

State of Wisconsin



2019 Senate Bill 169

Date of enactment: **November 25, 2019**

Date of publication*: **November 26, 2019**

2019 WISCONSIN ACT 59

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

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

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

281.36 (1) (ad) "Bank service area" means 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 the department and the U.S. army corps of engineers and referenced in a mitigation banking instrument under sub. (3w).

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

281.36 (1) (ae) "Basin" means the Lake Michigan, Lake Superior, or Mississippi River basin.

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

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

(bg) "HUC 8" means a watershed delineated by the U.S. geological survey using a nationwide system based

on surface hydrologic features at the 8-digit subbasin scale (the hydrologic unit code 8).

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

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

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

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

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

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

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

* Section 991.11, WISCONSIN STATUTES: Effective date of acts. "Every act and every portion of an act enacted by the legislature over the governor's partial veto which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication."

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

281.36 (3r) (ag) The department may, in consultation with the U.S. army corps of engineers, allow credits to be purchased from a different mitigation bank than the one prescribed under par. (a) 1. or allow mitigation to be done through the in lieu fee subprogram rather than by purchasing credits from a mitigation bank if the department 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. The department may also consider economic factors when making this determination only if the HUC 8 has one approved mitigation bank and that bank is charging a price for credits in that watershed that is in excess of 150 percent of the price of a credit in that watershed under the in lieu fee subprogram.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) The department may authorize a developing mitigation bank to sell its estimated credits at a faster rate than the schedule under par. (b) 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.

(d) After the department approves and executes a mitigation banking instrument establishing the specifications for a developing mitigation bank, the sponsor of the bank may not change the mitigation banking instrument without the approval of the department. After the sponsor of a developing mitigation bank submits to the department a proposed change to the mitigation banking instrument for review, the mitigation bank may not sell any

estimated credits under par. (b) until one of the following occurs:

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

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

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

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

SECTION 13. Nonstatutory provisions.

(1) Using the procedure under s. 227.24, the department of natural resources may promulgate the rules necessary to implement s. 281.36 (3t) (g) as emergency rules. Notwithstanding s. 227.24 (1) (a), (2) (b), and (3), the department of natural resources is not required to provide

evidence that promulgating a rule under this subsection as an emergency rule is necessary for the preservation of the public peace, health, safety, or welfare and is not required to provide a finding of emergency for a rule promulgated under this subsection.

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

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

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