

5. "The goal of the new DNR policy is no net loss of wetlands"

NOT TRUE.

The policy does not use the terms "no net loss" or "net gain". The new policy also does not try to replace what is being lost to permits. Simply, the new policy adds one more tool in decision making. The policy allows for the best outcomes which may include allowing a wetland to be impacted or filled with compensation elsewhere. The bottom line reason for allowing the wetland loss is not because we know the wetland is getting replaced. Activities that meet the standards in NR 103 are allowed to proceed.

6. "Small wetland loss will be compensated for at banks."

NOT TRUE.

The new code requires a look on-site and near the loss for feasible and ecologically desirable mitigation projects. In many cases, banking may end up being the best location for compensation, especially for the small impacts in urban settings.

NR 103 DECISION PROCESS (draft 8/1/01)

Process Steps 	Standard NR 103		Exceptions		
	Review Process	For activities that do not meet any of the exceptions	Activity to impact an Area of Special Natural Resource Interest (see list in NR 103.04)	Activity involves wetland impact of 0.1 acre or less or activity is wetland dependent	Activity involves impact to a wetland <1 acre in size, not in the 100-yr floodplain and not in certain types***
<p>Practicable Alternatives* Analysis</p> <p>Functions and Values Assessment and Compensatory Mitigation**</p>	<ol style="list-style-type: none"> 1. Is there an avoid alternative? 2. How can wetland impacts be minimized? 3. Evaluate wetland functions and values after alternatives test is met. 4. DNR may consider functions and values of mitigation project if it is part of the application. 5. Applicant must show no significant adverse impacts 	<ol style="list-style-type: none"> 1. Is there an avoid alternative? 2. How can wetland impacts be minimized? 3. Evaluate wetland functions and values after alternatives test is met. 4. Compensatory Mitigation cannot be considered in the state decision. 5. Applicant must show no significant adverse impacts 	<ol style="list-style-type: none"> 1. Evaluate wetland functions and values concurrently with alternatives to avoid and minimize. DNR may consider functions and values of mitigation project if it is part of the application. 2. Applicant must show no significant adverse impacts. 	<ol style="list-style-type: none"> 1. Evaluate wetland functions and values concurrently with alternatives to avoid and minimize. DNR may consider functions and values of mitigation project if it is part of the application. 2. Applicant must show no significant adverse impacts. 	<ol style="list-style-type: none"> 1. Evaluate wetland functions and values concurrently with alternatives to avoid and minimize. Alternatives for expansions limited to existing or immediately adjacent property. 2. Applicant must show no significant adverse impacts.

* For landfill expansions alternatives may be limited to areas adjacent to or on the same property. For public safety projects the Department cannot ask the applicant to evaluate practicable alternatives.

** All compensatory mitigation shall be conducted in accordance with NR 350.

***T To be reviewed under this column the activity cannot impact any of the following types: Deep marsh; Ridge and swale complex; Wet prairie not dominated by reed canary grass to the exclusion of a significant population of native species; Ephemeral pond in a wooded setting; Sedge meadow or fresh wet meadow not dominated by reed canary grass to the exclusion of a significant population of native species and located south of highway 10; Bog located south of highway 10; Hardwood swamp located south of highway 10; Cedar swamp located north of highway 10; or Conifer swamp located south of highway 10.

**Attachment 2: Department of Natural Resources
Responses to Comments
Received on Proposed NR 103 Revisions and Proposed NR 350 Pertaining to
Compensatory Wetland Mitigation in Wisconsin.**

MAY 29, 2001

This document lists all comments received on the proposed rule package and provides the Department staff response to each comment.

There were 8 public hearings held across the state. At each hearing the Department made a presentation on the background for the rules and on specific measures that the rules would establish. The Department received testimony and also provided a question and answer period at each hearing. Attendance was as follows: Madison—13; Green Bay—38; Wausau—16; Rhinelander—7; Spooner—9; Eau Claire—8; Prairie du Chien—2; and Waukesha—19.

In addition to the testimony at the hearings, 28 emails or letters were also received during the comment period. This summary document reflects all the comments received and includes them in either general comments or comments specific to sections of the proposed rules. Department response to comments, including notification of changes made to address comments, are reflected below in *italic* type. We did not attempt to classify and tally the letters or testimony by “for” or “against”. Where changes to the codes have been made based on comments, the answers are provided in **bold** type.

GENERAL COMMENTS

1. The department must have adequate staff to run the program.
The Department agrees. The Department included staffing requests in the state budget for this program and to date final decision on the budget have not been made.
2. When will DNR require compensatory mitigation?
The proposed rules would not require compensatory mitigation for any department decision. Act 147 called on the department to write rules for considering mitigation projects in state wetland decisions. The rules, which statutorily do not go into affect until August 2001, would allow consideration of the benefits of a mitigation project if it is included by the applicant in the package sent to DNR for a decision.
3. How does the new rule package affect mining?
This rule package will not impact how permit decisions are made relative to wetlands and metallic mining and prospecting projects. The current NR 103 specifically exempts metallic mining, since such projects are specifically regulated under NR 131 and 132. Compensatory mitigation is not a requirement of NR 131/132 but could be included as

part of an application for mining. Any compensatory mitigation for a mining project would have to meet NR 350 and this is clarified in revisions to NR 350.02.

4. Alleges that Department went way beyond the requirements of Act 147.
The rules follow the requirements of Act 147.

5. Restoration of some wetland types is impossible.
It is true that there are some wetland communities for which restoration may not be possible. Restoration of other types has been very successful and these will be promoted by the proposed rules. The difficult to restore wetland types tend to be those that the department would deny a certification for or would suggest alternatives for avoiding impacts altogether.

6. The Department should have written an environmental assessment (EA) or environmental impact statement (EIS) on these rules.
Under ch, NR 150, Wis. Adm. Code, an EA is only required for the promulgation of new rules or changes in existing administrative rules when the implementation of the proposed rule will have material impacts on the human environment. These rules are not expected to have any material impacts upon the human environment.

7. Consistency with Corps is important to avoid confusion. Should clearly state in NR 350 that conflicts between agencies will not occur.
It has been the goal of the advisory committee in this issue to work toward a consistent application of mitigation requirements. Draft guidelines for both federal and state agencies were developed and provided the basis for the proposed rules. Act 147 calls on the department to negotiate a Memorandum of Agreement with the Corps to assure greater consistency. The department is committed to continued efforts to simplify the process for all involved.

8. Adequate training of staff to assure consistency.
The department is committed to training not only for staff, but for the regulated public and its agents and consultants as well.

9. Need for guidance to public on the process and requirements. Need for a checklist as to what is included in a "complete application".
The department is constantly working to improve outreach materials on the process and expectations for those regulated by the process. Guidance and associated training will definitely follow passage of these rules.

10. DNR staff need to move away from avoid/minimize and be more flexible to allow mitigation to happen
The proposed rules should allow more flexibility for field staff in circumstances where lower quality wetlands are involved. The proposal will not eliminate the process of avoid and minimize however. Avoiding impacts can save applicants money while preventing environmental harm.

11. NR 350 should include concepts of avoid and minimize.

NR 350 provides requirements for compensation—the third step in the federal mitigation process of avoid, minimize, then compensate. NR 103 currently provides the state requirements for avoid and minimize, and now is proposed to include the concept of compensation. NR 350 sets the standards for the compensation projects.

12. Concern that mitigation is focused too much on habitat and not on flood control and other hydrologic functions and values.

All the functional values of wetlands must be considered during the wetland decision process. Mitigation projects should be focused on restoration of wetland habitats, but this does not mean that the other functions don't also occur in a high quality habitat. Performance standards for any mitigation project will necessarily be defined based on the function and value objectives for the site. In some cases the objectives may be habitat related and in others more focused on flood control, for example.

13. The terminology “best overall environmental solution” should be added to code.

This will be addressed in revisions to NR 1.95.

14. Some commentors questioned the preference for on-site mitigation while others questioned the preference for banking. There is concern that banks will allow more destruction of small wetlands and loss of watershed specific functions. But there is also concern that small on-site projects tend to fail and that banks offer better long-term restoration potential.

There are clearly opposing views on the merits of on-site projects as compared to banking. The proposed rules recognize the potential benefits of both types. The rules require a search for valuable on-site efforts before allowing banking. This recognizes the need to plan a project to account for important natural features. In many cases, it is just not feasible or ecologically preferable to have on-site mitigation projects.

15. Why special treatment for cranberry operations?

NR 103 was revised in 1998 to specifically address cranberry operations and no changes to that process are proposed at this time.

16. NR 350 should provide more specifics on compensation site selection and other requirements.

NR 350 provides the key requirements for compensatory mitigation projects. The department will finalize “Guidelines” that can provide more information. Each compensation site will be different and thus guidance must be flexible enough to allow case-by-case judgments.

17. NR 350 and NR 103 should have a reference to the “Guidelines” and that document should be published as part of the rules.

The proposed code has been developed based on the work of an advisory committee and the draft guidelines document developed from their work. Guidance can be developed based on rules, but should not be incorporated into the rules. The department anticipates

finalizing the "Guidelines" with the federal agencies after passage of these rules. NR 103.08(4)(e) has a reference to a memorandum of agreement between the state and federal agencies that establishes these guidelines. A revision to NR 350.01 includes a reference to the guidelines document as well. At this point the "Guidelines" have not been finalized as an official document that can be referred to specifically in the code.

18. Preservation of existing wetlands should be allowed as compensatory mitigation.

Omission makes the state rules counter to federal rules and to NR 1.95.

Act 147 did not allow for preservation to be included in the definition of mitigation projects. There are no federal rules on the subject. There is however federal guidance that allows preservation to meet federal mitigation requirements in exceptional circumstances. The department achieves preservation of important wetlands through other programs outside of the regulatory arena.

19. Wetland benefits of the proposed project itself should be counted as mitigation (e.g. ditches along a road and cranberry operations wetland values).

NR 103 requires the reviewer to consider the positive and negative impacts of any proposed activity.

20. Enforcement of NR 103 and NR 350 should be more clearly defined.

NR 103 are water quality standards and enforcement is not appropriately placed in that code. NR 350 includes some enforcement language in 350.14. The statutory enforcement language is what governs and this is found in 281, Stats.

21. Need to state in NR 350 that the loss should be compensated as close as possible to the location, ecological relationship, and type of wetland lost.

These concepts are set forth in 350.04 and 350.05.

NR 103 Specific Comments

1. 103.04(4): Environmental corridors should stay in the list of "Areas of Special Natural Resource Interest" (ASNRI). The revision in the ASNRI list in Act 147 only pertains to mitigation and thus the total change should not be made.

The proposed revision to NR 103 reflects the language from Act 147. Since environmental corridors are an important consideration in evaluating the wetland functional values, this concept has been added into 103.08(3)(g). The changes to 103.04(4) reflect the requirements of Act 147, while the new 103.08(3)(g) maintains an important consideration that is unrelated to the compensatory mitigation provisions.

2. 103.04 (11): This should not be limited to wild rice waters in 19.09, since s. 23.321 (Act 147) refers to all waters with wild rice.

Change made to 103.04(11).

3. 103.07: Need clear definition as to what is considered "practicable". Need more definition as to difference between the terms -- "adverse impact" and "significant adverse impact."

The practicable alternative definition is identical to the federal s. 404 Clean Water Act definition and has been in NR 103 since it was adopted in 1991. A body of case law further defines the meaning of the term. The language "significant adverse impact" has been used in state and federal wetland protection programs for many years, for decision-making both in NR 103 and for NR 115 and NR 117 county and municipal shoreland-wetland zoning.

4. 103.07(2m): There were many comments on the concept of "priority wetlands." The comments included the following:

The list of priority wetlands should be shorter (no suggestion made to what should be eliminated). The Department should use data to prove scarcity which may show that sedge meadows, fresh wet meadows and wet prairies may not need to be listed. Suggest a numeric rating system to take into account functional values and use that system to determine process and mitigation ratios.

The list of priority wetlands is too short—should add bogs in north and ephemeral wetlands statewide. Priority wetlands needs to differentiate between groundwater – fed and surface water fed systems. Should also include "other high quality peatlands".

Is the priority wetlands a higher standard than ASNRI? Does this mean a prohibition against filling these types?

The priority wetlands should be under the list of ASNRI. This second tier of protection is not called for by Act 147.

From the wide range of comments received about the priority wetland concept, it is clear that there was much confusion as to what was intended by the Department. The department proposes to eliminate the definition of priority wetland while keeping the list of types in the decision section 103.08(4) as revised.

The intended concept is that certain types of wetlands that tend to be those of most concern to Department staff should first have to meet the avoid test even before there is a consideration of the quality of the wetland. To address the requirement of Act 147 that compensatory mitigation be involved in the decisions for those projects that would impact wetlands with "negligible functional values" the proposed rules set forth those situations that would NOT be considered a wetland of negligible functional values. The department proposes changes to NR 103 that keep the concept as intended in the original proposal taken to hearings, but avoids the confusion and misinterpretation involved with having a new term of "priority wetland."

“Ephemeral ponds in wooded setting” has been added to the list based on comments. “Floodplain forest” has been removed since the concept of floodplain is already included and the list already includes hardwood swamps.

5. 103.07(2m): Including calcareous fen is confusing since it is already in the list ASNRI under 103.04. *Change made.*
6. 103.08(1): How can “other interested parties” be involved in the pre-meeting?
Suggest the Department maintain regional lists of parties to invite to such meetings. *If a project proponent requests a meeting with the Department, other interested parties may attend open meetings. At its discretion the Department may contact and meet with other interested parties that are potentially affected by a proposed project.*
7. 103.08(1): The meetings should be required and not just at the request of an applicant. *The Department cannot require a project proponent to meet with us to discuss a proposed project.*
8. 103.08(1): Concern with adding the scope of the alternatives analysis to this section. If this stays in, suggests adding “at its discretion” the Department may limit the scope. *The word “required” was deleted for clarification.*
9. 103.08(1k): Need to clarify the timing expected for submission of plans for mitigation projects as part of what constitutes a complete application. Concern that the language will not limit the number of times the Department requests additional information.
The expedited process should pertain to all wetland approvals.
This subsection 1k has been removed in the final rule draft. The Department plans to promulgate one code that has all the information on timelines for permitting. The expedited process for certain permits as called for in Act 147 will be incorporated in that code. The information requirements for complete applications are listed in NR 299.03, Adm. Code. NR 299 requires the Department to review applications for completeness within 30 days of receipt of an application and to notify applicants of additional information requirements that are reasonably necessary to review the application.
10. 103.08(3b): Why was the “avoid or minimize” language added? Suggests that this should read “avoid and minimize”.
Avoid and minimize is called for by Act 147. Change made from “or” to “and”.

11. 103.08(4): The section is confusing. Legislative Council suggests starting with sub. (e) and then referring to the other sections as exceptions to this.

This entire section was revised to be clearer based on this comment from Legislative Council.

12. 103.08(4): Suggests that the proposed revision to NR 103 is a reversal of the burden of proof away from applicant and onto the Department. Suggest adding to each subsection phrasing to the effect of needing "clear and convincing evidence" from the applicant.

Revised section is clear that burden of proof is with the project proponent. No change in burden of proof was ever intended.

13. 103.08(4): Does not understand reference to "sub (3)".

This is a subsection of the current NR 103.

14. 103.08(4): There is no definition of "other significant adverse environmental consequences."

This language is not specifically defined but has been in NR 103 since 1991. The language applies to certain extraordinary circumstances which may allow projects to occur which result in significant adverse impacts to wetland functional values when other significant environmental impacts would result if the wetlands were not impacted, (e.g., protecting human health by impacting a wetland to clean-up hazardous materials).

15. 103.08(4): The mitigation language needs to recognize that compensation will create a benefit that exceeds the loss. Any filling of a wetland is adverse impact, so current rules will not allow that impact.

The current rules do allow impacts to wetlands (including filling) after a finding is made that there will be no significant adverse impact to wetland functions and values. The change in the rules is intended to assure that the sequencing process (avoid, minimize, and replace) is incorporated into the existing rule. The proposed rule allows for a consideration of the functions and values of a proposed mitigation project and for weighing of the benefits against the proposed lost wetland values and functions.

16. 103.08(4): The "holistic" process called for in subs (b) and (c) appear to be geared toward impacts to marginal, seriously degraded wetlands. This approach should be applied to all wetland permits.

Act 147 calls for a measured approach for involving compensatory mitigation in some cases but not in all cases.

17. 103.08(4)(a): Be explicit that mitigation cannot be a factor in ASNRI cases.

The section has been revised to be explicit about ASNRI and compensatory mitigation (see 103.08(4)(b)).

18. 103.08(4)(b): Where is "wetland dependent" defined?

This is defined in NR 103.07.

19. 103.08(4)(c): If the one acre criterion is used, then DNR will require a delineation report before it can decide what review path to follow. This will add time and cost to the process.

A delineation of the wetland is already a part of the permit application. In most cases we expect it will be clear whether the wetland is greater or less than an acre. In borderline cases the delineation may require closer scrutiny.

20. 103.08(4)(c): How will the one acre be determined in cases where a project may impact a number of wetlands that are each less than 1 acre in size?

Clarified in 103.08(4)(c)(3) as revised. The revision states that "all wetlands that may be affected by an activity are less than one acre in size..." For the permit to be reviewed under the criteria in 103.08(4)(c) each affected wetland must be less than an acre in size. A cumulative addition of affected wetlands is not intended in this section. However cumulative impacts are considered in the review of impacts to wetland functions and values.

21. 103.08(4)(d): Why special treatment for cranberry operations? Cranberry projects should add the consideration of mitigation.

Act 147 which authorized the department to write rules allowing the consideration of mitigation for wetland projects does not specifically address cranberry operations. No changes are proposed.

22. 103.08(4)(e) The process seems to be different for "small" and "large" projects. The process should be the same for larger projects and allow consideration of all factors at the same time.

Act 147 and the proposed rule focus on consideration of all factors (including mitigation) for those cases that would result in minor impacts (to less than 1/10 acre) or impacts to wetlands of negligible functional values. Therefore the rules do not differentiate on the size or cost of the activity involved, but on the resources to be affected.

23. 103.08(4)(f): To prevent changes to the draft "Guidelines" inconsistent with the rules, add a requirement that the guidelines comply with Act 147, NR 350, NR 1.95, and NR 103. Suggests referring specifically to the September 1999 Guidelines document. *The September 1999 "Guidelines for Wetland Compensatory Mitigation in Wisconsin" is a draft document. The advisory committee on compensatory mitigation worked on this document and went as far as possible, recognizing that state legislation and associated rules would be required to finalize. It remains draft until this process is completed and the document can be revised accordingly. We anticipate finalizing the guidelines based on the adopted version of NR 350.*

24. Notes: Suggests adding a note referencing the chart that was used during the hearings to improve understanding of the process.

The chart referred to was used for illustrative purposes during presentations made during the hearings and would not be appropriate for the code itself. Revisions to the

code, especially to 103.08(4), should make it easier to understand the process. The chart will be revised and available for training and outreach materials from the department.

NR 350 Comments

1. 350.01: Suggests adding the statement from Act 147, that the rules “do not entitle an applicant to a permit or other approval in exchange for conducting a mitigation project.”

This is in the code at 350.13(4).

2. 350.02: Why exempt DOT?

DOT projects are reviewed in accordance with a liaison process set forth by s. 30.12 (4) of the statutes. As far as compensatory mitigation goes, the department and DOT have a long-standing process and guidelines in place. NR 350 and the DOT process are comparable.

3. 350.02: There needs to be a statement about retroactivity for banks and sites already conducted under proper authority prior to these rules.

Change made. NR 350.04 also provides grandfathering for banks established prior to the rule.

4. 350.03(5): The term “GMU” is now going to term Basin. The CSA is too large. Unclear if the CSA is one of the criteria or all of them. The radius should be 30 miles and the county criterion is meaningless. Change CSA to be as close to area of loss as possible and within the GMU.

Due to confusion for many reviewers, the term “compensation search area” has been eliminated. As such, there is no need to define GMU. See revisions to 350.04 for a simplification of the search area concept.

5. 350.03: performance standards seems to be the same as objectives.

The definition for “objectives” was deleted and incorporated into a new definition for “performance standards”.

6. 350.03(11): Suggests a new definition for “debit” following a national mitigation study: “Debit means the unit of wetland value (in acres) that is withdrawn from the wetland mitigation bank upon approval of a compensation transaction...”

Change made as suggested.

7. 350.03(13): Suggests that enhancement be defined as improving one or more functional values while not affecting other values. Suggest the phrase “restore one or more natural wetland functions.”

The concept of discouraging impacts to other functional values is included in the revised language on credit for enhancement in 350.07(4). It states, “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.”

8. 350.03(24): Questions use of ½ mile as definition of on-site. The decision of what is “feasible” on-site should be case-by-case.

The ½ mile criteria is provided as a simple way to define a reasonable search area for on-site opportunities. This builds in the concept of doing mitigation as near as possible to the site of impact or as stated in other mitigation programs within the same watershed or sub-watershed. The department wants to promote practical and ecologically valuable on-site projects, but recognizes that such may not always be available near the wetland impacted.

9. 350.04: This section must be clear as to who does what in the process.
Section revised for clarity.

10. 350.04: Questioning why NR 350 lacks the concept of in-kind and out-of-kind?
By this rule, the department is promoting quality mitigation projects that fit the landscape and seek to restore historic conditions. Section 350.05 (2) includes the concept of in-kind, without pushing for an absolute requirement of in-kind replacement.

11. 350.04(1): Add that the requirement is an evaluation of “feasibility” of on-site and provide guidance as to what the evaluation must include. It appears that the practicability test for on-site projects is an additional review step.
The intent is to maintain flexibility in the level of review of on-site project alternatives.

12. 350.04(2): The focus should be on on-site, keeping functions and values near the loss.
The intent is to promote quality mitigation projects, with the greatest ecological potential. This section contains a preference for on-site without pushing for an absolute requirement for on-site projects.

13. 350.04(4): There should be incentives such as lower ratios for mitigation in the same watershed as loss so flood control values can be addressed.
The flood storage function of wetlands varies depending on the wetland type and location. We believe that thorough project planning and evaluation will adequately address the potential for beneficial impacts to flood storage. The site conditions, wetland type, and degree of impact will best determine the need or desire to mitigate within a watershed. The code does not offer specific incentives to do such, but it is expected that weighing functions and values lost and replaced for an application will necessarily involve flood storage issues in those watersheds where this is most important. In addition, mitigation should occur on-site or off-site as near as practicable to the site of wetland impact.

14. 350.04(4): Rapidly urbanizing areas should be treated differently such that banking must be within the search area and not allow use of pre-existing banks if the loss is in a county or basin that has lost a large percentage of wetlands. The choices of anywhere in the GMU or the mileage or anywhere in a county is counter to a requirement that loss be compensated as near as possible to the loss.

Revised language in this section requires that mitigation occur as near as possible to the loss. However, the code provides some flexibility in siting compensation projects, since not all urbanizing areas have appropriate locations for compensation sites.

15. 350.04(4): Has a problem with allowing loss in the ceded territories but allowing mitigation outside the ceded territories

In accordance with the final judgment in Lac Courte Oreilles Indians v. State of Wisconsin, 775 F.Supp. 321 (W.D. Wis. 1991), the department currently coordinates its review on projects that may reasonably be expected to directly affect the abundance or habitat of any plant in the ceded territory. As such, the concerns over location of compensatory mitigation may be part of that coordination effort.

16. 350.04(4): This violates the requirements of Act 147 relative to comparability of lost wetland to that mitigated.

NR 350 as revised by comments includes preferences and requirements for compensation as near as possible to the loss and with a wetland of similar plant community type. These criteria are used as surrogates for actual replacement of exactly what was lost. The assumption is that replacing a similar plant community at a site near the loss will replicate functions. However, the code recognizes the difficulty of always being able to do this. Also, it should be noted that NR 103 requires an assessment of functional values lost and those provided by compensation. The list from Act 147 of items of "comparability" may not be clearly stated verbatim in the proposed codes, but the concepts are included.

17. 350.05(1): Suggests deleting reference to restoration as preferred technique. The technique should be the best for that site.

Restoration is referenced as the preferred technique for compensatory mitigation because it is the least cost method with the highest rate of success. NR 350 promotes compensating on good sites with projects that fit the landscape and have a high probability of success.

18. 350.05(1): Suggests adding that enhancement is the second preference and creation is least preferable.

Although restoration is a preferred alternative, there is no sequence for choosing the compensation technique, i.e., restoration, enhancement and creation. Creation is generally not preferred because of the lower probability of success, although under certain site conditions, it may be a viable compensation technique.

19. 350.05(2): Suggests using "in-kind plant community" rather than "ecologically similar". Suggests adding that the compensation should be similar type "and functional values." Questions preference for similar community when the original vegetation type may be preferable ecologically.

Revision for clarity has been made to refer to "similar plant community type." The assumption is being made here that a similar plant community will likely result in similar functions and values. We believe it is not feasible in all cases to try to require exact replacement of functional values. We do not believe it is feasible to require a

determination of the original vegetation type and restoration to that type. The rule provides flexibility for setting a goal of restoration to original vegetation type where practical.

20. 350.04(4): The reference to passive management is too vague. Management connotes activity. This needs to be better defined.

Revised to refer to a preference for avoiding projects with structures that require active management and maintenance.

21. 350.05(5): It is not always possible to include adequate adjacent vegetated uplands, so the code should give flexibility. There needs to be more specifics on what is required for "upland buffers" with specific methodologies for calculating. If buffers are required then full acre-for-acre credit should be provided. It does not appear that credit is given for "buffers."

Revised 350.05(5) to clarify that the Department determines whether the adjacent upland buffer is adequate to filter run-off entering the wetland.

Revised 350.07 to provide credit at a 1:10 ratio (1 acre credit for every 10 acres of buffer) for a minimum runoff filtration buffer while maintaining 1:4 credit ratio (1 acre of credit for every 4 acres restored) for "adjacent upland restoration."

The concept proposed is that adequate filtration of runoff into the wetland project is an essential characteristic of a feasible project site, and therefore a minimum requirement for all projects. Because of this credit is given at a minimal ratio of 1:10, in response to the concerns that credit should be provided, but only if the Department determines that the buffer is adequate to provide this function. The requirement in this section only refers to the buffer function of filtration of runoff. However, restoration of adjacent uplands that provides more than the minimal requirement of runoff filtration is addressed in section 350.07(6), which allows credit where additional ecological functions are provided. One acre of credit is allowed for every 4 acres of adjacent upland restored. Full acre to acre credit is not given because the project is intended to compensate for wetland loss, yet some credit is given in recognition of the increase in the overall ecological functions provided by the project when adjacent uplands are restored. The intent of the two different credit ratios is to provide an incentive for the restoration of an upland native plant community. The Guidelines, when finalized, will provide more detail on upland restorations, but that amount of detail is not considered appropriate for administrative code. The Guidelines will also provide more detail on the requirements for a sufficient filtration buffer. The intent is to provide flexibility in determining the adequacy of a water filtration buffer, based on site-specific characteristics.

22. 350.06: This section needs to be clear as to the by whom, when and where such ratios will be applied. Replacement ratios should follow the guidelines used by DOT in its agreement with the federal agencies. Has the Department looked at ratios in other states? Ratios should be allowed below or at 1:1 as is allowed by federal agencies now. Ratio of 1.5:1 is too low because replacement of certain wetland types is not possible. Ratios used by DOT are too low. Ratios are too low to be disincentive to filling priority wetlands—consider 10:1. Ratios are unfair for large projects and will prove too costly if they are at or above 1:1.

This section on compensation ratios has been revised for clarity. Rather than have a complex system of ratios as provided for in the DOT guidelines or in other states, the department proposed a simple approach. The use of a ratio 1.5:1 is a compromise, the figure has basis in other state programs, and is a simple number for all to understand. The department will use the NR 103 decision process to prevent the loss of high quality wetlands and does not propose to have compensatory mitigation and associated ratios drive decisions. The department also maintains that ratios should not be the subject of disagreement and challenge to decisions that can slow down the process.

23. 350.06(1): The term “currency for compensatory mitigation is acres...” is confusing and should be revised to replace the term “currency” with “credit units” and to allow the units to go to 0.01 acres. Functional values must also be considered and not just acres.

This section has been revised based on comments received. The concept of wetland functional values is built into the review of compensation site plans. Rather than pretend to have a program that calls for wetland-by-wetland replacement in-kind and by function, the proposed program promotes good site planning for compensation sites. Functional values are considered during the NR 103 review process. The goal at a compensation site is to have a project that is the best suited for the site. On-site efforts can also take into account functional values being list in the immediate vicinity.

24. 350.06(3)(b): The code reference is in error—should be reference to 103.07(2m).
Change made.

25. 350.07 (4): It is not clear that we are referring to conversion of types. The allowance for an applicant to demonstrate value in conversion is standardless. There needs to be guidance for staff on how to credit enhancement work. No standards are provided for such decisions. If the project involves converting “farmed wetland” the code should clearly state that this gets 1:1.

The term “conversion” has been added for clarity. It is anticipated that guidance and training for staff and consultants can go a long way to a better understanding of how this section will be implemented. The code cannot be more specific due to the great variability in real site conditions that require a case-by-case approach to crediting. While it likely that most sites that are now deemed “farmed wetland” by federal farm programs would be the types that would receive acre for acre credit as restoration or enhancements, the case specifics must be weighed to allow such a determination by the department.

26. 350.07(5): The notion of credit ratios is confusing when compared with replacement ratio. Suggest removing the term credit ratio and just explaining in words.
The term “credit ratio” has been removed to avoid confusion. This section has been revised accordingly.

27. 350.07(5): More credit for creation should be provided since there have been successful creations. Suggests that the applicant should be allowed to prove success based on track record or if important functional values will be provided. Creation

must be for functional values similar to those being lost in a GMU. There should not be allowance for greater than 0.5:1.

Credit is assigned based upon a case-by-case determination. Flexibility for creation credits is based upon the Department's determination of the likelihood that the project will result in a successful wetland.

28. 350.07(7): Should give credit for some stormwater features such as biofilters. The term "primarily" allows some stormwater projects to be used as mitigation. *Some compensation wetlands can provide secondary water quality or stormwater functions, however, no credit would be given for projects that are designed primarily to fulfill these functions. No change is proposed.*

29. 350.08(2); Add requirement for information for construction methods proposed and technical design criteria.

This is covered by the requirement to "...outline the construction plan and techniques."

30. 350.08(3): add a reference to the "Guidelines" here.

Information suggested as baseline information in the September 1999 draft guidelines is included in the text of the proposed code.

31. 350.09: This section refers often to the "compensation site plan". Whenever mentioned it should be clear that this is the plan developed by the proponent and approved by Department pursuant to s. 350.08.

This section has been revised for clarity.

32. 350.09(2)(b): clarify that plan referred to is the compensation site plan.

Change made.

33. 350.09(2) (e): There should be requirements for DNR inspection before the project is complete, so corrective actions can be noted and taken care of while equipment is still on site.

Change made by adding a subsection to require an inspection prior to end of the construction.

34. 350.09(3) be clear that performance standards should be scientifically based and easily measurable.

Change made to the definition of performance standard in 350.03.

35. 350.09(3): There should be flexibility such that if performance standards are met early, future monitoring is not needed. Performance standards should target historic conditions and not recent conditions. The performance standards as written reflect a bias toward more wetter end wetland types over dryer-end. The minimum invasive criteria is too weak, and the performance standards should allow for a higher quality target community.

The goal is high quality wetlands. The minimum performance standards in code are just that—minimums. We are not clear as to why the reader feels that the minimum

performance standards to achieve a certain hydrologic regime is seen as promoting wetter wetlands. The target hydrology could be a saturated soil condition.

36. 350.09(3)(d): Monitoring for banks should be a minimum of 10 years. *Monitoring is required for 5 years, however, the Department has flexibility to extend this monitoring period if necessary to assure that the project will meet performance measures.*

37. 350.09(3)(f): In addition to the monitoring report, there should be a pre-construction baseline report to be used as measuring points. *This is called for in the compensation site plan requirements under 350.08 and would be the basis for setting performance standards.*

38. 350.10 (1): Net worth should be an appropriate method of financial assurance. *The requirements for financial assurances do not preclude use of net worth. Our experience with other programs is that the documentation required for such a showing may not be appropriate for the scope of projects anticipated under this code, however this will be addressed on case-by-case basis.*

39. 350.10 (1): The code as written is a disincentive to land trusts that may be land rich and cash poor. The rules should give allowance for entities with proven track records for preservation and conservation missions. *The code would allow the department to accept mortgages as a form of escrow.*

40. 350.10(3): It seems that a third party obligor (not "obligee" as is in the code now) could provide the department 90 days notice that it was canceling, but would still be obligated if the proponent were to fail to get a replacement. Is there authority to do this?

Change made to make the term "obligor." The language in this section was modeled after financial assurance requirements used in the solid waste and Chapter 30 programs. The language proposed is routinely followed in those programs.

41. 350.10(4): The "may periodically re-evaluate" language should be changed to "shall upon request of the sponsor". The impacting project may be stopped and as such there should be an out for wetland mitigation financial assurances. *The existing language allows the department to re-evaluate financial assurance when warranted, including the case where a permitted project is suspended.*

42. 350.11: There should not be requirement for easement since access will be provided to the proper authorities. Should allow deed restrictions or covenants instead of just easements. *Act 147 specifically refers to usage of conservation easements.*

43. 350.11: In addition to easements, transfer to conservation organizations should be allowed.

There is nothing in the rules that precludes transfer of property to a conservation organization. The Department may also opt to transfer a conservation easement to an appropriate conservation organization.

44. 350.11: should include surety language to assure that bank sponsor conducts necessary repairs and maintenance.

This is addressed in requirements of 350.10.

45. 350.11(2): need to have release language if the wetland ceases to be wetland and the bank sponsor did not cause such.

The code references the language from Act 147 on this subject.

46. 350.12 (1): there should be a step whereby a preliminary assessment is made based on less information than a full-blown draft compensation site plan

The section has been revised to include a step for a prospectus before the draft bank document.

47. 350.12(3): Some news releases are never published by the papers. Must assure public involvement and this may not be best way.

In addition to public notices, the department plans to provide information on our web-site wetlands page.

48. 350.13: Code needs to define a service area for banks that is larger than the compensation search area as defined.

The concept used in NR 350 is a search area based on the location of the wetland impacted. In effect the bank's service area would be the same distance See the revised s. 350.04.

49. 350.13(1): If bank site fails, this should be grounds for removal from the registry. We agree. This is in the code at 350.14(4).

50. 350.13(5): There should be special allowance for creation projects in the red clay plain area of northwest Wisconsin.

No change proposed. These are statewide rules.

51. 350.13 (7): Should only allow release of up to 80% at year 5. The limits on credit release after year 2 are artificial and may limit viability of some banking ventures.

Suggest revising the credit release schedule in accordance with federal guidance.

Suggest requiring construction to begin within one year of sale of first credit.

The rule as written recognizes the need to allow some credit release for banks, but balances the needs of the banker against the real risk of site failure after apparent initial success. The credit release schedule in this section is taken directly from the draft "Guidelines" document that was developed with the advisory committee and the federal agencies, including the St. Paul District of the Army Corps of Engineers.

52. 350.13(8): Need to explain what happens when bank is full or used up, specifically who is responsible for maintenance.

NR 350.13(3) sets responsibilities for the bank sponsor. Also the compensation site plan will need to determine who is responsible for the long term maintenance and management of a site.

53. 350.14: Suggests that this should be modified to say that agents must give 5 day notice before visiting the site.

The proposed language is comparable to similar inspection language in other statutes and rules. Reasonable notice is required.

54. 350.14(1): Suggest adding "and 283" to the list of statutes under which enforcement can occur.

Change made.

I'm not sure that the committee can
split the issue of the MOU out from the guts
of the language that requires the mitigation to
occur as close as possible to the loss. → Therefore,
Senator Baumgart would like the whole objection to
be non-concurred ~~in~~ in.

Notion ~~Aspiration~~

concur

not concur

See Object (5-3)

Assembly object 5-3

Robson	Aye	Aye
Grobschmidt	Aye	Aye
Hansen	Aye	Aye
Welch	no	no
Cowles	Aye	Aye
Grothman	no	no
Sevanti		
Bunbersae	no	no
Turner	Aye	Aye
Holla	Aye	Aye

Effective
Feb. / March

Concepts for the HOU:

a. Reinvesting some proceeds

- i. actual restoration
- ii. providing funds
- iii. cost-sharing

what % of reinvesting? = the % varies
depending on # of credits

Next meeting week of Dec. 10th