



WISCONSIN LEGISLATIVE COUNCIL AMENDMENT MEMO

2001 Senate Bill 361

**Senate Amendment 1 to Senate
Substitute Amendment 1**

Memo published: March 7, 2002

**Contacts: Rachel Letzing, Staff Attorney (266-3370)
John Stolzenberg, Staff Scientist (266-2988)**

Current Law

Under current law, the Department of Natural Resources (DNR) is authorized to consider a wetland mitigation project as part of an application in determining whether to issue a permit for, or to otherwise approve, a variety of activities that may affect a wetland. Current law directs the DNR to promulgate rules to establish a process for consideration of wetland mitigation in reviewing applications, including a process for determining the size of the mitigation project relative to the size of the wetland that will be affected by the permitted activity.

Current law also directs the DNR to develop a memorandum of agreement (MOA) with the U.S. Army Corps of Engineers (ACE) establishing guidelines for mitigation projects and mitigation banks. Under current law, if the DNR determines that the conditions of an ACE permit or authorization for an activity that affects a wetland does not meet the requirements of the guidelines established in the MOA, the DNR may impose additional conditions to ensure that the requirements are met, but may not require that the acreage of a mitigation project exceed the acreage required under the guidelines.

Clearinghouse Rule 00-164

The DNR's proposed rule on wetland compensatory mitigation, Clearinghouse Rule 00-164, that was reviewed by legislative standing committees, included a provision that would have authorized the DNR to grant a variance to a permit applicant to reduce the wetland mitigation compensation ratio from the general requirement of 1.5 acres of compensation for every one acre of adversely affected wetland to a ratio of one acre of compensation for every one acre of adversely impacted wetland for a project impacting 20 acres or more of wetlands.

Senate Bill 361

Senate Bill 361 was introduced by the Joint Committee for Review of Administrative Rules in support of the objection of the Senate Environmental Resources Committee to the provision in

Clearinghouse Rule 00-164, described above, relating to the 1:1 mitigation ratio for a project impacting 20 or more acres of wetland.

Senate Bill 361 establishes a general minimum requirement that the size of the wetlands restored, enhanced or created as part of a mitigation project must be at least 150% of the size of the adversely affected wetlands. Under the bill, the size of the mitigation wetlands is reduced to 100% of the size of the adversely impacted wetlands if the project meets two criteria: (1) credits from a mitigation bank approved by the DNR are being used for the mitigation project; and (2) the permitted activity for which the mitigation project is being authorized will not impact a deep marsh, a ridge and swale complex, a wet prairie that is not dominated by reed canary grass to the exclusion of a significant population of native species, an ephemeral pond in a wooded area, a sedge meadow or fresh wet meadow that is not dominated by reed canary grass to the exclusion of a significant population of native species and that is located south of STH 10, a bog located south of STH 10, or a hardwood, cedar or conifer swamp located south of STH 10.

Senate Bill 361 also specifies that if the size of the wetlands to be restored, enhanced or created as part of a mitigation project exceeds the size required under the guidelines specified in the MOA between ACE and DNR, that the size of wetlands must be reduced to the maximum acreage allowed under these guidelines.

Senate Substitute Amendment 1

Senate Substitute Amendment 1 repeals the DNR's current authority to promulgate rules to establish a process for determining the size of the mitigation project relative to the size of the wetland that will be affected by the permitted activity.

The substitute amendment requires that the minimum amount of compensatory mitigation be determined by using a compensation ratio of at least ***1.5 acres of compensation for each acre of adversely affected wetland***. This compensation ratio is reduced to a ratio of at least one acre of compensation for each acre of adversely affected wetland if the two criteria listed in the previous paragraph apply. Under s. NR 350.06, Wis. Adm. Code, as set forth in a portion of Clearinghouse Rule 00-164, which was not objected to by a standing committee, the DNR determines the amount of acres of compensation required, not the size of the wetland at a mitigation project; thus, the wetland "compensation ratio" and "amount of compensatory mitigation" instead of the wetland "size" is technically correct and parallels the language used in s. NR 350.

Senate Substitute Amendment 1 removes the requirement in Senate Bill 361 which specifies that if the size of wetlands using the 150% or 100% replacement ratio exceeds the acreage that is required for the mitigation project under the MOA guidelines, the size of the mitigation wetlands must be reduced to equal the maximum acreage allowed under the guidelines. Under the substitute amendment, if the DNR determines that the conditions of a permit or authorization by the ACE for an activity that affects a wetland does not meet the requirements of the guidelines established in the MOA, the DNR may impose additional conditions to ensure that the requirements are met and ***in calculating the amount of compensatory mitigation required***, the DNR may not require that the acreage of a mitigation project exceed the acreage required under the guidelines.

Senate Substitute Amendment 1 also corrects technical errors in the bill. The substitute amendment replaces the notation “STH” with “USH” and specifies that a cedar swamp located *north of USH 10* is a type of wetland that may not be affected in order for a 1:1 compensation ratio to apply. The latter correction of the location of an affected cedar swamp conforms the substitute amendment to Clearinghouse Rule 00-164.

Senate Amendment 1

Senate Amendment 1 to Senate Substitute Amendment 1 removes the requirement that, for purposes of the 1.5:1 general minimum amount of compensatory mitigation and the exception authorizing a 1:1 compensation ratio under specified circumstances, the wetlands mitigation rules promulgated by the DNR must include a rule defining or otherwise specifying the criteria to be used in determining what qualifies for the compensation ratios. This language is currently provided in s. NR 350.06.

The Senate Environmental Resources Committee unanimously recommended adoption of the substitute amendment and passage of the bill, as amended, on January 29, 2002.

On February 5, 2002, the Senate adopted Senate Amendment 1 to Senate Substitute Amendment 1 on a voice vote, and adopted Senate Substitute Amendment 1, as amended, on a voice vote.

On February 25, 2002, the Assembly Environment Committee unanimously concurred in Senate Bill 361.

REL:JES:wu:jal;ksm