

1999 SENATE BILL 447

March 7, 2000 – Introduced by Senators COWLES, GROBSCHMIDT, RUDE, CLAUSING, HUELSMAN, ERPENBACH, ROESSLER, PLACHE, DRZEWIECKI, FARROW, ROSENZWEIG and BAUMGART, cosponsored by Representatives KEDZIE, AINSWORTH, REYNOLDS, HUNDERTMARK, HANDRICK, MUSSER, STONE, KESTELL, PETTIS, KLUSMAN, URBAN, MEYER, VRAKAS, GUNDRUM, GUNDERSON, WALKER, BOCK, KREUSER, POWERS, SYKORA and STEINBRINK. Referred to Committee on Agriculture, Environmental Resources and Campaign Finance Reform.

1 **AN ACT** *to amend* 23.32 (2) (b); and *to create* 23.321, 281.17 (10) and 281.98 (3)
 2 of the statutes; **relating to:** wetlands mitigation and granting rule-making
 3 authority.

Analysis by the Legislative Reference Bureau

Under federal law, projects involving the discharge of dredge or fill material into any body of water, including wetlands, must comply with certain guidelines contained in regulations promulgated by the federal environmental protection agency (EPA) in order for a permit to be issued by the U.S. Army Corps of Engineers (ACE). Under a memorandum of understanding entered into by EPA and ACE interpreting these guidelines, a project may comply with the guidelines, although it involves an adverse impact on an existing wetland, if compensatory action is taken, such as restoring another wetland that has already been degraded. However, before ACE may issue a permit, the department of natural resources (DNR) must determine that the project complies with state water quality standards, including those for wetlands.

Under current law, DNR has no specific authority to allow compensatory mitigation of wetlands under its statutory authority to promulgate state water quality standards. The department of transportation (DOT) may engage in compensatory mitigation of wetlands for highway construction and repair activities under procedures jointly established by DNR and DOT.

This bill creates a process and requirements for DNR to use in allowing wetland mitigation. The bill allows DNR to consider wetland mitigation in determining

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whether to grant a permit or other approval (approval) for an activity that will have an adverse affect on the wetland.

Under the bill, a wetland mitigation project is a project that restores, enhances or creates a wetland to compensate for adverse impacts to other wetlands or that uses credits from a “wetlands mitigation bank”. A wetlands mitigation bank is a system of accounting for wetland loss and compensation that includes one or more sites where wetlands are restored, enhanced or created to provide transferable credits to be subsequently applied to compensate for adverse impacts to other wetlands.

The bill prohibits DNR from considering wetlands mitigation in reviewing whether to grant a permit or other approval for a project that adversely affects “an area of special natural resource interest” or a wetland that is in such an area. The bill defines “an area of special natural resource interest” as being an area that has significant ecological, cultural, aesthetic, educational, recreational or scientific values and specifically lists certain areas. The areas listed include Lake Superior, Lake Michigan, the Mississippi River, the Lower Wisconsin State Riverway, fish and wildlife refuges and state parks and forests. DNR may not consider wetland mitigation unless the applicant for the approval demonstrates that all appropriate and practicable measures will be used to avoid and minimize the adverse impact on the wetland to be affected.

The bill requires a permit holder or person engaged in mitigation to grant a conservation easement to DNR to ensure that a restored, enhanced or created wetland is not destroyed or substantially degraded by subsequent owners.

The bill requires also that DNR initiate negotiations with ACE to establish guidelines for mitigation projects and banking. The bill specifically authorizes DNR to impose additional conditions on an approval it issues so that the approval complies with any guidelines that are established if ACE has not already required such compliance. Also, the bill specifically prohibits DNR from requiring that a mitigation project be larger in acreage than the minimum acreage required by the guidelines.

The draft requires that DNR promulgate rules to regulate mitigation projects. The rules must address several topics, including the comparability in size and location of the wetland to be improved and the wetland adversely affected and standards for measuring the success of mitigation projects. The rules must also establish an expedited decision-making process for granting approvals involving wetland mitigation. The rules must contain a provision that if the wetland that will be adversely affected is not located in a floodplain and if the activity for which the approval is sought does not involve the issuance of a permit required by DNR for a navigable water, DNR must issue the approval within 60 working days after a complete application is submitted, unless weather conditions prevent DNR from doing so. The bill also requires DNR to submit a biennial report to the legislature regarding the impact of wetland mitigation.

Under the Federal Water Pollution Control Act, a person who applies for a federal license or permit for an activity that may result in a discharge into water is required to obtain a state certification that the discharge will comply with water quality standards. If the state issues the certification, it may include conditions necessary to ensure compliance with water quality standards. DNR has

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promulgated rules for making water quality certification decisions. This bill prohibits a person from conducting an activity for which DNR denies a water quality certification required under the Water Pollution Control Act. The bill prohibits also a person from violating a condition that DNR includes in a water quality certification required under the Water Pollution Control Act.

Current law provides civil monetary penalties (forfeitures) for violating certain laws related to water quality. Under this bill, in addition to imposing forfeitures, a court may require a person who violates these laws, including the prohibitions created in the bill, to take any action necessary to eliminate or minimize any environmental damage caused by the person.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

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

1 **SECTION 1.** 23.32 (2) (b) of the statutes is amended to read:

2 23.32 (2) (b) Mapping priorities, technical methods and standards to be used
3 in delineating wetlands and a long-term schedule which will result in completion of
4 the mapping effort at the earliest possible date, ~~but not later than July 1, 1984,~~ shall
5 be developed by the department in cooperation with those other state agencies
6 having mapping, aerial photography and comprehensive planning responsibilities.

7 **SECTION 2.** 23.321 of the statutes is created to read:

8 **23.321 Wetlands; compensatory mitigation. (1) DEFINITIONS.** In this
9 section:

10 (a) “Area of special natural resource interest” means an area that possesses
11 significant ecological, cultural, aesthetic, educational, recreational or scientific
12 values, including any of the following:

13 1. A cold water community, as defined by the department, including a trout
14 stream or its tributary or a trout lake.

15 2. Lake Michigan, Lake Superior or the Mississippi River.

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1 3. A wild and scenic river designated under 16 USC 1271 to 1287, a wild river
2 designated under s. 30.26, the Lower Wisconsin State Riverway or a scenic urban
3 waterway designated under s. 30.275.

4 4. A unique and significant wetland identified in a special area management
5 plan, as defined in 16 USC 1453 (17), a special wetland inventory study or advanced
6 delineation and identification study under 40 CFR 230.80 or an area designated by
7 the U.S. environmental protection agency under 33 USC 1344 (c).

8 5. A calcareous fen.

9 6. A habitat used by state or federally designated threatened or endangered
10 species.

11 7. A state park, forest, trail or recreation area.

12 8. A state or federal fish and wildlife refuge or fish and wildlife management
13 area.

14 9. A state or federal designated wilderness area.

15 10. A state natural area designated or dedicated under ss. 23.27 to 23.29.

16 11. Wild rice waters.

17 12. Surface waters identified by the department as outstanding or exceptional
18 resource waters under s. 281.15.

19 13. Any other area identified by the department by rule.

20 (b) “Mitigation project” means the restoration, enhancement or creation of
21 wetlands to compensate for adverse impacts to other wetlands. “Mitigation project”
22 includes using credits from a wetlands mitigation bank.

23 (c) “Wetland” has the meaning given in s. 23.32 (1).

24 (d) “Wetlands mitigation bank” means a system of accounting for wetland loss
25 and compensation that includes one or more sites where wetlands are restored,

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1 enhanced or created to provide transferable credits to be subsequently applied to
2 compensate for adverse impacts to other wetlands.

3 (e) “Wetland water quality standards” means water quality standards
4 promulgated under s. 281.15 (1) that affect wetlands.

5 (f) “Working day” has the meaning given in s. 227.01 (14).

6 **(2) ISSUING PERMITS.** (a) The department may consider a mitigation project as
7 part of an application, in combination with the requirements under par. (b), for
8 complying with any wetland water quality standards in determining whether to
9 issue a permit for, or to otherwise approve, an activity that affects a wetland under
10 ss. 59.692, 61.351, 62.231, 87.30, 281.11 to 281.47 or 281.49 to 281.85 or ch. 30, 31,
11 283, 289, 291, 292, 293, 295 or 299. This subsection does not entitle an applicant to
12 a permit or other approval in exchange for conducting a mitigation project.

13 (b) The department may not consider a mitigation project in reviewing an
14 application under par. (a) unless the applicant demonstrates that all appropriate and
15 practicable measures will be taken to avoid and minimize adverse impacts on the
16 wetland.

17 (c) The department may not consider a mitigation project in reviewing an
18 application under par. (a) for an activity that adversely affects a wetland in an area
19 of special natural resource interest or for an activity that adversely affects an area
20 of special natural resource interest.

21 (d) If the department determines that the conditions of a permit or other
22 authorization issued by the U.S. Army Corps of Engineers for an activity that affects
23 a wetland do not meet the requirements of any guidelines established in the
24 memorandum of agreement under sub. (4), the department may impose additional
25 conditions to ensure that the requirements are met. The department may not

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1 require that the acreage of a mitigation project considered under par. (a) exceed the
2 acreage that is required for the project under the guidelines established in the
3 memorandum of agreement under sub. (4).

4 **(2m) SUBSEQUENT PROTECTION FOR WETLANDS.** (a) 1. A person who is the holder
5 of a permit or other approval that authorizes a mitigation project shall grant a
6 conservation easement under s. 700.40 to the department to ensure that a wetland
7 that is being restored, enhanced or created will not be destroyed or substantially
8 degraded by any subsequent owner of or holder of interest in the property on which
9 the wetland is located. The department shall revoke the permit or other approval
10 if the holder of the permit or other approval fails to take these measures.

11 2. A person who is restoring, enhancing or creating a wetland to provide
12 transferable credits as part of a wetlands mitigation bank shall grant a conservation
13 easement under s. 700.40 to the department, to ensure that the wetland will not be
14 destroyed or substantially degraded by any subsequent owner of or holder of interest
15 in the property on which the wetland is located.

16 (b) Notwithstanding par. (a), the department shall modify or release a
17 conservation easement granted under par. (a) if all of the following apply:

18 1. The department determines that part or all of the restored, enhanced or
19 created wetland ceases to be a wetland.

20 2. The person who is required to grant the conservation easement did not
21 contribute to the loss of the wetland specified in subd. 1.

22 3. Any subsequent owner of or holder of interest in the property on which the
23 wetland specified in subd. 1. is located did not contribute to the loss of the wetland.

24 **(3) RULES.** The department shall promulgate rules to establish a process for
25 consideration of wetland compensatory mitigation under sub. (2). Upon

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1 promulgation, the rules shall apply to any application or other request for an initial
2 determination for a permit or other authorization that is pending with the
3 department on the date on which the rules take effect. The rules shall address all
4 of the following:

5 (a) Requirements for the avoidance and minimization of adverse impacts to the
6 wetland that will be affected by the permitted activity.

7 (b) The conditions under which credits in a wetlands mitigation bank may be
8 used for wetland compensatory mitigation.

9 (c) Enforcement of a requirement to implement a mitigation project.

10 (d) Baseline studies of the wetland that will be affected by the permitted
11 activity and of the mitigation project site.

12 (e) Plan and project design requirements for a mitigation project, which shall
13 consider the relation of the project design to the hydrology of the watershed in which
14 a mitigation project is located.

15 (f) The comparability of a wetland that will be restored, enhanced or created
16 to the wetland that will be adversely affected by the permitted activity, including all
17 of the following:

18 1. Consideration of the size, location, type and quality of the wetlands.

19 2. Consideration of the functional values performed by the wetlands.

20 (g) The establishment of a process for determining replacement ratios.

21 (h) Standards for measuring the short-term and long-term success of a
22 mitigation project and requirements for the short-term and long-term monitoring
23 of a mitigation project.

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1 (i) Remedial actions to be taken by the applicant if a mitigation project is not
2 successful and actions to be taken by a wetlands mitigation bank if a mitigation
3 project on which mitigation credits are based is not successful.

4 (j) Establishment of an expedited decision-making process for activities
5 adversely affecting wetlands that are less than one acre in size and that have
6 negligible functional values.

7 **(3m)** EXPEDITED DECISION-MAKING PROCESS. (a) The expedited decision-making
8 process established under the rules under sub. (3) (j) shall include a requirement that
9 the department shall decide whether to issue a permit for, or otherwise approve, an
10 activity within 60 working days after a complete application for the permit or
11 approval has been received by the department if all of the following apply:

12 1. The wetland that will be adversely affected is not located in a floodplain.

13 2. The application does not involve the issuance of a permit or other approval
14 under ch. 30.

15 (am) The expedited decision-making process established under the rules
16 under sub. (3) (j) may limit the scope of alternatives to the proposed activities that
17 must be considered in reviewing an application under that process.

18 (b) The department is exempt from the time limit under par. (a) if the
19 department determines that weather conditions prevent the department from
20 making a determination within 60 working days after the receipt of the complete
21 application.

22 **(4)** MEMORANDUM OF AGREEMENT. The department shall initiate negotiations
23 with the U.S. army corps of engineers to develop a memorandum of agreement
24 establishing guidelines for mitigation projects and wetland mitigation banks. The
25 guidelines shall address all of the topics described in sub. (3) (a) to (i).

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1 **(5) REPORT TO LEGISLATURE.** No later than January 31, 2003, and no later than
2 January 31 of each subsequent odd-numbered year, the department shall submit to
3 the legislature under s. 13.172 (2) a report that provides an analysis of the impact
4 of the implementation of this section on wetland resources and on the issuance of
5 permits or other approvals under ss. 59.692, 61.351, 62.231, 87.30 281.11 to 281.47
6 or 281.49 to 281.85 or ch. 30, 31, 283, 289, 291, 292, 293, 295 or 299.

7 **SECTION 3.** 281.17 (10) of the statutes is created to read:

8 281.17 **(10)** (a) No person may conduct an activity for which the department
9 denies a water quality certification required by rules promulgated under this
10 subchapter to implement 33 USC 1341 (a).

11 (b) No person may violate a condition imposed by the department in a water
12 quality certification required by rules promulgated under this subchapter to
13 implement 33 USC 1341 (a).

14 **SECTION 4.** 281.98 (3) of the statutes is created to read:

15 281.98 **(3)** In addition to the penalties under sub. (1), the court may order the
16 defendant to abate any nuisance, restore a natural resource or take, or refrain from
17 taking, any other action as necessary to eliminate or minimize any environmental
18 damage caused by the defendant.

19 **SECTION 5. Nonstatutory provisions.**

20 **(1) SUBMISSION OF PROPOSED RULES.** The department of natural resources shall
21 submit proposed rules required under section 23.321 (3) of the statutes, as created
22 by this act, to the legislative council staff for review under section 227.15 (1) of the
23 statutes no later than the first day of the 12th month beginning after publication.

24 **SECTION 6. Effective dates.** This act takes effect on the day after publication,
25 except as follows:

