

1999 ASSEMBLY BILL 859

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

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

4 **SECTION 1.** 23.32 (2) (b) of the statutes is amended to read:
5 23.32 (2) (b) Mapping priorities, technical methods and standards to be used
6 in delineating wetlands and a long-term schedule which will result in completion of
7 the mapping effort at the earliest possible date, ~~but not later than July 1, 1984,~~ shall
8 be developed by the department in cooperation with those other state agencies
9 having mapping, aerial photography and comprehensive planning responsibilities.
10 **SECTION 2.** 23.321 of the statutes is created to read:

ASSEMBLY BILL 859**SECTION 2**

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

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

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

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

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

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

16 5. A calcareous fen.

17 6. A habitat used by state or federally designated threatened or endangered
18 species.

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

20 8. A state or federal fish and wildlife refuge or fish and wildlife management
21 area.

22 9. A state or federal designated wilderness area.

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

24 11. Wild rice waters.

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

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

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

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

8 (d) “Wetlands mitigation bank” means a system of accounting for wetland loss
9 and compensation that includes one or more sites where wetlands are restored,
10 enhanced or created to provide transferable credits to be subsequently applied to
11 compensate for adverse impacts to other wetlands.

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

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

15 **(2) ISSUING PERMITS.** (a) The department may consider a mitigation project as
16 part of an application, in combination with the requirements under par. (b), for
17 complying with any wetland water quality standards in determining whether to
18 issue a permit for, or to otherwise approve, an activity that affects a wetland under
19 ss. 59.692, 61.351, 62.231, 87.30, 281.11 to 281.47 or 281.49 to 281.85 or ch. 30, 31,
20 283, 289, 291, 292, 293, 295 or 299. This subsection does not entitle an applicant to
21 a permit or other approval in exchange for conducting a mitigation project.

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

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1 (c) The department may not consider a mitigation project in reviewing an
2 application under par. (a) for an activity that adversely affects a wetland in an area
3 of special natural resource interest or for an activity that adversely affects an area
4 of special natural resource interest.

5 (d) If the department determines that the conditions of a permit or other
6 authorization issued by the U.S. Army Corps of Engineers for an activity that affects
7 a wetland do not meet the requirements of any guidelines established in the
8 memorandum of agreement under sub. (4), the department may impose additional
9 conditions to ensure that the requirements are met. The department may not
10 require that the acreage of a mitigation project considered under par. (a) exceed the
11 acreage that is required for the project under the guidelines established in the
12 memorandum of agreement under sub. (4).

13 **(2m)** SUBSEQUENT PROTECTION FOR WETLANDS. (a) 1. A person who is the holder
14 of a permit or other approval that authorizes a mitigation project shall grant a
15 conservation easement under s. 700.40 to the department to ensure that a wetland
16 that is being restored, enhanced or created will not be destroyed or substantially
17 degraded by any subsequent owner of or holder of interest in the property on which
18 the wetland is located. The department shall revoke the permit or other approval
19 if the holder of the permit or other approval fails to take these measures.

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

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

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

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

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

9 **(3) RULES.** The department shall promulgate rules to establish a process for
10 consideration of wetland compensatory mitigation under sub. (2). Upon
11 promulgation, the rules shall apply to any application or other request for an initial
12 determination for a permit or other authorization that is pending with the
13 department on the date on which the rules take effect. The rules shall address all
14 of the following:

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

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

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

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

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

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

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

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

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

7 (h) Standards for measuring the short-term and long-term success of a
8 mitigation project and requirements for the short-term and long-term monitoring
9 of a mitigation project.

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

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

16 **(3m)** EXPEDITED DECISION-MAKING PROCESS. (a) The expedited decision-making
17 process established under the rules under sub. (3) (j) shall include a requirement that
18 the department shall decide whether to issue a permit for, or otherwise approve, an
19 activity within 60 working days after a complete application for the permit or
20 approval has been received by the department if all of the following apply:

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

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

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

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

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

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

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

19 281.17 **(10)** (a) No person may conduct an activity for which the department
20 denies a water quality certification required by rules promulgated under this
21 subchapter to implement 33 USC 1341 (a).

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

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

