
Wisconsin Legislative Council

AMENDMENT MEMO



Memo published: October 11, 2019

Contact: Anna Henning, Senior Staff Attorney

2019 Senate Bill 169

**Senate Substitute
Amendment 1, as Amended**

BACKGROUND

Wisconsin law generally 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 bank 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. Among other requirements, the rules specify locational criteria, a timeline for release of credits, procedures for approving and modifying mitigation bank documents, and financial assurance requirements for mitigation banks.

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.]

2019 SENATE BILL 169

2019 Senate Bill 169 makes several changes to current statutes relating to the mitigation of wetland impacts conducted by purchasing credits from a wetland mitigation bank. All of the changes in the bill relate to wetland mitigation banking requirements currently governed by the DNR’s administrative rules. Specifically, the bill 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.

Locational Criteria

The DNR's **current administrative 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"¹ or purchase of mitigation credits from a mitigation bank with a bank site located in the compensation search area. [s. NR 350.04, Wis. Adm. Code.]

The bill modifies locational requirements for wetland mitigation conducted by purchasing credits from a mitigation bank. Generally,² the bill provides the following locational sequence:

- If available, credits must be purchased from a bank located within the same **compensation search area**³ as the wetland impacts.
- If credits are not available within the same compensation search area, credits must be purchased from a bank located within **50 miles** of the wetland impacts.
- If credits are not available within 50 miles, credits must be purchased from a bank located within the same **basin**⁴ as the wetland impacts.
- If credits are not available within the same basin, credits may be purchased from a bank located **anywhere in the state**.

Schedule for Releasing Credits

Under the DNR's **current administrative rules**, the sponsor of a mitigation bank may release credits according to a schedule set forth in a bank document 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.

¹ 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.]

² The locational sequence created by the bill does not apply to mitigation required for activities exempt from state permitting requirements under 2017 Wisconsin Act 187, which must be conducted within the same compensation search area as the exempt wetland impact.

³ The definition of "compensation search area" in the bill is the same definition provided in the DNR's administrative rules, described above.

⁴ For this purpose, the bill defines "basin" to mean the Lake Michigan basin, the Lake Superior basin, and the Mississippi River basin.

- Up to 100 percent of the credits after the DNR receives a final year monitoring report and determines that the site has satisfactorily met all required performance standards.

[s. NR 350.13 (7), Wis. Adm. Code.]

The bill 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 bill 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.

Bank Documents

The DNR's **current 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.]

After it is finalized and signed, the rules provide that a bank document may be amended, subject to notification and approval of the DNR and the interagency review team. [s. NR 350.13 (2), Wis. Adm. Code.]

The bill prohibits the sponsor of a mitigation bank from changing a mitigation bank document 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 bill prohibits the bank from selling estimated credits until: (1) the DNR approves the change; and (2) the bank sponsor and the DNR adjust the estimated credits and make any necessary adjustments to the credit release schedule. The bill does not address the role of an interagency review team.

Rulemaking Relating to Financial Assurance

The DNR's **current 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.]

The bill specifically directs the DNR to promulgate rules relating to financial assurance requirements for the construction of mitigation projects by mitigation banks. The bill authorizes the DNR to promulgate those rules as emergency rules without making the findings generally required for emergency rulemaking. The bill also exempts rulemaking necessary to implement those financial assurance requirements from general rulemaking requirements relating to scope statements and Natural Resources Board approval.

SENATE SUBSTITUTE AMENDMENT 1, AS AMENDED

As amended by Senate Amendments 1 and 2, Senate Substitute Amendment 1 addresses the same aspects of mitigation banking that are addressed by the bill, with certain modifications. In addition, the substitute amendment adds provisions relating to the in-lieu fee program for wetland mitigation.

Wetland Mitigation Banking

Locational Criteria

Like the bill, the substitute amendment creates a tiered sequence regarding the geographic location of a mitigation bank. However, instead of the “compensation search area,” 50-mile radius, and the whole state, the substitute amendment establishes locational criteria in reference to hydrologic unit codes delineated by the U.S. Geological Survey.⁵

Specifically, the substitute amendment provides the following locational sequence:

- If available, credits must be purchased from a bank located within the same **HUC 8**⁶ as the wetland impacts.
- If credits are not available within the same HUC 8, credits must be purchased from a bank located within the same **service bank area**⁷ 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 **basin**⁸ as the wetland impacts.

The substitute amendment does not generally authorize credits to be purchased from a bank located anywhere in the state. However, the substitute amendment authorizes the DNR, in consultation with USACE, to allow credits to be purchased from a bank in another location, 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. As amended by Senate Amendment 2, the substitute amendment authorizes the DNR to consider economic factors in making that determination 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 substitute amendment generally retains the schedule provided by the bill for the release of credits by a mitigation bank. However, the substitute amendment 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.

⁵ Arguably, the geographic boundaries referenced in the substitute amendment more closely align with the “watershed approach” to compensatory wetland mitigation outlined in 2013 guidelines co-drafted by the DNR and the U.S. Army Corps of Engineers (USACE).

⁶ A “HUC 8” is a “subbasin” watershed level. More information regarding hydrologic unit codes is available here: <https://water.usgs.gov/GIS/huc.html>.

⁷ The substitute amendment defines “bank service area” as an area determined under an agreement between the DNR and USACE and corresponding to a HUC 6 watershed size.

⁸ As amended by Senate Amendment 1, the substitute amendment defines “basin” to mean the Lake Michigan basin, the Lake Superior basin, and the Mississippi River basin.

Bank Documents

The substitute amendment generally retains the provisions in the bill regarding amendments to bank documents after they are finalized. However, the substitute amendment replaces the term “bank document” with the term “mitigation banking instrument,” defined to mean the legal document that governs the establishment, operation, and use of a mitigation bank.

In addition, the substitute amendment modifies a provision of the bill to clarify that if the DNR rejects proposed changes to a mitigation banking document, the existing document remains in effect. Specifically, the substitute amendment prohibits the sponsor of a mitigation bank from changing a mitigation banking instrument 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 substitute amendment 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 substitute amendment retains provisions of the bill requiring the DNR to promulgate rules governing financial assurance requirements for the construction of mitigation projects by mitigation banks. In addition to the provisions in the bill, the substitute amendment 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

In addition to provisions relating to wetland mitigation banking, the substitute amendment includes provisions relating to the in-lieu fee mitigation subprogram, which is not addressed by the bill. Specifically, under current law, the DNR is authorized 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 substitute amendment modifies the statutory language to specify that the DNR is required to establish an in-lieu fee subprogram for wetland mitigation.

BILL HISTORY

Senators Wanggaard, Cowles, and Wirch offered Senate Substitute Amendment 1 to the bill on August 5, 2019. Senators Wanggaard and Cowles offered Senate Amendment 1 to the substitute amendment on August 29, 2019. On September 3, 2019, the Senate Committee on Natural Resources and Energy voted to recommend adoption of Senate Amendment 1 to Senate Substitute Amendment 1 and Senate Substitute Amendment 1, as amended, both with votes of Ayes, 5; Noes, 0. The committee then also voted unanimously to recommend passage of the bill, as amended.

Senators Wanggaard, Cowles, and Wirch offered Senate Amendment 2 to the substitute amendment on October 8, 2019. On the same day, the Senate voted to adopt all amendments and pass the bill, as amended, all on voice votes.

AH:jal