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# Legislative Briefs

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## WETLANDS MITIGATION

1999 Wisconsin Act 147, passed by the legislature and signed by Governor Tommy Thompson on May 10, 2000, gives the Wisconsin Department of Natural Resources (DNR) additional flexibility in approving development projects that could adversely affect wetlands. Under the new law, DNR may allow a project applicant, in certain circumstances, to restore, enhance, or create another wetland as compensation for the affected wetland. In determining whether to approve a project, DNR must assure that the applicant has taken all appropriate measures to avoid damage to the affected wetland. The new law does not, however, allow mitigation projects in certain particularly sensitive areas of significant ecological, cultural, aesthetic, educational, recreational, or scientific value.

### DEFINITION AND FUNCTIONS OF WETLANDS

Section 23.32, Wisconsin Statutes, defines a “wetland” as “an area where water is at, near, or above the land surface long enough to be capable of supporting aquatic or hydrophytic vegetation and which has soils indicative of wet conditions.” Wetlands include a variety of soil types, drainage conditions, seasonal variations, water depth and saturation, vegetation, and other characteristics.

As transitional zones between uplands and bodies of water, wetlands are important in promoting water quality, erosion control, flood control, habitat for plant and animal life, and other functions. They also support a diversity of flora and fauna, including some endangered species, and provide habitat for fish spawning and habitat for nesting, rearing, and feeding of game and nongame wildlife species.

### WETLANDS LOSS AND PROTECTION

Through most of Wisconsin’s history, drainage for conversion to agricultural use has been the cause of most wetlands loss, but nonagricultural causes have been increasing with pressures for additional commercial, residential, and highway development. Federal, state, and local regulations and incentives seek to reduce losses and protect wetlands.

**Federal Law.** The permit program under Section 404 of the Clean Water Act provides that projects that discharge dredging or fill materials into any body of water (including wetlands) must meet U.S. Environmental Protection Agency regulations before the U.S. Army Corps of Engineers can issue a permit for the project. A project that would adversely affect a wetland may, however, still comply with the guidelines. A memorandum of understanding between those two federal agencies provides an interpretation that allows approval of a proposal that includes compensatory action to create, restore, or enhance another wetland that has already been damaged. Before the Corps of Engineers may issue a permit, DNR must certify that the plan complies with state water quality standards.

**State Standards.** Chapter NR103 of the Wisconsin Administrative Code, Water Quality Standards for Wetlands, provides criteria for decisions affecting both wetlands and hydrologically-connected areas of “special natural resource interest” defined in the rule.

Chapters NR115, 116, and 117, on shoreland and floodplain management, also contain provisions related to wetlands.

### COMPENSATORY MITIGATION UNDER ACT 147

Prior to 1999 Wisconsin Act 147, DNR had no specific authority to allow compensatory mitigation of wetlands under its authority to promulgate state water quality standards, although the Department of Transportation (DOT) does have such authority under procedures jointly established by DOT and DNR. Act 147 gives DNR new authority to consider compensatory mitigation, as follows:

- **Mitigation projects and permit approvals.** Act 147 defines a “mitigation project” as “restoration, enhancement or creation of wetlands to compensate for adverse impacts to other wetlands.” Effective August 1, 2001, the act allows DNR to consider a mitigation project in determining whether to approve or issue a permit for an activity that will affect a wetland. In making this determination, DNR may not approve a mitigation project unless the applicant demonstrates that “all appropriate and practicable measures” will be taken to avoid damage. DNR also may not consider a mitigation project if a proposed activity would affect an area of “special natural resource interest” as defined in the act or by rule.
- **Wetlands mitigation credits.** A mitigation project may use credits from a “wetlands mitigation bank,” a system of accounting that creates transferable credits earned for wetland restoration, enhancement, or creation that may be subsequently applied as compensatory mitigation.
- **Conservation easements.** The act requires, with certain exceptions, a permit holder or person restoring, enhancing, or creating a wetland as part of a mitigation project to grant DNR a conservation easement to assure that the wetland will not be destroyed or degraded by any subsequent property owner.
- **Administrative rules.** By May 1, 2001, DNR must submit to the legislature proposed rules to establish the process for considering compensatory wetland mitigation applications. The rules shall address requirements for avoidance and minimization of adverse impacts; use of mitigation credits; enforcement; baseline wetland studies; design requirements relating to the hydrology of the affected watershed; comparability of the quality of adversely affected wetland with the restored, enhanced, or created wetland; replacement ratios; measurement of short- and long-term success of a project; remedial actions required for unsuccessful projects; and expedited decision-making for smaller wetlands that are less than one acre in size and that are determined to have “negligible functional values.”
- **Effective dates.** Except for the dates noted above, the act took effect May 25, 2000. DNR is also required to submit to the legislature an analysis of the act’s implementation no later than January 31, 2003, and every two years thereafter.

### FURTHER INFORMATION

Copies of 1999 Wisconsin Act 147 are available through the Legislative Reference Bureau at (608) 266-0342, or on the Internet at <http://folio.legis.state.wi.us>. For additional information, contact Scott Hausmann at DNR at (608) 266-7360.