

State of Wisconsin



1995 Assembly Bill 585

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1995 WISCONSIN ACT 296

AN ACT to *renumber* 29.092 (10); to *amend* 29.092 (10) (title), 29.093 (10) (b), 29.415 (1), 29.415 (4) (intro.) and 29.415 (6) (a); and to *create* 20.370 (1) (ft), 29.092 (10) (b), 29.415 (2) (am), 29.415 (2) (bn), 29.415 (6m) and 29.415 (6r) of the statutes; **relating to:** incidental takings of wild animals and wild plants of endangered species or threatened species, extending the time limit for emergency rule procedures, providing an exemption from emergency rule procedures, granting rule-making authority and making an appropriation.

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

SECTION 1. 20.370 (1) (ft) of the statutes is created to read:

20.370 (1) (ft) *Endangered resources — application fees.* All moneys received from application fees under s. 29.092 (10) (b) to be used for the purposes of processing applications under and administering s. 29.415 (6m) and (6r).

SECTION 2. 29.092 (10) (title) of the statutes is amended to read:

29.092 (10) (title) SCIENTIFIC COLLECTOR PERMIT; ENDANGERED SPECIES PERMIT.

SECTION 3. 29.092 (10) of the statutes is renumbered 29.092 (10) (a).

SECTION 4. 29.092 (10) (b) of the statutes is created to read:

29.092 (10) (b) The nonrefundable application fee for a permit issued under s. 29.415 (6m) is \$100.

SECTION 5. 29.093 (10) (b) of the statutes is amended to read:

29.093 (10) (b) *Endangered species permit.* A permit issued under s. 29.415 (6) or (6m) is valid for the period designated by the department.

SECTION 6. 29.415 (1) of the statutes is amended to read:

29.415 (1) **PURPOSE.** The legislature finds that certain wild animals and wild plants are endangered or threatened and are entitled to preservation and protection as a matter of general state concern. The federal endangered species act of 1973 and the Lacey act together provide for the protection of wild animals and wild plants threatened with worldwide extinction by prohibiting the importation of endangered or threatened wild animals and wild plants and by restricting and regulating interstate and foreign commerce in wild animals and wild plants taken in violation of state, federal and foreign laws. The states, however, must also assume their responsibility for conserving these wild animals and wild plants and for restricting the taking, possession, transportation, processing or sale of endangered or threatened wild animals and wild plants within their respective jurisdictions to assure their continued survival and propagation for the aesthetic, recreational and scientific purposes of future generations. The legislature finds that by ~~eliminating~~ restricting the taking, possession or marketing of endangered species in this state and by establishing a program for conservation and restoration of these endangered or threatened species, their potential for continued existence will be strength-

* Section 991.11, WISCONSIN STATUTES 1993-94: 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 as designated" by the secretary of state [the date of publication may not be more than 10 working days after the date of enactment].

ened. The legislature further finds that the activities of both individual persons and governmental agencies are tending to destroy the few remaining whole plant–animal communities in this state. Since these communities represent the only standard against which the effects of change can be measured, their preservation is of highest importance, and the legislature urges all persons and agencies to fully consider all decisions in this light.

SECTION 7. 29.415 (2) (am) of the statutes is created to read:

29.415 (2) (am) “State agency” means a board, commission, committee, department or office in the state government. “State agency” does not include the department of natural resources or the office of the governor.

SECTION 8. 29.415 (2) (bn) of the statutes is created to read:

29.415 (2) (bn) “Whole plant–animal community” means a group of species living together in a particular area, time and habitat.

SECTION 9. 29.415 (4) (intro.) of the statutes is amended to read:

29.415 (4) (intro.) Except as provided in sub. (6r) or as permitted by departmental rule or permit:

SECTION 10. 29.415 (6) (a) of the statutes is amended to read:

29.415 (6) (a) The department shall issue a permit, under such terms and conditions as it may prescribe by rule, authorizing the taking, exportation, transportation or possession of any wild animal or wild plant on the list of endangered and threatened species for zoological, educational or scientific purposes, for propagation of such wild animals and wild plants in captivity for preservation purposes, unless such exportation, possession, transportation or taking is prohibited by any federal law or regulation, or any other law of this state.

SECTION 11. 29.415 (6m) of the statutes is created to read:

29.415 (6m) INCIDENTAL TAKINGS; PERMITS. (a) In this subsection and sub. (6r), “taking” means an activity prohibited under sub. (4) (a), (b) or (c).

(b) The department may issue a permit, under such terms and conditions as it may prescribe, authorizing a taking that otherwise is prohibited by this section if the taking is not for the purpose of, but will be only incidental to, the carrying out of an otherwise lawful activity.

(c) The department may not issue a permit under this subsection unless an applicant for the permit submits to the department a conservation plan and an implementing agreement. The conservation plan shall include all of the following:

1. A description of the impact that will likely occur as a result of the taking of an endangered species or threatened species that is specified on the department’s endangered and threatened species list.

2. The steps that the parties specified under par. (d) will take to minimize and mitigate the impact that the endangered species or the threatened species will suffer.

3. A description of the funding that the parties specified under par. (d) will have available to implement the steps specified under subd. 2.

4. A description of the alternative actions to the taking that the parties in par. (d) have considered and the reasons that these alternatives will not be utilized.

5. Any other measures that the department may determine to be necessary or appropriate.

(d) The implementing agreement required under par. (c) shall specifically name, and describe the obligations and responsibilities of, all the parties that will be involved in the taking as authorized by the permit.

(e) Upon receipt of an application for a permit and the accompanying conservation plan and implementing agreement for a proposed taking, the department shall publicize the application by announcing the application receipt and by giving a brief description of the proposed taking. The department publicity shall be distributed to the news media in the vicinity of the proposed taking and to the official state newspaper designated under s. 985.04. The department shall, by rule, establish a list of organizations, including nonprofit conservation groups, that have a professional, scientific or academic interest in endangered species or in threatened species. The department shall give notification of proposed takings under this subsection to these organizations. The department shall establish a procedure for receipt of public comment on the proposed taking.

(f) After having considered the public comment received on the proposed taking, the department shall issue the permit if the department finds, based on the permit application, the conservation plan and the implementing agreement, the taking will meet all of the following requirements:

1. The taking will not be the purpose of, but will be only incidental to, the carrying out of a lawful activity.

2. The parties specified under par. (d) will, to the maximum extent practicable, minimize and mitigate the impact caused by the taking.

3. The parties specified under par. (d) will ensure that adequate funding for the conservation plan will be provided.

4. The taking will not appreciably reduce the likelihood of the survival or recovery of the endangered species or threatened species within the state, the whole plant–animal community of which it is a part or the habitat that is critical to its existence.

5. Any measures required under par. (c) 5. will be met.

(g) The department may require that a party specified under par. (d) make additional assurances that the

requirements under par. (f) 1. to 5. will be met before issuing a permit under par. (f).

(h) The department shall impose on the permit any terms or conditions that the department finds necessary to ensure that the requirements under par. (f) 1. to 5. will be met. These terms or conditions may include reporting and monitoring requirements. These terms or conditions are modifiable only as provided under par. (hm).

(hm) The terms or conditions of a permit shall be modified if one of the following applies:

1. The modification is expressly provided in the conservation plan, implementing agreement or permit.
2. The permittee requests the modification.
3. Just cause exists based upon a written finding of necessity by the secretary.

(hr) A finding of necessity under par. (hm) 3. by the secretary shall be a final decision not subject to review under subch. III of ch. 227.

(i) The department shall revoke a permit issued under this subsection if it finds that a party specified under par. (d) fails to comply with the terms and conditions of the permit.

(j) A permit issued by the department is not required if a federal permit under 16 USC 1539 has been issued and if the federal fish and wildlife service consulted with the department in the process of determining whether to issue the federal permit.

(k) Paragraphs (b) to (j) do not apply to activities by a state agency or by the department under sub. (6r).

SECTION 12. 29.415 (6r) of the statutes is created to read:

29.415 (6r) AGENCY ACTIVITIES. (a) A state agency shall notify the department at the earliest opportunity of the location, nature and extent of a proposed activity that the state agency may conduct, approve or fund and that may affect an endangered species or threatened species. The department may allow the taking of an endangered species or threatened species if all of the following apply:

1. The activity is accomplished in accordance with interagency consultation procedures established by the department and the state agency for the purpose of minimizing any adverse effect on the endangered species or threatened species.

2. The activity is not likely to jeopardize the continued existence and recovery of the endangered species or threatened species, or the whole plant–animal community of which it is a part, within this state and the activity is not likely to result in the destruction or adverse modification of a habitat that is critical to the continued existence of the endangered species or the threatened species within the state, as determined by the department under par. (b).

3. The benefit to public health, safety or welfare justifies the activity.

(b) For purposes of par. (a) 2., the department shall determine whether a habitat is critical to the continued

existence of an endangered species or threatened species by considering the endangered species' or threatened species' global and state element ranking as defined by the methodology used by the natural heritage inventory program.

(bn) The department may allow an activity by the department itself that results in the taking of an endangered species or threatened species if the activity is accomplished with procedures established by the department for the purpose of minimizing any adverse effect on the endangered species or threatened species and if pars. (a) 2. and 3. and (b) apply.

(c) The department shall notify the state agency if the department determines that there is reasonable cause for the department to determine that an activity by the state agency is not being carried out in compliance with this subsection or with any environmental protection requirements developed through interagency consultation procedures. If the secretary of natural resources and the head, as defined in s. 15.01 (8), of the state agency are unable to agree upon methods or time schedules to be used to correct the alleged noncompliance, the department may bring any action or initiate any other proceedings to enforce compliance with this subsection.

(d) The department and the state agency shall exchange information and cooperate in the planning and implementation of any activity relating to the taking of any endangered species or threatened species in order to alleviate, to the maximum extent practicable under the circumstances, any potential adverse effect on the endangered species or the threatened species.

(e) 1. Except as provided in subd. 2., cooperation between the department and the state agency under par. (d) shall include conducting reasonable surveys and reasonable biological assessments as determined by the department.

2. Subdivision 1. does not apply if the department states in writing that it has data that is sufficient to make a determination that the proposed taking will not reduce the likelihood of the survival or recovery of the endangered species or threatened species within the state, the whole plant–animal community of which it is a part or the habitat that is critical to its existence.

(em) 1. Before allowing the taking of an endangered species or threatened species under this subsection, the department shall give notice of the proposed activity to the news media throughout the state and to any person who wants to receive notification of proposed takings under this subsection and who has so informed the department in writing. The department shall transmit the notice at least 30 days before allowing the taking except as provided in subd. 2.

2. If the department determines that it cannot comply with the 30–day time limit in subd. 1., the department shall transmit the notice as far in advance as is practicable before allowing the taking.

(f) In addition to any requirements under s. 1.11, the department may give public notice of and hold public hearings on the activities of state agencies or the department under this subsection.

SECTION 12m. Nonstatutory provisions.

(1) The department of natural resources shall submit the proposed rule required under section 29.415 (6m) (e) of the statutes, as created by this act, to the legislative council staff for review under section 227.15 (1) of the statutes no later than October 1, 1996.

(2) Using the procedure under section 227.24 of the statutes, the department of natural resources shall pro-

mulgate the rule required under section 29.415 (6m) (e) of the statutes, as created by this act. The rule shall be in effect until the effective date of the rule submitted under subsection (1), regardless of whether the period of time during which the rule is in effect exceeds the period authorized under section 227.24 (1) (c) and (2) of the statutes. Notwithstanding section 227.24 (1) (a) and (2) (b) of the statutes, the department of natural resources need not provide evidence of the necessity of preservation of the public peace, health, safety or welfare in promulgating the rule under this subsection.
