

1999 Assembly Bill 859

Date of enactment: **May 10, 2000**
Date of publication*: **May 24, 2000**

1999 WISCONSIN ACT 147

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

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

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

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

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

23.321 Wetlands; compensatory mitigation. (1)

DEFINITIONS. In this section:

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

1. A cold water community, as defined by the department, including a trout stream or its tributary or a trout lake.
2. Lake Michigan, Lake Superior or the Mississippi River.
3. A wild and scenic river designated under 16 USC 1271 to 1287, a wild river designated under s. 30.26, the

Lower Wisconsin State Riverway or a scenic urban waterway designated under s. 30.275.

4. A unique and significant wetland identified in 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 designated by the U.S. environmental protection agency under 33 USC 1344 (c).

5. A calcareous fen.

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

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

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

9. A state or federal designated wilderness area.

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

11. Wild rice waters.

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

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

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

* Section 991.11, WISCONSIN STATUTES 1997-98: Effective date of acts. "Every act and every portion of an act enacted by the legislature over the governor's partial veto which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication as designated" by the secretary of state [the date of publication may not be more than 10 working days after the date of enactment].

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

(d) "Wetlands mitigation bank" means 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.

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

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

(2) ISSUING PERMITS. (a) The department may consider a mitigation project as part of an application, in combination with the requirements under par. (b), for complying with any wetland water quality standards in determining whether to issue a permit for, or to otherwise approve, an activity that affects a wetland 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. This subsection does not entitle an applicant to a permit or other approval in exchange for conducting a mitigation project.

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

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

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

(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 conservation easement under s. 700.40 to the department to ensure that a wetland that is being restored, enhanced or created will not be destroyed or substantially degraded by any subsequent owner of or holder of interest in the property on which the wetland is located. The department shall revoke the permit or other approval if the holder of the permit or other approval fails to take these measures.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(h) Standards for measuring the short-term and long-term success of a mitigation project and require-

ments for the short-term and long-term monitoring of a mitigation project.

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

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

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

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

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

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

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

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

(5) REPORT TO LEGISLATURE. No later than January 31, 2003, and no later than January 31 of each subsequent odd-numbered year, the department shall submit to the legislature under s. 13.172 (2) a report 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.

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

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

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

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

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

SECTION 5. Nonstatutory provisions.

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

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

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