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# RON TUSLER

STATE REPRESENTATIVE • 3<sup>rd</sup> ASSEMBLY DISTRICT

## Testimony

on

Assembly Bill 190

Assembly Committee on Environment

August 15, 2019

Mr. Chairman and members of the committee, thank you for hearing Assembly Bill 190. This bill will incentivize the creation of wetlands in needed areas.

Under current law, satisfying a mitigation requirement is achieved by purchasing credits from a mitigation bank, participating in the In-Lieu Fee program, or completing mitigation within the same watershed or within one-half mile from the site of the discharge. This bill promotes the creation of mitigation banks in high-cost areas and statutorily codifies the principle of executing mitigation as close as possible to the location of a disruption.

### Incentivizing Mitigation Bank Development

First, the bill incentivizes the creation of mitigation banks in high-cost areas. The release schedule for credits when a mitigation bank is created is back-heavy; most credits are not released until after two years.<sup>1</sup> This makes the creation of mitigation banks in developed and developing areas, areas in the most need of the ecological benefits wetlands provide, economically impractical. Mitigation banks in these areas would have significant, positive impacts such as: better filtration of groundwater; serving as critical habitat for waterfowl and other species throughout the state; and lessening flooding during extreme precipitation events. To incentivize the creation of wetlands in these high-cost, developed areas, this bill ties the credit release schedule to benchmarks during the establishment of a mitigation bank as follows:

- No more than 20 percent of the estimated credits after the DNR approves and executes the mitigation bank document establishing the specifications for the mitigation bank;
- No more than 65 percent of the estimated credits after the DNR issues a letter of compliance stating that construction and all corrective actions are complete;
- No more than 85 percent of the estimated credits after the department approves a monitoring report, but no sooner than 2 years after construction of the mitigation project;
- 100 percent of the estimated credits after the department approves the final monitoring report and determines all performance standards applicable to the mitigation bank are met.

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<sup>1</sup> See NR 350.13 (7) (DNR may release up 10%, 20%, 30% and 100% of credits upon the completion of certain benchmarks).

These benchmarks will speed the availability of mitigation credits for purchase while also ensuring real, concrete progress is made toward the creation of wetlands in areas desperately in need of these ecological features. It is also important to note that the percentage of credits released at each benchmark is a ceiling, not a set requirement; if the DNR determines that it would be imprudent to release the full number of credits allowable at each benchmark, it is not required to.

Further, the DNR “may authorize a developing mitigation bank to sell its estimated credits at a faster rate than the schedule . . . *if the bank provides an additional level of financial assurance or if the mitigation is of a type that is less prone to failure*, such as wetland preservation or enhancement.” See ASA 1 to AB 190 §11 page 7 ln. 4-7 (emphasis added). This provision is new to the substitute amendment; it recognizes that no two mitigation projects are the same and the many factors involved in wetland mitigation require deference to the environmental experts.

Whether the maximum number of credits are released or not, these changes are an improvement from current system and will spur the development of banks in needy areas.

### **Mitigation Location**

Second, this substitute amendment, developed in consultation with the DNR and Army Corps of Engineers (ACOE), lays out a framework that will incentivize the most impactful citing of wetland mitigation. The original bill required the purchase of credits in the same “compensation search area” of a discharge; if no credits were available for purchase in that area, then credits could be purchased from within a 50 mile radius of the discharge; if credits were not available in that area, then credits could be purchased in the same basin as the discharge; finally, if credits were not available in the same basin, then credits could be purchased from anywhere in the state.

The substitute amendment makes changes to these locational requirements that conform to ACOE regulations to make this bill feasible. Definitionally, the substitute amendment uses “HUC 8,” “HUC 6,” and “HUC 2” (Basins). “HUC” (hydrologic unit code) refers to a watershed delineated by the U.S. geological survey using a nationwide system based on surface hydrologic features; the number following “HUC” indicates the size of the HUC, with a smaller number indicating a larger geographic area. According to the substitute amendment, mitigation should occur in the same HUC 8 of a discharge; if not there, then the same HUC 6 (a/k/a “Bank Service Area”); if not there, then the same HUC 2 (“Basins,” which in Wisconsin are the Lake Michigan, Lake Superior, and Mississippi River Basins).

Section 7 of the substitute amendment gives flexibility to the DNR, in consultation with the ACOE, to allow mitigation in a different area than one prescribed or mitigation through the In-Lieu Fee program if the DNR “determines it would better serve natural resource goals, such as retaining flood water, improving or restoring wildlife habitat, or more closely matching the impacted wetland type.” This statutory location structure combined with the flexibility given to environmental experts is an environmentally-conscious solution that will benefit the entire state.

Attached to my testimony are two maps that shows the HUC 8s, HUC 6s (Bank Service Areas), and Basins (HUC 2s) in Wisconsin. On the left map, the thick black lines delineate Basins;

HUC 6s (Bank Service Areas) are labeled on the left map and are shaded; and HUC 8s are delineated by the faint gray lines within the HUC 6s. An electronic color copy is available from my office upon request.

**Financial Surety**

Additionally, the bill and substitute amendment require the DNR promulgate financial assurance rules. Financial surety will ensure that projects are completed if for any reason a mitigation bank developer decides not to complete a project.

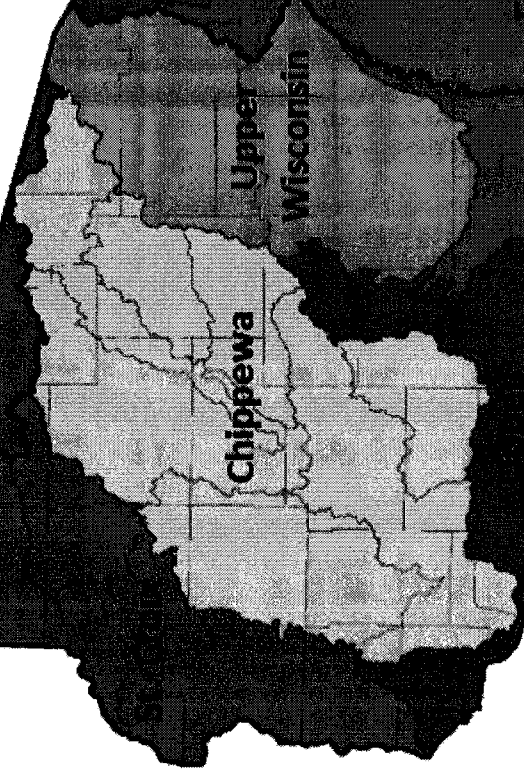
**Conclusion**

Thank you for your time and consideration. These simple and straightforward changes will have meaningful impacts by incentivizing the creation of wetlands in needed areas and/or ensure that mitigation has the best environmental impact according to the DNR and ACOE.

# SERVICE AREAS

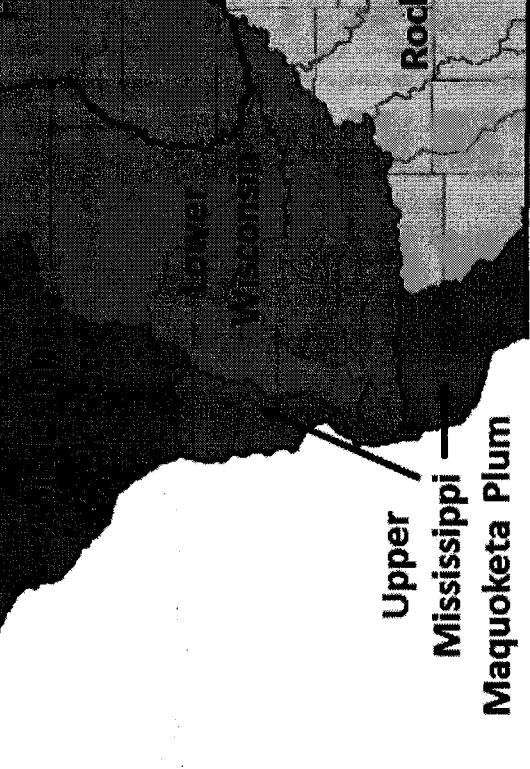


Lake Superior



Chippewa

Upper Wisconsin



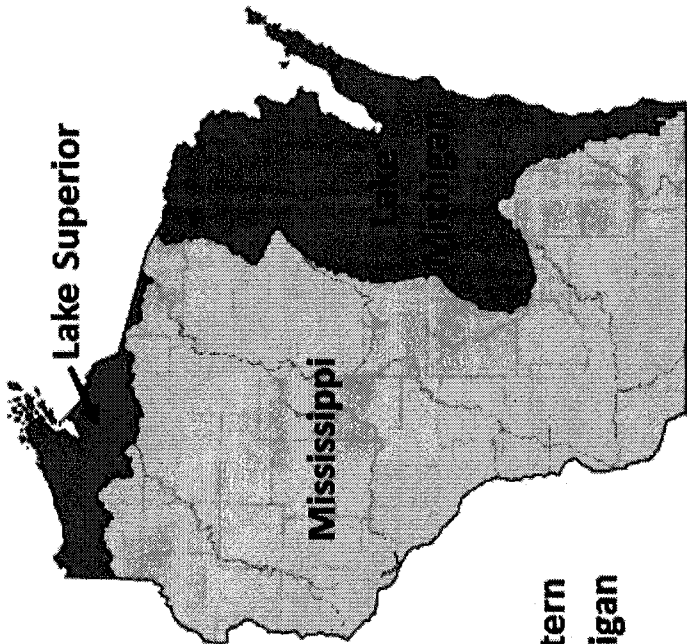
Lower Wisconsin

Fox

Rock

Upper Illinois

# BASINS



Lake Superior

Mississippi

Northwestern Lake Michigan

Southwestern Lake Michigan

Upper Mississippi  
Maquoketa Plum



# Tod Ohnstad

STATE REPRESENTATIVE

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August 15, 2019

Assembly Committee on Environment

Assembly Bill 190

Representative Tod Ohnstad

Chairman Kitchens and members of the Assembly Committee on Environment, thank you for the opportunity to provide testimony on Assembly Bill 190. This is bipartisan legislation designed to steer wetland mitigation closer to the site of a development project and provide for more flexibility in the schedule for release of credits.

Wisconsin takes issues of wetland mitigation seriously. We operate programs in conjunction with United States Army Corp of Engineers under federal law to offset permitted development in a particular area with the creation of new wetlands. Wetlands are fundamentally important for a multitude of environmental reasons and are critical to minimizing potentially disastrous issues like flooding.

However, we are concerned that mitigation under the current programs can often take place a great distance from the location of the initial project. While it is positive to offset losses to a particular wetland at another location, if the new wetland is too far from the area losing a wetland the benefits can be diminished. This can leave the initial area potentially more vulnerable to flooding or undermine the habitat and groundwater goals inherent to mitigation.

This proposal attempts to enhance the current mitigation bank program by requiring developers who elect to purchase mitigation bank credits to try to buy them geographically closer to the site and within the same hydrologic unit or watershed where possible.

In addition to trying to ensure mitigation takes place closer to the site of a redevelopment, the bill also makes changes to the schedule for the release of mitigation bank credits. This makes mitigation efforts more appealing to entities interested in doing this sort of work to expand activity in this field.

Thank you for your time today, and I would appreciate your support when Assembly Bill 190 comes for a vote before this committee.

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65th ASSEMBLY DISTRICT

State Capitol: P.O. Box 8953, Madison, WI 53708 • (608) 266-0455 • Toll-free: (888)-534-0065 • Fax: (608) 282-3665  
Email: [rep.ohnstad@legis.wisconsin.gov](mailto:rep.ohnstad@legis.wisconsin.gov) • Website: <http://ohnstad.assembly.wi.gov>



**State of Wisconsin**  
DEPARTMENT OF NATURAL RESOURCES  
101 S. Webster Street  
Box 7921  
Madison WI 53707-7921

Tony Evers, Governor  
Preston D. Cole, Secretary  
Telephone 608-266-2621  
Toll Free 1-888-936-7463  
TTY Access via relay - 711



## Assembly Committee on Environment

### *2019 Assembly Bill 190* *Wetland Mitigation Banking Requirements* 8/15/2019

Good morning Chairman Kitchens and members of the Committee. My name is Amanda Minks, and I am the Waterway and Wetland Section Chief with the Wisconsin Department of Natural Resources. Thank you for the opportunity to testify for informational purposes on Assembly Bill 190 (AB 190), related to wetland mitigation.

Wetland mitigation is a regulatory tool to offset wetland losses associated with certain types of permitted and exempt activities. Mitigation is required by state and federal law and is jointly implemented by DNR and the United States Army Corps of Engineers (ACOE). DNR supports the authors' intent to enhance the mitigation banking program, and appreciates that Assembly Substitute Amendment 1 to AB 190 reflects much of the technical feedback the DNR offered on the Senate companion bill, SB 169.

After careful analysis, and in collaboration with the ACOE, we believe that AB 190 preserves DNR's ability to jointly implement the wetland mitigation program with the ACOE. We also appreciate the bill authors' intention to foster more localized mitigation solutions when practicable to retain the wetland functions and values to the watershed including flood storage, wildlife habitat and water quality filtration.

Another goal of AB 190 is to create additional flexibility to the credit release schedule for mitigation bankers. Credit release schedules are negotiated on a case-by-case basis and ultimately set in an individual banking instrument by the ACOE and DNR. The DNR finds that the proposed credit release schedule would be more generous than what federal regulations and guidelines would typically authorize. This discrepancy would likely reduce the practical application of the credit release schedules specified in AB 190. DNR will continue to work with the ACOE to determine the appropriate credit release schedule for specific banks but, we have concerns that bankers may get false expectations or develop business models that may not be feasible or aligned with federal expectations. DNR will work with the banking community, and others, to help set expectations and provide transparency to the review and approval process and would appreciate support from the Legislature and others to help share this message.

A minor technical suggestion that DNR would also like to offer to the authors and this Committee is to replace the term "HUC 2" with the term "HUC 4" to help differentiate between the Lake Superior and Lake Michigan basins. Alternatively, the DNR recommends removing the term "HUC 2" altogether, and

simply refer to the Lake Michigan, Lake Superior or Mississippi River basins. Either of these options would provide the necessary clarification.

Thank you very much for considering this feedback. The DNR would like to reaffirm our commitment to supporting and enhancing Wisconsin's wetland mitigation program. We look forward to cohosting listening sessions for the mitigation banking community this fall; making technical improvements to administrative code NR 350 related to wetland mitigation; and continuing our working relationship with this Committee, members of the Legislature, and others to continue to support this program.

On behalf of the DNR and the Bureau Watershed Management, thank you for your time today and I would be happy to answer any questions you may have.