

98-055-NR16 - FISH FARMS

September 9, 1998

From: John O'Brien

To: Tim Andryk
WIDNR LS/5
101 S. Webster St.
Madison, WI

Tim,

Per our phone conversation of Sept. 8th, 1998. I am providing some suggested revisions to the Natural Pond Rule revised by the Natural Resources Board, FH 18-98. I am providing these thoughts and suggestions for your consideration and input in hopes of reaching an amicable agreement on this rule. I am not certain if these suggestions will be place before the committees for consideration except for the final issue discussed Notice Requirements. A final determination on how we will testify will be made after all interested parties have voiced their opinion on the current condition of the rule.

A. Applicability of rule to DNR Fish Rearing Activity

Include following language to assist the department in implementing what it has indicated is its intent.

1. The Department would issue a notice of intent to use a natural pond for a hatchery, including a written analysis of that proposal similar to the analysis that would be required of a private permit applicant.
2. The Department would be required to distributed the notice for comments in the same manner as the rule requires of private permit applications, and that the DNR hold a public hearing on the proposal if there is any substantive objection raise to it.
3. Provide that the requirements apply to the initial proposal of the DNR to convert a pond to use for fish raring and to the review of the continued use every 10 years thereafter, except that the DNR may continue to use ponds that were already in use by the DNR on January 1, 1998 without conducting an initial review.

B Fees.

Consider the following approach to the fee issue

The first component would be a fee of \$100.00 for the handling and office review of a permit application; the second component would be a fee of \$100.00 for an initial field survey of the pond, in which a single DNR staff member would survey the pond for species that are indicative of the quality and type of aquatic community that might support rare or endangered species of amphibians, invertebrates, plants or other organisms; the third component would be a fee of \$200.00 for a follow-up field survey in which a team of DNR staff would survey the pond for rare or endangered species to be conducted only if the initial survey had found indicator species suggesting the need for a full survey

Under this approach, a proposal to use a high quality pond for a fish farm would cost \$400.00 and would be subject to substantial scrutiny in the field, while a proposal to use a lower quality pond would be subject to lesser scrutiny and would cost \$200.00. It is designed to encourage fish farmers to avoid the higher quality ponds for their use and to make the fee reflect the amount of field work that the review of an individual application requires.

C. Notice Requirements

Revert to the original language on public notice.

With due respect to the Natural Resource Board Members we are opposed to changing the notice requirement to the language used for the notification of the taking of endangered species.

We will request the committees retain the original notice requirements that were agreed to by the Department and the Aquaculture Industry.

There is no scientific evidence that the past practices of using limited freeze out ponds for decades, by both the Department and the industry have caused any damage to any species what so ever. In fact, prior to this rule revision there is no evidence that any environmental organization had any concerns about the use of these waters for this purpose. It appears that a few individuals have inflamed certain well organized groups by disseminating mis-information about the use of these waters.

The change suggested by the Natural Resources Board would in effect hamstring both the Department of Natural Resources and the private industry. This notice requirement is not necessary, as there is no evidence that any species, endangered or not, is threatened by this practice.

The Department of Natural Resources has a proven history of protective stewardship of these waters. Allowing micro-management of the Departments duties by certain special interest groups is neither a cost effective solution, nor is it a practical way to determine a balanced public interest in the use of a public resource.

The waters of the state belong to all the citizens not just a vocal few who are organized enough to in effect prevent the use of any water of the state for the production of fish stocks that are needed to maintain Wisconsin's sport fisheries.

State of Wisconsin
Department of Natural Resources

**NOTICE TO PRESIDING OFFICERS
OF PROPOSED RULEMAKING**

Pursuant to s. 227.19, Stats., notice is hereby given that final draft rules are being submitted to the presiding officer of each house of the legislature. The rules being submitted are:

Natural Resources Board Order No. FH-18-98

Legislative Council Rules Clearinghouse Number 98-055

Subject of Rules Development of fees, criteria and procedures to use when permitting the use of natural waters as fish farms

Date of Transmittal to Presiding Officers September 8, 1998

Send a copy of any correspondence or notices pertaining to this rule to:

**Carol Turner, Rules Coordinator
DNR Bureau of Legal Services
LC/5, 101 South Webster**

266-1959

REPORT TO LEGISLATURE

Ch. NR 16, subch. II, Wis. Adm. Code
Development of fees, criteria and procedures to use when
permitting the use of natural waters as fish farms

Board Order No. FH-18-98
Clearinghouse Rule No. 98-055

Statement of Need

The proposed rule was created based on s. 29.521, Stats., which directs the Department to develop fees, criteria and procedures for issuing permits to use natural waters as fish farms. The rule applies to privately owned fish farms and state-owned fish hatcheries. The types of water bodies that can be permitted are those that were licensed as private fish hatcheries by the Department in 1997 and freeze-out ponds. A freeze-out pond is a natural, self-contained body of water in which freezing or anoxic conditions prevent the body of water from naturally sustaining a fish population at least twice every 5 years. The rule provides a three-tiered fee structure as follows:

1. For natural waters that were licensed as a private fish hatchery or as part of a private fish hatchery in 1997, the Department will issue a 10-year permit for this use without making an initial determination as specified in s. 29.521(2)(b), Stats. The fee is \$50.
2. For natural waters that are freeze-out ponds that were not formerly licensed by the Department, the Department will make an initial determination of substantial public interest in the freeze-out pond and whether public or private rights in the freeze-out pond would be damaged. This will entail an on-site inspection by Department personnel. The fee is \$500.
3. The natural waters permit is transferrable. The fee to transfer the permit is \$100.

Applications for this permit may be made beginning 60 days after the effective date of the rule. Renewal applications may be made up to 16 months before the expiration date of the permit, but no later than 2 months before the expiration date of the permit. The Department will issue, renew or deny the permit within 3 months of receiving the application; however, if the natural water body is ice-covered at the time of application, the Department may delay its action until the following May 31.

Modifications as a Result of Public Hearings

The following substantive changes were made as a result of public hearing:

NR 16.74(1)(c) - clarifying the term "wetland functional values" as "water quality related functional values or uses of wetlands identified in s. NR 103.03".

NR 16.74(1)(d) - clarifying the term "water quality" as "surface water quality standards identified in chs. NR 102, 104, 105, 106 and 107 and minimum water quantity requirements identified in s. 31.02, Stats."

NR 15.74(8) - providing a process to notify the public of new permit applications. "Upon receipt of a completed permit application, the department shall either schedule a hearing or provide notice stating that it will proceed on the application without a hearing if no substantive written objections to issuance of the permit is received within 30 days after publication or notice. The

notice shall be provided to the news media and other persons according to the procedure in s. NR 27.07(1)(b) and (c). The department may provide notice to other persons as it deems appropriate. The department will assume the cost of publishing the notice."

Appearances at the Public Hearings and Their Positions

May 12, 1998 - Madison

In support:

David Gollon, Gollon Bait & Fish Farm, 5117 Hwy. 191, Dodgeville, WI 53533

In opposition:

Todd F. Miller, 2013 Catlin Place, #1, Madison, WI 53713
Kerry Schumann, WISPIRG, 1121 University Avenue, Madison, WI 53715
Rose B. Smith, 445 W. Center, Whitewater, WI 53190
Galen Smith, 445 W. Center Street, Whitewater, WI 53190
Michael J. Lannoo, 11880 S. County Road 500 East, Selma, IN 47383
Matthew Lowonn, 4357 Britta Drive, #2, Madison, WI 53706
Charles Luthin, 3526 Cross Street, Madison, WI 53711
John Coleman, 500 Babcock Drive, Room B102, Madison, WI 53706
Gail M. Epping, Wisconsin Wetlands Association, 306 S. Baldwin, #1, Madison, WI 53703
Karen Etter Hale, Madison, Audubon Society, 222 S. Hamilton St., #1, Madison, WI 53703

As interest may appear:

Terence Barry, 123 Babcock Hall, Madison, WI 53706
Michael C. Berry, 1140 Freedom Court, Wisconsin Dells, WI 53965
Harold E. Jordahl, The Natural Conservancy, 633 W. Main Street, Madison, WI 53703
Jeff Malison, UW-Madison Aquaculture Program Director, 123 Babcock, Madison, WI 53706

May 13, 1998 - West Bend

In support:

Ervin Buenner, P.O. Box 1904, Eagle River, WI 54521

In opposition:

Joanne Kline, 1370 Chestnut Street, West Bend, WI 53095
Michelle Labry, 107 Maple Avenue South, #8, Slinger, WI 53086-0222
Gary Casper, Milwaukee Public Museum, 800 W. Wells Street, Milwaukee, WI 53233
Timothy Ehlinger, 4634 N. 105th, Wauwatosa, WI 53225
Paul Brautigam, 3428 N. Pierce Street, Milwaukee, WI 53212

As interest may appear:

Susan M. Beyler, N9563 Hwy. 67, Eagle, WI 53119
Don Bloecher, Timber Creek Fish Hatchery, 3205 Tree Lane, West Bend, WI 53095
Judy Brown, The Country Today, Fond du Lac, WI 54936

May 19, 1998 - Wausau

In support:

Robert H. Winkel, Silver Moon Springs, N10638 E. Isle of Pines Drive, Elcho, WI 54428
Robert E. Rotim, N10842 Circle Drive, Elcho, WI 54428
Fred Gollon, 1102 Old Wausau Road, Stevens Point, WI 54481

In opposition:

Sally Tadda, W3902 Sandy Lane, Owen, WI 54460
Alice Thompson, Chair, Wisconsin Wetland Association, 1320 Manitowoc Avenue, South Milwaukee, WI 53172
Herbert Hintze, President, Wis. River Valley Chapter, Trout Unlimited, 629 Hamilton Street, Wausau, WI 54403
Bill Lazarz, N5418 Church Road, Deerbrook, WI 54424
Jane Raymond-Wood, Wausau Bird Club, 1417 Skyline Lane, Wausau, WI 54403
Mary Reser, 1563 County Road ZZ, Amherst Junction, WI 54407
Stuart Grimstad, Frank Hornberg Chapter, Trout Unlimited 1563 County Road ZZ, Amherst Junction, WI 54407
Mitch Bent, Wisconsin Trout Unlimited, 935 South Union Street, Shawano, WI 54166-3145
Henry Bruse, Aldo Leopold Audubon Society, 1820 Wickham Avenue, Wis. Rapids, WI 54495
Marge Gibson, Raptor Education Group, Inc., N2160 W. Rollwood Road, Antigo, WI 54409

As interest may appear:

Rand Atkinson, N4546 Butternut Lane, Birnamwood, WI 54414
Carl Gollon, 1141 N. Old Wausau Road, Stevens Point, WI 54481
Don Hildebrandt, Wisconsin State Bass Federation, 2310 N. 6th Street, Wausau, WI 54403-3307

May 20, 1998 - Spooner

In support:

Charles M. Graham, Star Prairie Trout Farm, 400 Hill Avenue, Star Prairie, WI 54026

In opposition:

James Olson, 550 Graham Avenue, #210, Eau Claire, WI 54701
Craig Friess, Friesses Minnow Farm Inc., 736 20th Avenue, Cumberland, WI 54829
Edward Carlson, 5783 County Road X, Webster, WI 54893

As interest may appear:

Glenna Carlson, 5783 County Road X, Webster, WI 54893
Josephine Gurtner, N3355 Deer Path Road, Sarona, WI 54870
John Gurtner, N3355 Deer Path Road, Sarona, WI 54870
Kevin Hagen, Country Today Newspaper, W5676 Highway 70, Spooner, WI 54801
Ronald Johnson, P.O. Box 662, Iron River, WI 54847
Hugo Kettula, 1029 Clam Falls Drive, Lewis, WI 54837-4705
Ruby Kettula, Seven Pines Fisher Inc., 1029 Clam Falls Drive, Lewis, WI 54837-4705
James Michalski, Route 1, Downing, WI 54734
James L. Streeter, W9401 Valley View, Shell Lake, WI 54871
Harold E. Swanson, Cedar Island Conservancy, Ltd., P.O. Box 106, Brule, WI 54820-0106

Response to Legislative Council Rules Clearinghouse Report

The recommendations have been accepted.

Final Regulatory Flexibility Analysis

At present, there are 40-50 natural water bodies that are being used as fish farms. In order to continue this use, the fish farmers will need to obtain a permit from the Department. The permittee must maintain fish barriers at inlets and outlets to the water body as required by s. 29.521(2)(e), Stats. There is no reporting requirement for this permit. The information requested of the applicant is minimal and will be used by the Department in combination with on-site visits to make a determination regarding adverse impacts to public or private rights in the natural body of water.

Fish farmers can apply for renewal permits up to 16 months before the permit expires. The Department will reissue or deny the permit within 3 months of the application date. This provides a 13 month window in which the fish farmer can make business decisions. This is a 10-year permit which provides the fish farmer with considerable business opportunities and flexibility compared to the year to year licensing requirement under the old law.

Small businesses cannot be exempt from the requirement of this rule. Natural waters that are currently being used as fish farms do not need an initial determination by the Department. This saves the fish farmer \$450, since the Department already permitted the use under the 1997 private fish hatchery license. Department staff must make an initial determination for new ponds in order to insure public and private rights in the ponds are not adversely impacted. We estimate 1-10 new permit applications per year.

Fish farms are affected by this rule. There are no bookkeeping or reporting requirements for compliance.

ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD
CREATING RULES

The Wisconsin Natural Resources Board proposes an order to create NR 16, subch. II relating to the development of fees, criteria, and procedures to use when permitting the use of natural waters as fish farms.

FH-18-98

Analysis Prepared by the Department of Natural Resources

Statutory authority: s. 29.521 (2) (f), Stats.

Statutes interpreted: s. 29.521, Stats.

Summary of the Proposed Rule

NR 16, subch. II is created to set the fee structure, criteria, and procedures to use when permitting the use of natural waters as fish farms. The rule applies to fish farms and state-owned fish hatcheries located in, or proposed to be located in freeze-out ponds, and to natural water bodies that were licensed by the Department in 1997 as part of a private hatchery. A freeze-out pond is defined in s. 29.01 (3m), Stats. as a natural, self contained body of water (which has no inlet or outlet, except that it may have pipes equipped with barriers with which to put in or withdraw water) in which freezing or anoxic conditions prevent the body of water from naturally sustaining a fish population at least twice every five years. An application to use freeze-out ponds as fish farms may include more than one freeze-out pond if they are located on a contiguous parcel of property under the same ownership or leasehold.

The rule provides a three tiered fee structure as follows:

- 1) For natural waters that were licensed as a private fish hatchery or as part of a private fish hatchery in 1997, the Department will issue a 10 year permit for this use without making an initial determination as specified in s. 29.521 (2) (b), Stats. The fee is \$50.
- 2) For natural waters that are freeze-out ponds that were not formerly licensed by the Department, the Department will make an initial determination of substantial public interest in the freeze-out pond and whether public or private rights in the freeze-out pond would be damaged. This will entail an on-site visit by water management specialists, fisheries personnel, and other Department personnel as needed. The fee is \$500.
- 3) The natural waters permit is transferrable. The fee to transfer the permit is \$100.

Applications for this permit may be made beginning 60 days after the effective date of the rule. Renewal applications may be made within 16 months before the expiration date of the permit. The Department will issue, renew or deny the permit within 3 months of receiving the

application, however, if the natural water body is ice-covered at the time of application, the Department may delay its action until May 31.

The applicant must provide evidence that they own, lease, or otherwise control the land riparian to the water body and that the public does not have access to the water body, except for allowing fishing for a fee. The applicant must also indicate why they believe the water body is a freeze-out pond. They must attach copies of any other permits required by state, local or federal authorities (Chapters 30 and 31, Army Corps of Engineers, etc.). The applicant will also indicate the water source and quantity used for the fish farm and whether there is a discharge to a water of the state.

The Department will issue a permit for the use of a natural water body as a fish farm if all the requirements of this subchapter are met and if the Department determines that there is no substantial public interest in the body of water and that no public or private rights in the body of water will be damaged.

Although not inclusive, the following are indicative of public rights and interests: plant and wild animal habitats and populations, including threatened or endangered species; wetland functional values; water quality; navigability and associated incidents to navigation (fishing, swimming, canoeing, wading).

Species reared in the natural water body may not be detrimental, non-native species pursuant to s. 29.623 (2), Stats.

Physical improvements or modifications to the natural water body must comply with all federal, state, and local laws and ordinances.

After receiving a permit application, the Department shall schedule a public hearing or provide notice according to the procedures under NR 27.07(1)(b)&(c) that it will proceed without a public hearing if no substantive written objections are received within 30 days of publication of the notice.

The Department will renew permits subject to the provisions of s. 29.521 (2) (c), Stats., and will deny permits subject to the provisions of s. 29.521 (2) (d), Stats.

The Department will suspend or revoke permits subject to the provisions of s. 29.521 (2) (e), Stats.

SECTION 1. Chapter NR 16 (title) is amended to read:

Chapter NR 16

GAME FARMS AND, EXHIBITS AND FISH FARMS

SECTION 2. NR 16, subch. I (title) is created to read :

**NR 16, SUBCHAPTER I
GAME FARMS AND EXHIBITS**

SECTION 3. NR 16.001 (intro) is created to read:

NR 16.001 DEFINITIONS. In this subchapter:

SECTION 3. NR 16, subch. II is created to read:

**NR 16, SUBCHAPTER II
PERMITTING THE USE OF NATURAL BODIES OF WATER AS FISH FARMS**

NR 16.70 PURPOSE AND APPLICABILITY. (1) **PURPOSE.** The purpose of this subchapter is to establish fees, criteria and procedures to be used for permitting the use of natural bodies of water as fish farms as required under s. 29.521(2)(f), Stats.

(2) **APPLICABILITY.** The provisions of this subchapter are applicable to:

(a) Fish farms and state-owned hatcheries located in or proposed to be located in freeze-out ponds.

(b) Natural bodies of water that were licensed as a private fish hatchery or licensed as a part of a private fish hatchery in 1997.

(c) A freeze-out pond or more than one freeze-out pond that is proposed as a fish farm at the time of application and is located on the same contiguous parcel of property under the same ownership or leasehold.

NR 16.71 DEFINITIONS. In this subchapter: (1) "Barrier equipped" means the placement of a structure or device which prevents the movement of fish or bait from a fish farm to a natural body of water.

(2) "Freeze-out pond" has the meaning specified in s. 29.01(3m), Stats.

(3) "Natural body of water" means any spring, stream, pond, lake or wetland that was historically present in a natural state but may have been physically altered over time and has not been permitted as an artificial and private water body under ch. 30 or 31, Stats.

(4) "Preexisting fish rearing facility" has the meaning specified in s. 29.01(11c), Stats.

(5) "Transfer of permit" means the conveyance of a permit from one party to another as a result of change in ownership or leasehold interest of a fish farm.

(6) "Wetland" has the meaning specified under s. 23.32, Stats.

Note: For purposes of this subchapter, a natural body of water does not include a physically altered body of water that has been permitted as an artificial and private body of water under ch. 30 or 31, Stats.

NR 16.72 NATURAL BODY OF WATER PERMIT APPLICATION FEES. Permit application fees for the use of natural bodies of water for fish farms for a period of 10 years shall be as follows:

(1) Permit applicants for natural bodies of water reauthorized for use as fish farms under s. 29.521(2)(b) and (c), Stats., shall pay a non-refundable renewal fee of \$50.00.

(2) Permit applicants for the initial use of freeze-out ponds as fish farms shall pay a \$500.00 non-refundable permit application fee.

(3) Recipients of permit transfers shall pay a non-refundable permit transfer fee of \$100.00. The expiration date of the original permit shall remain in effect for the transferred permit.

NR 16.73 APPLICANT PERMIT PROCEDURES FOR USE OF NATURAL BODIES OF WATER FOR FISH FARMS. (1) For permits reauthorized under s. 29.521(2)(b), Stats., the applicant shall complete and submit an application form provided by the department and the appropriate permit fee within 60 days from the effective date of this rule ... [revisor insert date].

(2) For renewal of permits under s. 29.521(2)(c), Stats., the applicant shall submit a new application to the department not more than 16 months before the expiration date of the permit granted under this chapter but not less than 2 months from the expiration date of the permit.

(3) Applications for permits under this subchapter shall include documents verifying all of the following:

(a) The land that is riparian to the body of water is owned, leased or controlled by the owners of the fish farm.

(b) None of the owners of the fish farm or of the riparian lands provides access to the body of water to the public by means of an easement or other right-of way or by means of a business open to the public, except that the owners of the fish farm may allow fishing by the public for a fee.

(c) Documentation that the natural body of water may be a freeze-out pond or that the natural body of water is a preexisting fish rearing facility that is barrier equipped.

(d) Copies of any other permits or authorization required by ch. 30 or 31, Stats., the Army corps of engineers and any other federal, state or local laws and zoning ordinances.

(e) All applicants shall identify the water source and quantity used for the fish farm and whether there is any discharge to a water of the state.

(f) Any other information requested by the department to determine whether a permit would or would not be granted by the department.

Note: Permit application forms are available from the bureau of Fisheries Management and Habitat Protection, 101 South Webster St., P.O. Box 7921, Madison, WI 53707.

NR 16.74 DEPARTMENT DETERMINATIONS. (1) The department shall issue a permit for use of a natural body of water as a fish farm or as a part of a fish farm if all requirements of this subchapter have been met and if the department determines that no substantial public interest exists in the body of water and that no public or private rights in the body of water will be adversely impacted. Among the factors considered, the following are indicative of public rights and interests including but not limited to:

(a) Plant and wild animal habitat or plant and wild animal populations.

(b) Threatened or endangered species or their habitat.

(c) Water quality related functional values or uses of wetlands identified in s. NR 103.03.

(d) Surface water quality standards identified in chs. NR 102, 104, 105, 106 and 107 and minimum water quantity requirements identified in s. 31.02, Stats.

(e) The public's right to navigate and associated incidents to navigation including fishing, swimming, wading and canoeing.

(2) Fish farms may not introduce or propagate any non-native fish species if the department has determined that having the fish in that particular self-contained fish rearing

facility or preexisting fish rearing facility will pose a risk of being detrimental to the waters of the state.

(3) Physical improvements or modifications to natural bodies of water used as fish farms shall comply with all federal, state and local laws and ordinances.

(4) Permits approved under this subchapter may be transferred to another party if the department determines that all conditions of this subchapter and s. 29.521, Stats., have been satisfied.

(5) The department shall renew permits issued under this subchapter subject to the provisions of s. 29.521(2)(c), Stats.

(6) The department shall deny a permit for use of a natural body of water as a fish farm or as part of a fish farm if the requirements of this subchapter have not been met.

(7) Upon receipt of a complete permit application, the department shall either schedule a hearing or provide notice stating that it will proceed on the application without a hearing if no substantive written objections to issuance of the permit is received within 30 days after publication or notice. The notice shall be provided to the news media and other persons according to the procedures in s. NR 27.07(1)(b)&(c). The department may provide notice to other persons as it deems appropriate. The department will assume the cost of publishing the notice.

NR 16.75 ENFORCEMENT. The department may suspend or revoke a permit issued under this subchapter subject to the provisions of s. 29.521(2)(e), Stats.

The foregoing rules were approved by the State of Wisconsin Natural Resources Board on August 26, 1998.

The rules contained herein shall take effect on the first day of the month following publication in the Wisconsin administrative register, as provided in s. 227.22(2) (intro.), Stats.

Dated at Madison, Wisconsin _____.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By _____
George E. Meyer, Secretary

(SEAL)