

00-164

State of Wisconsin  
Department of Natural Resources

**NOTICE TO PRESIDING OFFICERS  
OF PROPOSED RULEMAKING**

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

Natural Resources Board Order No. FH-47-00

Legislative Council Rules Clearinghouse Number 00-164

Subject of Rules Wetland compensatory mitigation

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Date of Transmittal to Presiding Officers July 18, 2001

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

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

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

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

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

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

FH-47-00

Summary Prepared by Department of Natural Resources

Statutory authority: ss. 23.321, 281.15 and 227.11(2)(a), Stats.

Statutes interpreted: s. 23.321, 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) is amended to read:

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

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

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

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

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(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 6m. 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 7. 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 8. 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. 23.321, 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 site plan" means a comprehensive document prepared by a project proponent or bank sponsor that provides a thorough description of a proposed compensation project.

(6) "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.

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

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

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

(10) "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.

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

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

(13) "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).

(14) "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.

(15) "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.

(16) "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.

(17) "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.

(18) "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.

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

(20) "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".

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

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

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

(24) "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.

(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.

*QUESTIONS  
SAME WETLAND? WHAT DO YOU WANT*

(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].

*WHY ASK  
HOW MANY BANKS*

(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.

*MAYBE COST BASED*

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

*ASK*

(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.

*STRONGER REQUIREMENTS TO ADDRESS  
SIZE  
QUALITY } PROBLEMS  
OTHER*

**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.
- (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 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:

*What does that mean?*

*What is based on?*

- (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 final list of corrective actions and order completion by a specific date.

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

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

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

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

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

1. The number of acres of land delineated in the final monitoring year that meet the wetland definition.
2. A description of an acceptable hydrologic regime.
3. The acceptable level of occurrence of invasive species.

sub-4

WHEREAS THE ITEMS FROM THAT MONITORING

SHORT TERM

(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: *FINANCIAL*

1. A restatement of the compensation site plan goals, objectives and performance standards. *TOO SHORT?*
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. *CAN EXTEND BUT IS - FOR ERM*
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) 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.

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

**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.

*DO NOT HAVE WAY TO GO BACK*

(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 provide 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**

*REUSE*  
*- include MCA? W/ LAND EASEMENT?*

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 of or holder of interest in the property on which the wetland is located. 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. 23.321(2m)(b), 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 easement or deed restriction for the bank site pursuant to s. NR 350.11.

*commentary*  
*why include*      *CRIST position*

(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.

④

(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

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)

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

MAY 29, 2001

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

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

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

### GENERAL COMMENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*This will be addressed in revisions to NR 1.95.*

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

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

15. Why special treatment for cranberry operations?

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

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

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

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

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

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

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

*Omission makes the state rules counter to federal rules and to NR 1.95. Act 147 did not allow for preservation to be included in the definition of mitigation projects. There are no federal rules on the subject. There is however federal guidance that allows preservation to meet federal mitigation requirements in exceptional circumstances. The department achieves preservation of important wetlands through other programs outside of the regulatory arena.*

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

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

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

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

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

*These concepts are set forth in 350.04 and 350.05.*

### **NR 103 Specific Comments**

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

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

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

*Change made to 103.04(11).*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*This is a subsection of the current NR 103.*

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

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

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

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

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

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

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

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

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

*This is defined in NR 103.07.*

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

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

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

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

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

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

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

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

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

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

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

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

### **NR 350 Comments**

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

*This is in the code at 350.13(4).*

2. 350.02: Why exempt DOT?

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

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

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

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

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

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

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

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

*Change made as suggested.*

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

*The concept of discouraging impacts to other functional values is included in the revised language on credit for enhancement in 350.07(4). It states, “Proposed activities that result in conversion of one wetland type to another wetland type will generally not be given credit unless there is a demonstrated value in doing so.”*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

26. 350.07(5): The notion of credit ratios is confusing when compared with replacement ratio. Suggest removing the term credit ratio and just explaining in words.

*The term “credit ratio” has been removed to avoid confusion. This section has been revised accordingly.*

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

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

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

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

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

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

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

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

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

*This section has been revised for clarity.*

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

*Change made.*

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

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

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

*Change made to the definition of performance standard in 350.03.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*This is addressed in requirements of 350.10.*

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

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

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

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

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

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

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

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

49. 350.13(1): If bank site fails, this should be grounds for removal from the registry.

*We agree. This is in the code at 350.14(4).*

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

*No change proposed. These are statewide rules.*

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

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

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

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

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

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

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

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

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

*Change made.*

## REPORT TO LEGISLATURE

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

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

### Statement of Need

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

### Modifications as a Result of Public Hearing

#### *NR 103*

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

#### *NR 350*

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

# Attachment 1: PROPOSED NR 103 DECISION PROCESS

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

As in current NR 103  
**PROPOSED CHANGES**

Appearances at the Public Hearings and Their Position

December 11, 2000 - Madison

In support:

Robert Regan, BT<sup>2</sup>, Inc., 2740 Alice Circle, Stoughton, WI

In opposition:

Galen Smith, 218 DuRose Terrace, Madison, WI 53705

As interest may appear:

Chris Barden, 8025 Excelsior Drive, Madison, WI 53717

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

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

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

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

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

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

December 12, 2000 - Green Bay

In support:

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

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

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

In opposition:

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

As interest may appear:

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

Alden Moeller, N9154 Lawn Road, Seymour, WI 54165

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

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

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

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

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

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

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

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

Steven Grumann, 4135 Technology Parkway, Sheboygan, WI 53083

Kurt Rubsam, 4135 Technology Parkway, Sheboygan, WI 53083

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

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

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

December 12, 2000 - Wausau

In support:

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

In opposition - none

As interest may appear:

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

December 13, 2000 - Rhinelander

In support:

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

In opposition - none

As interest may appear:

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

**December 14, 2000 – Spooner**

**In support:**

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

**In opposition – none**

**As interest may appear:**

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

**December 14, 2000 – Eau Claire**

**In support:**

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

**In opposition – none**

**As interest may appear:**

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

**December 18, 2000 – Prairie du Chien**

**In support – none**

**In opposition – none**

**As interest may appear:**

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

**December 19, 2000 – Waukesha**

**In support:**

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

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

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

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

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

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

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

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

In opposition – none

As interest may appear:

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

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

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

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

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

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

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

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

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

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

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

#### Response to Legislative Council Rules Clearinghouse Report

The comments were accepted, except as noted:

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

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

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

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

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

5.b. See 5a.

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

5.d. See 5c

5.f. See 5c

5.i. Definition deleted

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

5.n. The section revised to be clearer.

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

5.u. revised per comment to be obligor

5.v. revised to "timeline"

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

#### Final Regulatory Flexibility Analysis

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

**RULES CLEARINGHOUSE**

Ronald Sklansky  
Director  
(608) 266-1946



Terry C. Anderson, Director  
Legislative Council Staff  
(608) 266-1304

Richard Sweet  
Assistant Director  
(608) 266-2982

One E. Main St., Ste. 401  
P.O. Box 2536  
Madison, WI 53701-2536  
FAX: (608) 266-3830

---

**CLEARINGHOUSE REPORT TO AGENCY**

---

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

**CLEARINGHOUSE RULE 00-164**

AN ORDER to amend NR 103.03 (1) (g), 103.04 (4), 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), (2m), (4) and (5) and 103.08 (1k) and chapter NR 350, relating to wetland compensatory mitigation.

Submitted by **DEPARTMENT OF NATURAL RESOURCES**

11-08-00 RECEIVED BY LEGISLATIVE COUNCIL.  
12-07-00 REPORT SENT TO AGENCY.

RNS:NZ:jal

**LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT**

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

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

Comment Attached      YES       NO

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

Comment Attached      YES       NO

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

Comment Attached      YES       NO

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

Comment Attached      YES       NO

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

Comment Attached      YES       NO

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

Comment Attached      YES       NO

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

Comment Attached      YES       NO

e. In s. NR 103.08 (4) (a) to (e), "when it determines" should be changed to "if it determines."

f. In s. NR 103.08 (4) (b), the first sentence would be clearer if it were broken up into two or more sentences. The same applies to s. NR 103.08 (4) (c) and (d).

g. In s. NR 350.03 (1), "incorporating" should be changed to "incorporates."

h. In s. NR 350.03 (15), what does "combination" mean in this context? Further, some words need to be added for "... and listed in s. NR 103.03 (1)" to make sense.

i. In s. NR 350.03 (17), what does "general visions" mean?

j. In s. NR 350.03 (28), the sentence would be clearer if it were to read "... a mitigation project that does not involve the purchase of bank credits."

k. In s. NR 350.04, there needs to be some context to the rule. For example, sub. (1) talks about applicants consulting with the department without explaining who these applicants are or what they are applying for.

l. In s. NR 350.04 (3), "project specific" should be changed to "project-specific."

m. In s. NR 350.05 (4), what is "passive maintenance and management"?

n. In s. NR 350.06 (3) (a), how many credits must be purchased? Are the credits purchased in addition to other mitigation efforts, or are the purchased credits to be the only means of mitigation?

o. In s. NR 350.07 (1), it is unclear whether the techniques used to develop the sight are being compared to the baseline and post-construction conditions, or whether they are being examined as a separate consideration in determining the number of acres.

p. In s. NR 350.07 (4), the second sentence is unclear. Is the sentence referring to management activities that have not been undertaken? If so, the wording needs to be changed to something like "... an approved plan for intensive management activities ..."

q. In s. NR 350.09 (2) (h), "letter or compliance" should be changed to "letter of compliance."

r. In s. NR 350.09 (3) (b), the use of the passive voice makes it ambiguous who is setting the performance standards. To the extent possible, passive voice should be replaced throughout the rule.

s. In s. NR 350.09 (3) (b), the third sentence is unclear. Does it mean that the applicant or bank sponsor may impose additional objectives on itself, or that the department can impose additional objectives?

t. In s. NR 350.09 (3) (e), the word "design" should be eliminated.

u. In s. NR 350.10 (3) (a), is it supposed to say "obligor" instead of "obligee"? Presumably the department is the obligee. [See s. NR 350.10 (3) (d).] The use of a dependant clause that starts with "which" makes it seem that all forms of financial assurance must include a third party as "obligee." Is that the intent?

v. In s. NR 350.12 (1) (f), what does "milestones" mean in this context? How does "milestones" apply to monitoring?

w. In s. NR 350.13 (1), "This registry shall provide" should be changed to "The department shall provide."

x. In s. NR 350.13 (3), should the term "bank site" be defined to distinguish it from "bank"?

y. In s. NR 350.13 (4), the sentence would be clearer if everything before the word "participation" were deleted, and the sentence were to read something like: "Participation in the establishment of a mitigation bank does not constitute ultimate authorization for specific projects . . . ." Nonetheless, it is unclear to what projects the sentence is referring.

z. In s. NR 350.13 (5), should the second sentence begin: "The total potentially available credits"?

Fiscal Estimate — 1999 Session

- Original       Updated  
 Corrected       Supplemental

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

Subject  
Wetland Compensatory Mitigation

Fiscal Effect

State:  No State Fiscal Effect

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

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

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

Local:  No Local Government Costs

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

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

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

Fund Sources Affected

- GPR       FED       PRO       PRS       SEG       SEG-S

Affected Chapter 20 Appropriations

Assumptions Used in Arriving at Fiscal Estimate

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

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

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

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

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

Long-Range Fiscal Implications

None

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

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

Original       Updated  
 Corrected       Supplemental

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

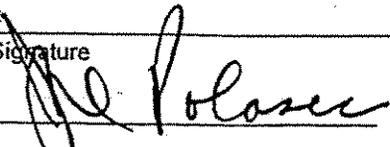
Subject  
 Wetland Compensatory Mitigation

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

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

**Net Annualized Fiscal Impact**

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

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

Office of Sen. Judith Robson  
Office of Rep. Glenn Grothman  
Phone 608-266-2253  
Phone 608-264-8486

**Joint Committee for  
Review of  
Administrative Rules**

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

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

Description of the Rule

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

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

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

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

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

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

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

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

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

#### Action by the Joint Committee for Review of Administrative Rules

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

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

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

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

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

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

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

#### Arguments Presented For and Against the Proposed Rule

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

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

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

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

#### Arguments in Favor of the Objection

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

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

#### Arguments Against Concurrence in the Objection

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

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

Statutory Basis for the Joint Committee's Objection

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

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

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

**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