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## WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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**Ronald Sklansky**  
*Clearinghouse Director*

**Richard Sweet**  
*Clearinghouse Assistant Director*

**Terry C. Anderson**  
*Legislative Council Director*

**Laura D. Rose**  
*Legislative Council Deputy Director*

### CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

#### CLEARINGHOUSE RULE 02-015

AN ORDER to amend NR 299.03 (2) and (3), 299.04 (1), 299.05 (1), 300.01, 300.02, 300.03 (2) and (9), 300.04 (4), 300.05 (3) to (6) and 300.06 (2) to (4); and to create chapters NR 351 and 352, relating to permit and water quality certification time limits, exempt activities in nonfederal wetlands and the identification and delineation of nonfederal wetlands.

Submitted by **DEPARTMENT OF NATURAL RESOURCES**

02-05-02 RECEIVED BY LEGISLATIVE COUNCIL.

02-27-02 REPORT SENT TO AGENCY.

RS:REL:tlu;ksm

**LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT**

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

Comment Attached      YES       NO

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

Comment Attached      YES       NO

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

Comment Attached      YES       NO

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS [s. 227.15 (2) (e)]

Comment Attached      YES       NO

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

Comment Attached      YES       NO

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL REGULATIONS [s. 227.15 (2) (g)]

Comment Attached      YES       NO

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

Comment Attached      YES       NO



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### CLEARINGHOUSE RULE 02-015

#### Comments

**[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]**

#### 2. Form, Style and Placement in Administrative Code

a. In s. NR 352.01 (1), the notation "ss." should be changed to "s." Also, the notation "(1)" should be inserted between "281.36" and "(c)."

b. In s. NR 352.01 (2), the phrase "to be used" should be replaced by the phrase "that shall be used."

c. Section NR 352.03 does not contain any material; perhaps this section was intended to be a part of s. NR 352.04?

d. In s. NR 352.04 (intro.), the phrase "are to be used" should be deleted and replaced by the word "shall be used." Also, in the Note following sub. (4) (e), the phrase "sub. (d) be" should be replaced by the phrase "par. (d) may be."

#### 5. Clarity, Grammar, Punctuation and Use of Plain Language

a. Sections NR 351.05 (intro.) and 352.04 (intro.) should conclude with colons.

b. In s. NR 352.01 (2), should the word "nonfederal" be inserted between "delineate" and "wetlands"?

c. In s. NR 352.04 (intro.), "All of the" should replace "The."

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

The State of Wisconsin Natural Resources Board proposes an order to amend NR 299.03(2) and (3), 299.04(1), 299.05(1), 300.01, 300.02, 300.03(2) and (9), 300.04(4), 300.05(3) to (6) and 300.06(2) to (4); and to create chs. NR 351 and 352 relating to permit and water quality certification time limits, exempt activities in nonfederal wetlands and the identification and delineation of nonfederal wetlands.

FH-6-02

Summary Prepared by Department of Natural Resources

Statutory authority: ss. 227.21(2) and 281.36, Stats.

Statutes interpreted: s. 281.36(4) to (6), Stats.

2001 Wisconsin Act 6 was signed into law May 7, 2001 requiring state water quality certification for certain activities conducted in nonfederal wetlands. The law identifies certain activities that are exempt from state water quality certification subject to meeting specific performance requirements. The law also required the department to promulgate rules to interpret and implement the provisions of the exempted activities consistent with existing federal law and to incorporate by rule any federal law and interpretation of federal law by rule.

A new code, NR 351 is proposed to identify all federal laws, interpretations of federal law, guidance documents and Memorandum of Agreements or Understandings between federal agencies relative to the exemptions of certain activities from regulatory requirements of the Clean Water Act for the purpose of making the exemptions under s. 281.36(4) and (5) consistent with existing federal law.

In addition, the law directs the department is to use the procedures in the 1987 U. S. Army Corps of Engineers wetland delineation manual in nonfederal wetlands. The department proposes a new code, NR 352, to incorporate the use of the manual and federal interpretations and guidance documents into state law.

Lastly, the department proposes to revise NR 299 and 300 to consolidate water regulation permit and water quality certification time limits into one code (NR 300). Presently 2001 Wisconsin Act 6, 1999 Wisconsin Act 147, NR 299 and NR 350 all have differing time limits for similar actions.

SECTION 1. NR 299.03 (2) is amended to read:

NR 299.03(2) 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. initially determine whether a complete application has been submitted and, no later than 30 calendar days after the application has been submitted, notify the applicant in writing about the initial determination of completeness. If the department determines that the application is incomplete, the notice shall state the reason for the determination and the specific items of information necessary to make the application complete. An application may not be considered complete until the requirements of the Wisconsin environmental policy act, s. 1.11, Stats., have been met and until all information necessary for associated permits, such as Wisconsin pollution discharge elimination permits under ch. 283, Stats., has been submitted to the department.

SECTION 2. NR 299.03 (3) is amended to read:

NR 299.03(3) ~~The applicant shall submit in timely fashion, at any time during the review process, such additional information which the department finds to be reasonably necessary for review of the application~~ department may not demand items of information that are not specified in the notice as a condition for determining whether the application is complete unless both the department and the applicant agree or unless the applicant makes material additions or alterations to the project for which the application has been submitted.

SECTION 3. NR 299.04 (1) is amended to read:

NR 299.04 Department review of water quality certification application. (1) The department shall, ~~within 60 business days of upon~~ receipt of the complete application, determine whether it has reasonable assurance that the proposed activity will:

SECTION 4. NR 299.05 (1) is amended to read:

NR 299.05 Preliminary and final department action. (1) The department shall notify the applicant, the federal permitting or licensing agency, and the regional administrator within 120 calendar days of receipt of the complete application of its determination to deny the certification, grant or conditionally grant the certification, or waive the certification.

SECTION 5. NR 300.01 is amended to read:

NR 300.01 Purpose. This chapter is developed pursuant to ss. 30.28, 31.39, and 281.22, 281.36 and 281.37, Stats., to establish procedures for charging basic and supplemental fees for permits, approvals, determinations and hearings for projects in navigable waters and wetlands.

SECTION 6. NR 300.02 is amended to read:

NR 300.02 Applicability. This chapter is applicable to any application for a permit, approval or determination pursuant to ss. 30.10 to 30.27, ss. 31.02 to 31.38, and 281.22, 281.36 and 281.37, Stats.

SECTION 7. NR 300.03 (2) is amended to read:

NR 300.03(2) "Business Working day" means each day except Saturday, Sunday, January 1, the third Monday in January, the last Monday in May, July 4, the first Monday in September, the 4<sup>th</sup> Thursday in November, December 24, December 25 and December 31. If January 1, July 4, or December 24, December 25 or December 31 fall on either a Saturday or Sunday, the day designated as a paid holiday in lieu of the specific date is not a business working day.

SECTION 8. NR 300.03 (9) is amended to read:

NR 300.03(9) "Permit, or approval, or determination" means a permit, or approval, or determination pursuant to ss. 30.10 to 30.27, ~~or ss. 31.02 to 31.38, 281.22, 281.36 and 281.37, Stats.~~

SECTION 9. NR 300.04 (4) is amended to read:

NR 300.04(4) For any permit, approval or determination listed in s. 300.02, a determination or decision shall be mailed to the applicant within the following time limits, or the report required by s. 227.116 (4). Stats., shall be submitted:

(a) ~~Permits or approvals where a class 1 legal notice under ch. 985 Stats., is required by law or deemed appropriate by the department, 150 business days.~~ The department shall initially determine whether a complete application has been submitted and, no later than 30 calendar days after the application is submitted, notify the applicant in writing about the initial determination of completeness.

(b) For determinations made pursuant to ~~ss. 30.10 to 30.27, 31.02 to 31.38, 281.22, 281.36 and 281.37, 120 business calendar days.~~

(c) ~~Other permits or approvals, 90 business days.~~ For all activities that meet the criteria listed in s. NR 103.08(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. 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. 281.37 (3m)

SECTION 10. NR 300.05 (3) is amended to read:

NR 300.05(3) The time limits specified in s. NR 300.04 do not include the number of business working days between any of the following:

SECTION 11. NR 300.05(4) is amended to read:

NR 300.05(4) If the department determines pursuant to ch. NR 150 that an EA is required for compliance with s. 1.11, Stats., the time limits specified in s. NR 300.04 shall be increased by 60 business working days.

SECTION 12. NR 300.05(5) is amended to read:

NR 300.05(5) If the department's action on a requested permit, or approval or determination is delayed or prevented by an order or decision of a court of law, the time limit specified in s. NR 300.04 shall be adjusted to conform to the court's decision or order.

SECTION 13. NR 300.05(6) is amended to read:

NR 300.05(6) If the departments action on a requested permit, or approval or determination is delayed or prevented by the action or failure to act of an agency or private party other than the department or the applicant, the time limit specified in s. NR 300.04 shall be adjusted accordingly.

SECTION 14. NR 300.06 (2) is amended to read:

NR 300.06(2) **BASIC FEES.** For fees charged for permits, and approvals or determinations under ss. 30.10 to 30.205, 30.21 to 30.27, 31.02 to 31.185, 31.33 to 31.38, and 281.22, 281.36 and 281.37, Stats., the department shall classify the types of permits, and approvals or determinations based on the estimated time spent by the department in reviewing, investigating and making determinations whether to grant the permits or approvals. The fees are established as follows:

SECTION 15. NR 300.06 (3) is amended to read:

NR 300.06 (3) **SUPPLEMENTAL FEES;** When the applicant requests in writing that the permit be issued in a shorter time interval than the total time interval allowed in s. NR 300.04, the department shall respond in writing within 20 business working days to state whether it can comply with the request. If the request to expedite the permit review is accepted by the department, the applicant shall submit \$2000 in supplemental fees for each expedited permit request which is accepted by the department, in addition to the applicable fees in sub. (2). If the department fails to make a decision on the completed application within the time limits requested, the department shall refund the supplemental fee.

SECTION 16. NR 300.06 (4) is amended to read:

NR 300.06 (4) **REFUNDS.** The department shall refund a permit, approval or determination fee if the applicant withdraws the application before the department determines that the application for the permit or approval is complete. The department shall refund a permit or approval fee for permits, approvals, or determinations issued under ss. 30.10 to 30.205, 30.21 to 30.27, or 281.22, 281.36 and 281.37, Stats., if the department fails to make a determination on the application within the time limits specified in NR 300.04. These refunds will only be applied to complete applications for permits, approvals or determinations received on or after September 1, 2000. The department may not refund a permit or approval fee after the department determines that the application is complete for permits or approvals issued under ss. 30.206, 31.02 to 31.38, Stats., or for any after-the-fact permit.

SECTION 17. Chapter NR 351 is created to read:

#### **Chapter NR 351**

#### **Exemptions from Water Quality Certification in Nonfederal Wetlands**

**NR 351.01 Applicability; purpose.** (1) **APPLICABILITY.** This chapter applies to all activities located in nonfederal wetlands exempted from state water quality certification under s. 281.36 (4) and (5), Stats.

(2) **PURPOSE.** This chapter is adopted under s. 281.36 (6), Stats., to identify and incorporate by rule any federal regulation, rule, memorandum of agreement, guidance letter, interpretive document, or other provision established by a federal agency that is promulgated or adopted pursuant to s. 33 USC 1344 (f) or that is used to interpret or implement s. 33 USC 1344 (f) for determining whether certain activities in nonfederal wetlands are eligible for exemption under s. 281.36 (4) and (5), Stats.

**NR 351.02 Definitions.** The definitions contained in s. 281.36 (1), Stats., apply to the terms used in this chapter.

**NR 351.03 Exemptions from water quality certification.** The exempted activities for which this chapter is applicable to are those under s. 281.36 (4), Stats.

**NR 351.04 Inapplicability of exemptions from water quality certification.** This chapter applies to all activities which meet the conditions and criteria pursuant to s. 281.36 (4) and (5), Stats.

**NR 351.05 Incorporation by reference.** The following federal regulation, rules, memorandum of agreement, guidance letter, interpretive document, or other provision established by a federal agency that is promulgated or adopted pursuant to s. 33 USC 1344 (f) or that is used to interpret or implement s. 33 USC 1344 (f) when determining whether certain activities in nonfederal wetlands are exempt or not eligible for exemption under ss. 281.36 (4) and (5), Stats., are hereby incorporated by reference under ss. 227.21 (2) and 281.36 (6), Stats. :

(1) Code of Federal Regulations (CFR). U.S. Army Corps of Engineers Regulatory Program Regulations 33 CFR 320-331 and U.S. Environmental Protection Agency Program Regulations 40 CFR 232.

**Table 1**  
**CFR References**

	Part	Name
33 CFR	Part 320	General Regulatory Policies - July 1, 2001 Edition
33 CFR	Part 323	Permits for Discharges of Dredged or Fill Material Into Waters of U.S. - July 1, 2001 Edition
33 CFR	Part 328	Definition of Waters of the United States - July 1, 2001 Edition
40 CFR	Part 232	404 Program Definitions; Exempt Activities Not Requiring Permits - July 1, 2000 Edition

**Note:** The documents in Table 1 are available at the following websites. U.S. Army Corps of Engineers, Regulatory Program, Statutory, Administrative & Judicial Materials (<http://www.usace.army.mil/inet/functions/cw/cecwo/reg/sadmin3.htm>). U.S. Environmental Protection Agency documents (<http://www.epa.gov/epahome/rules.html#codified>) and Title 40 CFR: Protection of the Environment (<http://www.epa.gov/epahome/cfr40.htm>). Copies of these materials are available for inspection in the offices of the department of natural resources, secretary of state and revisor of statutes, Madison, Wisconsin and in some public libraries or may be purchased for personal use from:

Superintendent of Documents  
PO Box 371954  
Pittsburgh PA 15250-7954

(2) U.S. Army Corps of Engineers Regulatory Guidance letters.

**Table 2**  
**Applicable Regulatory Guidance Letters**

RGLs	Title
82-03	Irrigation Exemption in Section 404(F)(1)(C) of the Clean Water Act
84-01	Regulatory Jurisdiction Over Vegetative Operations
84-05	Fifth Circuit Decision in Avoyelles vs Marsh
85-04	Agricultural Conversion
86-01	Exemptions to Clean Water Act - Plowing
86-03	Exemption of Farm and Forest Roads
87-07	Exemption for Drainage Ditch Maintenance
87-09	Exemption for Construction or Maintenance of Farm or Stock Ponds
93-03	Rescission of RGL's 90-5 and 90-8
96-02	Applicability of Exemptions under Section 404(f) to "Deep Ripping" Activities in Wetlands

**Note:** The documents in Table 2 are available at the following website. U.S. Army Corps of Engineers, Regulatory Program, Statutory, Administrative & Judicial Materials (<http://www.usace.army.mil/inet/functions/cw/cecwo/reg/sadmin3.htm>). Copies of these materials are available for inspection in the offices of the department of natural resources, secretary of state and revisor of statutes, Madison, Wisconsin and in some public libraries or may be purchased for personal use from:

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PO Box 371954  
Pittsburgh PA 15250-7954

(3) Memoranda of Understanding and Agreement (MOA/MOUs). Memorandum for the Field: Clean Water Act Section 404 Regulatory Program and Agricultural Activities (USEPA and Department of the Army).

**Note:** The above MOA can be obtained at website (<http://www.usace.army.mil/inet/functions/cw/cecwo/reg/moumoas.htm>). Copies of these materials are available for inspection in the offices of the department of natural resources, secretary of state and revisor of statutes, Madison, Wisconsin and in some public libraries or may be purchased for personal use from:

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Pittsburgh PA 15250-7954

SECTION 18. Chapter NR 352 is created to read:

**Chapter 352  
Delineation of Nonfederal Wetlands**

**NR 352.01 Applicability; purpose.** (1) **APPLICABILITY.** This chapter applies to all nonfederal wetlands as defined in ss. 281.36(c), Stats. (1) X

(2) **PURPOSE.** This chapter is adopted under ss. 281.36(1m) and (3) to designate the wetland delineation manual procedures to be used to delineate wetlands. The manual to be used is the 1987 edition of the U.S. army corps of engineers wetland delineation manual and any document that the U.S. army corps of engineers issues interpreting the manual.

**NR 352.02 Definitions.** The definitions contained in s. 281.36(1), Stats., apply to the terms used in this chapter.

**NR 352.03 Delineation procedures.** D

**NR 352.04 Incorporation by reference.** The following federal manual, memoranda, guidelines, regulatory guidance letters or other provision established by the U.S. army corps of engineers interpreting the 1987 wetlands delineation manual are to be used when delineating nonfederal wetland boundaries. X

(1) "Corps of Engineers Wetlands Delineation Manual", Technical Report Y-87-1, U.S. Army Engineer Waterways Experiment Station, Vicksburg, MS.

**Note:** The manual is available at this website:  
<http://www.saj.usace.army.mil/permit/87manual.pdf>. Copies of the manual are available through the National Technical Information Service (phone 703-487-4650, NTIS document number ADA 176734/21NE).

(2) Guidelines for Submitting Wetland Delineations in Wisconsin to the St. Paul District Corps of Engineers (Public Notice, 96-01078-SDE, May 22, 1996)

**Note:** Copies of the guidelines are available for inspection in the offices of the department of natural resources, secretary of state and revisor of statutes, Madison, Wisconsin.

(3) U.S. Army Corps of Engineers Regulatory Guidance Letters.

**Table 1  
References  
Applicable Regulatory Guidance Letters**

RGLs	Title
88-03	Wetland Jurisdictional Determinations
90-06	Expiration Dates for Wetlands Jurisdictional Delineations
94-01	Expiration of Geographic Jurisdictional Determinations

**Note:** The documents in Table 1 are available at the following website: U.S. Army Corps of Engineers, Regulatory Program, Statutory, Administrative & Judicial Materials (<http://www.usace.army.mil/inet/functions/cw/cecwo/reg/sadmin3.htm>). Copies of these materials

are available for inspection in the offices of the department of natural resources, secretary of state and revisor of statutes, Madison, Wisconsin and in some public libraries or may be purchased for personal use from:

Superintendent of Documents  
PO Box 371954  
Pittsburgh PA 15250-7954

(4) Memoranda of Understanding and Agreement (MOA/MOUs).

(a) Memorandum For See Distribution: Implementation of the 1987 Corps Wetland Delineation Manual, Aug. 27, 1991.

(b) Memorandum for See Distribution: Questions & Answers on the 1987 Manual, Oct. 7, 1991.

(c) Memorandum for See Distribution: Clarification and Interpretation of the 1987 Manual, Mar. 6, 1992.

(d) Memorandum of Agreement: Concerning the Delineation of Wetlands for Purposes of Section 404 of the Clean Water Act and Subtitle B of the Food Security Act, Jan. 6, 1994.

(e) Memorandum: Updated Questions and Answers Related to the Implementation of the January 6, 1994 Interagency Memorandum of Agreement Concerning the Delineation of Wetlands for Purposes of Section 404 of the Clean Water Act and Subtitle B of the Food Security Act, Dec. 12, 1994.

Note: The MOA listed in <sup>par.</sup> <sup>can</sup> (sub) (d) be obtained at this website:  
<http://www.usace.army.mil/inet/functions/cw/cecwo/reg/moumoas.htm>.

Copies of these materials are available for inspection in the offices of the department of natural resources, secretary of state and revisor of statutes, Madison, Wisconsin and in some public libraries or may be purchased for personal use from:

Superintendent of Documents  
PO Box 371954  
Pittsburgh PA 15250-7954

(5) Regulatory IV Training Lecture Notes: Wetland Identification and Delineation, Version 1/97, U.S. Army Corps of Engineers Waterways Experiment Station.

Note: Copies of the training lecture notes are available for inspection in the offices of the department of natural resources, secretary of state and revisor of statutes, Madison, Wisconsin and in some public libraries or may be purchased for personal use from:

Superintendent of Documents  
PO Box 371954  
Pittsburgh PA 15250-7954

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)

**NOTICE TO PRESIDING OFFICERS  
OF PROPOSED RULEMAKING**

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

Natural Resources Board Order No. FH-6-02

Legislative Council Rules Clearinghouse Number 02-015

Subject of Rules Permit and water quality  
Certification time limits, exempt activities  
in nonfederal wetlands and the  
identification and delineation of nonfederal  
Wetlands.

Date of Transmittal to Presiding Officers August 28, 2002.

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

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

Telephone: 266-1959  
e-mail: [turnec@dnr.state.wi.us](mailto:turnec@dnr.state.wi.us)

An electronic copy of the proposed rule may be obtained by contacting Ms. Turner

## REPORT TO LEGISLATURE

NR 299, 300, 351 and 352, Wis. Adm. Code  
Permit and water quality certification time limits,  
exempt activities in nonfederal wetlands and the  
identification and delineation of nonfederal wetlands

Board Order No. FH-6-02

Clearinghouse Rule No. 01-015

### Statement of Need

2001 Wisconsin Act 6 required state water quality certification for certain activities conducted in nonfederal wetlands. The law identifies certain activities that are exempt from state water quality certification subject to meeting specific performance requirements. The law also required the department to promulgate rules to interpret and implement the provisions of the exempted activities consistent with existing federal law and to incorporate by rule any federal law and interpretation of federal law.

Chapter NR 351 is proposed to identify all federal laws, interpretations of federal law, guidance documents and Memorandum of Agreement or Understanding between federal agencies relative to the exemptions of certain activities from regulatory requirements of the Clean Water Act for the purpose of making the exemptions under ss. 281.36(4) and (5), Stats., consistent with existing federal law.

In addition, the law directs the department to use the procedures in the 1987 U.S. Army Corps of Engineers wetland delineation manual in nonfederal wetlands. The department proposes a new code, ch. NR 352, to incorporate the use of the manual and federal interpretations and guidance documents into state law.

Chapters NR 299 and 300 are being revised to consolidate water regulation permit and water quality certification time limits into ch. NR 300.

### Modifications as a Result of Public Hearings

Regulatory Guidance Letter 92-02 has been added to Table 2 in s. NR 351.05(2).

### Appearances at the Public Hearings and Their Position

#### ***March 12, 2002 – Madison***

Alice Thompson, Wisconsin Wetlands Association, 1320 Manitowoc Ave. S., Milwaukee, WI 53122  
Jim Ruwaldt, U.S. Fish and Wildlife Service, 4511 Helgesen Drive, Madison, WI 53718  
Robert D. Weihrouch, NRCS Wetland Biologist, 6515 Watts Road, Suite 200, Madison, WI 53719  
Thomas M. Boos II, 10747 Moyer Road, Blue Mounds, WI 53517  
Eric Parker, Graef, Anhalt Schloemer & Associates, 4821 Elm Island Circle, Waterford, WI 53185

In opposition – none

As interest may appear:

Greg Sambs, 315 Rogers Street, Ft. Atkinson, WI 53538  
Bill McKinley, Applied Ecological Services, 1310 Iowa Drive, Madison, WI 53704  
Hilda McVoy, 1406 W. Skyline Drive, Madison, WI 53705  
Ron Kuehn, 2 E. Mifflin Street, Madison, WI 53703  
Jeff Nania, Wisconsin Waterfowl Association, W11360 Highway 127, Portage, WI  
Aaron Kubichka, Applied Ecological Services, 17921 W. Smith Road, Brodhead, WI 53550  
Charlie Luthin, Wisconsin Wetlands Association, 222 S. Hamilton St., #1, Madison, WI 53703  
Peter Peshek, Attorney, 2 E. Mifflin Street, Suite 600, Madison, WI

**March 13, 2002 – Oshkosh**

In support:

Dan Sambs, 403 S. River Road, Fremont, WI 54940  
Clarence Kunde, 104 Wenban Avenue, Neenah, WI 54956  
Jeff Gropp, 345 Saratoga Avenue, Oshkosh, WI 54901  
Mark Ramge, Property Mgr., W.D. Steenberg, 1213 W. South Park Ave., Oshkosh, WI 54902  
Nathaniel [last name illegible], 521 Jackson, Oshkosh, WI 54901  
Clay Georgeson, 2854 Stoney Beach Street, Oshkosh, WI 54902  
James R. Schuster, 5133 Island View Drive, Oshkosh, WI 54901  
Chris Peshek, 734 W. 10<sup>th</sup> Street, Oshkosh, WI 54902  
Bill Rosnow, President, Wisconsin Wetlands, 2954 Timberline Drive, Green Bay, WI 54313  
David Metzger, 7742 State Road 110, Fremont, WI 54940  
Paul Bernegger, N3154 Highway 45, Hortonville, WI 54944  
Pat Arens, 555 Oak Street, Neenah, WI 54956  
Thomas Hansen, Wisconsin Wetlands, 233 Mound Street, Berlin, WI 54923  
Thomas R. Arens, 7265 Trauba Road, Larsen, WI 54947  
Dick Sedlachek, N6087 Heritage Drive, P.O. Box 483, Green Lake, WI 54941

In opposition – none

As interest may appear:

Bob Lang, 9396 Clayton Avenue, Neenah, WI 54956  
Patrick White, W8554 Pheasant Run, Hortonville, WI 54944  
Curt Holman, W6361 Northwestern Avenue, Fond du Lac, WI 54937

**March 14, 2002 – Eau Claire**

In support:

Tom Wilson, Northern Thunder, 500 E. Jefferson Street, Suite 201, Viroqua, WI 54665

In opposition:

Carol Hale, 1403 Frederick Street, Eau Claire, WI 54701

As interest may appear:

Alex Kadinger, N1264 420 Street, Menomonie, WI 54751

Thomas C. Kempen, 2654 Calumet Road, Eau Claire, WI 54703

Paul M. Pettis, 29966 10<sup>th</sup> Avenue, Cadott, WI 54727

Mary Jo Wagner, Wisconsin Public Radio, 1221 W. Clairemont Avenue, Eau Claire, WI

*June 11, 2002 – Madison* – no appearances

Response to Legislative Council Rules Clearinghouse Report

The recommendations were accepted.

Final Regulatory Flexibility Analysis

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

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

The State of Wisconsin Natural Resources Board proposes an order to renumber and amend NR 300.03(2); to amend NR 299.03(2) and (3), 299.04(1)(intro.), 299.05(1), ch. NR 300 (title), 300.01, 300.02, 300.03(9), 300.04, 300.05(3)(intro.) to (6) and 300.06(2)(intro.) to (4); and to create chs. NR 351 and 352 relating to permit and water quality certification time limits, exempt activities in nonfederal wetlands and the identification and delineation of nonfederal wetlands.

FH-6-02

Summary Prepared by Department of Natural Resources

Statutory authority: ss. 227.21(2) and 281.36, Stats.

Statutes interpreted: s. 281.36(4), (5) and (6), Stats.

Wisconsin Act 6 of 2001 was signed into law May 7, 2001 requiring state water quality certification for certain activities conducted in nonfederal wetlands. The law identifies certain activities that are exempt from state water quality certification subject to meeting specific performance requirements. The law also required the department to promulgate rules to interpret and implement the provisions of the exempted activities consistent with existing federal law and to incorporate by rule any federal law and interpretation of federal law by rule.

A new code, NR 351 is proposed to identify all federal laws, interpretations of federal law, guidance documents and Memorandum of Agreements or Understandings between federal agencies relative to the exemptions of certain activities from regulatory requirements of the Clean Water Act for the purpose of making the exemptions under ss. 281.36(4) and (5) consistent with existing federal law.

In addition, the law directs the department is to use the procedures in the 1987 U. S. Army Corps of Engineers wetland delineation manual in nonfederal wetlands. The department proposes a new code, NR 352, to incorporate the use of the manual and federal interpretations and guidance documents into state law.

Lastly, the department proposes to revise NR 299 and 300 to consolidate water regulation permit and water quality certification time limits into one code (NR 300) and to reflect the legislative changes enacted in 2001 Wisconsin Act 16, the biennial budget bill. Presently 1999 Wisconsin Act 147, 2001 Wisconsin Act 6, 2001 Wisconsin Act 16 and Wisconsin Administrative Code chapters NR 299 and NR 350 all have differing time limits for similar actions.

SECTION 1. NR 299.03 (2) is amended to read:

NR 299.03(2) ~~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. initially determine whether a complete application has been submitted and, no later than 30 calendar days after the application has been submitted, notify the applicant in writing about the initial determination of completeness. If the department determines that the application is incomplete, the notice shall state the reason for the determination and the specific items of information necessary to make the application complete.~~ An application may not be considered complete until the requirements of the Wisconsin environmental policy act, s. 1.11, Stats., have been met and until all information necessary for associated permits, such as

Wisconsin pollution discharge elimination permits under ch. 283, Stats., has been submitted to the department.

SECTION 2. NR 299.03 (3) is amended to read:

NR 299.03(3) ~~The applicant shall submit in timely fashion, at any time during the review process, such additional information which the department finds to be reasonably necessary for review of the application~~ department may not demand items of information that are not specified in the notice as a condition for determining whether the application is complete unless both the department and the applicant agree or unless the applicant makes material additions or alterations to the project for which the application has been submitted.

SECTION 3. NR 299.04 (1)(intro.) is amended to read:

NR 299.04(1) The department shall, ~~within 60 business days of~~ upon receipt of the complete application, determine whether it has reasonable assurance that the proposed activity will:

SECTION 4. NR 299.05 (1) is amended to read:

NR 299.05(1) The department shall notify the applicant, the federal permitting or licensing agency, and the regional administrator within 120 calendar days of receipt of the complete application of its determination to deny the certification, grant or conditionally grant the certification, or waive the certification.

SECTION 5. Chapter NR 300 (title) is amended to read:

Chapter NR 300 Time Limits and Fees for Waterway and Wetland Permit Decisions

SECTION 6. NR 300.01 is amended to read:

NR 300.01 **Purpose.** This chapter is developed pursuant to ss. 30.28, 31.39, and 281.22, 281.36 and 281.37, Stats., to establish procedures for charging basic and supplemental fees for permits, approvals, determinations and hearings for projects in navigable waters and wetlands.

SECTION 7. NR 300.02 is amended to read:

NR 300.02 **Applicability.** This chapter is applicable to any application for a permit, approval or determination pursuant to ss. 30.10 to 30.27, 31.02 to 31.38, and 281.22, 281.36 and 281.37, Stats.

SECTION 8. NR 300.03 (2) is renumbered NR 300.03(10) and, as renumbered, is amended to read:

NR 300.03(10) **"Business Working day"** means each day except Saturday, Sunday, January 1, the third Monday in January, the last Monday in May, July 4, the first Monday in September, the 4<sup>th</sup> Thursday in November, December 24, December 25 and December 31. If January 1, July 4,

December 24, December 25 or December 31 fall falls on either a Saturday or Sunday, the day designated as a paid holiday in lieu of the specific date is not a business working day.

SECTION 9. NR 300.03 (9) is amended to read:

NR 300.03(9) "Permit, or approval or determination" means a permit, or approval or determination pursuant to ss. 30.10 to 30.27, ~~or ss. 31.02 to 31.38, 281.22, 281.36 and 281.37, Stats.~~

SECTION 10. NR 300.04 is amended to read:

**NR 300.04 Time limits.** (1) Except as provided in s. NR 300.05, time limits specified in sub. (2) (4) shall be applied to decisions on fully completed applications for the water regulatory permits, or approvals or determinations listed in s. NR 300.02.

(2) ~~The~~ For any permit, approval or determination made pursuant to ss. 30.10 to 30.27, Stats., the department shall review the application for completeness within 15 days of receipt of the application. The department shall notify the applicant of any additional information reasonably necessary to review the application initially determine whether a complete application has been submitted and, no later than 60 calendar days after the application is submitted, notify the applicant in writing about the initial determination of completeness. For any permit, approval or determination made pursuant to s. 281.37, Stats., the department shall initially determine whether a complete application has been submitted and, no later than 30 calendar days after the application is submitted, notify the applicant in writing about the initial determination of completeness. If the department determines that the application is incomplete, the notice shall state the reason for the determination and the specific items of information necessary to make the application complete. For any permit, approval or determination made pursuant to ss. 30.10 to 30.27 and 281.37, Stats., the department may not demand items of information that are not specified in the notice as a condition for determining whether the application is complete unless both the department and the applicant agree or unless the applicant makes material additions or alterations to the project for which the application has been submitted. An application may not be considered complete until the requirements of the Wisconsin environmental policy act, s. 1.11, Stats., have been met and until all information necessary for associated permits, such as Wisconsin pollution discharge elimination permits under ch. 283, Stats., has been submitted to the department.

(3) ~~The~~ For any permit, approval or determination made pursuant to ss. 31.02 to 31.38, 281.22 and 281.36, Stats., the applicant shall submit as requested, at any time during the review process, additional information the department finds to be reasonably necessary for review of the application.

(4) For any permit, approval or determination listed in s. NR 300.02, a determination or decision shall be mailed to the applicant within the following time limits, or the report required by s. 227.116 (4), Stats., shall be submitted:

(a) ~~Permits or approvals where a class 1 legal notice under ch. 985 Stats., is required by law or deemed appropriate by the department, 150 business days. The department shall initially determine whether a complete application has been submitted and, no later than 30 calendar days after the application is submitted, notify the applicant in writing about the initial determination of completeness.~~

(b) For determinations made pursuant to ~~s.~~ ss. 30.10 to 30.27, 31.02 to 31.38, 281.22, 281.36 and 281.37, Stats., 120 business calendar days.

(c) Other permits or approvals, 90 business days. For all activities that meet the criteria listed in s. NR 103.08(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. 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 11. NR 300.05 (3)(intro.) is amended to read:

NR 300.05(3)(intro.) The time limits specified in s. NR 300.04 do not include the number of business working days between any of the following:

SECTION 12. NR 300.05(4) is amended to read:

NR 300.05(4) If the department determines pursuant to ch. NR 150 that an EA is required for compliance with s. 1.11, Stats., the time limits specified in s. NR 300.04 shall be increased by 60 business working days.

SECTION 13. NR 300.05(5) is amended to read:

NR 300.05(5) If the department's action on a requested permit, or approval or determination is delayed or prevented by an order or decision of a court of law, the time limit specified in s. NR 300.04 shall be adjusted to conform to the court's decision or order.

SECTION 14. NR 300.05(6) is amended to read:

NR 300.05(6) If the departments action on a requested permit, or approval or determination is delayed or prevented by the action or failure to act of an agency or private party other than the department or the applicant, the time limit specified in s. NR 300.04 shall be adjusted accordingly.

SECTION 15. NR 300.06 (2)(intro.) is amended to read:

NR 300.06(2) BASIC FEES. (intro.) For fees charged for permits, and approvals or determinations under ss. 30.10 to 30.205, 30.21 to 30.27, 31.02 to 31.185, 31.33 to 31.38, and 281.22, 281.36 and 281.37, Stats., the department shall classify the types of permits, and approvals or determinations based on the estimated time spent by the department in reviewing, investigating and making determinations whether to grant the permits or approvals. The fees are established as follows:

SECTION 16. NR 300.06 (3) is amended to read:

NR 300.06 (3) SUPPLEMENTAL FEES. When the applicant requests in writing that the permit be issued in a shorter time interval than the total time interval allowed in s. NR 300.04, the department shall respond in writing within 20 business working days to state whether it can comply with the request. If the request to expedite the permit review is accepted by the department, the

applicant shall submit \$2000 in supplemental fees for each expedited permit request which is accepted by the department, in addition to the applicable fees in sub. (2). If the department fails to make a decision on the completed application within the time limits requested, the department shall refund the supplemental fee.

SECTION 17. NR 300.06 (4) is amended to read:

NR 300.06 (4) REFUNDS. The department shall refund a permit, approval or determination fee if the applicant withdraws the application before the department determines that the application for the permit or approval is complete. The department shall refund a permit or approval fee for permits, approvals or determinations issued under ss. 30.10 to 30.205, 30.21 to 30.27, ~~or~~ 281.22, 281.36 and 281.37, Stats., if the department fails to make a determination on the application within the time limits specified in NR 300.04. These refunds will only be applied to complete applications for permits, approvals or determinations received on or after September 1, 2000. The department may not refund a permit or approval fee after the department determines that the application is complete for permits or approvals issued under ss. 30.206, 31.02 to 31.38, Stats., or for any after-the-fact permit or approval applications.

SECTION 18. Chapter NR 351 is created to read:

#### **Chapter NR 351**

#### **Exemptions from Water Quality Certification in Nonfederal Wetlands**

**NR 351.01 Applicability; purpose. (1) APPLICABILITY.** This chapter applies to all activities located in nonfederal wetlands exempted from state water quality certification under s. 281.36 (4) and (5), Stats.

**(2) PURPOSE.** This chapter is adopted under s. 281.36 (6), Stats., to identify and incorporate by rule any federal regulation, rule, memorandum of agreement, guidance letter, interpretive document or other provision established by a federal agency that is promulgated or adopted pursuant to s. 33 USC 1344 (f) or that is used to interpret or implement s. 33 USC 1344 (f) for determining whether certain activities in nonfederal wetlands are eligible for exemption under s. 281.36 (4) and (5), Stats.

**NR 351.02 Definitions.** The definitions contained in s. 281.36 (1), Stats., apply to the terms used in this chapter.

**NR 351.03 Exemptions from water quality certification.** The exempted activities for which this chapter is applicable to are those under s. 281.36 (4), Stats.

**NR 351.04 Inapplicability of exemptions from water quality certification.** This chapter applies to all activities that meet the conditions and criteria pursuant to s. 281.36 (4) and (5), Stats.

**NR 351.05 Incorporation by reference.** The following federal regulations, rules, memoranda of agreement, guidance letters, interpretive documents or other provisions established by a federal agency that is promulgated or adopted pursuant to s. 33 USC 1344 (f) or that is used to interpret or implement s. 33 USC 1344 (f) when determining whether certain activities in nonfederal wetlands are exempt or not eligible for exemption under s. 281.36 (4) and (5), Stats., are hereby incorporated by reference under ss. 227.21 (2) and 281.36 (6), Stats:

(1) Code of Federal Regulations (CFR). U.S. Army Corps of Engineers Regulatory Program Regulations 33 CFR 320-331 and U.S. Environmental Protection Agency Program Regulations 40 CFR 232.

**Table 1**  
**CFR References**

	Part	Name
33 CFR	Part 320	General Regulatory Policies - July 1, 2001 Edition
33 CFR	Part 323	Permits for Discharges of Dredged or Fill Material Into Waters of U.S. - July 1, 2001 Edition
33 CFR	Part 328	Definition of Waters of the United States - July 1, 2001 Edition
40 CFR	Part 232	404 Program Definitions; Exempt Activities Not Requiring Permits - July 1, 2000 Edition

**Note:** The documents in Table 1 are available at the following websites. U.S. Army Corps of Engineers, Regulatory Program, Statutory, Administrative & Judicial Materials (<http://www.usace.army.mil/inet/functions/cw/cecwo/reg/sadmin3.htm>). U.S. Environmental Protection Agency documents (<http://www.epa.gov/epahome/rules.html#codified>) and Title 40 CFR: Protection of the Environment (<http://www.epa.gov/epahome/cfr40.htm>). Copies of these materials are available for inspection in the offices of the department of natural resources, secretary of state and revisor of statutes, Madison, Wisconsin and in some public libraries or may be purchased for personal use from:

Superintendent of Documents  
PO Box 371954  
Pittsburgh PA 15250-7954

(2) U.S Army Corps of Engineers Regulatory Guidance letters.

**Table 2**  
**Applicable Regulatory Guidance Letters**

RGLs	Title
82-03	Irrigation Exemption in Section 404(F)(1)(C) of the Clean Water Act
84-01	Regulatory Jurisdiction Over Vegetative Operations
84-05	Fifth Circuit Decision in Avoyelles vs Marsh
85-04	Agricultural Conversion
86-01	Exemptions to Clean Water Act – Plowing
86-03	Exemption of Farm and Forest Roads
87-07	Exemption for Drainage Ditch Maintenance
87-09	Exemption for Construction or Maintenance of Farm or Stock Ponds
92-01	Water Dependency and Cranberry Production
93-03	Rescission of RGL's 90-5 and 90-8
96-02	Applicability of Exemptions under Section 404(f) to "Deep Ripping" Activities in Wetlands

**Note:** The documents in Table 2 are available at the following website: U.S. Army Corps of Engineers, Regulatory Program, Statutory, Administrative & Judicial Materials (<http://www.usace.army.mil/inet/functions/cw/cecwo/reg/sadmin3.htm>). Copies of these materials are available for inspection in the offices of the department of natural resources, secretary of state and revisor of statutes, Madison, Wisconsin and in some public libraries or may be purchased for personal use from:

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(3) Memoranda of Understanding and Agreement (MOA/MOUs). Memorandum for the Field: Clean Water Act Section 404 Regulatory Program and Agricultural Activities (USEPA and Department of the Army).

**Note:** The above MOA can be obtained at website (<http://www.usace.army.mil/inet/functions/cw/cecwo/reg/moumoas.htm>). Copies of these materials are available for inspection in the offices of the department of natural resources, secretary of state and revisor of statutes, Madison, Wisconsin and in some public libraries or may be purchased for personal use from:

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SECTION 19. Chapter NR 352 is created to read:

#### Chapter 352 Delineation of Nonfederal Wetlands

**NR 352.01 Applicability; purpose.** (1) **APPLICABILITY.** This chapter applies to all nonfederal wetlands as defined in s. 281.36(1)(c), Stats.

(2) **PURPOSE.** This chapter is adopted under s. 281.36(1m) and (3) to designate the wetland delineation manual procedures to be used to delineate nonfederal wetlands. The manual to be used is the 1987 edition of the U.S. army corps of engineers wetland delineation manual and any document that the U.S. army corps of engineers issues interpreting the manual.

**NR 352.02 Definitions.** The definitions contained in s. 281.36(1), Stats., apply to the terms used in this chapter.

**NR 352.03 Incorporation by reference.** All of the following federal manual, memoranda, guidelines, regulatory guidance letters or other provision established by the U.S. army corps of engineers interpreting the 1987 wetlands delineation manual shall be used when delineating nonfederal wetland boundaries:

(1) "Corps of Engineers Wetlands Delineation Manual", Technical Report Y-87-1, U.S. Army Engineer Waterways Experiment Station, Vicksburg, MS.

**Note:** The manual is available at this website:  
<http://www.saj.usace.army.mil/permit/87manual.pdf>. Copies of the manual are

available through the National Technical Information Service (phone 703-487-4650, NTIS document number ADA 176734/21NE).

(2) Guidelines for Submitting Wetland Delineations in Wisconsin to the St. Paul District Corps of Engineers (Public Notice, 96-01078-SDE, May 22, 1996).

**Note:** Copies of the guidelines are available for inspection in the offices of the department of natural resources, secretary of state and revisor of statutes, Madison, Wisconsin.

(3) U.S. Army Corps of Engineers Regulatory Guidance Letters:

**Table 1**  
**References**  
**Applicable Regulatory Guidance Letters**

RGLs	Title
88-03	Wetland Jurisdictional Determinations
90-06	Expiration Dates for Wetlands Jurisdictional Delineations
94-01	Expiration of Geographic Jurisdictional Determinations

**Note:** The documents in Table 1 are available at the following website: U.S. Army Corps of Engineers, Regulatory Program, Statutory, Administrative & Judicial Materials (<http://www.usace.army.mil/inet/functions/cw/cecwo/reg/sadmin3.htm>). Copies of these materials are available for inspection in the offices of the department of natural resources, secretary of state and revisor of statutes, Madison, Wisconsin and in some public libraries or may be purchased for personal use from:

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PO Box 371954  
Pittsburgh PA 15250-7954

(4) Memoranda of Understanding and Agreement (MOA/MOUs):

(a) Memorandum For See Distribution: Implementation of the 1987 Corps Wetland Delineation Manual, Aug. 27, 1991.

(b) Memorandum for See Distribution: Questions & Answers on the 1987 Manual, Oct. 7, 1991.

(c) Memorandum for See Distribution: Clarification and Interpretation of the 1987 Manual, Mar. 6, 1992.

(d) Memorandum of Agreement: Concerning the Delineation of Wetlands for Purposes of Section 404 of the Clean Water Act and Subtitle B of the Food Security Act, Jan. 6, 1994.

(e) Memorandum: Updated Questions and Answers Related to the Implementation of the January 6, 1994 Interagency Memorandum of Agreement Concerning the Delineation of Wetlands for Purposes of Section 404 of the Clean Water Act and Subtitle B of the Food Security Act, Dec. 12, 1994.

**Note:** The MOA listed in par. (d) may be obtained at this website:  
<http://www.usace.army.mil/inet/functions/cw/cecwo/reg/moumoas.htm>.  
Copies of these materials are available for inspection in the offices of the department of natural resources, secretary of state and revisor of statutes, Madison, Wisconsin and in some public libraries or may be purchased for personal use from:

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PO Box 371954  
Pittsburgh PA 15250-7954

(5) Regulatory IV Training Lecture Notes: Wetland Identification and Delineation, Version 1/97, U.S. Army Corps of Engineers Waterways Experiment Station.

**Note:** Copies of the training lecture notes are available for inspection in the offices of the department of natural resources, secretary of state and revisor of statutes, Madison, Wisconsin and in some public libraries or may be purchased for personal use from:

Superintendent of Documents  
PO Box 371954  
Pittsburgh PA 15250-7954

The foregoing rules were approved and adopted by the State of Wisconsin Natural Resources Board on August 14, 2002.

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)