2019 SENATE BILL 169

April 18, 2019 - Introduced by Senators Wanggaard, Cowles, Wirch and Olsen, cosponsored by Representatives Tusler, Ohnstad, Sinicki, Kerkman and Mursau. Referred to Committee on Natural Resources and Energy.

AN ACT to renumber and amend 281.36 (3r) (a) 1.; to amend 281.36 (3r) (am); and to create 281.36 (1) (ae), 281.36 (1) (ag), 281.36 (1) (be), 281.36 (3r) (a) 1. b., c. and d., 281.36 (3t) (g) and 281.36 (3w) of the statutes; relating to: wetland mitigation banks, providing an exemption from emergency rule procedures, providing an exemption from rule-making procedures, and requiring the exercise of rule-making authority.

Analysis by the Legislative Reference Bureau

This bill makes changes to requirements for wetland mitigation banks. Under current law, the Department of Natural Resources must issue wetland general permits for discharges of dredged or fill material into certain wetlands and may require a person to apply for and obtain a wetland individual permit if DNR determines that conditions specific to the site require additional restrictions on the discharge in order to provide reasonable assurance that no significant adverse impacts to wetland functional values will occur. Under current law, before DNR may issue a wetland individual permit, it must require the restoration, enhancement, creation, or preservation of other wetlands to compensate for adverse impacts to a wetland resulting from the discharge, also known as mitigation.

Under current law, there are three methods by which wetland mitigation may be accomplished: 1) purchasing credits from a mitigation bank located in this state; 2) participating in the in lieu fee subprogram; or 3) completing mitigation within the
same watershed or within one-half mile of the site of the discharge. A mitigation
bank is a system of accounting for wetland loss and compensation in which sites
where wetlands are restored, enhanced, created, or preserved generate credits that
may be applied or purchased in order to compensate for adverse impacts to other
wetlands. Under current law, DNR must approve the establishment of a mitigation
bank.

This bill changes the first method of wetland mitigation by limiting credit
purchases to only a mitigation bank located in the same compensation search area
as the wetland impacted by the discharge, if available. Under the bill, a
compensation search area is an area that includes the geographic management unit
of a wetland impacted by a discharge, the county of the impacted wetland, and the
area within a 20-mile radius from the impacted wetland. Under the bill, a
dgeographic management unit is one of the 22 statewide management units
established by DNR based on the major river basins of the state. If no available
mitigation bank is located in the same compensation search area as the wetland
impacted by the discharge, the bill allows credit purchases to be made from a
mitigation bank located within 50 miles of the wetland impacted by the discharge.
If no available mitigation bank is located within 50 miles of the impacted wetland,
the bill allows credit purchases to be made from a mitigation bank in the same basin
as the wetland impacted by the discharge, meaning the Lake Michigan Basin, the
Lake Superior Basin, or the Mississippi River Basin. If no available mitigation bank
is located in the same basin as the wetland impacted by the discharge, the bill allows
credit purchases to be made from a mitigation bank anywhere in the state.

This bill requires DNR to establish by rule financial assurance requirements
for the construction of mitigation projects by mitigation banks. The bill also
establishes the means by which a mitigation bank that has not yet completed
construction of a mitigation project and has not been approved by DNR (developing
mitigation bank) may sell the credits that the mitigation bank estimates it will have
once the mitigation project is complete. Under the bill, a developing mitigation bank
may sell these credits if it is in compliance with DNR’s financial assurance
requirements and if it follows a specific schedule for release of the credits that is
established in the bill.

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

SECTION 1. 281.36 (1) (ae) of the statutes is created to read:

281.36 (1) (ae) “Basin” means the Lake Michigan basin, the Lake Superior
basin, or the Mississippi River basin, except that this definition does not apply to par.

SECTION 2. 281.36 (1) (ag) of the statutes is created to read:
SENATE BILL 169

281.36 (1) (ag) “Compensation search area” means an area that includes the geographic management unit of a wetland impacted by a discharge, the county of the impacted wetland, and the area within a 20-mile radius from the impacted wetland.

SECTION 3. 281.36 (1) (be) of the statutes is created to read:

281.36 (1) (be) “Geographic management unit” means one of the 22 statewide management units established by the department based on the major river basins of the state.

SECTION 4. 281.36 (3r) (a) 1. of the statutes is renumbered 281.36 (3r) (a) 1. a. and amended to read:

281.36 (3r) (a) 1. a. Purchasing Except as provided in subd. 1. b., purchasing credits from a mitigation bank located in this state the same compensation search area as the wetland impacted by the discharge.

SECTION 5. 281.36 (3r) (a) 1. b., c. and d. of the statutes are created to read:

281.36 (3r) (a) 1. b. Except as provided in subd. 1. c., if credits are not available to be purchased as provided under subd. 1. a., credits may be purchased from a mitigation bank within 50 miles of the wetland impacted by the discharge, as measured between the closest outer boundary of the impacted wetland and the closest outer boundary of the mitigation bank.

c. Except as provided in subd. 1. d., if credits are not available to be purchased as provided under subd. 1. b., credits may be purchased from a mitigation bank in the same basin as the wetland impacted by the discharge.

d. If credits are not available to be purchased as provided under subd. 1. c., credits may be purchased from a mitigation bank anywhere in this state.

SECTION 6. 281.36 (3r) (am) of the statutes is amended to read:
281.36 (3r) (am) For a discharge that is exempt from permitting requirements under sub. (4n) (b) or (c), any off-site mitigation, including any mitigation conducted by a mitigation bank or under the in lieu fee subprogram, shall be completed within the same compensation search area, as defined by the department by rule, as the discharge.

SECTION 7. 281.36 (3t) (g) of the statutes is created to read:

281.36 (3t) (g) Financial assurance requirements for the construction of mitigation projects by mitigation banks.

SECTION 8. 281.36 (3w) of the statutes is created to read:

281.36 (3w) RELEASE OF CREDITS. (a) In this subsection:

1. “Applicant” means the applicant for a wetland individual permit for which wetland mitigation is required under sub. (3n) (d) or the proponent of a wetland mitigation project required under sub. (3n) (d).

2. “Bank document” means a document that contains specifications pertaining to the establishment, operation, and maintenance of a mitigation bank and any other items required by the department by rule.

3. “Bank sponsor” means any public or private entity financially responsible for establishing or operating a mitigation bank.

4. “Compensation site plan” means a comprehensive document prepared by an applicant or bank sponsor that provides a thorough description of a proposed wetland mitigation project.

5. “Developing mitigation bank” means a mitigation bank that has not completed its mitigation project and that has not yet been established under an agreement between the bank sponsor and the department or otherwise approved by the department.
6. "Estimated credits" means the total number of credits that a developing mitigation bank estimates it will have once its mitigation project is constructed.

(b) A developing mitigation bank may sell its estimated credits under the mitigation program under sub. (3r) only if the mitigation bank has met the financial assurance requirements established by the department under sub. (3t) (g) and only in accordance with the following schedule:

1. No more than 20 percent of the estimated credits after the department approves and executes the bank document.

2. No more than 65 percent of the estimated credits after the department issues a letter of compliance stating that construction and all corrective actions are complete.

3. No more than 85 percent of the estimated credits after the department approves a monitoring report for the mitigation bank or after 2 years have passed after construction of the mitigation project is completed, whichever is later.

4. One hundred percent of the estimated credits after the department approves the final monitoring report for the mitigation bank and determines that all performance standards identified in the compensation site plan are met.

(c) After the department approves and executes a mitigation bank document establishing the specifications for a developing mitigation bank, the sponsor of the bank may not change the mitigation bank document without the approval of the department. After the sponsor of a developing mitigation bank submits to the department a proposed change to the mitigation bank document for review, the mitigation bank may not sell any estimated credits under par. (b) until all of the following occur:

1. The department approves the change to the mitigation bank document.
2. The mitigation bank sponsor and the department adjust the estimated credits and make any necessary adjustments to the credit release schedule under par. (b), if the department believes these adjustments are necessary based on the change to the mitigation bank document.

**SECTION 9. Nonstatutory provisions.**

(1) Using the procedure under s. 227.24, the department of natural resources may promulgate the rules necessary to implement s. 281.36 (3t) (g) as emergency rules. Notwithstanding s. 227.24 (1) (a), (2) (b), and (3), the department of natural resources is not required to provide evidence that promulgating a rule under this subsection as an emergency rule is necessary for the preservation of the public peace, health, safety, or welfare and is not required to provide a finding of emergency for a rule promulgated under this subsection.

(2) Notwithstanding s. 227.135 (2), the department of natural resources is not required to present the statement of scope of the rules necessary to implement s. 281.36 (3t) (g) to the department of administration for review by the department of administration and approval by the governor. Notwithstanding s. 227.135 (2), the department of natural resources is not required to present the statement of scope, as provided in s. 227.135 (2), to the natural resources board for approval.

**SECTION 10. Effective date.**

(1) This act takes effect on the 90th day after the day of publication.