

2001 ASSEMBLY BILL 697

January 4, 2002 – Introduced by JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES. Referred to Committee on Environment.

1 **AN ACT** *to repeal* 281.37 (3) (g); and *to create* 281.37 (3c), 281.37 (3g) and 281.37
2 (3j) of the statutes; **relating to:** the size of restored, enhanced, or created
3 wetlands that are parts of wetland mitigation projects.

Analysis by the Legislative Reference Bureau

Under federal law, projects involving the discharge of dredge or fill material into any navigable body of water, including some 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. For wetlands not subject to federal law, any discharge of dredge or fill material, with certain exceptions, must also comply with all of the state water quality standards.

Current state law specifically authorizes DNR to consider a wetland mitigation project as a means for complying with these water quality standards in determining whether to grant a permit or other approval (approval) for an activity that will have an adverse effect on a wetland. Under this law, wetland mitigation may be accomplished by restoring, enhancing, or creating another wetland to compensate for the impact to the wetland that is being adversely affected or by using credits from

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a “wetland mitigation bank.” A wetland 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.

Current law prohibits DNR from considering wetland mitigation in reviewing whether to grant an 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. Also, 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 adversely affected.

Current state law also requires that DNR initiate negotiations with ACE to establish guidelines for mitigation projects and banking. Current law authorizes DNR to promulgate rules concerning the size of the wetlands to be restored, enhanced, or created (mitigating wetlands) and replacement ratios that will apply in determining the size of these wetlands. Current law specifically prohibits DNR from requiring that a mitigation project be larger in acreage than the acreage required by these guidelines.

This bill repeals DNR’s authority to promulgate rules establishing a process for determining these replacement ratios. Instead, the bill imposes a general minimum size requirement that the size of the mitigating wetlands be at least 150% of the size of the adversely affected wetlands.

The bill reduces this minimum size requirement to 100% for a mitigation project that meets certain criteria. The mitigating wetlands used for such a project must come from a mitigation bank approved by DNR, and the activity for which the mitigation project is authorized may not affect certain areas, such as deep marshes or wet prairies in any area of the state, or other areas that are located south of STH 10, such as wet meadows and forested swamps.

The bill specifies that, if the size of the mitigating wetlands using the 150% or 100% replacement ratio exceeds the acreage that is required for the mitigation project under the guidelines, the size of the mitigating wetlands shall be reduced to equal the maximum acreage allowed under those guidelines.

This bill is introduced as required by s. 227.19 (5) (e), stats., in support of the objection of the senate committee on environmental resources on October 9, 2001, and the objection of the joint committee for review of administrative rules on November 14, 2001, to the issuance of a portion of clearinghouse rule 00-164 by DNR. The portion of the proposed rule objected to would allow DNR to grant a variance to reduce the replacement ratio to 100% for certain mitigation projects that are in addition to those described above to which the 100% ratio applies.

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For further information see the *state* 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.** 281.37 (3) (g) of the statutes, as affected by 2001 Wisconsin Act 6,
2 is repealed.

3 **SECTION 2.** 281.37 (3c) of the statutes is created to read:

4 **281.37 (3c) SIZE REQUIREMENT.** (a) In approving a mitigation project, the
5 department shall determine the size of the wetlands to be restored, enhanced, or
6 created.

7 (b) Except as provided in sub. (3g), and subject to sub. (3j), the size of the
8 wetlands that are restored, enhanced, or created as part of a mitigation project shall
9 be at least 150% of the size of the wetlands that are adversely impacted.

10 **SECTION 3.** 281.37 (3g) of the statutes is created to read:

11 **281.37 (3g) SIZE REQUIREMENT; SPECIFIC AREAS.** Subject to sub. (3j), the size of
12 the wetlands that are restored, enhanced, or created as part of a mitigation project
13 shall be at least 100% of the size of the wetlands that are adversely impacted if all
14 of the following apply:

15 (a) Credits from a mitigation bank that has been approved by the department
16 are being used for the mitigation project.

17 (b) The permitted activity for which the mitigation project is being authorized
18 will not impact any of the following:

19 1. A deep marsh.

20 2. A ridge and swale complex.

