

pt 2

**Joint Committee for Review of Administrative Rules
November 14, 2001**

Comments of William H. Horns, Department of Natural Resources

My name is William Horns. I am the Great Lakes Fisheries Specialist for the Department of Natural Resources. Also here today is my supervisor, Stephen Hewett, who is Section Chief for the Policy and Operations Section of the Bureau of Fisheries Management and Habitat Protection.

I am speaking in favor of a 60 day extension of Emergency Rule NR20.20(73)(j)1. and 2. and NR 25.06(2)(b)1. This rule reduces the daily sport fishing bag limit for Green Bay from 25 to 10 and reduces the total annual commercial harvest from 200,000 pounds to 20,000 pounds.

I have worked closely with this issue as Team Leader for our Lake Michigan Fisheries Team, and as the Department's liaison with the Lake Michigan Commercial Fishing Board, the Great Lakes Study Committee of the Conservation Congress, and the Lake Michigan Fisheries Forum.

This emergency rule took effect on July 1 and was designed to protect the rapidly declining yellow perch population of Green Bay. In October the Natural Resources Board adopted an identical permanent rule, NRB Order FH-12-01, which will take effect early in 2002, following legislative review. This extension of the emergency order is needed to sustain present fishing rules until the permanent order takes effect. A second extension may also be needed. At the request of Representative John Gard the permanent order includes a sunset clause under which Green Bay fishing regulations will return to those in effect prior to this round of rule-making on June 30, 2004.

The fishing regulations established by these rules are needed to protect the rapidly declining yellow perch population of Green Bay and to maximize the likelihood of an early recovery. By our estimates, the adult yellow perch population has declined over 90% in the past decade. Sport fishing catches have declined similarly. The figure summarizes our annual estimates of yellow perch abundance in Green Bay. That figure is based on annual trawl surveys at 78 separate stations distributed throughout Green Bay, annual creel surveys, annual commercial fishing reports, and vital statistics (age, sex, size) taken from individual fish harvested by sport and commercial fishers.

The decline in yellow perch reflects a decade of poor natural reproduction. The only moderately strong year for natural reproduction was 1998, and yellow perch spawned in that single year now make up over 90% of the sport and commercial harvest. Green Bay is a rapidly changing ecosystem, and we do not know the cause of the poor reproduction. A number of possible factors have been mentioned, including weather, declining water levels, zebra mussels, cormorants, white perch, and predators stocked by the Department. We simply cannot at this time say which, if any, of these is the cause of the decline.

We believe that the only prudent policy is to protect the remaining yellow perch in order to give them the best chance of reproducing and restoring a healthy yellow perch population to Green Bay. With the new harvest limits in effect, the population may continue to decline slightly, but should sustain itself at approximately present levels for several more years. Without these protective rules, the yellow perch population could continue to decline rapidly. The rules we have adopted provide significant protection to the yellow perch population while also allowing some continuing sport and commercial fishing. In this way we believe we have struck the appropriate balance between the needs of individuals and businesses affiliated with sport and commercial fishing and the needs of the yellow perch population.

~~THIS 9/20/01 VERSION SHOWS CHANGES TO THE VERSION
APPROVED BY NRB AT 6/27/01 MEETING~~

ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD
AMENDING, REPEALING AND RECREATING AND CREATING RULES

The State of Wisconsin Natural Resources Board proposes an order to amend NR 103.03(1)(g), 103.04(4) and (11), 103.05(3) and 103.08(1) and (3)(b); to repeal and recreate NR 103.08(4); and to create NR 103.07(1m), ~~and (4) and (5)~~, 103.08(1k), ~~103.08(3)(g)~~ and ch. NR 350 relating to wetland compensatory mitigation.

FH-47-00

Summary Prepared by Department of Natural Resources

Statutory authority: ss. ~~281.37 23-324~~, 281.15 and 227.11(2)(a), Stats.
Statutes interpreted: s. ~~281.37 23-324~~, Stats.

Wisconsin Act 147 of 1999 was signed into law on May 10, 2000, and includes two main components—enforcement authority and authority to consider wetland compensatory mitigation in permitting/approval decisions. The law granted the Department authority to enforce conditions of its water quality certification decisions, and this measure went into effect upon signing. For compensatory mitigation, the law granted general authority for the Department to consider mitigation projects in its decisions, and called for the Department to write rules for both the process and the specific requirements for compensatory mitigation projects and mitigation banking.

The proposed changes to NR 103 address the process for consideration of wetland compensatory mitigation. To make the new process clear, the department proposes a complete re-write of the decision process section of the code under NR 103.08(4). The revision would set forth a different review process depending on the type of activity or the characteristic of the wetland impact. When compensatory mitigation enters into a decision, the specifics for what is required for compensation shall be found in NR 350.

A new code, NR 350, is proposed to establish requirements for mitigation projects and mitigation banking in accordance with the requirements of the law including: a sequence of compensatory mitigation that requires practicable on-site compensation before allowing off-site compensation and/or use of banks; ratios for wetland replacement based on the type of wetland, proximity of the compensation site to the area of impact, and the type of replacement project; requirements for planning and design of compensation sites; requirements for short and long-term monitoring and management of compensation sites; financial assurances that the sites will be constructed and maintained as approved; requirements for long-term protection of sites as wetlands using easements or deed restrictions; a process for mitigation banking and the responsibilities of bank sponsors and the department; and requirements for public notification on mitigation banks and bank proposals.

SECTION 1. NR 103.03(1)(g) is amended to read:

NR 103.03(1)(g) Recreational, cultural, educational, scientific and natural aesthetic scenic beauty values and uses.

SECTION 2. NR 103.04(4) and (11) are is amended to read:

NR 103.04(4) ~~Environmentally sensitive areas and environmental corridors identified in area-wide water quality management plans,~~ Unique and significant wetlands identified in special area management plans (SAMP), special wetland inventory studies (SWIS), advanced delineation and identification studies (ADID) and areas designated by the United States environmental protection agency under s. 404(c), 33 USC 1344 (c);

(11) ~~Wild rice waters as listed in s. NR 19.09;~~ and

SECTION 3. NR 103.05(3) is amended to read:

NR 103.05(3) These procedures are promulgated under ss. 23.321, 281.11, 281.12(1), and 281.15, 281.37, and 283.001, Stats.

SECTION 4. NR 103.07(1m), (4) and (5) are created to read:

NR 103.07(1m) "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 wetland mitigation bank.

(4) "Wetland mitigation 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.

(5) "Working day" means any day except Saturday, Sunday and holidays designated under s. 230.35 (4)(a), Stats.

SECTION 5. NR 103.08(1) is amended to read:

NR 103.08(1) The department shall review all proposed activities subject to this chapter and shall determine whether the project proponent has shown, based on the factors in sub. (3), if the activities are in conformance with the provisions of this chapter. The department shall, upon request, meet with a project proponent and other interested persons to make a preliminary analysis assessment of the scope for an analysis of alternatives and the potential for compliance with this chapter.

SECTION 6. NR 103.08(1k) is created to read:

NR 103.08(1k) (a) For the purposes of reviewing an application under this chapter, the department may require submission of information consistent with s. NR 299.03(1).

(b) The department shall review the application for completeness within 30 days of receipt of the application. The department shall notify the applicant of any additional information

reasonably necessary to review the application. An application may not be considered complete until the requirements of the Wisconsin environmental policy act, s. 1.11, Stats., have been met.

(c) The applicant shall submit, at any time during the review process, additional information which the department finds to be reasonably necessary for review of the application.

(d) The department shall protect as confidential any information, other than effluent data, submitted under this chapter which meets the requirements of s. 283.55(2), Stats., and under s. NR 2.19.

(e) For all activities that meet the criteria listed in sub. (4)(c) 3. and that do not require authorization under ch. 30, Stats., the department shall make a final decision on an application within 60 working days of receipt of a complete application from the project proponent.

(f) The 60 working day limit does not apply if the department determines that weather conditions prevent the department from making a decision in that time frame.

SECTION 76. NR 103.08(3)(b) is amended to read:

NR 103.08(3)(b) Practicable alternatives to the proposal which will not adversely impact avoid and minimize adverse impacts to wetlands and will not result in other significant adverse environmental consequences;

SECTION ~~86~~m. NR 103.08(3) (g) is created to read:

NR 103.08(3)(g) Any potential adverse impact to wetlands in environmentally sensitive areas and environmental corridors identified in areawide water quality management plans.

SECTION ~~97~~. NR 103.08(4) is repealed and recreated to read:

NR 103.08(4)(a) Except as provided in par. (b), (c) or (d), the department shall make a finding that the requirements of this chapter are satisfied if it determines that the project proponent has shown all of the following:

1. No practicable alternative exists which would avoid adverse impacts to wetlands.

2. If subd. 1. is met, all practicable measures to minimize adverse impacts to the functional values of the affected wetlands have been taken.

3. If subds. 1. and 2. are met, utilizing the factors in sub. (3) (b) to (g) and considering potential wetland functional values provided by any mitigation project that is part of the subject application, 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.

(b) For all activities that will adversely affect a wetland in an area of special natural resource interest as listed in s. NR 103.04 or that will adversely affect an area of special natural resource interest, the department may not consider potential functional values provided by any mitigation project that is part of the subject application.

(c) For all activities which meet one or more of subd. 1., 2. or 3., the department, utilizing the factors in sub. (3) and considering potential wetland functional values provided by any mitigation 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 108. 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 23.321~~ 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.

(65) "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.

(76) "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.

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

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

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

(110) "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.

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

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

(143) "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.

(164) "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.

(175) "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.

(186) "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.

(197) "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.

(2048) "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.

(2119) "On-site" means a mitigation project located within one-half mile of the impacted wetland.

(220) "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".

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

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

~~(23) "Region" means one of the 5 geographic areas established to decentralize the duties of the department.~~

(254) "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.

(265) "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) ~~(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) ~~either through purchase of mitigation bank credits or D~~ 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.

~~(5) Off-site mitigation shall be located as near as practicable to the location of the adversely affected wetland and within the same department region.~~

~~(6) 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, then mitigation may occur through P~~ 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.

(75) 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.

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

(h) ~~AA~~ 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, 11 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)~~ ~~23.321(2m)(b)~~ 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 or ~~deed restriction~~ 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)

REPORT TO LEGISLATURE

NR 103 and 350, Wis. Adm. Code
Wetland compensatory mitigation

Board Order No. FH-47-00
Clearinghouse Rule No. 00-164

Statement of Need

The wetland mitigation law, 1999 Wis. Act 147, authorized the Department to make rules to include consideration of wetland compensatory mitigation in the Department's decision process. The proposed rule includes a new chapter, NR 350, which sets state requirements for mitigation projects and banking. This rule will be the basis for new statewide guidelines for mitigation that will be the basis of the proposed memorandum of agreement with the U.S. Army Corps of Engineers. The goal is one set of standards for both the Department and federal agencies. Attachment 1 contains the proposed NR 103 decision process.

Modifications as a Result of Public Hearing

NR 103

1. Elimination of the term "priority wetland". As explained in the attached response to comments, this definition raised the most concerns from commenters. The concept as intended remains in the code, but the actual term has been eliminated to avoid confusion.
2. Environmental corridors were included. These areas were eliminated from the list of areas of special natural resource interest, but based on comments, we have added that adverse impacts to these areas must be factored into a decision.
3. The process section was revised. Section NR 103.08(4) was revised based on comments to be more understandable. The concepts remain as originally proposed.

NR 350

1. Mitigation sequence and compensation search area was revised. The process still involves a search on-site for mitigation before allowing off-site (which includes using a bank). We have simplified the search area for off-site mitigation by saying that the mitigation must occur as near as practicable to the location of wetland impact and within the same DNR region.
2. Credit for buffers. The rules require that all wetland mitigation projects have an adequate vegetated upland area surrounding the site, to protect the wetland from run-off. Based on comments, we have added some acreage credit for any vegetated upland adjacent to a mitigation project that provides this minimum water quality protection. As originally proposed, additional credit will be provided for ecological restoration work in the adjacent upland area.
3. Prospectus for bankers. We have added a process that allows for department review of an early prospectus before a potential banker would proceed with additional effort or expenditure at a site.
4. The Natural Resources Board approved a variance for the compensation ration for unavoidable losses of more than 20 acres of wetland.

Attachment 1: PROPOSED NR 103 DECISION PROCESS

<i>Standard NR 103 Review Process</i>		EXCEPTIONS		
	<i>Area of Special Natural Resource Interest (ASNRI)</i>	<i>Wetland impact 0.1 acre or less or activity is wetland dependent</i>	<i>Wetland <1 acre, not in the 100-yr floodplain and not a "Priority Wetland"</i>	<i>Cranberry Operation</i>
Practicable Alternatives Analysis	Avoid first, THEN MINIMIZE	Avoid and MINIMIZE	Avoid and MINIMIZE	Avoid and MINIMIZE
Functions and Values Assessment	Evaluate wetland functions and values <i>after</i> alternatives test is met. Applicant must show no significant adverse impacts.	Evaluate wetland functions and values <i>concurrently</i> with alternatives. Applicant must show no significant adverse impacts.	Evaluate wetland functions and values CONCURRENTLY WITH ALTERNATIVES. Applicant must show no significant adverse impacts.	Evaluate wetland functions and values <i>concurrently</i> with alternatives. Applicant must show no significant adverse impacts.
Compensatory Mitigation (see NR 350)	DNR MAY CONSIDER FUNCTIONS AND VALUES OF A COMPENSATION PROJECT VOLUNTARILY ADDED BY APPLICANT.	DNR MAY CONSIDER FUNCTIONS AND VALUES OF A COMPENSATION PROJECT VOLUNTARILY ADDED BY APPLICANT.	DNR MAY CONSIDER FUNCTIONS AND VALUES OF A COMPENSATION PROJECT VOLUNTARILY ADDED BY APPLICANT.	DNR will not consider compensation in its decision. May have Federal requirement for compensation.
Expedited Review	None, unless as part of expedited Ch 30 application.	None, unless as part of expedited Ch 30 application.	FINAL DECISION PER STATUTE WITHIN 60 WORKING DAYS OF RECEIPT OF COMPLETE APPLICATION.	None, unless as part of expedited Ch 30 application.
Other Comments	ASNRI LIST REVISED PER STATUTE TO EXCLUDE "ENVIRONMENTAL CORRIDORS"	0.1 acre minimum includes cumulative and secondary impacts	60 DAY LIMIT IS WEATHER DEPENDENT	Alternatives for expansions limited to existing or immediately adjacent property.

As in current NR 103
PROPOSED CHANGES

Appearances at the Public Hearings and Their Position

December 11, 2000 – Madison

In support:

Robert Regan, BT², Inc., 2740 Alice Circle, Stoughton, WI

In opposition:

Galen Smith, 218 DuRose Terrace, Madison, WI 53705

As interest may appear:

Chris Barden, 8025 Excelsior Drive, Madison, WI 53717

Mike Kakuska, 217 S. Hamilton St., Suite 403, Madison, WI 53703

Travis Olson, WI Coastal Management Program, DOA, P.O. Box 7868, Madison, WI 53707

Hilda McVoy, 1406 W. Skyline Drive, Madison, WI 53705

Kirk McVoy, 1406 W. Skyline Drive, Madison, WI 53705

Angela James, 3 S. Pinckney Street, P.O. Box 1784, Madison, WI 53701

Morgan Robertson, 2320 Winnebago Street, #2B, Madison, WI 53704

December 12, 2000 – Green Bay

In support:

Representative John Ainsworth, W6382 Waukechon Road, Shawano, WI 54166

Jim Johnson, 5072 Brown Road, Little Suamico, WI 54141

Floyd Van Camp, W1988 Twilight Terrace, Seymour, WI 54165

In opposition:

Robert E. Schmitz, Wolf River Watershed Alliance, 1736 Carroll Avenue, Green Bay, WI 54304

As interest may appear:

Thomas Hogan, 530 School House Road, Sobieski, WI 54171

Alden Moeller, N9154 Lawn Road, Seymour, WI 54165

Joseph H. Kieloikowski, 740 Bellevue, Green Bay, WI 54302

Patrick J. Farrell, 2859 Sunray Lane, Green Bay, WI 54313

Jan Tesch, STS Consultants, 1035 Kepler Drive, Green Bay, WI 54311

Matt Heyroth, Assistant Brown County Zoning Administrator [no address given]

David Harp, 2738 Oakwood Drive, Green Bay, WI 54304

Pete Van Airdale, Winnebago County Land & Water Conservation Dept., 625 E. County Road Y,
Oshkosh, WI 54901

Gary Knapton, Green Bay Field Office, U.S. Army Corps of Engineers, Suite 211, Old Fort Square,
211 N. Broadway, Green Bay, WI

Nick Sturzl, CQM, Inc., 2679 Continental Drive, Green Bay, WI 54311

Steven Grumann, 4135 Technology Parkway, Sheboygan, WI 53083

Kurt Rubsam, 4135 Technology Parkway, Sheboygan, WI 53083

James Havel, NES Ecological Services, 2825 S. Webster Avenue, P.O. Box 2100, Green Bay, WI

Bob Stollberg, 1434 S. Locust Street, Green Bay, WI 54304

Patrick Robinson, 925 Marquette Drive, UW-Extension, Kewaunee, WI 54216
Joel Diebl, Brown County Planning Commission, 100 N. Jefferson Street, Room 608, Green Bay, WI
Roger Roffers, W375 EE, DePere, WI 54115
Don Johnson, 100 W. Briar Lane, Green Bay, WI 54301
Jeremiah L. Farrell, 723 Sunset Beach Road, Suamico, WI 54173
Rebecca Katus, Clean Water Action Council of NE Wis., Inc., 1270 Main Street, Suite 120,
Green Bay, WI 54311
George & Lois Kozak, 1102 Ridge Lane, Appleton, WI 54914
Robert A. Calewarts, 2484 St. Pat's Drive, Green Bay, WI 54313
Robert G. Reeners, Federation of Fly Fishers, 4313 Hillcrest Drive, Oneida, WI 54155
Lilian & Donald R. Bouche, 2191 Oakwood Drive, Green Bay, WI 54304

December 12, 2000 - Wausau

In support:

Jim Pellitteri, Marathon Co. Director of Waste Management, 18500 East Hwy. 29, Ringle, WI
Gary Starzinski, 315 Main Street, Marathon, WI
Melvin Buetsch, 2799 CTH S, Marathon, WI 54448

In opposition - none

As interest may appear:

Robert C. Westphal, 808 Marsh Drive, Mosinee, WI 54455
Tom Normington, Maxim Technologies, Inc., 8001 10th Lane, Athens, WI 54411
Robert W. Worth, 4209 Ridge Court, Stevens Point, WI 54481
Evelyn Fisher, Becher-Hoppe Associates, P.O. Box 8000, Wausau, WI 54402
Robert Stimers, 400 Riverside Avenue East, Merrill, WI 54452
Monica D. Stimers, 400 Riverside Avenue East, Merrill, WI 54452
Amy Thorstenson, Maxim Technologies, 3005 Bob O Link Avenue, Wausau, WI 54401
David Erickson, City of Wausau, 407 Grant Street, Wausau, WI 54403
Tom Lochner, WI State Cranberry Growers Association, 181 2nd Street South, Wis. Rapids, WI
Bob Rybarczyk, 900 Grand Avenue, Schofield, WI 54476
Allen O'Leary, Northland Cranberries, Inc., P.O. Box 8020, Wis. Rapids, WI 54495

December 13, 2000 - Rhinelander

In support:

Chuck Wrbelis, 3208 N. Rifle Road, Rhinelander, WI 54501
Brian J. Shimkus, Shimkus Auto Body, Inc., 5890 Musky Bay Drive, Rhinelander, WI 54501
William L. Ludwig, P.O. Box 312, Eagle River, WI
Ron Sleight, 84 Wildwood Road, Manitowish Waters, WI 54545
Richard T. Sleight, 70 Wildwood Road, Manitowish Waters, WI

In opposition - none

As interest may appear:

Shane Spencer, 829 Lake Shore Drive, Rhinelander, WI 54501
Michael P. Meyers, 1030 W. Davenport Street, Rhinelander, WI 54501

December 14, 2000 – Spooner

In support:

Tim King, King Environmental & Planning, 1311 Duke Street, Rice Lake, WI 54868
James Palmer, 1890 Montanis Avenue, Rice Lake, WI 54868
Scott Kimmes, 1409 N. 76th Street, Superior, WI 54880

In opposition – none

As interest may appear:

John Donlin, 24520 Lind Road, Siren, WI 54872
Charles Johansen, 12905 W. County OO, Hayward, WI 54843

December 14, 2000 – Eau Claire

In support:

Pam Rasmussen, Xcel Energy, Inc., 1414 W. Hamilton Avenue, P.O. Box 8, Eau Claire, WI 54702
Christopher J. Bolt, Cedar Corporation, 604 Wilson Avenue, Menomonie, WI 54751
Mark Iverson, Cedar Corporation, 604 Wilson Avenue, Menomonie, WI 54751
Tim Ralston, 3237 Rolling Hills Drive, Eagan, MN 55121

In opposition – none

As interest may appear:

Bill Beskar, N7656 State Road 25, Menomonie, WI 54751
Ritchie Brown, Ho-Chunk Nation DNR, P.O. Box 726, Black River Falls, WI 54615
Michelle Schoolcraft, Ho-Chunk Nation Division of Natural Resources, P.O. Box 726, Black River Falls, WI 54615
Tom Wilson, Northern Thunder, 416 E. Court Street, Viroqua, WI 54665
Doug Brewer, 746 21st Street, Chetek, WI 54728

December 18, 2000 – Prairie du Chien

In support – none

In opposition – none

As interest may appear:

Blair E. Dillman, 800 N. Villa Louis Road, Prairie du Chien, WI 54821

December 19, 2000 – Waukesha

In support:

Gene Kramer, Superior Emerald Park Landfill, Inc., 31024 Timber Lane, Burlington, WI 53105
Ron Williams, W287 S2002 Highway DT, Waukesha, WI 53188
Keirston Peckham, Murn Environmental, Inc., 2707 E. Philhower Road, Beloit, WI 53511

Stevan Keith, Milwaukee County Dept. of Public Works, 2711 W. Wells Street, Room 215,
Milwaukee, WI 53208

William W. Carity, 12720 W. North Avenue, Brookfield, WI 53005

Eric Parker, Graef, Anhalt, Schloemer & Associates, 4821 Elm Island Circle, Waterford, WI 53185

Brian J. Karczewski, Graef, Anhalt, Schloemer & Associates, 567 N. 106th St., Wauwatosa, WI

Marc E. Marszalek, Weaver Boos & Gordon, Inc., 2021 Timberbrook Lane, Springfield, IL 62702

Andrea Lorenz, Superior Services, Inc., N104 W13285 Donges Bay Road, Germantown, WI 53022

Leigh Himebauch, Metropolitan Builders Assoc., 6511 N. Bluemound Road, Milwaukee, WI 53213

In opposition – none

As interest may appear:

Pam Christenson, Dept. of Commerce Small Business Ombudsman, 201 W. Washington Avenue,
P.O. Box 7970, Madison, WI 53703

Edward B. Witte, c/o Foley & Lardner, 777 East Wisconsin Avenue, Milwaukee, WI 53202

Ryan P. Mallery, Burke Properties, Inc., 622 N. Water Street, #200, Milwaukee, WI 53202

Joe Ramchick, 2835 N. Grandview Blvd., Pewaukee, WI 53072

Wynnie Zuchowski, 2835 N. Grandview Blvd., Pewaukee, WI 53072

Mark Jenks, Waukesha Co. Dept. of Parks & Land Use, 1320 Pewaukee Road, Room 260,
Waukesha, WI 53188

Michael A. Dodge, Reinhart, Boerner, Van Deuren, Norris & Rieselbach, 1000 N. Water Street,
Milwaukee, WI 53203

Senator Margaret Farrow, W262 N2402 Deer Haven Drive, Pewaukee, WI 53072

Jeffrey A. Mierow, Mierow Building Company, 17635 Bolter Lane, Brookfield, WI 53045

Sandy Scherer, Waukesha Co. Dept. of Parks & Land Use, 1320 Pewaukee Road, Room 230,
Waukesha, WI 53188

Donald A. Smith, Superior Glacier Ridge Landfill, N7296 Hwy. V, Horicon, WI 53032

Response to Legislative Council Rules Clearinghouse Report

The comments were accepted, except as noted:

1. 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.

2.i. The date August 1, 2001 was not added because the proposed rule will not be taking effect until sometime after that date. The effective date will not be known until after legislative review has been completed.

3.a. The comment correctly noted that the wrong citation was included. The final rule omits all references to timelines which is planned for a forthcoming rule. This subsection was deleted.

3.b. The comment was correct. Rather than reference a list in NR 103, the revision includes the list in NR 350.06 (2)(b).

5.a. As discussed above, all references to timelines for review and the associated language pertaining to what is considered a complete application (which triggers certain timelines), has been removed from NR 103 and will be the subject of one comprehensive rule on timelines.

5.b. See 5a.

5.c. Per Leg Council comments, the entire section NR 103.08(4) has been revised and reorganized.

5.d. See 5c

5.f. See 5c

5.i. Definition deleted

5.k. This section revised to address the comment.

5.n. The section revised to be clearer.

5.s. The section has been revised to provide more on who is responsible for what action.

5.u. revised per comment to be obligor

5.v. revised to "timeline"

5.x. The term "bank" is defined. Bank sites are simply compensation sites used in a bank. No change made.

Final Regulatory Flexibility Analysis

The proposed rules do not directly regulate small business. Therefore, a final regulatory flexibility analysis is not required.

Fiscal Estimate — 1999 Session

Original Updated
 Corrected Supplemental

LRB Number	Amendment Number if Applicable
Bill Number	Administrative Rule Number NR 103/350

Subject
Wetland Compensatory Mitigation

Fiscal Effect

State: No State Fiscal Effect

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.

Increase Existing Appropriation Increase Existing Revenues
 Decrease Existing Appropriation Decrease Existing Revenues
 Create New Appropriation

Increase Costs — May be possible to absorb within agency's budget.
 Yes No
 Decrease Costs

Local: No Local Government Costs

1. Increase Costs
 Permissive Mandatory
2. Decrease Costs
 Permissive Mandatory

3. Increase Revenues
 Permissive Mandatory
4. Decrease Revenues
 Permissive Mandatory

5. Types of Local Governmental Units Affected:
 Towns Villages Cities
 Counties Others
 School Districts WTCS Districts

Fund Sources Affected

GPR FED PRO PRS SEG SEG-S

Affected Chapter 20 Appropriations

Assumptions Used in Arriving at Fiscal Estimate

SUMMARY OF RULES: 1999 Wisconsin Act 147 authorizes the Department to establish a compensatory mitigation program and directs the Department to promulgate rules governing the program.

FISCAL IMPACT: The Department will incur one-time costs associated with promulgating the rules, including rule development, holding hearings, compiling a record, finalizing the rules, presentation to the Natural Resources Board, drafting guidance, and conducting training. Because the rule development phase is likely to be controversial, the Department estimates that it will devote at least 1,000 hours of staff time to complete the rule development process.

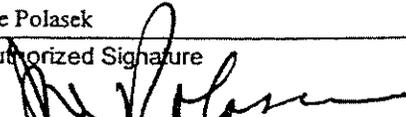
However, there are significant ongoing workload implications and costs associated with implementing a compensatory mitigation and enforcement program. The Department estimates that compensatory mitigation will require nearly 13,000 hours in additional effort annually for Water Division field staff—or the equivalent of 7 FTE. This includes estimated staff time spent on permit processing, consultations in cases that do not lead to formal permit applications, and monitoring of compensatory wetland mitigation sites. Additionally, the Department anticipates the need for an additional 1.0 FTE statewide program coordinator to administer the mitigation program for statewide consistency.

Act 147 also gave the Department the authority to enforce wetland water quality certification decisions and prosecute illegal wetland destruction. A Departmental workload analysis estimates that it will require an additional 4 FTE enforcement specialists to adequately administer the enforcement component of Act 147.

All totaled, the Department projects additional, ongoing annualized costs associated with an additional 12.0 FTE totaling \$591,000.

Long-Range Fiscal Implications

None

Prepared By: Joe Polasek	Telephone No. 608/266-2794	Agency DNR
Authorized Signature 	Telephone No.	Date (mm/dd/ccyy) 9-22-00

Fiscal Estimate Worksheet — 1999 Session
 Detailed Estimate of Annual Fiscal Effect

Original Updated
 Corrected Supplemental

LRB Number	Amendment Number if Applicable
Bill Number	Administrative Rule Number NR 103/350

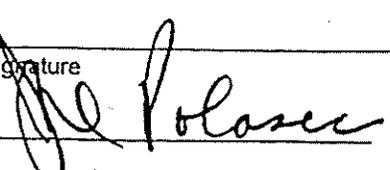
Subject
 Wetland Compensatory Mitigation

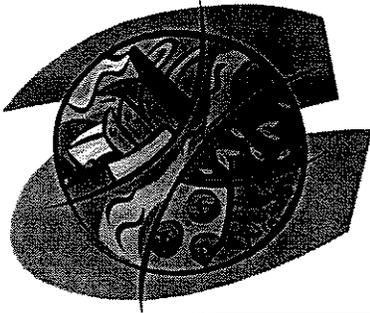
One-time Costs or Revenue Impacts for State and/or Local Government (do not include in annualized fiscal effect):
 Rule Development Costs = 1000 hours x \$25/hr = \$25,000.

Annualized Costs:		Annualized Fiscal Impact on State Funds from:	
		Increased Costs	Decreased Costs
A. State Costs by Category		\$ 591,000	
State Operations — Salaries and Fringes			\$ -
(FTE Position Changes)		(12.00 FTE)	(- FTE)
State Operations — Other Costs			-
Local Assistance			-
Aids to Individuals or Organizations			-
Total State Costs by Category		\$ 591,000	\$ -
B. State Costs by Source of Funds		Increased Costs	Decreased Costs
GPR		\$	\$ -
FED			-
PRO/PRS			-
SEG/SEG-S		591,000	-
State Revenues	Complete this only when proposal will increase or decrease state revenues (e.g., tax increase, decrease in license fee, etc.)	Increased Revenue	Decreased Revenue
GPR Taxes		\$	\$ -
GPR Earned			-
FED			-
PRO/PRS			-
SEG/SEG-S			-
Total State Revenues		\$	\$ -

Net Annualized Fiscal Impact

	State	Local
Net Change in Costs	\$ 591,000	\$
Net Change in Revenues	\$	\$

Prepared By: Joe Polasek	Telephone No. 608-266-2794	Agency DNR
Authorized Signature 	Telephone No.	Date (mm/dd/ccyy) 9-22-00



**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]

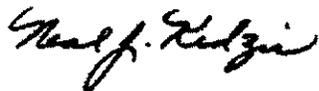
4. Amend language under NR 350.06 (2)(a) to read:

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

August 31, 2001

Darrell Bazzell, Secretary
WI Department of Natural Resources
101 South Webster St. - GEF 2
Madison, WI 53702

Dear Secretary Bazzell:

On August 30, 2001, the Senate Environmental Resources Committee took executive action on CR Rule 00-164, and by a vote of 5 Ayes, 0 Noes and) Absent, the committee passed the following motion.

Combined Motion

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 (also known as the "compensation search area").
2. Alter the compensatory mitigation sequence in s. NR 350.04 so that if the department determines that a 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 use of any of the following off-site mitigation options:
 - a. Purchase of mitigation credits from a bank established prior to the effective date of the 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.

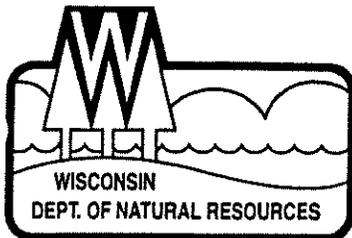
- b. Development of a project-specific mitigation site if the site is located within the same compensation search area, as defined in point #1, as the adversely affected wetland.
 - c. Purchase mitigation credits from a bank established after the effective date of the rule if the site is located within the same compensation search area, as defined in point #1, as the adversely affected wetland.
3. Delete the compensation ratio variance in s. NR 350.06 (3).
 4. 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.).
 5. 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.
 6. 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.
 7. 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.)
 8. 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).
 9. 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.)

If the department does not agree, in writing, to consider the modifications set forth in the motion by September 14, 2001, the committee will object to the rule.

Sincerely,



Jim Baumgart, Chair
Senate Environmental Resources
Committee



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

September 28, 2001

Honorable James R. Baumgart, Chair
Senate Committee on Environmental Resources
Room 306 South
State Capitol

Honorable Neal Kedzie, Chair
Assembly Committee on Environment
Room 307 North
State Capitol

Re: Clearinghouse Rule No. 00-164
Wetland compensatory mitigation

Gentlemen:

On August 15, 2001, the Assembly Committee on Environment requested the Department of Natural Resources to modify Clearinghouse Rule No. 00-164 relating to wetland compensatory mitigation. On August 31, 2001, the Senate Committee on Environmental Resources also requested modifications. At its September 26, 2001 meeting, the Natural Resources Board adopted modifications. Attached is a copy of the proposed rule as adopted by the Natural Resources Board as well as a draft copy highlighting the modifications that were made.

Both committees suggested changes to the sequence for mitigation in s. NR 350.04, specifically looking at how the Department "grandfathers" existing banks that were developed prior to the rules. The Department proposes using the Senate's recommendation, though it appears that this is not different in intent from the Assembly's version. The Senate also recommended eliminating the ratio variance language for those filling more than 20 acres of wetland. The Department does not propose to make that change. The remainder of the recommended changes are more technical in nature and are included.

Under s. 227.19(4)(b)2., Stats., the Department of Natural Resources refers this rule to your Committees for an additional 10 working day review on the modifications. If the Department does not hear from you within 10 working days of the receipt of this notification, the Department will continue processing this rule.

Sincerely,

Darrell Bazzell
Secretary

cc: Scott Hausmann – FH/3
Dave Siebert – SS/BW
Carol Turner – LS/5
Michael Cain – LS/5

Attach.



State Representative
Neal J. Kedzie
43rd Assembly District

October 11, 2001

Darrell Bazzell, Secretary
Wisconsin Department of Natural Resources
101 S. Webster Street, Fifth Floor
Madison, WI 53702

Dear Secretary Bazzell,

This letter is to inform you that on October 11, 2001 the Assembly Environment Committee held an Executive Session and voted (Ayes, 6; Noes, 4;) to object to proposed s. NR 350.04 in its entirety pursuant to s. 227.19 (4) (d) 6., Stats. as set forth in the modified version of Clearinghouse Rule 00-164, relating to wetland compensatory mitigation, received by the committee on October 1, 2001 on the grounds that the section is arbitrary and capricious.

Thank you for your consideration.

Sincerely,

A handwritten signature in cursive script that reads "Neal J. Kedzie".

Neal Kedzie
Chair, Assembly Environment Committee
State Representative
43rd Assembly District

NJK: dj

October 10, 2001

Darrell Bazzell, Secretary
WI Department of Natural Resources
101 South Webster St. - GEF 2
Madison, WI 53702

Dear Secretary Bazzell:

Please be advised that the Senate Environmental Resources Committee, on October 9, 2001, took executive action on Clearinghouse Rule 00-164, relating to wetland compensatory mitigation.

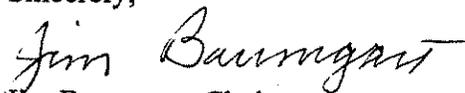
The committee adopted the following motion on October 9, 2001:

“The Senate Environmental Resources Committee objects under s. 227.19 (4) (d) 6., Stats. to proposed s. NR 350.06 (3), as set forth in the modified version of Clearinghouse Rule 00-164 received by the committee on October 1, 2001, on the grounds that this subsection is arbitrary and capricious.”

The vote, by polling, for adoption of the motion was

Ayes: (5) Senators Baumgart, Hansen, Wirch, Cowles and Schultz.
Noes: (0) None.
Absent: (0) None.

Sincerely,



Jim Baumgart, Chair
Senate Environmental Resources Committee

JR:ae



Wisconsin Builders Association

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Mary Anne Moore-
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**Deputy Executive
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Jerry Deschane

November 13, 2001

Senator Robson, Representative Grothman,
Members of the Joint Committee for Review of Administrative Rules

Dear Committee members:

The Wisconsin Builders Association asks for your support *in sustaining the objection of the Assembly Environment Committee to the wetland mitigation rule*. Sustaining this objection puts you on record in support of the long-standing compromise that made wetland mitigation possible.

If this objection is not sustained, the current draft language will have many negative impacts on Wisconsin's economy and environment, including:

- Only four months' worth of wetland mitigation credits will be available. New credits will not be available for up to 10 years.
- The DNR will be given power to establish policies above and beyond the law and rule.
- Rural areas will not have access to mitigation.
- One bank will be given "monopoly" power over bank credits.

While well-intended, the current language also has other practical problems.

We support the Assembly objection because it restores a consensus agreement reached between the business community, environmental community, the DNR and wetland bankers. (Please see Sierra Club testimony-attached.) Like the Sierra Club, our organization supported the creation of wetland mitigation on the basis of that consensus.

We thank you for your support on this matter.

Sincerely,

Jerry Deschane





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Deputy Executive
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November 14, 2001

Senator Robson, Representative Grothman,
Members of the Joint Committee for Review of Administrative Rules

Dear Committee members:

The Wisconsin Builders Association asks that you **take no action on the wetland mitigation rule**. We ask this so that the parties can come together one final time to address concerns of the supply of credits. It is our firm belief that those concerns can be addressed with few, if any, modifications and clarifications.

The current draft language may have many negative impacts on Wisconsin's economy and environment, including:

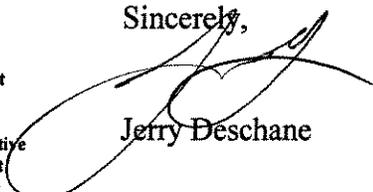
- It is possible that only eight months' worth of wetland mitigation credits will be available.
- New credits may not be available for up to 10 years
- Some areas may never see new credits available.
- Rural areas will probably not have access to mitigation banks.
- The DNR will be given power to establish policies through MOU's above and beyond the law and rule.
- One bank will be given "monopoly" power over bank credits.

We supported the Assembly objection because it restored the consensus agreement reached between the business community, environmental community, DNR and wetland bankers. (Please see Sierra Club testimony-attached.) Like the Sierra Club, our organization supported the creation of wetland mitigation on the basis of that consensus.

A new concept was introduced in the draft language; the concept of restoration in addition to bank credits. We are not opposed to this concept, provided it facilitates the availability of credits, and is not merely a "surcharge." Today we ask for time to meet with the proponents of this concept, and to make sure that it will work.

We thank you for your support on this matter.

Sincerely,


Jerry Deschane





**SIERRA
CLUB**
FOUNDED 1892

John Muir Chapter

see
page
two

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.

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.



Wisconsin Builders Association

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**Deputy Executive
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Jerry Deschane

October 11, 2001

Representative Kedzie,
And Members of the Assembly Environment Committee

RE: CR00-164 Wetland Mitigation UPDATED October 11, 2001

Dear Representative Kedzie and Members:

We have been informed that the Senate Environment Committee has passed this rule to the Joint Committee for Review of Administrative Rules, objecting to the provision for large sites (not a Builder issue). However, this means the Senate Committee will not consider our request to restore the original language relative to grandfathering existing banks.

Because of the Senate Committee action, the Wisconsin Builders Association has no choice but to ask you to object to 350.04 (the compensation sequence language) in its entirety.

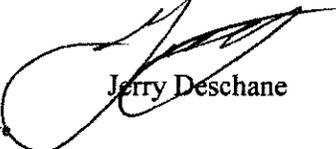
There are numerous problems with the Senate changes that DNR adopted, including:

- They reduce by 50% the amount of mitigation credits available.
- Only one of the three existing banks can comply with the new requirements.
- They ignored longstanding agreements regarding the status of existing banks
- This will lead to a situation where applicants cannot use mitigation because no credits are available.
- The new provisions are vague and open-ended; the DNR could demand any amount of restoration projects or any amount of money.

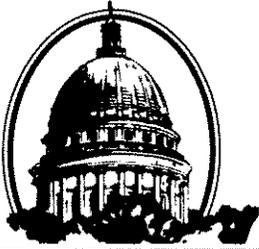
The mitigation sequence was resolved long ago. It was not perfect, but it was a compromise. The Senate Environment Committee made a number of significant changes to that section; some of those changes will make banking more difficult, or even financially impossible. That is unacceptable to the Wisconsin Builders Association.

This rule is not ready for adoption, and we hope that you will agree.

Sincerely,


Jerry Deschane





15-N

State Senator
James R. Baumgart

State Capitol: P. O. Box 7882, Madison, WI 53707-7882 • Telephone (608) 266-2056
Toll-free: 1-888-295-8750 • E-Mail: sen.baumgart@legis.state.wi.us

M E M O

October 23, 2001

TO: Members of the Joint Committee for Review of Administrative Rules

Senator Judy Robson, Co-chair
Senator David Hansen
Senator Rob Cowles

Senator Richard Grobschmidt
Senator Robert Welch

Rep. Glenn Grothman, Co-chair
Rep. Scott Gunderson
Rep. Tom Hebl

Rep. Lorraine Seratti
Rep. Robert Turner

FROM: Senator Jim Baumgart, Chair
Senate Environmental Resources Committee

RE: Wetland Mitigation Rules: Mitigation Banking Language and 20-acre
Variance Request Objections.

As you may be aware, the Senate and Assembly Environment Committees have objected to different portions of the proposed administrative rules relating to wetland mitigation. Last session, on a bi-partisan basis, the legislature passed Act 147 allowing for mitigation of wetland losses during development. It is imperative that these rules be both workable and insure the protection of our natural resources. That authority now rests with you.

BACKGROUND:

Currently, there are three wetland banks that are approved to sell credits for restoration projects they have already completed. When the Department of Natural Resources (DNR) began writing these rules, these three banks were to be allowed to sell their credits statewide, regardless of where the wetland loss occurred. However, after the public comment period ended, it was clear that the mitigation ought to take place as close as possible to the site of the loss. The Department then drafted rules requiring the mitigation occur as close as possible within the designated search area. This, of course, considerably reduces the number of customers for the banks.

"As stewards for this and future generations, we must use the land wisely." - Jim Baumgart

ACTIONS OF THE SENATE ENVIRONMENTAL RESOURCES COMMITTEE:

Working in a bi-partisan fashion, the members of the Senate Committee on Environmental Resources were able to craft a compromise between those who wanted to be able to sell mitigation credits statewide and those who want the restorations as close as possible to the area of loss. Under our proposal, the bank may sell their mitigation credits statewide, but then they must work with the DNR to find a location within the relevant search area and undertake an additional project. If the bank is located within the search area of the wetland loss no further action is necessary. This compromise was accepted by members of the wetland restoration industry and by the members of the Senate Environmental Resources Committee by a vote of 5 to 0.

ACTIONS OF THE ASSEMBLY ENVIRONMENT COMMITTEE:

The Assembly Committee, on a 6 to 4 vote, decided to object to this language and allow credits to be sold statewide. Unfortunately, this will deny the area of the functional values that each destroyed wetland provided. I believe that this would be detrimental for the environment as well as lead to increased flooding, especially in the southeastern corner of the state.

RECOMMENDATION TO JCRAR:

I would like to urge you all to very carefully consider the objections. The majority of the mitigation that will occur will be done through this banking system and it is imperative that we create a process that protects our resources. Therefore, I would ask that the Committee not concur with the Assembly objection, but allow these rules to be promulgated with the Senate language intact.

The rules call for a mitigation ratio of 1.5 acres of restored wetland for every 1 acre of destroyed wetlands. Unfortunately, the DNR Board included a provision allowing for a variance from this ratio for projects impacting over 20 acres of wetlands. The Senate Environment Committee saw no logical reason for this provision. The committee asked for it to be removed but the Board did not honor this request and therefore we felt the need to object and as a result ask that you uphold this objection.

Thank you for your consideration of these important issues and if you have any questions please feel free to contact me.



State Senator
James R. Baumgart

State Capitol: P. O. Box 7882, Madison, WI 53707-7882 • Telephone (608) 266-2056
Toll-free: 1-888-295-8750 • E-Mail: sen.baumgart@legis.state.wi.us

November 13, 2001

Representative Glenn Grothman, Co-Chair
Joint Committee for Review of Administrative Rules
State Capitol, 15-North

Dear Representative ^{Glenn}Grothman:

As you know, the Senate Environmental Resources Committee and the Assembly Environment Committee have both objected to portions of the wetland mitigation rules.

These rules went through extensive public hearings. Both in the Legislature and during the formation process. It is clear from those hearings that the public believes it is imperative for the restoration to occur as close as possible to where the loss has occurred. The language that the Senate Environmental Resources Committee proposed in a bi-partisan manner accomplishes this goal. This language will not lead to a decreased opportunity for developers to mitigate wetlands. If they are not able or willing to purchase mitigation credits they may undergo their own mitigation project within the search area.

Those industries that impact Wisconsin's wetlands have been promoting this mitigation statute from its inception and the Legislature has provided the option for them. We ought to design a system where the restored wetlands, and their functional values, are located as near to the wetland loss as possible before considering out-state options. The Senate rules will allow for a fair process. I urge you to not concur with the Assembly Environment Committee's objection and allow the bi-partisan compromise worked out in the Senate to be implemented.

Additionally, the Senate Committee objected to the inclusion of a variance from the mitigation ratio of 1.5 acres of restored wetland for every 1 acre that is destroyed for projects that are going to impact over 20 acres of wetlands. The committee found no reasonable basis for including this variance. I would ask that you concur in this objection and protect our largest wetlands from being mitigated to a lesser extent.

Sincerely,


JIM BAUMGART

State Senator
9th Senate District

"As stewards for this and future generations, we must use the land wisely." - Jim Baumgart

Printed on recycled paper.



State Representative
Neal J. Kedzie

43rd Assembly District

November 7, 2001

State Senator Judy Robson
Co-Chair, Joint Committee on Review of Administrative Rules
Room 15 South, State Capitol

State Representative Glenn Grothman
Co-Chair, Joint Committee on Review of Administrative Rules
Room 15 North, State Capitol

Dear Chairs Robson and Grothman,

On October 11, 2001, the Assembly Environment Committee objected to section NR 350.04 of Clearinghouse Rule 00-164. CR 00-164 is the proposed rule for 2000 Wisconsin Act 147 (compensatory wetland mitigation) which state Senator Rob Cowles and I authored. This letter is to request consideration by the Joint Committee on Review of Administrative Rules to concur with the Assembly Environment Committee's objection.

Initially, the Assembly Environment Committee was poised to make modifications to NR 350.04. Those modifications were in response to the actions by the Senate Environmental Resources Committee, which quickly drafted and adopted new language to NR 350.04. That new language was never afforded any discussion or debate by the myriad of interested parties that worked years to craft the language of Act 147 and the subsequent rules.

In addition, it is my opinion that the new language will drastically reduce the supply of mitigation bank credits in the state of Wisconsin. Further, the new language allows the Department of Natural Resources to establish a Memorandum of Understanding (MOU) for approval of pre-rules and post rules mitigation banks. When asked about the MOU's in committee, department officials could not offer any information about the criteria or parameters of the MOUs. Put simply, the MOU would allow department staff to create policy within policy with no oversight by the standing committees of the Legislature.

If the Legislature grants that power to the department, the department, in turn, could set standards for wetlands mitigation banking that may distort the intent of Wisconsin Act 147. In addition, allowing the department free reign over the MOUs would continue the slow erosion of legislative control of the department.

Letter to JCRAR Chairs - Wetland Mitigation Rule
November 7, 2001; page 2 of 2

Since my first days in office, I have worked very closely with representatives from the department, development and building community, environmental groups and legislators on both sides of the aisle and respective houses in order to produce a truly consensus piece of legislation.

The rules process has been no different, up until this point. In fact, the Assembly Environment Committee's recommendations to the department were suggested by the Sierra Club in committee and agreed to by the Wisconsin Builders Association. The committee instructed the department to return to the original language crafted by an advisory group made up of individuals from all interested parties. In short, the Assembly Environment Committee held true to the original intent and agreements established throughout this process.

Unfortunately, the Senate Environmental Resources Committee's adoption of new language in the last days of the process severely upset four years of a delicate consensus arrangement. Additionally, the Senate Environment Committee blocked efforts by the Assembly Environment Committee to make modifications to that new language.

Prior to executive action by the Assembly Environment Committee, the Senate Environmental Resources Committee objected to an unrelated portion of the rule. That action limited the Assembly Environment Committee's ability to discuss and possibly modify NR 350.04, which again upset this long and arduous process. Thus, the Committee was left no option but to object to the section in its entirety.

For those reasons stated, I ask the Joint Committee on Review of Administrative Rules to concur with the objection made by the Assembly Environment Committee and uphold the integrity of a long-standing, bi-partisan, consensus effort by numerous individuals on all sides of this issue.

Thank you for your time and consideration of my request.

Sincerely,



Neal Kedzie
Chair, Assembly Environment Committee
State Representative
43rd Assembly District

cc: Members, Joint Committee on Review of Administrative Rules
State Senator Jim Baumgart, Chair - Senate Environmental Resources Committee
Members, Assembly Environment Committee
Members, Senate Environmental Resources Committee



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

WISCONSIN WATERFOWL ASSOCIATION, INC.
78 Enterprise Rd., Suite A
Delafield, WI 53018
(262) 646-5926
(262) 646-5949 (Fax)

TO: Representative Glenn Grothman, Co-Chair
Senator Judy Robson, Co-Chair
Committee for Review of Administrative Rules

FROM: Jeff Nania, Executive Director
Wisconsin Waterfowl Association

DATE: November 12, 2001

RE: Wetland Mitigation Rule Objection

I am writing in opposition to the Assembly Environment Committee's objection to section 350.04 of Clearing House Rule 00-164 relating to wetlands on behalf of the Wisconsin Waterfowl Association.

The Wisconsin Waterfowl Association has been working to conserve Wisconsin's waterfowl and wetland resources for over 18 years. Our membership has now grown to over 7,500 members throughout Wisconsin. In 2000 alone these members help us to restore 333 acres of Wetland habitat and 555 acres of upland nesting cover in Wisconsin.

We worked closely with Senator Schultz and the Department of Natural Resources to adopt the new language in section 350.04 relating to mitigation sequencing. The language allows existing mitigation banks to sell their mitigation statewide while also working with the DNR to find a mitigation location within the region of the wetland fill. This provides important environmental enhancements to habitat in the area of the State where a filled wetland occurs. It is important the functional values of newly mitigated wetlands benefit the region where a fill occurs. The DNR Board at their September meeting adopted these changes.

Wetland mitigation banks are a tool that provides a viable wetland to replace a wetland that may be filled during a development or agriculture project. Our wetland bank is located in Columbia County and has been providing credits in Wisconsin since May of 1996. It is important to understand during the wetland mitigation debate over 1999 Act 147 mitigation banks were only meant to be one option for an owner to mitigate a wetland fill. The owners also have the opportunity to mitigate on their own in the same region of the fill site.

For the last five years we have provided credits for wetland impacts in several different areas of the State. Our program is unique in that the most significant portion of the proceeds of our bank goes 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.

As a private mitigation bank we entered into an agreement of the Mitigation Bank Review Team, consisting of representatives from the U.S. Army Corps of Engineers, DNR, EPA, Natural Resource Conservation Service and U.S. Fish & Wildlife. Though this process we have followed the rules of bank establishment to the letter.

As an option for owners existing wetland mitigation banks and new banks will provide plenty of options for years to come. We currently have 80 acres available for banking. A new bank by Superior Landfill is already under construction in Southeastern Wisconsin. It was just this summer that the Northland Company brought their bank to the DNR's attention and conveyed their intent to sell credits outside their industry.

In 1999 Act 147 the legislature directed the department to create "rules for the conditions under which credits in a wetland mitigation bank may be used for wetland compensatory mitigation." Through numerous public hearings via the department and legislature the public expressed their desire for compensatory wetlands to occur as near as practicable to the location of the adversely impacted wetland. Allowing wetland fills to occur in one corner of the state without in turn requiring the mitigation to occur in the same region would be detrimental to Wisconsin's habitat and environment.

The Waterfowl Association has worked hard to build a valuable and viable wetland mitigation bank. We agree with the need to require statewide banks to work in the region where the wetland fill takes place and undertake additional projects.

If the objection by the Assembly Committee on Environment were concurred in by JCRAR the committee would be denying the area of the State where a filled wetland occurs the functional values of newly mitigated wetlands or projects in that region. We urge you to object to the Assembly Environment Committee's objection to section 350.04 of Clearing House Rule 00-164 relating to wetlands

Thank you for your consideration. Please feel free to contact our representative Sean Dilweg or myself with any further questions on this issue.

Cc: Members, Committee for Review of Administrative Rules



Wisconsin Builders Association

Dedicated to Preserving and Promoting the American Dream

President
Chuck Elliott
Madison

President-Elect
Mary Anne Moore-
Church
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Green Bay

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**Executive
Vice-President**
Wendle

**Deputy Executive
Vice-President**
Jerry Deschane

November 14, 2001

Senator Robson, Representative Grothman,
Members of the Joint Committee for Review of Administrative Rules

Dear Committee members:

The Wisconsin Builders Association asks that you **take no action on the wetland mitigation rule**. We ask this so that the parties can come together one final time to address concerns of the supply of credits. It is our firm belief that those concerns can be addressed with few, if any, modifications and clarifications.

The current draft language may have many negative impacts on Wisconsin's economy and environment, including:

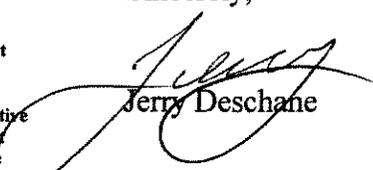
- It is possible that only eight months' worth of wetland mitigation credits will be available.
- New credits may not be available for up to 10 years
- Some areas may never see new credits available.
- Rural areas will probably not have access to mitigation banks.
- The DNR will be given power to establish policies through MOU's above and beyond the law and rule.
- One bank will be given "monopoly" power over bank credits.

We supported the Assembly objection because it restored the consensus agreement reached between the business community, environmental community, DNR and wetland bankers. (Please see Sierra Club testimony-attached.) Like the Sierra Club, our organization supported the creation of wetland mitigation on the basis of that consensus.

A new concept was introduced in the draft language; the concept of restoration in addition to bank credits. We are not opposed to this concept, provided it facilitates the availability of credits, and is not merely a "surcharge." Today we ask for time to meet with the proponents of this concept, and to make sure that it will work.

We thank you for your support on this matter.

Sincerely,


Jerry Deschane





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see
page
two

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.

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.



*"Dedicated to the Conservation of
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WISCONSIN WATERFOWL ASSOCIATION, INC.
78 Enterprise Rd., Suite A
Delafield, WI 53018
(262) 646-5926
(262) 646-5949 (Fax)

TO: Representative Glenn Grothman, Co-Chair
Senator Judy Robson, Co-Chair
Committee for Review of Administrative Rules

FROM: Jeff Nania, Executive Director
Wisconsin Waterfowl Association

DATE: November 14, 2001

RE: CR 00-164 regarding wetland mitigation rules.

I appreciate the opportunity to testify before the committee today and am appearing in opposition to the Assembly Environment Committee's objection to section 350.04 of Clearing House Rule 00-164 relating to wetlands as the Executive Director for the Wisconsin Waterfowl Association.

The Wisconsin Waterfowl Association has been working to conserve Wisconsin's waterfowl and wetland resources for over 18 years. Our membership has now grown to over 7,500 members throughout Wisconsin. In 2000 alone these members help us to restore 333 acres of Wetland habitat and 555 acres of upland nesting cover in Wisconsin.

We worked closely with Senator Schultz and the Department of Natural Resources to adopt the new language in section 350.04 relating to mitigation sequencing. The language allows existing mitigation banks to sell their mitigation statewide while also working with the DNR to find a mitigation location within the region of the wetland fill. This provides important environmental enhancements to habitat in the area of the State where a filled wetland occurs. It is important the functional values of newly mitigated wetlands benefit the region where a fill occurs. The DNR Board at their September meeting adopted these changes.

Wetland mitigation banks are a tool that provides a viable wetland to replace a wetland that may be filled during a development or agriculture project. Our wetland bank is located in Columbia County and has been providing credits in Wisconsin since May of 1996. It is important to understand during the wetland mitigation debate over 1999 Act 147 mitigation banks were only meant to be one option for an owner to mitigate a wetland fill. The owners also have the opportunity to mitigate on their own in the same region of the fill site.

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As an option for owners existing wetland mitigation banks and new banks will provide plenty of options for years to come. We currently have 80 acres available for banking. A new bank by Superior Landfill is already under construction in Southeastern Wisconsin. It was just this summer that the Northland Company brought their bank to the DNR's attention and conveyed their intent to sell credits outside their industry.

In 1999 Act 147 the legislature directed the department to create "rules for the conditions under which credits in a wetland mitigation bank may be used for wetland compensatory mitigation." Through numerous public hearings via the department and legislature the public expressed their desire for compensatory wetlands to occur as near as practicable to the location of the adversely impacted wetland. Allowing wetland fills to occur in one corner of the state without in turn requiring the mitigation to occur in the same region would be detrimental to Wisconsin's habitat and environment.

The Waterfowl Association has worked hard to build a valuable and viable wetland mitigation bank. We agree with the need to require statewide banks to work in the region where the wetland fill takes place and undertake additional projects.

There has been talk about the memorandum of understanding between the existing mitigation banks and the DNR. We are planning on meeting with the DNR during the next few weeks on the MOU. We look forward to working out the details of such an agreement.

We urge the committee to object to the Assembly Environment Committee's objection to section 350.04 of Clearing House Rule 00-164 relating to wetlands

Thank you for your consideration.

SENATOR JUDITH B. ROBSON
CO-CHAIR
P.O. BOX 7882
MADISON, WI 53707-7882
(608) 266-2253



REPRESENTATIVE GLENN GROTHMAN
CO-CHAIR
P.O. BOX 8952
MADISON, WI 53708-8952
(608) 264-6486

JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

November 15, 2001

Secretary Darrell Bazzell
Department of Natural Resources
101 South Webster Street
Madison, Wisconsin

Re: Emergency Rule NR 20.20(73)(j) and NR 25.06(2)(b)
Clearinghouse Rule 00-164

Dear Secretary Bazzell:

We are writing to inform you that the Joint Committee for the Review of Administrative Rules (JCRAR) held a public hearing and executive session on November 14, 2001.

At that meeting, the JCRAR received public testimony regarding Emergency Rule NR 20.20(73)(j) and NR 25.06(2)(b), relating to sport fishing for yellow perch in Green Bay and its tributaries and commercial fishing for yellow perch in Green Bay.

Based on that testimony, the committee adopted a motion extending the effective period of Emergency Rule NR 20.20(73)(j) and NR 25.06(2)(b) for 60 days. The committee approved the motion on a 10 to 0 vote.

The committee also heard public testimony and took executive action on Clearinghouse Rule 00-164, relating to wetland compensatory mitigation. The committee adopted two motions relating to this proposed rule.

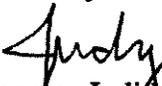
The committee voted to object to section NR 350.06(3) of this rule on the grounds that the rule provision does not comply with legislative intent and is arbitrary and capricious. The committee's vote on this motion was 7 to 3. Pursuant to the committee's statutory mandate, the committee will be introducing legislation on this topic in the near future.

Regarding this same rule, the committee also voted to not concur in the objection to section NR 350.04 of this rule raised by the Assembly Committee on Environment.

The department is now free to promulgate Clearinghouse Rule 00-164 with the limited exception of section NR 350.06(3).

Pursuant to § 227.24(2)(c), *Stats.*, we are notifying the Secretary of State and the Revisor of Statutes of the Committee's action through copies of this letter.

Sincerely,


Senator Judith B. Robson
15th Senate District


Representative Glenn Grothman
59th Assembly District

JBR:GG:da



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see page two

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.

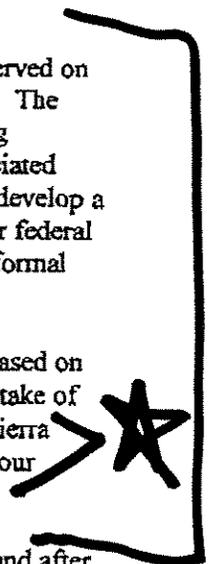
We continue to have reservations that any wetland compensatory program will adequately protect Wisconsin's wetland resources. We still maintain that the science or art of wetland restoration and creation is extremely complex and poorly understood. While we are supportive of the many private efforts to 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.

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.

Year 2000 version

(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.