

CORRESPONDENCE/MEMORANDUM

50

DATE: DRAFT

TO: Elizabeth Kluesner - AD/5

FROM: P. Scott Hausmann - FH/3

SUBJECT: Bill Analysis of SB 361

1. Description of Legislation: This bill is introduced supporting the objection of the Senate Committee on Environmental Resources and the objection of the Joint Committee for the Review of Administrative Rules to a portion of the proposed NR 350, Wetland Compensatory Mitigation. The objection related to a portion of the proposed rule that would have allowed applicants proposing to impact 20 acres or more of wetlands the possibility of a reduction in the compensation ratio to 1-acre compensation for each acre of wetland impacted.
2. Legislative Action in the Previous Session: None.
3. Policy/Administrative Effect: The administrative and policy effect would be minimal. This legislation would enact the compensation ratio provisions of NR 350 as originally proposed by staff and an advisory committee.
4. Fiscal Effect: None.
5. Impact on other Bureaus: None or minimal.
6. Information Impact: Minimal.
7. Administrative Rules: If the legislation does not pass, an amendment to NR 350 would be necessary (NR 350 is being promulgated without the objected-to section). No action would be required if the legislation were enacted.
8. Effective Date: 30 days after publication.
9. Land Use Impacts: Minimal.
10. Recommendations: While the concept of the bill is consistent with the rule as brought to the Natural Resources Board for approval in June 2001, the actual wording is problematic. The Department should oppose this legislation unless the following problems are addressed:

Page 3 Line 5: NR 350.06 addresses the requirements for compensation amounts. The department makes the determination of the amount of acres of compensation—not the size of the wetland at a mitigation project. NR 350.07 provides details on how a person can accrue compensation credit through activities on the ground. That is, a mitigation project is not just about *wetland size*. Credit can be generated by upland buffers and one can also get partial credit for enhancement activities on somewhat degraded wetland. Therefore, the size of the mitigation project wetland is not necessarily the correct concept to use. This section should refer to the

"amount of Compensation" rather than the "size of the wetland".

Page 3 Line 7-9: As discussed above, the "size of the wetlands" is a problem. The concept of "at least 150%" is also a problem. We understand that this is a way of saying that the ratio is at least 1.5:1, but the focus on wetland size is the problem. Again, as proposed in NR 350, the ratio applies as acres of compensation to acres of impact. The test in this bill is very different. The wording should be "...the amount of compensation shall be at least 150% of the acreage of wetland adversely impacted".

Page 3 Lines 11-13: Same problem as above with the focus on "size of wetland."

Page 4 Lines 7-8: The reference to "STH 10" is incorrect. Highway 10 is a US Highway (USH)

Page 4 Line 8: NR 350.06(2)(b) refers to a cedar swamp that is NORTH of highway 10—not south. Reference to a hardwood swamp or a conifer swamp south of highway 10 is correct.

Page 4 Lines 10-15: We do not understand this provision. Is this a provision to that says we cannot require more than what the ratios require? That is fine, but it makes no sense to require the wetlands to be reduced in size (line 14). At project specific mitigation sites, the ratios are the minimum, but everyone recognizes that you do what the site provides and this may mean more acres than you need will be developed with the same level of effort. Also, this section includes the "size of wetland" concept we object to in the above comments.

Analysis Prepared By: P. Scott Hausmann/ Dave Siebert
Phone Number: 266 - 7360 / 264 - 6048

Return the bill analysis to Elizabeth Kluesner within *seven days* with the approval signatures of:

APPROVED:

Michael Staggs, Bureau Director
Bureau of Fisheries Management and Habitat Management

Susan Sylvester, Administrator
Division of Water

Joe Polasek, Director
Bureau of Management and Budget

Franc Fennessey
Deputy Secretary

11/26/01 Meeting -- MOU as proposed by NR 350.04 (4) (c)

1. NR 350.04 sequence has two parts—one is on-site search and two is off-site.
2. Off-site can be either of three choices—do your own within the CSA, use a bank in the CSA OR use a “grandfathered” bank
3. For a bank to be “grandfathered” for selling statewide it must be in COMPLIANCE WITH AN MOU
4. MOU is between DNR and Banker—determination of compliance with MOU is made by DNR
5. MOU only applies to the banks that were established prior to NR 350 promulgation
6. If no MOU, or it is determined that bank is not in compliance with an MOU, bank can still sell within the CSA
7. **Concepts** for the MOU.

NR 350.04 (4) (c) says:

“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.”

- a. reinvesting some proceeds
- b. addresses need to keep mitigation as near as possible the loss
- c. goal is not double mitigation
- d. flexible and workable
- OK → **e.** grace period before starting
- f. simple report format to show compliance
- g. grace period to stay in compliance
- h. compliance checks on annual basis
- i. compliance determination holds for one year—avoids continuous reporting and checking
- j. list several ways that a banker can “restore wetlands”
- k. determining amount of “credit” for restoration projects should be flexible

Proposed MOU DRAFT

Provision #2

- simple annual report—GMU and calculation is all that is reported in a table
- reporting is cumulative from start of MOU to end of bank
- why 2X-Y?

X is acres facilitated (see #3 for ways to facilitate)

Y is acres credits sold in that GMU from the bank

2 is to give more credit for restoration projects and to be fair since 1.5:1 ratios applied to the sale

Provision #4: Determining compliance

- Goal is to have a positive or zero balance for each GMU, so the report check will be to look for any negative values on the spreadsheet
- Provide one-year of grace for compliance, so non-compliance is only when there are two years in a row with a negative value
- Compliance or non-compliance determination lasts one full year

Provision #7: grace period

- allows pre-NR 350 banks to sell statewide until 2/28/03

Provision #3: ways to facilitate restoration

- includes cost-sharing on projects of others
- letter from project sponsor shall suffice for determining amount of acres of value for cost-share

XXX Bank Reinvesting in Wetlands

**A Memorandum of Understanding
Between
Wisconsin Department of Natural Resources
And
XXXX Bank**

Whereas XXXX bank has been determined by the department to be a bank established prior to adoption of Chapter NR 350, Wis. Adm. Code;

Whereas XXXX entered into a signed bank document on xxxx, xx 199X with the US Army Corps of Engineers;

Whereas, the US Army Corps of Engineers has determined that the XXXX bank site located XXXXXXXXXXXX is meeting applicable performance standards;

Whereas XXXX Bank may sell credits to project proponents which have wetland loss within its service area, an area comprised of the entire XXXX geographic management unit (GMU), XXXX county, and a circle within a radius 20 miles from the XXX bank site;

Whereas, s. NR 350.13 (8) requires that XXX bank maintain a debit ledger that records all transactions with the bank;

And whereas, s. NR 350.04 (4), Wis. Adm. Code, requires compliance with a memorandum of understanding between the bank sponsor and the department, in order for the bank to sell credits to customers from outside its service area.

The Department and XXXX Bank do hereby agree:

1. XXX Bank shall Reinvest in Wetlands, by using a portion of its proceeds from out-of-service-area bank sales to facilitate wetland restoration projects elsewhere in Wisconsin.
2. XXXX Bank shall provide to the department an annual Reinvest in Wetlands MOU Report, based on data from all its past debit ledgers. The report shall include a calculation for each GMU (with the exception of the XXX GMU) using the equation $(2 X - Y)$, where X = the number of acres of facilitated wetland restoration in a given GMU and Y = number debit acres sold in that GMU.
3. Acres of facilitated wetland restoration (the "X" term in the equation in #2) may be counted in any of the following ways: conducting actual restoration work; providing funds to a private landowner to conduct a wetland restoration project; providing funds to a not-for-profit organization to conduct a specific wetland restoration project; or



*"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

Henderson, Patrick

From: Delaporte, Maggie
Sent: Monday, November 12, 2001 3:55 PM
To: Henderson, Patrick
Subject: FW: November 14th Amended Joint Committee for Review of Administrative Rules Notice

COMMITTEE HEARINGS

Joint Committee for Review of Administrative Rules

* * Amended Notice * *

The committee will hold a *public hearing* and *executive session* on the following items at the time specified below:

Wednesday, November 14, 2001
1 p.m.
Room 201 Southeast
State Capitol

Emergency Rule HFS 94.20(3)

Relating to patients' rights. Extension of the effective period of this emergency rule by 60 days at the request of the Department of Health and Family Services. First consideration.

Emergency Rule HFS 119

Relating to Health Insurance Risk-Sharing Program (HIRSP) premium rates. Extension of the effective period of this emergency rule by 60 days at the request of the Department of Health and Family Services. First consideration.

Emergency Rule NR 20.20(73)(j)1. and 2. and NR 25.06(2)(b)1.

Relating to sport fishing for yellow perch in Green Bay and its tributaries and commercial fishing for yellow perch in Green Bay. Extension of the effective period of this emergency rule by 60 days at the request of the Department of Natural Resources. First consideration.

Clearinghouse Rule 99-071

Relating to the eligibility of nonparent relatives of children to receive kinship care benefits to help them provide care and maintenance for the children.

Submitted by the Department of Health and Family Services. Objected to by the Senate Committee on Human Services and Aging.

Clearinghouse Rule 00-164

Relating to wetland compensatory mitigation.

Submitted by the Department of Natural Resources. Objected to in part by the Senate Committee on Environmental Resources and objected to in part by the Assembly Committee on Environment.

Representative Glenn Grothman Co-Chair

Senator Judith Robson Co-Chair



State Senator
Kevin Shibilski

November 5, 2001

State Senator Judy Robson
State Representative Glenn Grothman
Co-Chairs, Joint Committee on Review of Administrative Rules

Dear Chairs Robson and Grothman:

I am writing to request that the Joint Committee for the Review of Administrative Rules (JCRAR) approve the Assembly position on NR 350, specifically as it relates to NR 350.04 and the banking of mitigation credits.

At minimum, **the proposed rule should not apply retroactively** to existing mitigation banks, bank creation projects that have submitted application to proper authorities, or mitigation projects where an application has been received by the proper authority.

The US Army Corps of Engineers should remain the primary authority in the administration and enforcement of rules and standards for mitigation banking. Northland Cranberries Inc. has been operating a mitigation bank in good faith since 1999. Regardless of the intent of the most recently proposed NR 350, it changes the rules after agreements have been made and contracts have been entered into in accordance with the 1993 Interagency Coordination Agreement.

The Department of Natural Resources should certainly be a partner on the Mitigation Banking Review Team (MBRT), but the Department should not adopt a pattern of creating rules that supercede existing standards adhered to in good faith by the regulated community for the last several years.

In addition, NR 350.03 defines Mitigation Bank Service Areas that are, again, retroactive and far too restrictive. It is patently unfair to redefine existing geographic boundaries with new, unworkable areas. Agreements and contracts have been entered into and should not be breached by retroactive changes to existing regulations.

Thank you for your consideration of these requests, and please feel free to contact me on this issue.

Sincerely,

KEVIN SHIBILSKI
State Senator
24th Senate District

cc: Senator James Baumgart, Chair, Senate Committee on Environmental Resources
Members, Joint Committee for Review of Administrative Rules
Members, Senate Committee on Environmental Resources

Ten Good Reasons to Object to the Sequencing Section
Wisconsin Builders Association
10/23/01

The Senate Environment Committee passed a motion to redraft the sequencing section (350.04) of the wetland mitigation rule. The Assembly asked for changes as well, but the Assembly changes would have restored the original (public hearing version) of the rule. The Natural Resources Board approved the Senate version, and the Senate Environment Committee approved it as well. The Assembly Environment Committee objected.

We believe the JCRAR should sustain the objection because:

- The Senate Committee made numerous changes that had never been discussed in a public forum.
- The Senate changes have not been “thought through”; the more you look at them, the more confusing and troublesome they become.
- The Senate changes give the DNR unlimited authority to impose any new requirements they wish upon the existing mitigation banks.
- Development of wetland mitigation has been a consensus process..up to now.
- The Senate changes make it harder and more expensive to use wetland mitigation.
- The Senate changes make it less likely that private, nonprofit mitigation banks will be developed (*for-profit* mitigation is not financially feasible in Wisconsin.)
- The Senate changes give a financial advantage to one of the two existing mitigation banks.
- The Senate changes impose a new requirement on the other existing bank..a requirement that bank has indicated it is not able to meet.
- The Senate changes make it likely there will be a shortage of mitigation credits within two years—no credits, no permits?
- **Developments in rural areas will be harmed the most, since the Senate changes eliminate statewide banking.**
- **Rural areas may never be able to access mitigation banking, because bank developers will focus on urban areas where there is greater demand.**

(25) "Wetlands" means an area where water is at, near or above the land surface long enough to be capable of supporting aquatic or hydrophytic vegetation and which has soils indicative of wet conditions.

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

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

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

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

(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 purchase of mitigation credits from a bank established prior to the effective date of this rule ...[revisor insert date].

(7) 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.

(8) 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.

Post-
Hearing
Version

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

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

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

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

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

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

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

(26) "Wetlands" means an area where water is at, near or above the land surface long enough to be capable of supporting aquatic or hydrophytic vegetation and which has soils indicative of wet conditions.

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

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

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

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

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

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

state
version

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

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

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

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

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

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

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

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

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

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

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

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

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



OCT 12 2001

State Representative
Neal J. Kedzie

43rd Assembly District

COPY

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.

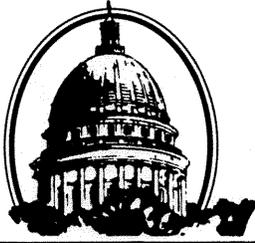
Thank you for your consideration.

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



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

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

Dedicated to Preserving and Promoting the American Dream

President
Chuck Elliott
Madison

President-Elect
Mary Anne Moore-
Church
Appleton

Treasurer
Jack Sjoström
Hayward

Secretary
Mike Lotto
Green Bay

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Senior Officers
Ron Kneebone
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Area Vice Presidents
1999-2002
Judy Carpenter
La Crosse

Mike Marthaler
Eau Claire

George Robak
Greenfield

Esther Stange
Green Bay

2000-2003
Brian McKee
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Jim Leppla
Appleton

Lana Ramsey
Union Grove

Dave Kautza
Antigo

Charlie Johansen
Hayward

2001-2004
John Anderson
Menasha

Ken Pavlik
Janesville

Mark Janowski
Green Bay

Mark Etrheim
La Crosse

Keith Weller
Wausau

Executive
Vice-President
Bill Wendle

Deputy Executive
Vice-President
Jerry Deschane

October 10, 2001

Representative Kedzie,
And Members of the Assembly Environment Committee

RE: CR00-164 Wetland Mitigation

Dear Representative Kedzie and Members:

The Wisconsin Builders Association urges you to amend the language proposed by the DNR regarding the grandfathering of existing mitigation banks. Specifically we ask that you modify proposed NR 350.04(c) as follows:

~~“Purchase of mitigation credits from a bank established prior to the effective date of this rule... 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 unit of its customers.”~~

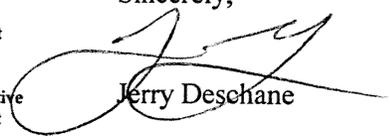
The language we propose for deletion was recommended by the Senate Environment Committee. The Assembly Environment Committee recommended language that we would support. There are numerous problems with the Senate language, including:

- It will immediately reduce by 50% the amount of mitigation credits available.
- Only one of the three existing banks can comply with this agreement.
- We calculate that it will lead to a situation where applicants cannot use mitigation because no credits are available.
- It is vague and open-ended; the DNR could demand any amount of restoration projects or any amount of money.
- It does not reflect the spirit of the agreement that existing banks, established under existing regulations, should be allowed to continue their operation.

There are only three sources of mitigation bank credits in Wisconsin. Under the proposed mitigation rules, it will take a minimum of two years to get new banks on line. Using the department's estimates for demand (100 acres of permits per year, 80% will request mitigation = 80 acres of credits per year), the Wisconsin Builders Association believes this provision will result in credits becoming unavailable very quickly, perhaps within the first year.

We urge you in the strongest terms possible to delete this language.

Sincerely,


Jerry Deschane



October 9, 2001

Senate Committee on Environmental Resources

Motion on Clearinghouse Rule 00-164,
Relating to Wetland Compensatory Mitigation

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.

Henderson, Patrick

From: Jerry Deschane [jdeschane@wisbuild.org]
Sent: Tuesday, October 09, 2001 8:09 AM
To: beil.mickey@co.dane.wi.us
Cc: Johnson, Dan (Legislature); Henderson, Patrick
Subject: Wetland bank

Hi, Mickey.

I wanted to bring something to your attention that may impact the future of the wetland mitigation bank that was established by Dane County.

The Assembly and Senate Environment Committees are set to vote (Assembly will vote Thursday) on the rule governing mitigation banks. One provision in that rule (350.04(c)) specifically relates to banks like yours. The original version of this rule allowed a pre-existing bank (Dane County and two others) to sell credits to purchasers around the state without additional restrictions. However, the Senate Environment Committee asked that the rule be amended to allow you to do that only if you agree to sign an agreement with DNR to conduct wetland restoration projects over and above the work done at the bank within the Geographic Management Unit of the credit purchaser. Since Dane County alone has four GMU's, this will mean increased cost to the County. For every credit issued, you will have to conduct a restoration project near the credit project site.

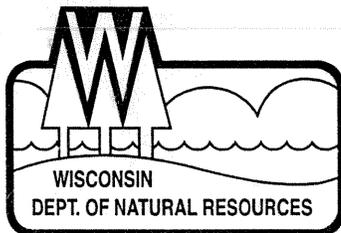
Since our members would be likely purchasers of bank credits, the Wisconsin Builders Association has asked that this amendment not be made, since it will limit or eliminate the ability of Dane County and one other bank to sell credits in the future. Since there are only three mitigation banks in Wisconsin, the loss of two-thirds of all available credits is a serious matter.

If you agree that this is a concern, we urge you to contact the Senate and Assembly Environment Committees, and ask that the additional restoration restriction on existing banks be removed.

As usual, time is short. The Assembly Environment Committee will take this matter up on Thursday, and I'm sure the Senate will take it up shortly afterward.

Please call me if you need more information.

Jerry Deschane
Wisconsin Builders Association



State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Scott McCallum, Governor
Darrell Bazzell, Secretary

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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.

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), (4) and (5), 103.08(1k), (3)(g) and ch. NR 350 relating to wetland compensatory mitigation.

FH-47-00

Summary Prepared by Department of Natural Resources

Statutory authority: ss. 281.15, 281.37 and 227.11(2)(a), Stats.

Statutes interpreted: s. 281.37, 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 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. 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 7. 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 8. 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 9. 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 10. Chapter NR 350 is created to read:

**Chapter NR 350
Wetland Compensatory Mitigation**

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

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

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

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

NR 350.03 Definitions. In this chapter:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(26) "Wetlands" means an area where water is at, near or above the land surface long enough to be capable of supporting aquatic or hydrophytic vegetation and which has soils indicative of wet conditions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6. Bog located south of highway 10.

7. Hardwood swamp located south of highway 10.

8. Conifer swamp located south of highway 10.

9. Cedar swamp located north of highway 10.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. A description of an acceptable hydrologic regime.

3. The acceptable level of occurrence of invasive species.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) Facilitate finalization of the bank document.

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

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

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

1. The name of the bank sponsor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The foregoing rules were approved and adopted by the State of Wisconsin Natural Resources Board on June 27, 2001 and September 26, 2001.

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)

NATURAL RESOURCES BOARD AGENDA ITEM

SUBJECT: Request by Legislative Committee for proposed Modifications of NR 350.04,
Wetland Mitigation Rules.

FOR: SEPTEMBER 2001 BOARD MEETING

TO BE PRESENTED BY: Darrell Bazzell and Scott Hausmann

SUMMARY:

The Board approved the package for wetland mitigation rules at the June 2001 meeting. Both the Assembly Committee on Environment and Senate Committee on Environmental Resources have recommended changes to NR 350.

RECOMMENDATION: That the Natural Resources Board adopt changes to NR 350 in accordance with agency recommendations in attached background memo.

LIST OF ATTACHED MATERIALS:

- No Fiscal Estimate Required
- No Environmental Assessment or Impact Statement Required
- No Background Memo

- Yes Attached
- Yes Attached
- Yes Attached

APPROVED:

Michael Staggs
Bureau Director, Mike Staggs- FH/3

9-7-01
Date

Susan Sylvester
Administrator, Susan Sylvester

9-7-01
Date

Darrell Bazzell
Secretary, Darrell Bazzell

9/20/01
Date

- cc: Linda Jahns - AD/5
- Mike Staggs- FH/3
- Jeff Bode- FH/3
- Michael Cain- LS/5
- Carol Turner- LS/5

- Dave Siebert- SS/7
- Scott Hausmann- FH/3

DATE: September 20, 2001
TO: Natural Resources Board
FROM: Secretary Darrell Bazzel *DB*
SUBJECT: Wetland Mitigation Package—Legislature Recommendations

The Board approved rules for wetland mitigation at its June 2001 meeting in Kenosha. The Assembly Committee on Environment and the Senate Committee on Environmental Resources have recommended changes to that package.

There are two issues that involve a change that is substantially different from the package the Board approved in June. Both committees suggested changes to the sequence for mitigation in NR 350.04, specifically looking at how we "grandfather" existing banks that were developed prior to the rules. We propose to use the Senate's recommendation, though it appears that this is not different in intent from the Assembly's version. Second, the Senate recommended eliminating the ratio variance language for those filling more than 20 acres of wetland—a change that was added to NR 350.06 at the Board's request. The Department does not propose to make that change. The rest of the legislative committees' recommended changes are more technical in nature, as noted in the memo.

This memo summarizes the recommendations from both the Assembly and Senate committees. After each recommendation, we have provided the Department response in *italics*.

Assembly:

1. Include statutory timelines for permits as required under Act 147, s. 281.37 (3m) into CR 00-164.

Agree. Since the mitigation law, the non-federal wetland law, and Chapter 30 all include timelines, we had proposed putting all timelines in one code-- a revised NR 300. We can add the timelines from the mitigation statute to this package and then when NR 300 is complete we could remove.

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)

Agree. This would be a return to our originally proposed "compensation search area" which includes the GMU plus a 20 mile radius from the wetland loss and plus the county of the loss. I believe this is what is intended from the Assembly Committee, though exact wording above is not quite correct. See also Senate #1 below.

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]

We should not agree to this specific change, however, we can meet the intent of the Assembly committee, by following the Senate recommendation. See discussion of Senate proposal #2 to address the concern of "grandfathering" banks established prior to the rules.

4. Amend language under NR 350.06 (2)(a) to read: Credits will be purchased from a registered mitigation bank under NR 350.13

Agree. The wording we propose is "(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."

Senate:

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").

Agree. Same as Assembly recommendation #2. .

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.

Agree. This is a different approach than the Department's original proposal and different from what the Assembly recommended in #3 above. But the concept for both committees is the same—to provide some "grandfathering" of banks established before the rules. The concept of a "surcharge" on bankers to fund restorations in urban Wisconsin is something we proposed in 1998, and the MOU concept here should address some of the concerns of urban Wisconsinites that mitigation will be far from losses if we allow carte blanche use of existing banks. This proposal would allow us to enter a MOU with those bankers to have wetland restoration projects, that are not mitigation, occur in GMUs where loss is occurring. The details of the MOU and the tracking and follow-up may fit well with some of the basin planning concepts for restoration and citizen monitoring we have proposed.

3. Delete the compensation ratio variance in s. NR 350.06 (3).

No change recommended. This is the variance for those who impact more than 20 acres item added by NRB at the June meeting. This provision was not part of the original staff proposal or the guidelines developed with the advisory committee and the federal agencies.

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.).

Agree. We can add a NOTE.

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.

Agree. We intended to provide the specifics for a management plan in guidance, but can easily bring in that language to code.

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.

Agree. This was our intent. We will clarify.

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.)

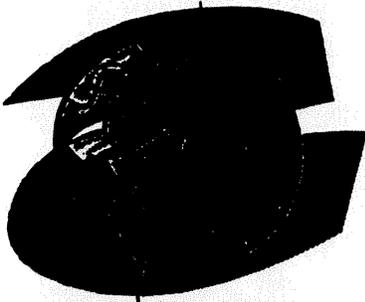
Agree. This is editorial.

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).

Agree. This was our intent. We will clarify.

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.)

Agree.



**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]

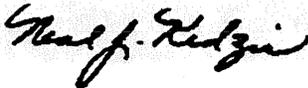
4. Amend language under NR 350.06 (2)(a) to read:

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



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

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.

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OFFICE OF THE
SECRETARY

- 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

Jim Baumgart, Chair
Senate Environmental Resources
Committee

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), (4) and (5), 103.08(1k), (3)(g) and ch. NR 350 relating to wetland compensatory mitigation.

FH-47-00

Summary Prepared by Department of Natural Resources

Statutory authority: ss. 281.15, 281.37 and 227.11(2)(a), Stats.
Statutes interpreted: s. 281.37, 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 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. 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 7. 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 8. 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 9. 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