

project that is part of the subject application, shall make a finding that the requirements of this chapter are satisfied if it determines that the project proponent has shown that the activity will not result in significant adverse impacts to wetland functional values, significant adverse impacts to water quality or other significant adverse environmental consequences. The department may limit the scope of the analysis of alternatives under sub. (3)(b), as determined at the preliminary assessment meeting under sub. (1).

1. The activity is wetland dependent.
2. The surface area of the wetland impact, which includes impacts noted in s. NR 103.08(3), is 0.10 acres or less.
3. All wetlands that may be affected by an activity are less than one acre in size, located outside a 100-year floodplain, and not any of the following types:
 - a. Deep marsh.
 - b. Ridge and swale complex.
 - c. Wet prairie not dominated by reed canary grass (*Phalaris arundinacea*) to the exclusion of a significant population of native species.
 - d. Ephemeral pond in a wooded setting.
 - e. Sedge meadow or fresh wet meadow not dominated by reed canary grass (*Phalaris arundinacea*) to the exclusion of a significant population of native species and located south of highway 10.
 - f. Bog located south of highway 10.
 - g. Hardwood swamp located south of highway 10.
 - h. Conifer swamp located south of highway 10.
 - i. Cedar swamp located north of highway 10.

(d) For cranberry operations, the department, utilizing the factors in sub. (3) (b) to (g), shall make a finding that the requirements of this chapter are satisfied if it determines that the project proponent has shown that the activity will not result in significant adverse impacts to wetland functional values, significant adverse impacts to water quality or other significant adverse environmental consequences. For the purposes of determining whether there is a practicable alternative to a proposed expansion of an existing cranberry operation, the analysis shall be limited to alternatives within the boundaries of the property where the existing cranberry operation is located and on property immediately adjacent to the existing cranberry operation. For new cranberry operations, a practicable alternatives analysis shall be conducted which includes off-site alternatives.

(e) Mitigation projects and the use of wetland mitigation banks shall be carried out in accordance with ch. NR 350 and any memorandum of agreement between the department and the United States army corps of engineers that establishes guidelines for mitigation projects and wetland mitigation banks.

Note: Examples of wetland ecological evaluation methods include, but are not limited to, "Wetland Evaluation Technique" (FHWA/COE), "Wisconsin Wetland Evaluation Methodology", "Hollands-Magee" (IEP/Normandeau), "Minnesota Wetland Evaluation Methodology for the North Central United States" and the "Wisconsin Department of Natural Resources Rapid Assessment Method".

Note: Examples of available land use studies include Special Area Management Plans (SAMP), Special Wetland Inventory Studies (SWIS) and Advanced Delineation and Identification Studies (ADID).

SECTION 10. Chapter NR 350 is created to read:

Chapter NR 350
Wetland Compensatory Mitigation

NR 350.01 Purpose. (1) The purpose of this chapter is to establish standards for development, monitoring and long term maintenance of wetland compensatory mitigation projects that are approved by the department, and to establish procedures and standards for the establishment and maintenance of mitigation banks.

(2) These provisions are adopted pursuant to s. 281.37, Stats.

Note: Additional information can be found in the memorandum of agreement between the department and the United States army corps of engineers that adopts guidelines for wetland compensatory mitigation in Wisconsin.

NR 350.02 Applicability. This chapter applies to all compensatory mitigation projects that are considered by the department as part of a review process conducted in accordance with chs. NR 103, 131 and 132. This chapter does not apply to compensatory mitigation conducted by the department of transportation as part of the liaison process pursuant to s. 30.12(4), Stats. This chapter does not apply to compensatory mitigation conducted as a requirement of a federal permit issued prior to the effective date of this rule ...[revisor insert date].

NR 350.03 Definitions. In this chapter:

(1) "Bank document" means a document that contains specifications pertaining to the establishment, operation and maintenance of a mitigation bank, identification of the goals, objectives, procedures for operation of the mitigation bank, and incorporates the appropriate terms and conditions of this chapter.

(2) "Bank sponsor" means any public or private entity financially responsible for establishing and, in most cases, operating a mitigation bank.

(3) "Compensation" or "compensatory mitigation" means the restoration, enhancement or creation of wetlands expressly for the purpose of compensating for unavoidable adverse impacts that remain after all appropriate and practicable avoidance and minimization has been achieved.

(4) "Compensation ratio" means the number of acres a project proponent shall provide at a mitigation project compared to the acres of wetland lost from a permitted project.

(5) "Compensation search area" means an area that includes the geographic management unit (GMU) of the impacted wetland, the county of the impacted wetland, and a circle with a 20-mile radius from the impacted wetland.

(6) "Compensation site plan" means a comprehensive document prepared by a project proponent or bank sponsor that provides a thorough description of a proposed compensation project.

(7) "Corrective action" means an action taken by a project proponent or bank sponsor to correct deficiencies in a wetland compensatory mitigation project as early as possible after the problem is noticed.

(8) "Creation" means a technique involving the establishment of a wetland where one did not historically exist.

(9) "Credit" means a unit of measure, in acres, representing the accrual or attainment of wetland functions and values at a compensation site.

(10) "Debit" means a unit of wetland value, in acres, that is withdrawn from the wetland mitigation bank upon approval of a banking transaction.

(11) "Degraded wetland" means a wetland subjected to deleterious activities such as drainage, grazing, cultivation, increased stormwater input, and partial filling, to the extent that natural wetland characteristics are severely compromised and where wetland function is substantially reduced.

(12) "Enhancement" means activities conducted in existing wetlands that increase one or more wetland functions.

(13) "Established" means a compensation site that the department determines has met performance standards set forth in the compensation site plan.

(14) "Functional values" means the physical, chemical and biological processes or attributes that occur in a wetland system and how society finds certain functions beneficial as listed in s. NR 103.03(1).

(15) "Geographic management unit" means one of the 22 statewide management units based on the major river basins of the state.

(16) "Management" means actions taken at a compensation site to establish and maintain desired habitat and human use conditions including water level manipulations, herbicide application, mechanical plant removal, prescribed burning, fencing, signage and vandalism repair.

(17) "Mitigation bank" or "bank" means a system of accounting for wetland loss and compensation that includes one or more sites where wetlands are restored, enhanced or created to provide transferable credits to be subsequently applied to compensate for adverse impacts to other wetlands.

(18) "Mitigation bank review team" or "MBRT" means an interagency group of federal, state, local and tribal regulatory and resource agency representatives who oversee the establishment, use and operation of a mitigation bank.

(19) "Mitigation project" means the restoration, enhancement or creation of wetlands to compensate for adverse impacts to other wetlands. "Mitigation project" includes using credits from a wetlands mitigation bank.

(20) "Monitoring plan" means a specific program of data collection and analysis, conducted, analyzed and reported by a project proponent or bank sponsor, which documents the physical, biological, hydrological and human-use characteristics of compensation site wetlands.

(21) "On-site" means a mitigation project located within one-half mile of the impacted wetland.

(22) "Performance standards" means a list of quantifiable measures or objectives identified for a compensation site in the compensation site plan agreed to in advance by the project sponsor and the department, that shall be met before a compensation site can be deemed "established".

(23) "Practicable" means available and capable of being implemented after taking into account cost, available technology and logistics in light of overall project purposes.

(24) "Project-specific" means a mitigation project that does not involve the purchase of bank credits.

(25) "Restoration" means a technique involving the reestablishment of historic wetland conditions and functions, to the maximum extent practicable, at a site where they have ceased to exist, which can include focus on reestablishing hydrologic conditions, plant communities, land contours and surrounding land conditions.

(26) "Wetlands" means 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.

NR 350.04 Compensatory mitigation sequence. (1) Project proponents are encouraged to consult with the department in pre-proposal conferences or during the permit application process to identify appropriate compensatory mitigation options.

(2) The project proponent shall conduct an evaluation of potential on-site compensation opportunities.

(3) If the department determines that the project proponent has demonstrated that it is not practicable or ecologically preferable to conduct an on-site mitigation project, the department shall allow the project proponent to conduct off-site mitigation.

(4) Off-site mitigation shall be accomplished by the project proponent as near as practicable to the location of the adversely impacted wetland and through use of any of the following off-site mitigation options:

(a) Development of a project-specific mitigation site located within the compensation search area.

(b) Purchase of mitigation credits from a mitigation bank with a bank site located in the compensation search area.

(c) Purchase of mitigation credits from a bank established prior to the effective date of this rule ...[revisor insert date], if the department determines that the bank sponsor is in compliance with a memorandum of understanding between the bank sponsor and the department that requires the bank sponsor to restore wetlands in the geographic management units of its customers.

(5) Purchase of mitigation bank credits shall be from a bank that is listed on the state registry of approved banks pursuant to s. NR 350.13.

(6) If a project proponent opts to purchase mitigation bank credits, the project proponent shall provide to the department a written affidavit that the purchase occurred, providing the name of the mitigation bank, the acres purchased and the signatures of both the project proponent and the bank sponsor.

NR 350.05 Planning for a mitigation project. (1) Mitigation projects may involve one or a combination of techniques including restoration, enhancement or creation of wetlands. Restoration is the preferred technique.

(2) When practicable, compensatory mitigation should result in a project with a similar plant community type to the wetland being impacted.

(3) Unless the wetland impacted by the permitted activity is a deep marsh or a shallow open water community, creation of ponds or deepwater habitats as a mitigation project may not be accepted by the department.

(4) When practicable, compensation sites may not rely on structures that require active maintenance and management.

(5) Compensation sites shall include a zone of vegetated upland adjacent to the wetland that the department determines is adequate to filter run-off entering the wetland.

NR 350.06 Amount of compensatory mitigation required. (1) The department shall determine the number of acres of compensation required based on subs. (2) and (3) and shall inform the project proponent of the determination. Except as provided in subs. (2) and (3), the compensation ratio is 1.5:1, which means 1.5 acres of compensation for each acre of impacted wetland.

(2) A compensation ratio of 1:1 may apply if the project proponent demonstrates to the satisfaction of the department that the following conditions are met:

(a) Credits will be purchased from a mitigation bank that is listed on the state registry of approved banks pursuant to s. NR 350.13.

(b) The permitted project will not impact any of the following types:

1. Deep marsh.
2. Ridge and swale complex.
3. Wet prairie not dominated by reed canary grass (*Phalaris arundinacea*) to the exclusion of a significant population of native species.
4. Ephemeral pond in a wooded setting.

5. Sedge meadow or fresh wet meadow not dominated by reed canary grass (*Phalaris arundinacea*) to the exclusion of a significant population of native species and located south of highway 10.

6. Bog located south of highway 10.

7. Hardwood swamp located south of highway 10.

8. Conifer swamp located south of highway 10.

9. Cedar swamp located north of highway 10.

(3) The department may allow a variance from the ratio in sub. (1), but no less than a ratio of 1:1, if the project will involve unavoidable loss of more than 20 acres of wetland and if the project proponent demonstrates to the satisfaction of the department that the following conditions are met:

(a) The project proponent will develop a project-specific mitigation project within the same watershed as the impacted wetland.

(b) The applicant demonstrates to the department a record of past successes with wetland mitigation projects.

NR 350.07 Site crediting. (1) The total number of acres of credit at a compensation site or mitigation bank site shall be calculated by the department based on information provided in the compensation site plan pursuant to s. NR 350.08.

(2) The location of wetland boundaries for use in calculating acreage of wetland at a compensation site shall be made consistent with s. NR 103.08 (1m).

(3) Credit for restoration shall be one credit acre for every one acre restored.

(4) Credit for enhancement can range from no credit to one credit acre for every acre of wetland enhanced. The appropriate amount of credit shall be determined by the department based on a comparison of the functional values of the current condition of the site and the projected functional values of the completed compensation site. Proposed management activities on pre-existing, fully functioning wetlands will typically receive no credit. Re-establishment of historic hydrology, land contours and plant communities on substantially degraded wetland sites will typically receive higher credit. In some cases, intensive management activities based on an approved plan and backed with financial assurances that the work will be conducted, may receive credit. Proposed activities that result in conversion of one wetland type to another wetland type will generally not be given credit unless there is a demonstrated value in doing so.

(5) Creation shall only be allowed if the department determines that the planned creation will provide significant wetland functional values. Because of the greater difficulty, poorer track record and the longer time scale involved in the development of wetland functions for wetland creation projects, any creation accepted by the department for project-specific compensation shall receive one-half credit acre for each acre of wetland created, unless the applicant can demonstrate to the satisfaction of the department that the circumstances warrant greater credit.

(6) Credit for establishment of an adequate zone of vegetated upland, as required in s. NR 350.05(5), shall be one credit acre for every 10 acres of adjacent vegetated upland. Restoration efforts on adjacent uplands that provide additional ecological functions to the site, beyond filtering run-off, may receive one acre of credit for every 4 acres of adjacent upland restored.

(7) Wetland-like projects used primarily as stormwater or wastewater treatment facilities, including features covered by s. NR 103.06 (4), will not receive credit as mitigation projects.

NR 350.08 Compensation site plan requirements. (1) For any proposal to construct a compensation site, either for project-specific compensation or for a mitigation bank site, a compensation site plan shall be prepared by the applicant or bank sponsor and approved by the department.

(2) The purpose of the compensation site plan is to demonstrate that the applicant has sufficient scientific expertise to carry out the proposed compensation project work; to outline the construction plan and techniques, project goals and objectives, performance standards, monitoring plan and long term management plan; to demonstrate that the applicant has sufficient financial resources to assure the project is built according to the plans and specifications, and will be monitored and maintained as proposed; and to provide evidence that the site will be maintained as wetland in perpetuity.

(3) An adequate compensation site plan shall include the following information: identification of the site plan developers and their expertise; general description of site plan; location of site; description of pre-project baseline conditions including soils, hydrologic conditions, current land-use and current plant communities present; site map; description of design features; goals and objectives for the site; performance standards; construction inspection plan; post-construction monitoring plan; management plan for future maintenance of wetland conditions; provisions for long-term ownership and protection of site; implementation schedule for construction and monitoring; and a plan for financial assurances.

NR 350.09 Construction inspection and monitoring requirements. (1) GENERAL. The compensation site plan approved by the department under s. NR 350.08, shall include a construction inspection plan, a post-construction monitoring plan and a management plan for each compensation site.

(2) CONSTRUCTION INSPECTION. (a) The applicant shall inform the department of the progress of construction and shall provide full access to the department for site inspections.

(am) The department shall conduct an inspection prior to the completion of construction to identify any problems and shall provide notice of the problems to the project proponent or bank sponsor within one month of the inspection.

(b) The applicant shall receive written approval from the department before implementing any substantial deviations from the approved compensation site plan.

(c) Within one month after the completion of construction, the project proponent or bank sponsor shall provide an as-built report to the department. This report shall summarize the construction activities including how problems noted in par. (am) have been addressed, note any changes to the construction plan that occurred, and provide as-built plan sheets of the site. The as-built report shall serve as the basis for the final construction inspection.

(d) A final construction inspection shall be conducted by the department within one month after receipt of the as-built report in par. (c) to determine whether the site was built in accordance with plans and specifications.

(e) After the final construction inspection, the department shall provide the applicant or bank sponsor a list of corrective actions and order completion by a specific date.

(f) The applicant or bank sponsor shall certify to the department evidence that all corrective actions identified under par. (e) have been addressed.

(g) The department shall issue a letter of compliance to the applicant or bank sponsor after the department determines that construction and all corrective actions are complete.

(h) After the department issues a letter of compliance, the department shall reevaluate the amount of required financial assurance.

(3) POST-CONSTRUCTION MONITORING. (a) The purpose of post-construction monitoring is to determine whether performance standards established for the site in the compensation site plan are being met, identify trends in wetland functions at the site and identify the need for corrective actions.

(b) Performance standards shall be established for each compensation site in the compensation site plan prepared by the project proponent or bank sponsor and approved by the department pursuant to s. NR 350.08. These performance standards represent the minimum objectives that shall be met in order for a site to be deemed established by the department. At a minimum, the performance standards shall include all of the following:

1. The number of acres of land delineated in the final monitoring year that meet the wetland definition.

2. A description of an acceptable hydrologic regime.

3. The acceptable level of occurrence of invasive species.

(c) The monitoring plan shall take into consideration unique aspects of each site.

(d) The monitoring plan shall include a monitoring schedule of adequate frequency and duration to measure specific performance standards and to assure long-term success of the stated goals for the site.

(e) The monitoring plan shall be sufficient to assess trends in wetland function at the site and the degree to which the performance standards for the site are met.

(f) For all bank sites, a monitoring report shall be provided to the department annually for a period of at least 5 years after the date of the letter of compliance identified under sub. (2)(g). The monitoring report shall include, but is not limited to, all of the following:

Note: Based on the 2001 report on wetlands mitigation by a committee of the National Research Council, monitoring to determine compliance with performance standards, and management to ensure this compliance, is likely to take more time than the 5-year minimum specified.

1. A restatement of the compensation site plan goals, objectives and performance standards.
2. Identification of any structural failures or external disturbances on the site.
3. A description of management activities and corrective actions implemented on the site during the past year.
4. A summary of and full presentation of the data collected during the past year.
5. A site map showing the locations of data collection.
6. An assessment of the presence and level of occurrence of invasive species.
7. An assessment of the degree to which performance standards are being met.
8. Proposed corrective actions to improve attainment of performance standards.
9. A narrative summary of the results and conclusions of the monitoring.

(g) Based on review of the monitoring report, the department may require implementation of corrective actions listed under par. (f) 8, or other corrective actions identified by the department necessary to improve attainment of the site's performance standards.

(h) At the end of the monitoring period, the department shall issue a final letter of compliance to the project proponent or bank sponsor if the department determines that the site is successful and established.

(i) After the department issues a final letter of compliance, the department shall release the financial assurances under s. NR 350.10.

(4) **MANAGEMENT PLAN.** (a) The purpose of the management plan is to lay out the specifics for how the site will be used, how the site will be maintained, who will be responsible for the work and the schedule for these activities.

(b) The project proponent or bank sponsor shall include short and long-term plans for management activities that may include prescribed burns, invasive species control, fencing, signage and water level manipulation.

(c) The management plan shall be clear as to what conditions will trigger needs for certain maintenance or management activities.

NR 350.10 Financial assurances. (1) **GENERAL.** The department may require a performance bond, irrevocable letter of credit, irrevocable escrow account, irrevocable trust account or other financial assurance to insure that a mitigation project is constructed, operated, monitored and maintained in accordance with the approvals issued by the department and other agencies involved in the approval process.

(2) **TERM.** Financial assurances may be required for both site construction activities and post-construction monitoring and care. Financial assurances to guarantee adequate post-construction monitoring and care shall be for a specified time period after construction is complete, or after success criteria are met, depending on the type of project.

(3) LEVEL OF FINANCIAL ASSURANCE. The department shall determine the level for financial assurance based upon the estimated costs of the construction, operation, monitoring and maintenance of the mitigation project. The costs may include any costs for corrective actions which may be required to bring the project into compliance.

(4) REQUIREMENTS FOR FINANCIAL ASSURANCE. Financial assurance instruments shall meet requirements determined by the department to be reasonably necessary to assure proper construction, operation, monitoring and maintenance of the mitigation project. Requirements shall, at a minimum, include:

(a) Forms of financial assurance, which include a third party as obligor, shall be issued by an entity authorized to do business in this state.

(b) Any financial assurance shall provide that the financial assurance cannot be canceled or modified except after not less than 90 days notice in writing to the department by certified mail. Not less than 30 days prior to the cancellation or modification of the financial assurance, the project proponent shall deliver to the department a replacement for the financial assurance that is acceptable to the department. If the replacement financial assurance is not provided and accepted, the original financial assurance shall remain in effect.

(c) The financial assurance shall provide that the project proponent will faithfully perform all requirements of the approvals for the project. If the project site or the mitigation bank is transferred, the new owner or successor in interest shall provide the necessary financial assurance in the amount required for the project.

(d) The financial assurance shall be payable to the "State of Wisconsin, Department of Natural Resources".

(5) REEVALUATION OF THE AMOUNT OR FORM OF FINANCIAL ASSURANCE. In accordance with s. NR 350.09, the department may periodically reevaluate and adjust the amount or form of financial assurance to reflect completion of tasks which are required under the department's approval.

(6) MULTIPLE PROJECTS. A person who obtains approval for 2 or more mitigation projects may elect, at the time of the approval for the second or subsequent site, to provide a single form of financial assurance in lieu of separate assurances for each site.

(7) MULTIPLE JURISDICTIONS. In cases where more than one regulatory authority has jurisdiction, a cooperative financial security arrangement may be developed and implemented by the regulatory authorities to avoid requiring the project proponent or bank sponsor to prove financial assurance with more than one regulatory authority for the same compensation site.

(8) CHANGING METHODS OF FINANCIAL ASSURANCE. A project proponent or bank sponsor may change from one method of financial assurance to another with written approval from the department.

(9) BANKRUPTCY NOTIFICATION. A project proponent or bank sponsor shall notify the department by certified mail of the commencement of any voluntary or involuntary proceeding under bankruptcy code, 111 USC, et seq., naming the project proponent or bank sponsor as debtor, within 10 days of commencement of the proceeding.

NR 350.11 Long-term protection of compensation sites and mitigation bank sites. (1) A bank sponsor or person responsible for development of a project specific compensation site under this chapter shall grant a conservation easement under s. 700.40, Stats., to the department to ensure that the restored, enhanced or created wetland will not be destroyed or substantially degraded by any subsequent owner or holder of interest in the property on which the wetland is located. At a minimum, the conservation easement shall include any zone of vegetated upland adjacent to the wetland, identified under s. NR 350.05 (5) and credited under s. NR 350.07 (6). The department shall revoke the permit or other approval if the holder of the permit fails to provide the conservation easement.

(2) The department shall modify or release a conservation easement issued under sub. (1) if the conditions in s. 281.37 (2m), Stats., apply.

NR 350.12 Process for establishing a mitigation bank. (1) A prospective bank sponsor shall prepare a bank prospectus and provide copies to both the department and the United States army corps of engineers. The bank prospectus shall at a minimum include the following information:

- (a) Identification of the bank sponsor and purpose of the bank.
- (b) Identification of consultants or experts to be involved in design of the bank's compensation site.
- (c) Location of the proposed compensation site.
- (d) General description of current ownership and land-use at the compensation site.
- (e) General description of anticipated design concept for wetland restoration, enhancement or creation at the proposed compensation site.

(2) Upon receipt of a bank prospectus, the department shall:

- (a) Facilitate a meeting of the mitigation bank review team within 60 working days;
- (b) Provide to the prospective bank sponsor the department's written opinion as to the likelihood that a proposed compensation site will comply with the requirements of this chapter.

(3) Based on comments received from the department and other members of the MBRT, a prospective bank sponsor shall prepare a draft bank document and provide copies to both the department and the United States army corps of engineers. The draft bank document shall include the following information:

- (a) Information required under sub. (1).
- (b) A draft compensation site plan for each proposed compensation site developed in accordance with s. NR 350.08.
- (c) Information on the operation of the bank including the expected number of credits, provisions for sale of credits, accounting and reporting procedures, and provisions for site inspections.
- (d) A discussion of the persons responsible for management of the bank accounting, long-term ownership of the bank site, monitoring of bank site and maintenance and management of the bank site.

(e) A proposed conservation easement for the bank site pursuant to s. NR 350.11.

(f) A proposed schedule that includes, at a minimum, a timeline for finalizing the bank document, construction and monitoring.

(4) Upon receipt of a draft bank document, the department shall:

(a) Facilitate finalization of the bank document.

(b) In accordance with sub. (5), issue public notification that a draft bank document has been received and is under review.

(c) Provide to the prospective bank sponsor the detailed comments of the MBRT and a listing of state permits or approvals that may be required for construction of any proposed bank sites.

(5) Public notification. (a) The department shall develop a news release for each draft banking document to include all of the following information:

1. The name of the bank sponsor.

2. A brief description of the bank including all bank sites.

3. The name and address of a contact within the department who can receive comments and respond to questions.

4. A date by which the department will accept and consider comments.

(b) When deemed appropriate by the department, any other department notice, including a notice required under statute or administrative rule, containing the information in par. (a) may be used in lieu of a news release.

(c) The department shall distribute the news release or legal notice to appropriate news media in the vicinity of the proposed action.

(6) Once all concerns of the department and MBRT have been addressed by the prospective bank sponsor to the satisfaction of the department, the bank sponsor shall prepare a final bank document. The department shall be a signatory to the bank document pursuant to s. NR 350.13(2).

(7) Upon receipt of the final bank document with the signatures of all members of the MBRT, the department shall include the bank on the state registry pursuant to s. NR 350.13 (1).

NR 350.13 Mitigation banking. (1) The department shall maintain a registry of all mitigation banks in the state that have been approved by the department as eligible to sell credits. This registry shall include information on the bank sponsors, the location of bank sites and the number of available credits determined under sub. (5). The department shall provide a copy of the registry to anyone who requests it.

(2) The bank document is the record of department and MBRT concurrence on the objectives and administration of a mitigation bank. The secretary or designee shall sign for the department and this signature on the bank document constitutes department approval of the bank.

The terms and conditions of the bank document may be amended, subject to notification and approval of the department and the MBRT. Failure to comply with the terms of the bank document may result in removal from the state registry under sub. (1).

(3) The bank sponsor is responsible for establishing a mitigation bank site in accordance with an approved compensation site plan, administration of the accounting of debits and credits, conducting required corrective actions, providing required monitoring and status reports to the department and the MBRT, and assuring long term maintenance and protection of the site. Bank sponsors may request that more than one compensation site be included in a bank.

(4) Participation in the establishment of a mitigation bank does not constitute ultimate authorization for specific activities, as excepting the activities from any applicable requirements, or as pre-authorizing the use of credits from that bank for any particular activity.

(5) The total potentially available credits at a bank shall be determined by the department and the MBRT pursuant to s. NR 350.07. The total available credits shall be stated in the bank document and reflected on the registry. The total credits derived from wetland creation or restoration of adjacent uplands shall be limited that:

(a) No more than 25% of the final total credits can be the result of wetland creation; and

(b) No more than 15% of the final total credits can be the result of restoration of adjacent uplands.

(6) Site conditions and performance will determine the timeline for actual release of bank credits. Credits will be released as performance standards, established in the monitoring plan under s. NR 350.09, are met.

(7) The bank sponsor may sell or use a portion of the total potentially available credits before the mitigation bank site is deemed established by the department and MBRT. The actual schedule for release of credits shall be set forth in the bank document. In that schedule, the department may allow:

(a) Release of up to 10% of total estimated credits when the bank document is signed by all parties.

(b) Release of up to 20% of total estimated credits when the department issues the letter of compliance specified in s. NR 350.09 (2)(g).

(c) Release of up to 30% of total estimated credits upon receipt by the department of the monitoring report for year 2 after construction.

(d) Release of 100% of credits after the department receives the final year monitoring report and determines that the site has satisfactorily met all performance standards established in the compensation site plan.

(8) By January 30 of each year that a bank is in operation, the bank sponsor shall provide a report to the department that provides an accounting of bank credits and debits using the format established in the bank document. The department shall provide a letter of concurrence to the bank sponsor within 30 days of receipt of this report and shall reflect the appropriate information on the bank registry.

NR 350.14 Enforcement. (1) Violations of this chapter may be prosecuted by the department under chs. 23, 30, 31, 281 and 283, Stats.

(2) Any agent or employee of the department shall at all times be given reasonable access to any and all parts of a project site and may enter upon any property to investigate the project.

(3) A violation of a permit, approval, contract or order issued relating to a project under this chapter is a violation of the statutes or rules relating to the issuance of that permit, approval, contract or order.

(4) The department may remove a party from the approved wetland banking registry for failure to comply with the requirements of the registration after notice and an opportunity for hearing in accordance with the procedures in ch. 227, Stats.

The foregoing rules were approved and adopted by the State of Wisconsin Natural Resources Board on

The rules 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 _____
Darrell Bazzell, Secretary

(SEAL)

SEP 4 2001



*"Dedicated to the Conservation of
Wisconsin's Waterfowl and Wetland Resources"*

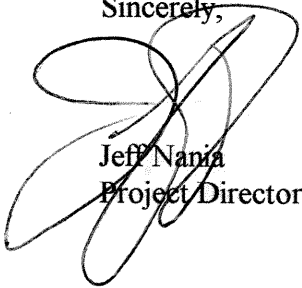
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8-31-2001
Senator James Baumgart
State Capitol
P.O. Box 7882
Madison, Wi 53707-7882

Dear Senator Baumgart,

Your support of the provision in the mitigation rules that protects existing mitigation banks by offering the opportunity to do business statewide, if those existing banks will then take proceeds and restore additional wetlands in the areas of impact, will become the tenant of the best mitigation program in the country. I spoke to a friend of mine in Washington last evening, Charlie Newling. Charlie has been noted routinely as one of the top wetland scientists in the world. He said this, "Again Wisconsin did what every State wishes they had." On behalf of our 7500 members I would like to thank you for your continued support and leadership in the protection of our precious natural resources and outdoor traditions.

Sincerely,



Jeff Nania
Project Director

December 2000	Rules to Legislature
On-site	On-site
Off-site within CSA Or Prove not practicable in CSA and do something elsewhere Or Use a pre-rules bank	Off-site as near as possible to loss and within the Region
	Prove not practicable in the region and use a pre-rules bank

On-site= within ½ mile of loss

Off-site= build your own or use a bank

CSA= GMU+county+20 miles

Pre-rules Bank= One of sites developed and established prior to these rules taking effect. List likely includes WWA Walkerwin (Columbia County); Northland Cranberry (Wood Co.); Dane Co. Lodi

D. Siebert 8/30/2001

August 30, 2001

*SENATE COMMITTEE ON ENVIRONMENTAL RESOURCES
MOTION ON CLEARINGHOUSE RULE 00-164
RELATING TO WETLAND COMPENSATORY MITIGATION*

The Senate Environmental Resources Committee recommends that the Department of Natural Resources agree to consider modifying Clearinghouse Rule 00-164, relating to wetland compensatory mitigation under s.227.19 (4) (b) 2., Stats., to alter the compensatory mitigation sequence in NR 350.04 as follows;

If the department determines that the project proponent has demonstrated that it is not practicable or ecologically preferable to conduct an on-site mitigation project, the department shall allow under the sequence for off site mitigation by use of any of the following;

1. Purchase of mitigation credits from a bank established prior to the effective date of this rule if the operator of the bank commits to the department by use of a written memorandum of understanding with the department, to facilitate additional wetland restoration projects at agreed to locations, within an agreed to time frame
2. Development of a project specific mitigation site if the site is located within the same department region as the adversely affected wetland.
3. Purchase mitigation credits form a bank established after the effective date of this rule if the site is located within the same department region as the adversely affected wetland.



Wisconsin Builders Association

Dedicated to Preserving and Promoting the American Dream

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Madison

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Mary Anne Moore-
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La Crosse

Keith Weller
Wausau

**Executive
Vice-President**
Bill Wendle

**Deputy Executive
Vice-President**
Jerry Deschane

Memorandum

TO: Chairman Baumgart and Members of the Senate Environment Committee

FROM: Jerry Deschane, Deputy Executive Vice-President
Mike Semmann, Director of Political Affairs

DATE: August 30, 2001

RE: NR 103 and NR 350 relating to wetland mitigation

The Wisconsin Builders Association supports passage of this rule package.

We believe the proposed rules establish an acceptable framework from which the department may consider the positive impact of mitigation while reviewing a permit to fill a wetland. Like the legislation that called for these rules, the rules are less than perfect, and may need adjustment in the future. We believe, however, that getting the program in place, **training DNR field staff in its proper implementation**, and demonstrating to Wisconsin citizens and regulators that it works are more important than debating vague words and phrases.

The Assembly Environment Committee has requested several changes, outlined in their August 15 letter to the DNR. While the Wisconsin Builders Association supported the rule package without revision, we do not oppose the requested changes. We hope that this committee, if it sees the need to also request changes, will keep those changes as close to the Assembly changes as possible. Our desire, which is shared by other organizations representing both business and environmental interests, is to get a mitigation program operating in Wisconsin. There may be fine details that need adjusting as time goes by, but for now, this is a good start.

We conclude by offering our gratitude to this committee for your ongoing interest in this topic, and your efforts to bring forth a program that is in the best interest of Wisconsin's environment and its economy.

Thank you for considering our viewpoint.

We can be reached at (608) 242-5151, or via email jdeschane@wisbuild.org or msemmann@wisbuild.org.



NAHB



*"Dedicated to the Conservation of
Wisconsin's Waterfowl and Wetland Resources"*

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78 Enterprise Rd., Suite A
P.O. Box 180496
DeLafield, WI 53018
(262) 646-5926
(262) 646-5949 (Fax)

To; John O'Brien
Pat Henderson
Jennifer Halbur

From; Jeff Nania

This is a record of a mitigation experiment we did with the WDNR and USACOE. We documented this extensively because of a requests to do so by the Agencies. The wetland impacted was a highly degraded system next to the interstate in northern Dane County. We are able to take relatively small amounts of money and match them several times with private donations resulting in a replacement ratio of about 30 to 1. The Walker Bank only allows this to continue, and anybody who doesn't see this as good for the State of Wisconsin cannot see the forest for the proverbial trees.



"Dedicated to the improvement of
Wisconsin's Waterfowl and Wetland Resources"

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131 W. Broadway P.O. Box 792
Waukesha, WI 53186-0792
(414) 524-8460
(414) 524-8807 (Fax)

AN EXPERIMENT IN WETLAND MITIGATION

Report of Wetlands Restored or Scheduled to be Restored in Dane and Columbia Counties and Funded by a Contribution of \$26,000 to Wisconsin Waterfowl Association by Mr. Gene Christopher Evans September, 1995

The following is a list of projects which the Wisconsin Waterfowl Association (WWA) funded (completely or in part), or will fund with the mitigation contribution to WWA by Mr. Gene Christopher Evans. This contribution was in compensation for 3.0 acres impacted by Mr. Evans and described in USACOE Permit #91-50152-AFFNW-JBK. All eight projects are located in Dane or Columbia Counties.

Total wetland acres restored will total approximately 100 acres, while significant ratios of adjacent upland acres have been or will be enhanced. All projects are located on lands where deed restrictions requiring that wetland improvements remain forever are in place or where landowners have signed legal agreements requiring that wetland improvements remain in place for a minimum of ten years.

It should be noted that the WWA, in each of the following described projects has provided several thousands of dollars in project assistance, including surveying, permitting, design and on-site project coordination. The Evans funds have been or will be spent only on the actual costs of wetland enhancement or restoration. None of these funds have been used for administrative or other service related costs to WWA.

1) Sections 8 and 11, Township 6 North, Range 10 East
Town of Dunn, Dane County, Yahara and Waubesa Watershed Areas
Net acres restored - 11 acres
Adjoining uplands restored or enhanced - 4
WWA/Evans pay out - \$3,500

This 15 acre parcel had been designated both prior converted and farmed wetland. The land had been ditched for agricultural use years ago, resulting in a large sediment load being dumped directly into Lake Waubesa. Aerial photographs revealed an increasing area of sediment deposit extending out into the lake.

Our restoration resulted in 11 acres of restored wetlands, including 2 acres of farmed wetland, 9 acres of prior converted wetland. This site also included an additional 4 acres of seeded prairie buffer area. The restoration also included scrape areas to allow sediment drop. This site has been legally designated as a passive nature park and must remain as such forever.

**2) Section 25, Township 10 North, Range 9 East
Arlington Township, Columbia County, North Yahara River Watershed
Net wetland acres restored - 11
Adjoining uplands restored or enhanced - 5
WWA/Evans pay out - \$400**

WWA and other partners completed a restoration of prior converted wetland on this site in January, 1995. After completion, it was noted that an adjacent low area could impound additional water and prevent backflow onto adjacent property for little additional cost. The installation of an additional berm resulted in the containment of the entire restored basin. This allowed for a successful restoration including the propagation of emergent, natural and historical vegetation, and use by a diverse population of wildlife.

**3) Section 32, Township 9 North, Range 9 East
Town of Vienna, Dane County, North Yahara River Watershed
Net wetland acres to be restored - 10
Adjoining uplands restored or enhanced - 20
WWA/Evans pay out \$2,500**

This prior converted wetland had a history of row cropping, and had marsh hay regularly harvested. This site had been ditched, tilled and contained by road construction. The significant outflow runs directly into Six Mile Creek, then flows into Lake Mendota. This is an area of great water quality concern and is within a Wisconsin Department of Natural Resources (WDNR) priority watershed area. Our ditch plug will result in the restoration of 10 acres of this wetland. Additionally, restored prairie will buffer the complex with a seeded area measuring approximately 20 acres. The site is deed restricted as a permanent natural area. USACOE permit has been granted - we are awaiting Wisconsin DNR approval.

**4) Section 21, Township 13 North, Range 8 East
Lewiston Township, Columbia County, Neenah Creek Watershed
Net wetland acres restored - 8
Adjoining uplands restored or enhanced - 20
WWA/Evans pay out - \$1,425**

This is a prior converted wetland site that has been actively farmed to date for both corn and soybeans. It is a part of a large ditched wetland complex

that at one time stretched many miles. This restoration will result from a scrape of soil for the ditch plug, and muck soil regraded into the scrape.

**5) Section 17, Township 13 North, Range 8 East
Lewiston Township, Columbia County, Neenah Creek Watershed
Net wetland acres to be restored - 2.5
Adjoining uplands previously restored or enhanced - 20
NWA/Evans pay out - \$1,800**

This site is a previously restored converted wetland of 5 acres. The site was restored in 1991. The site adjoins 20 acres of upland buffer and grass cover. The site was featured in the June, 1994 issue of *Wisconsin Natural Resources* magazine. The landowner received the Columbia County Conservation Award for the project. It was completed in agreement with an adjacent landowner that controls an agricultural drainage ditch. He later decided to recrop his land and through permitted action, cleaned the ditch, thus resulting in the restoration drying up. A water budget study was then completed and it was determined that there would be adequate flow from surrounding hills and a spring flow on the site to facilitate restoration by building a berm for containment of shallow water.

**6) Section 4, Township 9 North, Range 9 East
Vernia Township, Dane County, North Yahara River Watershed
Net wetland acres to be restored - 3
Adjoining uplands to be restored or enhanced - N/A
NWA/Evans pay out - \$1,375**

This project site is an earlier restored wetland of 56 acres that was completed in the 1960's. It is within the North Yahara River priority watershed area and is adjacent to land which has been actively farmed and pastured. A tornado that passed through the area several years ago deposited a great deal of debris into the site, thus degrading it significantly. This project will be a several step process that will first involve cleaning up of the tornado debris, then excluding the cattle from the area, and finally removing the washed-in soil from the wetland area. Washed-in soil ranged between one and three feet deep throughout the site. The excavation of this soil to the original wetland soil will restore the basin to its original contours. The planned beginning stage of this potentially large project will result in the restoration of 3.0 acres which will significantly increase the functions and values of the entire site.

**Section 15 & 16, Township 12 - North, Range 12 East
Town of Courtland, Columbia County, Neenah Creek Watershed
Total wetland acres to be restored - 48 to 54
WVA/Evans pay out - \$7,500**

This significant planned restoration requires some detailed description.

This is a prior converted wetland that has been ditched in its northwest corner in an attempt to render the land suitable for agricultural purposes. The site in its present form has a history of agricultural use that includes some evidence of row cropping and pasturing. However, there has been no active farming on the site during the past several years. Because of the ditch, the site remains converted with very low wetland functions and values.

Historically, the site was a shallow marsh area that had an average water depth of between six to twelve inches. The ditch is about two feet deeper than the closest adjacent unexcavated wetland. It does, however, appear that there was an effort made to scrape the area next to the constructed ditch to redirect flow into the ditch.

The vegetation on the site currently consists primarily of reed canary grass and some cattails. It is consistent with what would be expected in an altered wetland environment. There are visible remnants of other vegetation that are found in the lowest areas of the site and it can be expected that the original plant types will begin to assert dominance after hydrology is returned to pre-ditch levels.

During site visits and conversations with the landowner, it was decided that the site should be constructed with a berm and water control structure thus allowing the landowner to manage the site for moist soil plants and wildlife. The benefits to water level control include the ability to control cattails and the ability to non-chemically remove reed canary grass, thus establishing a moist soil native plant community that will provide a more stable transition area.

The berm will be 250 feet long and will be cored (removal of muck soils and vegetation from the immediate footprint area of the berm). This muck soil will be stockpiled, then regraded onto the top and sides of the constructed berm. The berm will then be planted with deep rooted native seed stock such as Indian Grass, Switch Grass, Prairie Cord Grass, Big Blue Stem and Little Blue Stem, for berm stabilization. The water control structure at the site will be a 24-inch culvert with a 36-inch half round riser with stoplogs for water level control. The berm side slopes will be 5 to 1 on both sides. In addition, we will build an emergency spillway located on the NNE side of the berm. This spillway will direct water in the event of a large rainstorm.

In addition, the site will be planted with some native wetland species, such as arrowhead and three different rushes, to allow those plants to establish dominance, thus reducing the potential for encroachment by cattails. We intend to plant sago pondweed tubers to help provide for waterfowl food. We are excited by the additional possibility of using a recently acquired quantity of prairie cordgrass seed to plant the transitional zones.

As with all of our sites, we will be available to the landowner for hands-on management assistance as needed in the future.

This project, once completed, will restore between 48 to 54 acres depending on the number of low area inclusions. Estimated cost of the restoration is \$7,500 including the control structure, permit and contractor fees. Permits have been received from the USACOE and are expected soon from the Wisconsin DNR. Construction is expected to be completed by November, 1995.

August 30, 2001

***SENATE COMMITTEE ON ENVIRONMENTAL RESOURCES
MOTION ON CLEARINGHOUSE RULE 00-164,
RELATING TO WETLAND COMPENSATORY MITIGATION***

The Senate Environmental Resources Committee recommends that the Department of Natural Resources agree to consider modifying Clearinghouse Rule 00-164, relating to wetland compensatory mitigation under s. 227.19 (4) (b) 2., Stats., to do all of the following:

1. Require that off-site mitigation be located as near as practicable to the location of the adversely effected wetland and, rather than within the same department region, within the same department geographic management unit that the project is occurring in, the county that the project is occurring in or an area within a 20-mile radius from the project site.
2. Delete the compensation ratio variance in s. NR 350.06 (3).
3. Clarify, either through a note to the rule or an amendment to the text of the rule, that, based upon the recently issued report on wetlands mitigation by a committee of the National Research Council, monitoring to determine compliance with performance standards, and management to ensure this compliance, is likely to take more time than the five-year minimum specified in s. NR 350.09 (3) (f) (intro.).
4. Specify in the rule the minimum requirements for the long-term management plan referenced in ss. NR 350.08 (2) and (3) and 350.09 (1), including information on how the site will be used and maintained, who will be responsible for these activities and the schedule for these activities.
5. Clarify that the department may require the implementation of some or all of the corrective actions identified in a monitoring report under s. NR 350.09 (3) (f) 8. or other corrective actions identified by the department necessary to improve attainment of the site's performance standards.
6. Clarify and use consistently throughout the rule the acceptable methods for providing for the long-term protection of compensation and mitigation bank sites. (Section NR 350.11 (1) refers to conservation easements and s. NR 350.12 (3) (e) refers to conservation easements and deed restrictions.)
7. Clarify that a conservation easement used to provide long-term protection of compensation or mitigation bank sites under s. NR 350.11 (1) must include any zone of vegetated upland adjacent to the wetland identified under s. NR 350.05 (5) and credited under s. NR 350.07 (6).
8. Correct the outdated references in the rule to s. 23.321, Stats. (Section 23.321, Stats., was renumbered to s. 281.37, Stats., by 2001 Wisconsin Act 6.)

Wetland Mitigation Rules: Questions and Recommendations for Changes

- ✓ 1. NR 350.04 (5) – Why use the regions and not (GMU+County+20 miles)
- Done for simplicity of understanding by the public and for administrative purposes by the DNR.

⇒ **Support the Assembly Committee's recommendation to return to the GMU search area.**

- ✓ 2. NR 350.06 (3) – Rational behind 20 acre variance?
- Put in by the DNR board, not a staff recommendation.
 - Done for the paper council.

⇒ **Suggest that the option to provide a variance from the 1.5:1 down to 1:1 be removed.**

- ✓ 3. NR 350.09 – Where is the “management plan” info.
- Applicant will provide the plan for approval by the DNR.

⇒ **Suggest that the rules incorporate the internal guidance documents that give direction as to what ought to be included by the applicant in the management plan.**

- ✓ 4. NR 350.09 (f) – Is 5 years really long enough?
- Performance standards are established on a case by case basis.
 - 5 years will set an expectation that 5 years is all that is required.

⇒ **Provide a note to the reader that conveys the intention that the goal is quality restorations and the timeline is only there for guidance.**

- ✓ 5. 350.12 (e) – Are deed restrictions and easements the same thing.
- Deed restrictions and easements are the same thing.

⇒ **Legal council will clarify this for the committee and we will include it as a suggestion for changes.**

- ✓ 6. 350.11 – Conservation Easements, what is involved?

⇒ **Insure that all upland areas are part of the conservation easements, if the upland area counts as part of the mitigation.**
- project proponent gets the easement from upland owner
then turn it over to DNR.

7. 350.09 (3)(f) – Corrective Measures

⇒ Make it clear that the applicant is responsible for all corrective measures until final sign off of completion by the DNR.

8. Renumber the statutes 23.321 in each instance that it appears to be in compliance with current statutes.

9. Discuss staffing and how to implement the program without adequate staffing.

- a. Do not implement until there is adequate staff.
- b. Establish a pilot program - *no statewide can only do a pilot*
- c. Concentrate on areas of highest need.

10. Success Monitoring – What is DNR's interpretation of short term and long term success (ACT 147 requires monitoring of both).

- *check of Sean?* Short term success = Did you construct what you said you were going to construct.
- Long term success = Was the restoration successful - did it take?

11. NR 350.06 (6) – How many banks are there that would be grandfathered.

- 1 or 2 at the most. All others on the registry will be new banks.

⇒ 2 banks will be grandfathered due to the fact that they were in compliance with ACE requirements.

-
- ❖ By August 17, 2001, Formally add these rules to the executive session portion of the August 30th hearing to extend our review time.
 - ❖ Committee will take up suggested recommendations during this hearing.

NR 350.04 MITIGATION SEQUENCE AS PROPOSED

Dave Siebert 8/27/01

1. look on-site
2. If on-site is not possible, then go off-site by choosing EITHER to build your own site or buy from a bank. BUT, off-site must be as near as possible to loss site but within the search area * .
3. If not practicable to buy or build in search area, you could buy from an existing bank. DNR has not formally put any bank on a registry, but is likely that the list would be the WWA Walkerwin Bank in Columbia County, the Dane County Lodi Bank, and the Northland Cranberry Bank in Wood County

* In rules sent to Legislature, the concept of search area is simplified to DNR Region, but the Assembly has asked that this be changed to an area that is comprised of the GMU +20 miles from the loss site + the county of the loss site.



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78 Enterprise Rd., Suite A
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(262) 646-5926
(262) 646-5949 (Fax)

August 23, 2001
Sec. Darrell Buzzell
WDNR
101 South Webster St
P.O. Box 7921
Madison, WI 53707-7921
RE: NR350

Dear Secretary Buzzell,

I was most disappointed with the response from your agency about the change to NR 350, that put our mitigation bank, permitted in May of 1996 at a huge disadvantage. I have attempted to find out why the WDNR felt this change was necessary and the responses I've gotten absolutely do not hold water.

The issue that if existing mitigation banks are allowed to do business as they currently do, will prevent the development of local banks located more closely to the wetland impact, is not true. Banks are a private sector enterprise. They will be developed and compete with other private sector enterprises that offer the same service. The consumer will make the decision of where to purchase credits based on price, quality and what they feel best serves the State of Wisconsin. Secondly, the existing banks are a finite resource. There are only so many credits available. By the WDNR's own estimate those credits would be used up in short order based on a current permitted wetland impacts of over 100 acres per year. Thirdly *our* banking program is the best anywhere. In a normal bank the proceeds are pocketed by the developer. In ours, though funded by private investment, the most significant portion of the proceeds go to funding high quality wetland restorations in areas of wetland impact. Take in to account that in the meetings of the Mitigation Bank Steering Committee we looked time and time again at the quality of those wetlands impacted by development and found them to have very low functions and values. Our program makes Wisconsin's wetlands the winner.

As we worked together with the Department developing the mitigation law, we expressed concern about how our bank would be treated. We were told in writing by the Secretary and were assured by the staff that we would be treated fairly, our service area not reduced. This was reflected in all rule drafts up to this point. The change to NR 350 is a breach of faith and trust and is inexcusable.



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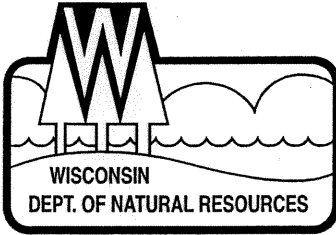
WISCONSIN WATERFOWL ASSOCIATION, INC.
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Delafield, WI 53018
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(262) 646-5549 (Fax)

Through thick and thin we have been very active and ardent supporter of the Wisconsin's natural resources and the DNR. We worked diligently to prove that a best quality mitigation bank was possible, and that a mitigation bank could and should be a public asset. That the bar for mitigation bank performance should be set high. The bar for allowable wetland impacts even higher. We have worked tirelessly to be a positive part of Wisconsin's natural resource future. And regardless of your decision this will not change. We will be there when you need us.

Thank you for your consideration in this matter.

Sincerely,

Jeff Mania
Project Director



State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Scott McCallum, Governor
Darrell Bazzell, Secretary

101 S. Webster St.
Box 7921
Madison, Wisconsin 53707-7921
Telephone 608-266-2621
FAX 608-267-3579
TTY 608-267-6897

August 24, 2001

The Honorable Neal Kedzie
Member of Assembly
Room 307 N
State Capital,

Dear Representative *Neal* Kedzie:

I am in receipt of your August 15, 2001 letter informing me of the Assembly Environment Committee's action on Clearinghouse Rule 00-164 relating to wetland compensatory mitigation.

I agree to consider modifications to the rule. After the Senate Environment and Energy Committee meeting on August 30, 2001 I will meet with staff to consider both committee's requests. At that time, I will need to make a decision about how to approach the Natural Resources Board about any modifications to the rule.

I appreciate all the work you have done on wetlands issues in the past year and look forward to working with you and your committee on this important wetland compensatory mitigation program.

Sincerely,

Darrell Bazzell
PMB

Darrell Bazzell
Secretary

ATT: KAT



"Dedicated to the Conservation of
Wisconsin's Waterfowl and Wetland Resources"

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August 23, 2001
Senator Jim Baumgart
State Capitol
P.O. Box 7882
Madison, WI 53707-7882

Dear Senator Baumgart,

We are owners of a private mitigation bank in Columbia County, Wisconsin. Our bank was the first private mitigation bank in the State, and was permitted to begin selling credits in May of 1996. At that time with the agreement of the Mitigation Bank Review Team, consisting of representatives from the U.S. Army Corps of Engineers, Wisconsin Dept. of Natural Resources, Environmental Protection Agency, Natural Resources Conservation Service, and U.S. Fish and Wildlife Service we were allowed to sell credits to compensate for wetland losses anywhere in the State of Wisconsin.

For the last five years we have provided credits for wetland impacts in several different areas of the State, many out of our region. However our program is unique in that the most significant portion of the proceeds of our bank go to fund our **non-profit wetland restoration program**. While we do these restorations statewide, we especially target those areas where there have been wetland impacts that we have compensated for through our bank. We have provided additional high quality wetland restoration in those areas.

A section of NR350, NR 350.04, deals with the subject of how existing mitigation banks will be treated in the new rule.

All drafts prior to this stated:

Off-site mitigation shall occur within the compensation search area of the impacted wetland unless the department determines the project proponent has demonstrated that it is not practicable to do so or purchase of mitigation credits will occur at a bank established prior to the effective date of this rule.....

However in the current draft NR350, NR350.4 now states:

If the department determines that the project proponent has demonstrated that it is not practicable to locate off-site mitigation within the same department region as the adversely affected wetland, the mitigation may occur through purchase of mitigation credits from a bank established prior to the effective date of this rule.



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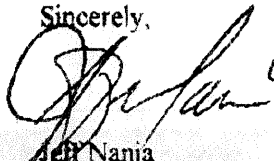
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This change will prevent us from doing business as we currently do, reducing our service area and prevent us from competing with other mitigation banks that will be established, as project proponents will be required to use these banks regardless of price, quality, or additional benefits to the State of Wisconsin. This change in the rule will greatly diminish the value of our bank and will have severe financial ramifications for us.

I would like to note, that we are the only private mitigation bank that has followed the rules of bank establishment to the letter. We have done everything we said we would do and much, much more. We have corresponded many times with the WDNR on this issue over the past couple of years and have been assured in writing that we would be "grandfathered" into the new rule. This change is an inexcusable breach of trust.

Your committee will be hearing this issue on August 30, 2001 I hope that you will recommend the WDNR reinstall, protections needed for existing banks.

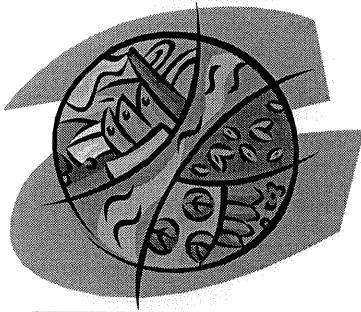
Sincerely,



Jeff Nania
Project Director

Contact;

Jeff Nania
W11360 Hwy 127
Portage, WI 53901
608-742-6699 home
608-742-1669 fax
608-697-7002 cell



**ASSEMBLY
COMMITTEE
ON ENVIRONMENT**
State Representative Neal Kedzie, Chair

August 15, 2001

Darrell Bazzell, Secretary
Wisconsin Department of Natural Resources
101 S. Webster, Fifth Floor
Madison, WI 53703

Dear Secretary Bazzell,

The Assembly Environment Committee has voted (Ayes, 7; Noes, 0; 3 Not Present) pursuant to s. 227.19 (4) (b) 2., Stats., to request that the Department of Natural Resources agree to modify Clearinghouse Rule 00-164, relating to wetland compensatory mitigation. The rule was recently submitted to the Legislature by the Department and was referred to the Assembly Environment Committee and the Senate Environmental Resources Committee.

The Assembly Committee held a public hearing on the Rule on August 14, 2001, and had concerns regarding the lack of time limits for the DNR decision-making process, the use of regions rather than geographic management units for off-site mitigation sites, and the clarity of the type of mitigation bank available under s. NR 350.06 (2) (a).

Specifically, the Committee recommends the following:

1. Include statutory timelines for permits as required under Act 147, s. 281.37 (3m) into CR 00-164.
2. Replace the five (5) DNR regions used throughout the rule to locate off-site mitigation with the original rule proposal of 22 geographic management units with a 20 mile radius, including the following:
 - Add language under NR 350.03, Definitions to read:
 - "Geographic management unit" means one of the 22 statewide management units based on the major five river basins.

- "Compensation search area" means the geographic management unit (GMU) that the project is occurring in, the county that the project is occurring in, or an area within a 20-mile radius from the project site.
- Delete definition of "Region" under NR 350.03 (23)

3. Add language under the NR 350.04 [(5)] Compensatory mitigation sequence to read:

Off-site mitigation shall occur within the compensation search area of the impacted wetland unless the department determines the project proponent has demonstrated that it is not practicable to do so or purchase of mitigation credits will occur at a bank established prior to the effective date of this rule...[revisor insert date]

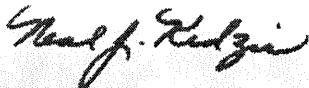
4. Amend language under NR 350.06 (2)(a) to read:

Credits will be purchased from a registered mitigation bank under NR 350.13

Pursuant to this request, the Committee may request additional modifications upon further review if additional issues arise. Please inform me, in writing by August 24, 2001, as to whether or not the Department agrees to this request.

Thank you for consideration of this recommendation.

Sincerely,



Neal Kedzie
State Representative
Chair, Assembly Environment Committee

NJK: dj

Cc: Assembly Environment Committee members

Assembly
8/14

Dave's Testimony

1. Staffing (2.5 FTE) is not adequate
 2. NAS - study = done ~~done~~ chaired by UW-Radison
 - lack of staff meant a lack of accomplishment of goals
 - lack of direction & planning
 - Goals were not being met
- WI's mitigation rules improve on programs around the nation.
- Goal: One set of standards for all.
 - : Guidelines document for all decisions.
 - : Provides rules for banking.
 - ratios = straight ratio of ~~2.5~~ 1.5 to 1.

Revisions to NR103

- Mitigation is not going to be required but it may be considered by DNR. some cases it may not be appropriate.
- Avoid & Minimize still the standard - No extra burden will be imposed unless ~~they are~~ the applicant wishes to do mitigation.

↳ DNR Board will combine all timelines in Act 147, Act G & ch. 30 into NR 300 revisions.

Options for Staff implementation

1. locate them in the central office
2. Spread out among 5 districts
3. Limit the program to SE area of the state

Rick McVoy - WI Wetlands Assoc.

- NAS study suggests that funding/staffing are inadequate to accomplish the goals they are trying to accomplish.

350.06 (3) = Paper Council exemption. reduce ratio to 1:1 for 20 acre wetlands.

• Not part of the public process & input & not part of committee deliberations

- Must also provide funding of \$or 5 FTE?

Carol Terrell

Supports Rules except for:

1. The 20 acre exemption for >20 acre wetlands (Paper Council)

2. Advisory Committee recommendation ~~is~~ off-site mitigation to be located w/in the same watershed. → However, DNR put them in the same DNR region which they say is easier to implement

3. Not enough staff!

Definitions: #5 compensation search area - restored

#10 Geographic region - restored

Region - removed

→ Nothing that guarantees that the credits will be purchased from an established bank.

→ Does DOT have to follow the same mitigation Rates.

Part of Advisory Committee
The restoration should be maintained in the same watershed to protect the functional values of the watershed
GMA + the proposed 20 acres surrounding the GMA is almost the same as the region DNR requires

Advisory committee rejected this

GMU + 20 miles + the County = The Search Area
for off site mitigation

→ This is comparable to the region area.

* There is also a requirement of as close as possible.

→ ~~The~~ Committee wants the timelines included in these
rules & not in another part.

Committee Recommendations

1. GMUs + 20 + county
2. Timelines as part of rule at NR300
3. Reference to mitigation Bank must come from the registry
4. Not limited to but must address these 3 issues.



**SIERRA
CLUB**

FOUNDED 1892

John Muir Chapter

**Before the Assembly Environment Committee
IN SUPPORT of Wetland Mitigation, Clearinghouse Rule 00-164
August 14, 2001
Caryl Terrell, Legislative Coordinator**

Wetland protection is a high priority with our members. Our goal is to stop the unnecessary destruction of the state's remaining legacy of wetlands and to restore and enhance wetlands that have been degraded over time.

We continue to have reservations that any wetland compensatory program will adequately protect Wisconsin's wetland resources. We still maintain that the science or art of wetland restoration and creation is extremely complex and poorly understood. While we are supportive of the many private efforts to restore degraded wetlands by groups, such as the WI Waterfowl Association, we know the track record for mitigation in Wisconsin and the Midwest is not good.

This concern was further substantiated by a recent major US study. In late June the National Academy of Sciences, the prestigious group of scientists that advises Congress, issued a major report that highlighted the shortcomings and mistakes made in other states and by the Army Corps of Engineers with their compensatory mitigation programs. The National Academy of Sciences found that some mitigation projects are never undertaken or are not completed, and of those completed, the "new" or restored wetlands failed to provide the same benefits compared to nearby natural wetlands.

Keeping these reservations in mind, on behalf of the Sierra Club-John Muir Chapter, I served on the DNR Wetland Compensatory Mitigation Advisory Committee, starting in mid-1996. The charge of the committee was to "formulate a compensatory mitigation program including necessary legislation and administrative rules, for the unavoidable loss of wetlands associated with state approved or certified actions..." The committee worked for many months to develop a Memorandum of Understanding, MOU, between the Army Corps of Engineers and other federal agencies, who also served on the committee, and the DNR and then tackled developing formal Guidelines for Compensatory Mitigation in Wisconsin.

These documents were major accomplishments of the Committee. The documents are based on good science, candid assessment of mitigation programs in other states and the give and take of the committee members in reaching reasonable compromises. The involvement of the Sierra Club in negotiations that lead to the adoption of 1999 WI Act 147 was largely based on our "comfort" level with the Guidelines for Compensatory Mitigation in Wisconsin.

The DNR developed Clearinghouse Rule 00-164 after the Committee finished its work and after 1999 WI Act 147 was adopted. The Sierra Club submitted several comments critical of the proposed rule, especially are on-going objection to minimal compensation ratios based simply on the precedent of a previous DNR-DOT interagency agreement. We feel that more compensation should be sought from private parties seeking to destroy Wisconsin's valuable wetlands, a natural resource heritage being held in public trust for this and future generations. Our comments did note our continued support for using the Guidelines for Compensatory Mitigation in Wisconsin.

We are generally supportive of the rule but wish to draw your attention to three points.

1. At the meeting of the Natural Resources Board, the paper industry was able to convince the Board to add NR 350.06 (3). This new provision will allow a variance from the established mitigation ratio of 1.5:1 for large projects affecting more than 20 acres of wetlands. This idea was presented many years ago by a paper company to the Mitigation Advisory Committee and after discussion was not accepted. There is no ecological justification for this illogical variance. Just the opposite--such a large wetland loss goes against the state policy of "reversing the loss" of wetland acres and should require an increased ratio of mitigation acreage requirements.

We request that this change be removed from the mitigation rule. (see attached Year 2000 Version)

2. The Advisory Committee, after extensive discussion of ways to characterize regions for mitigation sites, recommended that off-site mitigation be sited within the watershed of the wetland destruction. In the rule these watersheds were described as the DNR map of 22 Geographic Management Units (GMUs)
To increase flexibility for the project proponent, an additional 20 mile radius area that could extend into adjacent counties and watersheds was also included. We are very disappointed that the DNR staff concluded that this was "too difficult" to understand and reverted to the five DNR Regions.

Wetlands are an essential component of watersheds. Wetlands absorb flood waters, protecting lives and property, and then gradually release clean water for our use. Watersheds with wetlands have less flood damage and loss of life. Restoring just 6% of the state's land area to wetlands, or 1.7 million acres, would have helped reduce the 1993 floods that killed 70 and cost \$18 billion. Every wetland loss should be replaced with wetland restoration within the same watershed.

We ask that, in the rule, the 5 DNR regions, established for administrative, not ecological purposes, be restored to the original rule proposal of 22 GMUs with 20 mile radius along with the appropriate references where this is used.

REINSERT from Year 2000 (old) Version of the Rule--section NR 350.03 Definitions (16) "Geographical management unit" means one of the 22 statewide management units based on the major river basins of the state." And old section NR 350.03 Definitions (5) "Compensation search area" means the geographic management unit (GMU) that the project is occurring in, the county that the project is occurring in, or an area within a 20-mile radius from the project site." And old section NR 350.04 Compensatory mitigation sequence. (4) "Off-site mitigation shall occur within the compensation search area of the impacted wetland..." (see attached Year 2000 Version)

3. Staffing of this new program remains a concern. Although the DNR is cognizant of the shortcomings of mitigation in other states and has tried to avoid similar problems in Wisconsin through its mitigation rule-making process, we are deeply troubled that good rules will be of little value if the agency responsible for their administration is not adequately staffed. The DNR has repeatedly argued for a MINIMUM staff of five full-time positions to administer this new program, but has been allowed only 2.5 FTEs in the current budget. The legislature at its earliest convenience should rectify this inequity of need to be certain that the mitigation process proceeds smoothly and is administered in a proper and timely manner.

Thank you for your attention to our concern and for your support of the original mitigation rules as proposed by the DNR.

Request a hearing to extend timeline + then make suggestions -> Request hearing + add the rules to Aug. 30 agenda.

Wetland Mitigation Rules

NR 350.04 (5) - Why use the regions and not GMU+County+20 miles

X (1)

- Done for simplicity of understanding by the public and for administrative purposes by the DNR.
- we support GMU but not a long deal.

NR 350.06 (6) - How many banks are there that would be grandfathered.

- 1 or 2 at the most. All others on the registry will be new banks.

NR 350.06 (2) - "similar" what does this mean?

NR 350.06 (3) - Rational behind 20 acre variance?

(2)

- Put in by the DNR board, not a staff recommendation.
- Done for the paper council.

-> Suggest that the ~~20~~ Variance be removed.

NR 350.09 - Where is the "management plan" info.

(3)

- Applicant will provide the plan for approval by the DNR.
- DNR should provide some guidelines as to what this is in the rules. to insert into the guidance documents already written into the rule

NR 350.09 (f) - Is 5 years really long enough?

(4)

350.09 (b) - Performance standards shall be established for each site

- 5 yrs in language sets an expectation - can we be more successful specific as to DNR's ability to review longer than 5 yrs.
- Provide notification to the reader that 5 yrs is the bare min - only!

350.12 (e) - Are deed restrictions and easements the same thing.

(7)

Note also should talk about quality restrictions + timeframes must comply w/this goal.

Success Rate monitoring: DNR's interpretation.

② Short term = did you construct according to requirements

Long term = was it successful - did it take

350.11

⑤ Make sure upland areas are part of conservation easements

⑥ 350.09 (3)(f) - make it clear that the applicant is responsible for ~~the~~ corrective measures.

⑦ ^{statutes were} Remembered we should make these changes.

⑧ How to handle the lack of staff?

- Don't implement until staff
- Pilot program
- Concentrate on one or two areas
- Prioritize by need

Year 2000 Version

SECTION 9. Chapter NR 350 is created to read:

**Chapter NR 350
Wetland Compensatory Mitigation**

NR 350.01 Purpose. (1) The purpose of this chapter is to establish standards for development, monitoring and long term maintenance of wetland compensatory mitigation projects that are approved by the department, and to establish procedures and standards for the establishment and maintenance of mitigation banks.

(2) These provisions are adopted pursuant to s. 23.321, Stats.

NR 350.02 Applicability. This chapter applies to all compensatory mitigation projects that are considered by the department as part of a decision made in accordance with ch. NR 103. This chapter does not apply to compensatory mitigation conducted by the department of transportation as part of the liaison process pursuant to s. 30.12(4), Stats. This chapter does not apply to metallic mineral prospecting or mining, which are regulated pursuant to chs. NR 131 and 132.

NR 350.03 Definitions. In this chapter:

(1)"Bank document" means a document that contains specifications pertaining to the establishment, operation and maintenance of a mitigation bank, identification of the goals, objectives, procedures for operation of the mitigation bank, and incorporating the appropriate terms and conditions of this chapter.

(2)"Bank sponsor" means any public or private entity financially responsible for establishing and, in most cases, operating a mitigation bank.

(3)"Compensation" or "compensatory mitigation" means the restoration, enhancement or creation of wetlands expressly for the purpose of compensating for unavoidable adverse impacts that remain after all appropriate and practicable avoidance and minimization has been achieved.

(4)"Compensation ratio" means the number of acres an applicant must provide at a mitigation project compared to the acres of wetland lost from a permitted project.

(5)"Compensation search area" means the geographic management unit (GMU) that the project is occurring in, the county that the project is occurring in, or an area within a 20-mile radius from the project site.

(6)"Compensation site plan" means a comprehensive document prepared by an applicant or bank sponsor that provides a thorough description of a proposed compensation project.

(7)"Corrective action" means an action taken by an applicant or bank sponsor to correct deficiencies in a wetland compensatory mitigation project as early as possible after the problem is noticed.

(8)"Creation" means a technique involving the establishment of a wetland where one did not historically exist.

(9)"Credit" means a unit of measure, in acres, representing the accrual or attainment of wetland functions and values at a compensation site.

(10)"Credit ratio" means the number of acres that can be accrued for credit through the use of a given technique, expressed as acres of credit to acres on the ground at the compensation site.

(11)"Debit" means a unit of measure, in acres, representing the loss of wetland functions and values at an impact or project site.

(12)"Degraded wetland" means a wetland subjected to deleterious activities such as drainage, grazing, cultivation, increased stormwater input, and partial filling, to the extent that natural wetland characteristics are severely compromised and where wetland function is substantially reduced.

(13)"Enhancement" means activities conducted in existing wetlands that increase one or more wetland functions.

(14)"Established" means a compensation site that the department determines has met performance standards set forth in the compensation site plan.

(15)"Functional values" means a combination of the terms: functions (the physical, chemical and biological processes or attributes that occur in a wetland system) and values (how society finds certain functions beneficial) and listed in s. NR 103.03(1).

(16)"Geographic management unit" means one of the 22 statewide management units based on the major river basins of the state.

(17)"Goals" means general visions of how a compensation site will look and function.

(18)"Management" means actions taken at a compensation site to establish and maintain desired habitat and human use conditions including water level manipulations, herbicide application, mechanical plant removal, prescribed burning, fencing, signage, and vandalism repair.

(19)"Mitigation bank" or "bank" means a system of accounting for wetland loss and compensation that includes one or more sites where wetlands are restored, enhanced or created to provide transferable credits to be subsequently applied to compensate for adverse impacts to other wetlands.

(20)"Mitigation bank review team" or "MBRT" means an interagency group of federal, state, local and tribal regulatory and resource agency representatives who oversee the establishment, use and operation of a mitigation bank.

(21)"Mitigation project" means the restoration, enhancement or creation of wetlands to compensate for adverse impacts to other wetlands. "Mitigation project" includes using credits from a wetlands mitigation bank.

(22)"Monitoring plan" means a specific program of data collection and analysis, conducted, analyzed and reported by an applicant or bank sponsor, which documents the physical, biological, hydrological and human-use characteristics of compensation site wetlands.

(23)"Objectives" mean quantifiable measures of the goals identified for a compensation site in the compensation site plan.

(24)"On-site" means a mitigation project located within one-half mile of the impacted wetland.

(25)"Performance standards" means a list of objectives, agreed to in advance by the project sponsor and the department, that must be met before a compensation site can be deemed "established".

(26)"Practicable" means available and capable of being implemented after taking into account cost, available technology, and logistics in light of overall project purposes.

(27) "Priority wetland" means a wetland type that the department has determined to be scarce or a priority for protection.

(28) "Project-specific" means a mitigation project that is not the purchase of bank credits.

(29) "Restoration" means a technique involving the re-establishment of historic wetland conditions and functions, to the maximum extent practicable, at a site where they have ceased to exist, which can include focus on re-establishing hydrologic conditions, plant communities, land contours and surrounding land conditions.

(30) "Wetlands" means 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.

NR 350.04 Compensatory mitigation sequence. (1) Applicants are encouraged to consult with the department in pre-proposal conferences or during the permit application process to identify appropriate options. For any compensatory mitigation that is part of an application considered by the department under chs. NR 103 and 299, the department shall determine that the project proponent has evaluated an on-site mitigation project.

(2) If the department determines that the project proponent has demonstrated that it is not practicable or ecologically preferable to conduct an on-site mitigation project, the department shall allow off-site mitigation.

(3) Off-site mitigation shall be accomplished either through purchase of mitigation bank credits or development of a project specific mitigation project.

(4) Off-site mitigation shall occur within the compensation search area of the impacted wetland unless the department determines that the project proponent has demonstrated that it is not practicable to do so or purchase of mitigation credits will occur at a bank established prior to the effective date of this rule ... [revisor insert date].

(5) Purchase of mitigation bank credits shall be from a bank that is listed on the state registry of approved banks pursuant to s. NR 350.13.

(6) The purchaser of mitigation bank credits shall provide to the department a written affidavit that the purchase occurred, providing the name of the mitigation bank, the acres purchased and the signatures of both the applicant and the bank sponsor.

NR 350.05 Planning for a mitigation project. (1) Mitigation projects can involve one or a combination of techniques including restoration, enhancement or creation of wetlands. Restoration is the preferred technique.

(2) When practicable, compensatory mitigation should result in a project with an ecologically similar plant community to the wetland being impacted.

(3) Unless the wetland impacted by the permitted activity is a deep marsh or a shallow open water community, creation of ponds or deepwater habitats as a mitigation project may not be accepted by the department.

(4) When practicable, compensation sites should rely on passive maintenance and management.

(5) Compensation sites shall include an adequate zone of vegetated upland adjacent to the wetland to filter run-off entering the wetland.

NR 350.06 Amount of compensatory mitigation required. (1) The currency for compensatory mitigation is acres.

(2) The standard compensation ratio is 1.5:1, which means 1.5 acres of compensation for each acre of impacted wetland.

(3) The minimum compensation ratio is 1:1, which may only apply if the project proponent demonstrates to the satisfaction of the department that the following conditions are met:

(a) Credits will be purchased from a mitigation bank with an established bank site located within the compensation search area of the project; and

(b) The permitted project will not impact a priority wetland as defined in s. NR 103.08.

NR 350.07 Site crediting. (1) The total number of acres of credit at a compensation site or mitigation bank site will be calculated by the department based on a comparison of baseline and post-construction conditions and the techniques used to develop the site.

(2) The location of wetland boundaries for use in calculating acreage of wetland at a compensation site shall be made consistent with s. NR 103.08 (1m).

(3) The credit ratio for restoration shall be one credit acre for every one acre restored, or a ratio of 1:1.

(4) The credit ratio for enhancement can range from no credit to 1:1. The appropriate ratio shall be determined by the department based on a comparison of the functional values of the current condition of the site and the projected functional values of the completed compensation site. Management activities on pre-existing, fully functioning wetlands will typically receive no credit. Re-establishment of historic hydrology, land contours and plant communities on substantially degraded wetland sites will typically receive higher credit. In some cases, intensive management activities based on an approved plan and backed with financial assurances that the work will be conducted, may receive credit. Activities that result in replacement of one wetland type with another will generally not be given credit unless there is a demonstrated value in doing so.

(5) Creation shall only be allowed if the department determines that the planned creation will provide significant wetland functional values. Because of the greater difficulty, poorer track record and the longer time scale involved in the development of wetland functions for wetland creation projects, any creation accepted by the department for project-specific compensation shall be credited at 0.5:1, unless the applicant can demonstrate to the satisfaction of the department that the circumstances warrant greater credit.

(6) Restoration efforts on adjacent uplands that provide additional ecological functions to the site, beyond filtering run-off, may receive credit at the ratio of one acre of credit for every 4 acres restored.

(7) Wetland-like projects used primarily as stormwater or wastewater treatment facilities, including features covered by s. NR 103.06 (4), will not receive credit as mitigation projects.

NR 350.08 Compensation site plan requirements. (1) For any proposal to construct a compensation site, either for project-specific compensation or for a mitigation bank site, a compensation site plan shall be prepared by the applicant or bank sponsor and approved by the department.

(2) The purpose of the compensation site plan is to demonstrate that the applicant has sufficient scientific expertise to carry out the proposed compensation project work; to outline the construction plan and techniques, project goals and objectives, performance standards, monitoring plan, and long term management plan; to demonstrate that the applicant has sufficient financial resources to assure the project is built according to the plans and specifications, and will be monitored and maintained as proposed; and to provide evidence that the site will be maintained as wetland in perpetuity.



Wisconsin Builders Association

Dedicated to Preserving and Promoting the American Dream

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Vice-President**
Bill Wendle

**Deputy Executive
Vice-President**
Jerry Deschane

Memorandum

TO: Chairman Kedzie and Members of the Assembly Environment Committee
FROM: Jerry Deschane, Deputy Executive Vice-President
DATE: August 14, 2001
RE: NR 103 and NR 350 relating to wetland mitigation

The Wisconsin Builders Association supports this rule package.

We believe the proposed rules establish an acceptable framework from which the department may consider the positive impact of mitigation while reviewing a permit to fill a wetland. Like the legislation that called for these rules, the rules are less than perfect, and may need adjustment in the future. We believe, however, that getting the program in place, **training DNR field staff in its proper implementation**, and demonstrating to Wisconsin citizens and regulators that it works are more important than debating vague words and phrases.

For future reference, we encourage the committee to monitor these areas:

- The rules do not state the department's supposed goal of making the "best overall environmental decision." We believe that goal should drive decisions.
- **The rules do not include review deadlines.** Prompt, consistent reviews are essential, and are required by Act 147.
- **The rule package does not identify wetland types that have "negligible functional values,"** and are therefore subject to expedited review as stated in Act 147. Instead, it defines wetlands that cannot be considered on an expedited basis. This is confusing and may lead to disputes in the future.
- NR 350.04 (1), (2), and (3) require the applicant to demonstrate that there is no adequate on-site mitigation opportunity. Without adequate staff training, this will lead to confusion and delays. **On-site mitigation has a dismal track record nationwide and therefore should be discouraged.** We believe the rule should urge off-site mitigation rather than put field staff and applicants through any sort of time-consuming on-site search process.
- **The number and type of projects that are subject to limited alternatives analysis per Act 147.** The rule gives the department much latitude in this area.
- **We request that this committee ask the department to come back within six months with an interim progress report.** Members of the Wisconsin Builders Association, municipal organizations and environmental organizations are all keenly interested in how mitigation fits into the regulatory process.

It would not be appropriate to conclude without expressing our gratitude to this committee, especially Chairperson Kedzie and Vice-Chair Johnsrud for their hard work on this historic legislation. We are also grateful to the department, especially former Secretary Meyer, and staff persons Dave Siebert and Scott Hausmann for the long hours they put in on Act 147, its predecessors, and the rule package you have before you.

Thank you for considering our viewpoint.



NAHB



AUG 13 2001

August 8, 2001

Senator Jim Baumgart
Senate Environmental Resources Committee
Room 306 South
State Capitol
Madison, WI 53702

Dear Senator Baumgart,

Northland Cranberries Inc. is a publicly traded company and the largest cranberry producer in the United States, with approximately 2000 acre planted in Wisconsin. The federal government through the US Army Corps of Engineers has required the cranberry industry to mitigate for any wetland impacts since 1991. We found it difficult to locate acceptable mitigation on-site because most of our property is already wetland or else it is wooded upland. To expedite the permit process, Northland purchased a 155-acre parcel of prior converted farmland in Wood County and restored it to wetlands as a wetland mitigation bank. Northland's Bank was established with the Corps in December 1999 and it was agreed in the Banking Instrument that credits would be available for sale to the public with a service area to include the entire State of Wisconsin.

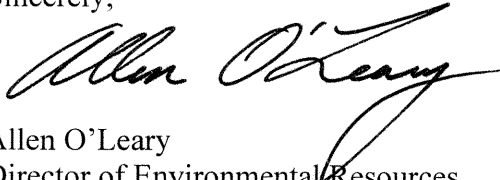
Northland believes that our intent to sell wetland credits to project applicants throughout the state have been greatly diminished by NR350. DNR staff told us that banks established prior to the rule would have retroactive status and that we will be able to provide wetland credits to any project in the state. NR350.04(6) states that "if the department determines that the project proponent has demonstrated that it is not practicable to locate off-site mitigation within the same department region as the adversely affected wetland, the mitigation may occur through purchase of mitigation credits from a bank established prior to the effective date of this rule." Although this subsection gives prior established banks the ability to provide credits to project applicants from throughout the state, in reality, it will be extremely rare that any DNR water management investigator will agree that there is not a restorable wetland available within the same department region as the impacted wetland.

Northland fully understands the reasoning and agrees with the compensatory mitigation sequencing as described in NR350.04. The sequence is the same as with the Corps rules that we have abided by for the past ten years. Our concern is that our investment made in good faith before the state recognized the concept of compensatory mitigation has lost its value. Past experience has shown that individual DNR water management investigators can be very subjective in their determinations. We would like to see language that would

more easily allow project applicants to seek off-site mitigation outside the department regions.

I would like to thank you for your consideration of these comments and would greatly appreciate hearing your response.

Sincerely,

A handwritten signature in black ink that reads "Allen O'Leary". The signature is written in a cursive style with a large, sweeping flourish at the end of the name.

Allen O'Leary
Director of Environmental Resources

DRAFT 8/01/2001
Guidance for
DNR WETLAND MITIGATION POLICY
Revised NR 103 and New NR 350

ADDRESSING SOME COMMON PERCEPTIONS:

1. "Now I can fill any wetland as long as I replace it somewhere else."

NOT TRUE.

The new DNR policy is about allowing the consideration of mitigation in certain circumstances, generally when impacts to small, low quality wetlands are involved. NR 103 will continue to require an analysis of practicable alternatives and a determination that the activity not result in significant adverse impacts to wetland functions and values.

2. "DNR will require me to replace every wetland acre I fill."

NOT TRUE.

DNR will never require that compensatory mitigation be part of an application. DNR will consider mitigation in some circumstances and sometimes this may sway a state decision. The only requirement for mitigation will come from the Corps of Engineers. The new policy clarifies when DNR can consider mitigation. The compensatory mitigation will either be part of a plan because of a federal requirement or by choice of the applicant.

3. "Now with mitigation, I do not need to look at practicable alternatives"

NOT TRUE.

NR 103 maintains the key concept that alternatives to avoid and minimize wetland loss must be considered. The change is that in some circumstances, the alternatives analysis must also weigh the potential for impact to wetland functions and the potential value of a compensation project. The final decision may be that avoiding the wetland loss is not the best choice, and in fact allowing the loss with a managed and protected wetland restoration as compensation is preferable.

4. "The wetland I'm filling is low quality, so if I do mitigation I need only replace it with something of low quality."

NOT TRUE.

Any compensatory mitigation that is part of an application will need to meet the rules set forth in NR 350. That means that the quality of site selection and planning is the same, regardless of the character of the wetland that is being lost. This also means that exact replacement of the wetland functions and values is not required. NR 350 encourages on-site and in-kind mitigation, but only when feasible and/or ecologically desirable.