law requires a person to obtain a permit before conducting an activity that will result in a discharge of dredged material or fill material into a wetland, unless the activity is exempt from that requirement. The Department of Natural Resources (DNR) generally must require mitigation to offset wetland impacts authorized in an individual wetland permit. In addition, under 2017 Wisconsin Act 183, which created new exemptions from state wetland permitting requirements, certain wetland impacts that are exempt from state permitting are nonetheless subject to specified mitigation requirements. [s. 281.36 (3b), (3n) (d) 1., and (3r) (a), Stats.]

Mitigation may be accomplished by any of the following methods:

- Purchasing or applying credits from a mitigation bank¹ in this state.
- Participating in an “in-lieu fee” subprogram, under which payments are made to the DNR or another entity for the purposes of restoring, enhancing, creating, or preserving wetlands or other water resource features.
- Completing mitigation within the same watershed or within one-half mile of the site of the discharge.

The DNR must establish mitigation ratios that are consistent with the federal regulations that apply to mitigation and mitigation banks, but the minimum ratio must generally be at least 1.2 acres for each acre affected by a discharge. [s. 281.36 (3n) (d) and (3r), Stats.]

The DNR’s administrative rules establish requirements for conducting mitigation by purchasing credits through a mitigation bank.² Most relevant to the act, the rules outline a sequence of compensatory mitigation, which requires that on-site compensation opportunities be evaluated first. If the DNR determines that the project proponent has shown that it is not practicable or ecologically preferable to conduct on-site mitigation, the DNR must allow the project proponent to conduct off-site mitigation. Off-site mitigation must occur as near as practicable to the location of the adversely impacted wetland through development of a project within a “compensation search area”³ or purchase of mitigation

¹ A “mitigation bank” is a system of accounting for wetland loss. A mitigation bank typically includes one or more sites where wetlands are restored, enhanced, or created to provide transferable credits, which may be used to offset impacts to other wetlands.

² For wetlands subject to federal jurisdiction, federal law also governs various aspects of mitigation banking, including locational factors and the pace for releasing credits. The federal mitigation rule requires that credits be released after “specific milestones associated with the mitigation bank site’s protection and development are achieved.” [33 C.F.R. s. 332.3.]

³ The DNR’s rules define “compensation search area” to mean an area that includes the geographic management unit of the impacted wetland, the county of the impacted wetland, and a circle within a 20-mile radius from the impacted wetland. The state is divided into 22 “geographic management units,” based on the major river basins in the state. [s. NR 350.03 (6) and (15), Wis. Adm. Code.]

credits from a mitigation bank with a bank site located in the compensation search area. [s. NR 350.04, Wis. Adm. Code.]

In addition, under the DNR's administrative rules, the sponsor of a mitigation bank may release credits according to a schedule set forth in a bank document⁴ approved by the DNR. In such schedules, the DNR may allow the release of credits as follows:

- Up to 10 percent of the total estimated credits when the bank document is signed by all parties.
- Up to 20 percent of the total estimated credits when the DNR issues a letter of compliance after completion and initial monitoring of a project.
- Up to 30 percent of the total estimated credits upon receipt of a monitoring report, following the second year after construction.

The DNR's administrative rules require a prospective mitigation bank sponsor to submit a prospectus to the DNR. Within 60 days after receiving the prospectus, the rules require the DNR to facilitate a meeting of an interagency group of federal, state, local, and tribal representatives to review and comment on the prospectus. Based on those comments, the sponsor then must draft a bank document, which must satisfy several procedural steps before it is finalized and signed. The DNR must be a signatory to the bank document. [s. NR 350.12, Wis. Adm. Code.]

Finally, the DNR's administrative rules provide financial assurance requirements for mitigation banks. The rules specify that the DNR may require a bank to provide a performance bond, irrevocable letter of credit, irrevocable trust account, or other financial assurance, which the DNR may hold during both site construction and post-construction monitoring phases. [s. NR 350.10, Wis. Adm. Code.]

2019 WISCONSIN ACT 59

2019 Wisconsin Act 59 makes several changes which codify or modify current DNR administrative rules relating to the mitigation of wetland impacts conducted by purchasing credits from a wetland mitigation bank. As described below, the act addresses: (1) locational criteria; (2) the schedule for releasing credits; (3) mitigation bank documents; and (4) rulemaking authority regarding financial assurance requirements for mitigation banks. In addition, the act makes a change relating to the in-lieu fee program for wetland mitigation.

Wetland Mitigation Banking

Locational Criteria

The act creates a tiered sequence governing the geographic location of mitigation banks, referencing hydrologic unit codes (HUCs) delineated by the U.S. Geological Survey. Specifically, the act provides the following locational sequence:

- If available, credits must be purchased from a bank located within the same HUC⁵ as the wetland impacts.

⁴ The "bank document" is a record specifying the establishment, operation and maintenance, and goals, objectives, and procedures of a mitigation bank. [s. NR 350.03 (1), Wis. Adm. Code.]

⁵ A "HUC8" is a "subbasin" watershed level. More information regarding hydrologic unit codes is available here: <https://water.usgs.gov/GIS/huc.html>.

- If credits are not available within the same HUC 8, credits must be purchased from a bank located within the same service bank area⁶ of the wetland impacts.
- If credits are not available within the same service bank area, credits must be purchased from a bank located within the same basin⁷ as the wetland impacts.

The act authorizes the DNR, in consultation with the USACE, to allow credits to be purchased from a bank in a location other than those listed above, if the DNR determines that doing so would better serve natural resources goals, such as retaining flood water, improving or restoring wildlife habitat, or more closely matching the impacted wetland type. When making that determination, the act authorizes the DNR to consider economic factors, if the HUC 8 area has only one mitigation bank, and the bank is charging a price that exceeds 150 percent of the price of a credit offered through the DNR's in-lieu fee program.

Schedule for Releasing Credits

The act modifies the timeline by which an approved mitigation bank may release credits for wetland mitigation conducted through wetland mitigation banking. Specifically, if a mitigation bank has met financial assurance requirements established by the DNR, the act authorizes the release of credits according to the following schedule:

- Up to 20 percent of the estimated credits after the DNR approves and executes the bank document.
- Up to 65 percent of the estimated credits when the DNR issues a letter of compliance that construction and all corrective actions are complete.
- Up to 85 percent of estimated credits upon receipt of a monitoring report, or after two years have passed after construction, whichever is later.
- Up to 100 percent of estimated credits after the DNR receives a final year monitoring report and determines that the site has satisfactorily met all required performance standards.

In addition, the act authorizes the DNR to allow a developing mitigation bank to sell its estimated credits at a faster rate than the provided schedule, 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.

Bank Documents

The act prohibits the sponsor of a mitigation bank from changing its "mitigation bank instrument," defined to mean the legal document that governs the establishment, operation, and use of a mitigation bank, without the DNR's approval after the DNR has approved and executed the document. If a mitigation bank sponsor submits a proposed change to its bank document to the DNR, the act prohibits the bank from selling estimated credits until either: (1) the DNR approves the change; or (2) the DNR rejects the changes, in which case the existing mitigation banking instrument remains effective.

Rulemaking Relating to Financial Assurance

The act directs the DNR to promulgate rules relating to financial assurance requirements for the construction of mitigation projects by mitigation banks. The act authorizes the DNR to promulgate those rules as emergency rules without making the findings generally required for emergency rulemaking. The act also exempts rulemaking necessary to implement those financial assurance

⁶ The act defines "bankservice area" as an area determined under an agreement between the DNR and U.S. Army Corps of Engineers (USACE) and corresponding to a HUC 6 watershed size.

⁷ The act defines "basin" to mean the Lake Michigan basin, the Lake Superior basin, and the Mississippi River basin.

requirements from general rulemaking requirements relating to scope statements and Natural Resources Board approval. In addition, the act specifies that, if the DNR promulgates an emergency rule regarding financial assurance requirements, the emergency rule may remain in effect for up to two years.

In-Lieu Fee Program

Prior law, generally retained by the act, authorizes the DNR to establish an in-lieu fee subprogram as part of its wetland mitigation program. The in-lieu fee program established by the DNR, called the Wisconsin Wetland Conservation Trust, currently offers credits in each major HUC 4 river basin throughout the state.

The act modifies the statutory language to specify that the DNR is required to establish an in-lieu fee subprogram for wetland mitigation.

Effective date: The act generally takes effect on February 24, 2020. However, provisions of the act relating to financial assurance, including rulemaking authority corresponding with financial assurance requirements, took effect on November 27, 2019.

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