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**Joint Committee for
Review of
Administrative Rules**

**Report to the Legislature on
Clearinghouse Rule 00-164**

Produced pursuant to s. 227.19(6)(a), Stats.

Description of the Rule

Clearinghouse Rule 00-164 relates to wetland compensatory mitigation. The rule was written by the Department of Natural Resources under the authority provided in ss. 23.321, 281.15 and 227.11(2)(a), Stats. The rule implements 1999 Wisconsin Act 147, which required the department to write rules for both the process and the requirements for compensatory mitigation projects and mitigation banking.

The proposed rule amends chapter NR 103 of the Wisconsin Administrative Code to address the process for consideration of wetland compensatory mitigation and creates a new chapter of the code, NR 350, to establish the requirements for mitigation projects and mitigation banking.

CR 00-164 was submitted to the Senate Committee on Environmental Resources on July 19, 2001 for standing committee review. The committee did not hold a public hearing but met in executive session on August 30, 2001. The committee voted unanimously to request modifications to the rule.

Simultaneously, the proposed rule was submitted to the Assembly Committee on Environment on July 19, 2001. A public hearing and executive session was held

on August 14, 2001. At the executive session the committee voted 7-0, with three members absent, to request modifications.

The Department of Natural Resources submitted a modified version of the proposed rule to both the Senate and Assembly committees on October 1, 2001.

The Senate committee conducted an executive session by polling on October 9, 2001 and unanimously objected to section NR 350.06(3) of the proposed rule.

On October 11, 2001, the Assembly committee met in executive session and voted 6-4 to object to section NR 350.04 of the proposed rule.

Because of the objections of the standing committees, CR 00-164 was referred to the Joint Committee for Review of Administrative Rules.

Action by the Joint Committee for Review of Administrative Rules

One of the statutory duties with which the Joint Committee for Review of Administrative Rules is charged is the review of partial or complete objections to clearinghouse rules by standing committees of the Assembly and Senate. Generally, the Joint Committee may take one of three executive actions in response to a standing committee objection:

- The Joint Committee may vote to concur in the objection of a standing committee. Should this occur, the clearinghouse rule, in whole or in part, will be suspended. The Joint Committee must then introduce bills into both houses of the Legislature to codify the objection.

- The Joint Committee may vote to nonconcur in the objection of a standing committee. In that event, the clearinghouse rule will go into effect as written by the agency.
- The Joint Committee may vote to request that the agency make modifications to the clearinghouse rule.

Regarding Clearinghouse Rule 00-164, the Joint Committee held a public hearing and executive session on November 14, 2001 at which the objections of the Senate and Assembly committees to CR 00-164 were discussed.

The Joint Committee voted 7-3 to not concur in the objection of the Assembly Committee on Environment to section NR 350.04 of the proposed rule. Therefore, this portion of the rule may go into effect as written by the department.

However, the Joint Committee also voted 7-3 to concur in the objection of the Senate Committee on Environmental Resources, objecting to section NR 350.06(3) of the proposed rule.

On December 12, 2001, the Joint Committee voted to introduce 2001 LRB 4367 and 2001 LRB 4298 (introduced here in bill form) to uphold the Legislature's objection to CR 00-164. The Joint Committee vote to introduce these bills was 8-2.

Arguments Presented For and Against the Proposed Rule

The portion of the rule to which the Joint Committee objected deals with the amount of compensatory mitigation that is required for a particular development project.

The proposed rule would establish a general ratio between compensatory mitigation and destroyed wetlands of 1.5 to 1. That is, for every 1 acre of impacted wetland a project proponent would have to compensate with 1.5 acres of new or restored wetland. Section NR 350.06 (1).

The portion of the rule to which the Joint Committee objected would provide an exception to this general requirement. The objected to portion of the rule would give the department authority to approve a ratio of 1 to 1 for development projects impacting more than 20 acres.

The Joint Committee upheld the objection of the Senate committee to this portion of CR 00-164 after hearing the following arguments at its public hearing.

Arguments in Favor of the Objection

■ *The proposed rule does not reflect legislative intent.* The legislation on which this rule is based made no distinction between small and large wetland projects. It is therefore inappropriate for the department to make this distinction on its own.

■ *The proposed rule is arbitrary.* The rule applies a standard to projects that impact more than 20 acres of wetlands that is less stringent than the standard for smaller projects even though larger projects have environmental impacts that are equal to or exceed the impacts of smaller projects.

Arguments Against Concurrence in the Objection

■ *Requiring a 1.5 to 1 ratio for large projects would be excessively costly.* It would be very costly to provide 1.5 acres of mitigated wetland for every 1 acre of impacted wetland on projects exceeding 20 acres. The rule provision allows the

department to use a 1 to 1 ratio only if the project proponent can prove a record of past successes with other wetland mitigation projects.

Statutory Basis for the Joint Committee's Objection

The Joint Committee objected to a portion of Clearinghouse Rule 00-164 pursuant to s. 227.19(5)(d), Stats, and for the reasons enumerated in ss. 227.19(4)(d)3 and 6, Stats. That is, on the grounds that the rule provision does not comply with legislative intent and that the provision is arbitrary and capricious.

The proposed rule provision does not comply with legislative intent because there is no evidence that the Legislature intended to hold mitigation projects on parcels of land above a certain size to a different standard than projects on smaller pieces of land. The act on which this rule is based does not differentiate between projects of different sizes and the rule should not either.

In addition, the proposed rule provision is arbitrary and capricious because it treats development projects requiring mitigation differently depending on the size of the project. The environmental harm caused by large development projects is equal too or exceeds the harm caused by smaller development projects yet the rule holds large projects to a less stringent standard than smaller projects.