



State of Wisconsin
1999 - 2000 LEGISLATURE

LRB-3637/4
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1999 BILL

- 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 if any of the wetlands involved is a wetland that is in or adjacent to an "area of special natural resource interest". 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.

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 promulgated rules for making water quality certification decisions. This bill

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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.

a special area management plan, as defined in 16 USC 1453 (17), a special wetland inventory study or advanced delineation and identification study under 40 CFR 230.80 or an area designed by the U.S. environmental protection agency under 33 USC 1344(c). *---same language in /3 pg 4 ln 1-4---*

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SECTION 2

- 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.

Insert
New

→ 4. Unique and significant wetlands identified in

- 4 5 ~~4~~. A calcareous fen.
- 5 6 ~~5~~. A habitat used by state or federally designated threatened or endangered
- 6 species.
- 7 7 ~~6~~. A state park, forest, trail or recreation area.
- 8 8 ~~7~~. A state or federal fish and wildlife refuge or fish and wildlife management
- 9 area.

NR 103
order

- 10 9 ~~8~~. A state or federal designated wilderness area.
- 11 10 ~~9~~. A state natural area designated or dedicated under ss. 23.27 to 23.29.
- 12 11 ~~10~~. Wild rice waters.
- 13 12 ~~11~~. Surface waters identified by the department as outstanding or exceptional
- 14 resource waters under s. 281.15.
- 15 13 ~~12~~. Any other area identified by the department by rule.

16 (b) "Mitigation project" means the restoration, enhancement or creation of
 17 wetlands to compensate for adverse impacts to other wetlands. "Mitigation project"
 18 includes using credits from a wetlands mitigation bank.

19 (c) "Wetland" has the meaning given in s. 23.32 (1).

20 (d) "Wetlands mitigation bank" means a system of accounting for wetland loss
 21 and compensation that includes one or more sites where wetlands are restored,
 22 enhanced or created to provide transferable credits to be subsequently applied to
 23 compensate for adverse impacts to other wetlands.

24 (e) "Wetland water quality standards" means water quality standards
 25 promulgated under s. 281.15 (1) that affect wetlands.

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1 (f) "Working day" has the meaning given in s. 227.01 (14).

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

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

13 (c) The department may not consider a mitigation project in reviewing an
14 application under par. (a) for an activity that adversely affects a wetland in ~~or~~
15 ~~adjacent to~~ an area of special natural resource interest, ^{or for an activity ^{that} adversely}
_{affects an area of special natural R.}

16 (d) If the department determines that the conditions of a permit or other
17 authorization issued by the U.S. Army Corps of Engineers for an activity that affects
18 a wetland do not meet the requirements of any guidelines established in the
19 memorandum of agreement under sub. (4), the department may impose additional
20 conditions to ensure that the requirements are met. The department may not
21 require that the acreage of a mitigation project considered under par. (a) exceed the
22 acreage that is required for the project under the guidelines established in the
23 memorandum of agreement under sub. (4).

24 (2m) SUBSEQUENT PROTECTION FOR WETLANDS. (a) 1. A person who is the holder
25 of a permit or other approval that authorizes a mitigation project shall grant a

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1 conservation easement under s. 700.40 to the department to ensure that a wetland
2 that is being restored, enhanced or created will not be destroyed or substantially
3 degraded by any subsequent owner of or holder of interest in the property on which
4 the wetland is located.

add -> The department shall revoke the permit or other approval if the holder
of the permit or other approval fails to take these measures.

--- same language in /3 pg 6 ln 9-11---

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

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

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

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

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

18 (3) RULES. The department shall promulgate rules to establish a process for
19 consideration of wetland compensatory mitigation under sub. (2). Upon
20 promulgation, the rules shall apply to any application or other request for an initial
21 determination for a permit or other authorization that is pending with the
22 department on the date on which the rules take effect. The rules shall address all
23 of the following:

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

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

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

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

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

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

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

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

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

15 (h) Standards for measuring the short-term and long-term success of a
16 mitigation project and requirements for the short-term and long-term monitoring
17 of a mitigation project.

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

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

24 (4) MEMORANDUM OF ^{Agreement} ~~UNDERSTANDING~~ The department shall initiate
25 negotiations with the U.S. army corps of engineers to develop a memorandum of

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(j) into
page 8 (g)
or
page 8 into
(c)

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1 agreement establishing guidelines for mitigation projects and wetland mitigation
2 banks. The guidelines shall address all of the topics described in sub. (3) (a) to (i).

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

- 8 1. The wetland that will be adversely affected is not located in a floodplain.
- 9 2. The application does not involve the issuance of a permit or other approval
10 under ch. 30.

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

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

16 281.17 (10) (a) No person may conduct an activity for which the department
17 denies a water quality certification required by rules promulgated under this
18 subchapter to implement 33 USC 1341 (a).

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

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

23 281.98 (3) In addition to the penalties under sub. (1), the court may order the
24 defendant to abate any nuisance, restore a natural resource or take, or refrain from


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1 taking, any other action as necessary to eliminate or minimize any environmental
2 damage caused by the defendant.

3 **SECTION 5. Nonstatutory provisions.**

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

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

10 (1) The treatment of section 23.321 (2) of the statutes takes effect on the first
11 day of the ~~21st~~ month beginning after publication. 

12 ^{15th} (END)

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1999 BILL

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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* if any of the wetlands involved is a wetland that is in or adjacent to an "area of special natural resource interest". 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.

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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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SECTION 2

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~~ *A unique and significant wetland identified in INS 3-4*

5 5. ~~A~~ A calcareous fen.

6 6. ~~5.~~ A habitat used by state or federally designated threatened or endangered
7 species.

8 7. ~~6.~~ A state park, forest, trail or recreation area.

9 8. ~~7.~~ A state or federal fish and wildlife refuge or fish and wildlife management
10 area.

11 9. ~~8.~~ A state or federal designated wilderness area.

12 10. ~~9.~~ A state natural area designated or dedicated under ss. 23.27 to 23.29.

13 11. ~~10.~~ Wild rice waters.

14 12. ~~11.~~ Surface waters identified by the department as outstanding or exceptional
15 resource waters under s. 281.15.

16 13. ~~12.~~ Any other area identified by the department by rule.

17 (b) "Mitigation project" means the restoration, enhancement or creation of
18 wetlands to compensate for adverse impacts to other wetlands. "Mitigation project"
19 includes using credits from a wetlands mitigation bank.

20 (c) "Wetland" has the meaning given in s. 23.32 (1).

21 (d) "Wetlands mitigation bank" means a system of accounting for wetland loss
22 and compensation that includes one or more sites where wetlands are restored,
23 enhanced or created to provide transferable credits to be subsequently applied to
24 compensate for adverse impacts to other wetlands.

25 (e) "Wetland water quality standards" means water quality standards
promulgated under s. 281.15 (1) that affect wetlands.

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

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

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

13 (c) The department may not consider a mitigation project in reviewing an
14 application under par. (a) for an activity that adversely affects a wetland in

15 ~~adjacent to~~ an area of special natural resource interest. *or if for an activity that*
16 *adversely affects any*
area of special natural resource interest

17 (d) If the department determines that the conditions of a permit or other
18 authorization issued by the U.S. Army Corps of Engineers for an activity that affects
19 a wetland do not meet the requirements of any guidelines established in the
20 memorandum of agreement under sub. (4), the department may impose additional
21 conditions to ensure that the requirements are met. The department may not
22 require that the acreage of a mitigation project considered under par. (a) exceed the
23 acreage that is required for the project under the guidelines established in the
24 memorandum of agreement under sub. (4).

25 (2m) SUBSEQUENT PROTECTION FOR WETLANDS. (a) 1. A person who is the holder
of a permit or other approval that authorizes a mitigation project shall grant a

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SECTION 2

1 conservation easement under s. 700.40 to the department to ensure that a wetland
2 that is being restored, enhanced or created will not be destroyed or substantially
3 degraded by any subsequent owner of or holder of interest in the property on which
4 the wetland is located. *INS 6-4*

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

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

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

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

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

18 (3) RULES. The department shall promulgate rules to establish a process for
19 consideration of wetland compensatory mitigation under sub. (2). Upon
20 promulgation, the rules shall apply to any application or other request for an initial
21 determination for a permit or other authorization that is pending with the
22 department on the date on which the rules take effect. The rules shall address all
23 of the following:

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

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

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

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

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

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

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

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

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

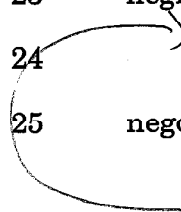
15 (h) Standards for measuring the short-term and long-term success of a
16 mitigation project and requirements for the short-term and long-term monitoring
17 of a mitigation project.

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

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

24 (4) MEMORANDUM OF UNDERSTANDING) The department shall initiate
25 negotiations with the U.S. army corps of engineers to develop a memorandum of

AGREEMENT CS



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SECTION 2

1 agreement establishing guidelines for mitigation projects and wetland mitigation
2 banks. The guidelines shall address all of the topics described in sub. (3) (a) to (i).

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

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

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

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

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

16 281.17 (10) (a) No person may conduct an activity for which the department
17 denies a water quality certification required by rules promulgated under this
18 subchapter to implement 33 USC 1341 (a).

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

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

23 281.98 (3) In addition to the penalties under sub. (1), the court may order the
24 defendant to abate any nuisance, restore a natural resource or take, or refrain from

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1 taking, any other action as necessary to eliminate or minimize any environmental
2 damage caused by the defendant.

3 **SECTION 5. Nonstatutory provisions.**

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

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

10 (1) The treatment of section 23.321 (2) of the statutes takes effect on the first
11 day of the ~~20th~~ month beginning after publication.

15th

(END)

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1 special area management plan, as defined in 16 USC 1453 (17), a special wetland
2 inventory study or advanced delineation and identification study under 40 CFR
3 230.80 or an area designated by the U.S. environmental protection agency under 33
4 USC 1344 (c).

END OF
INSERT

- 5 5. A calcareous fen.
- 6 6. A habitat used by state or federally designated threatened or endangered
- 7 species.
- 8 7. A state park, forest, trail or recreation area.
- 9 8. A state or federal fish and wildlife refuge or fish and wildlife management
- 10 area.
- 11 9. A state or federal designated wilderness area.
- 12 10. A state natural area designated or dedicated under ss. 23.27 to 23.29.
- 13 11. Wild rice waters.
- 14 12. Surface waters identified by the department as outstanding or exceptional
- 15 resource waters under s. 281.15.
- 16 13. Any other area identified by the department by rule.

17 (b) "Mitigation project" means the restoration, enhancement or creation of
18 wetlands to compensate for adverse impacts to other wetlands. "Mitigation project"
19 includes using credits from a wetlands mitigation bank.

20 (c) "Wetland" has the meaning given in s. 23.32 (1).

21 (d) "Wetland in or near an area of special natural resource interest" means a
22 wetland that is within an area of special natural resource interest or that is in
23 proximity to or has a direct hydrologic connection to an area of special natural
24 resource interest.

BILL

SECTION 2

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 holder of
5 a permit or other approval that authorizes a mitigation project shall take the
6 necessary legal measures, as determined by the department, to ensure that a
7 wetland that is being restored, enhanced or created will not be destroyed or
8 substantially degraded by any subsequent owner of or holder of interest in the
9 property on which the wetland is located. ^{WPA} The department shall revoke the permit

10 or other approval if the holder of the permit or other approval fails to take these
11 measures. *INS*
6-4

END OF INSERT

12 2. A person who is restoring, enhancing or creating a wetland to provide
13 transferable credits as part of a wetlands mitigation bank shall take the necessary
14 legal measures, as determined by the department, to ensure that the wetland will
15 not be destroyed or substantially degraded by any subsequent owner of or holder of
16 interest in the property on which the wetland is located.

17 (b) Notwithstanding par. (a), the effects of any legal measures taken under par.
18 (a) do not apply if all of the following apply:

- 19 1. The restored, enhanced or created wetland ceases to be a wetland.
- 20 2. The person who is required to take the legal measures did not contribute to
21 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

**SUBMITTAL
FORM**

LEGISLATIVE REFERENCE BUREAU
Legal Section Telephone: 266-3561
5th Floor, 100 N. Hamilton Street

The attached draft is submitted for your inspection. Please check each part carefully, proofread each word, and sign on the appropriate line(s) below.

Date: 02/29/2000

To: Senator Cowles

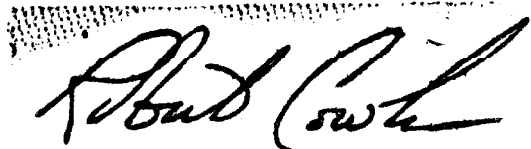
Relating to LRB drafting number: LRB-3637

Topic

Wetlands mitigation

Subject(s)

Nat. Res. - wet/shore/flood



1. **JACKET** the draft for introduction _____

in the Senate or the Assembly _____ (check only one). Only the requester under whose name the drafting request is entered in the LRB's drafting records may authorize the draft to be submitted. Please allow one day for the preparation of the required copies.

2. **REDRAFT.** See the changes indicated or attached _____.

A revised draft will be submitted for your approval with changes incorporated.

3. Obtain **FISCAL ESTIMATE NOW.** _____ to introduction _____.

If the analysis indicates that _____ required because the proposal makes an appropriation or increases or decreases _____ or general local government fiscal liability or revenue _____ estimate prior to introduction. If you choose to introduce _____ fiscal estimate will be requested automatically upon introduction. Requesting the fiscal estimate prior to introduction _____ proposal.

Jacket needed for 3/1 hearing thanks

If you have any questions relating to the attached _____ please call 266-3561. If you have any questions _____.

Mary Gibson-Glass, Senior Legislative Attorney
Telephone: (608) 267-3215



State of Wisconsin
1999-2000 LEGISLATURE

Friday
noon

RMR

LRB-3637/6

MGG&RCT:cmh:km

1999 BILL

reger
& cat

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

BILL

The bill also requires DNR to submit a biennial report to the legislature regarding the impact of wetland mitigation
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.

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 promulgated rules for making water quality certification decisions. This bill

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.

BILL

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,

BILL

memo under par. (b),

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~~ *part of an application, in combination with the require-*
8 whether to issue a permit for, or to otherwise approve, an activity that affects a
9 wetland under ss. 59.692, 61.351, 62.231, 87.30, 281.11 to 281.47 or 281.49 to 281.85
10 or ch. 30, 31, 283, 289, 291, 292, 293, 295 or 299. This subsection does not entitle an
11 applicant to a permit or other approval in exchange for conducting a mitigation
12 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

BILL

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

BILL

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.

BILL

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

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

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

INSERT 8
22

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

BILL

1 281.17 (10) (a) No person may conduct an activity for which the department
2 denies a water quality certification required by rules promulgated under this
3 subchapter to implement 33 USC 1341 (a).

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

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

8 281.98 (3) In addition to the penalties under sub. (1), the court may order the
9 defendant to abate any nuisance, restore a natural resource or take, or refrain from
10 taking, any other action as necessary to eliminate or minimize any environmental
11 damage caused by the defendant.

12 **SECTION 5. Nonstatutory provisions.**

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

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

19 (1) The treatment of section 23.321 (2) of the statutes takes effect on the first
20 day of the 15th month beginning after publication.

21 **(END)**

Insert 8-22

No later than January 31, 2003, ^{and subsequent} ~~of each~~ odd-

(b) ⁽⁵⁾ ~~numbered~~

and no later than January 31 of each subsequent odd-numbered year,

(5) REPORT TO LEGISLATURE

(9)

No later than January 31, 2003, the department

shall submit to the legislature ~~legislature~~ under a report

s. 13.178(2) that provides an analysis of the impact of the implementation of this section on wetland

resources and on the issuance of permits or

other approvals under ss. 59.692, 61.351, 62.231,

87.30, 281.11 to 281.47 or 281.49 to 281.85 ^{or} ch.

30, 31, 283, 289, 291, 292, 293, 295 ^{or} 299.

~~...~~

Shawn in ^{Sen.} Cowles office

3637

Re: wetland mitigation

needs /? - by Mon. afternoon

pg. 8, line 16

needs to add - after of & before activities
"alternatives to the proposed"
they are returning the jacket

doing as companion

LRB 4659

~~to companion~~ Kedzie

should be incorporated

will ~~call~~ have Kedzie call in

Kedzie's office called - incorporate this
change in their bill also



State of Wisconsin
1999 - 2000 LEGISLATURE

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LRB-3637/A 7
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Mon noon

ej's

1999 SENATE BILL

- 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

SENATE BILL

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

SENATE BILL

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.

SENATE BILL**SECTION 2**

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,

SENATE BILL

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

SENATE BILL**SECTION 2**

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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SECTION 2

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 activities that must be considered in
17 reviewing an application under that process.

WFO: the writing in pencil reads:
"alternatives to the proposed"

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: