



WISCONSIN STATE LEGISLATURE ... PUBLIC HEARING - COMMITTEE RECORDS

2009-10

(session year)

Senate

(Assembly, Senate or Joint)

Committee on Environment...

COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
 - (**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
 - (**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

Senate

Record of Committee Proceedings

Committee on Environment

Clearinghouse Rule 09-077

Relating to ensuring that lands acquired with funding from the stewardship program under ss. 23.0915 and 23.0917, Stats., are open to public hunting, trapping, fishing, hiking and cross county skiing.

Submitted by Department of Natural Resources.

February 02, 2010 Referred to Committee on Environment.

March 16, 2010 **PUBLIC HEARING HELD**

Present: (5) Senators Miller, Jauch, Wirch, Kedzie and Olsen.

Absent: (0) None.

Appearances For

- Doug Haag, Madison — DNR
- Elizabeth Kluesner, Madison — DNR
- Mike Carlson, Madison — Gathering Waters Conservancy
- David Wernecke, Baraboo — Baraboo Range Preservation Association
- Jim Welsh, Madison — Natural Heritage Land Trust
- Todd Holschbach, Madison — The Nature Conservancy

Appearances Against

- Scott Gunderson, Waterford — Representative, 83rd Assembly District
- Dick Baudhuin, Sturgeon Bay — Himself
- Sandy Heidel — Herself
- Jeff Nania, Portage — Wisconsin Waterfowl Association
- George Meyer, Madison — Wisconsin Wildlife Federation
- Jerry Knuth, Plover — Wisconsin Wildlife Federation
- Steve Schmuki, Waukesha — Waukesha County Environmental Action League
- Ellen Gennrich, Waukesha — Waukesha County Land Conservancy
- Bob Welch — Hunters Rights Coalition; State Chapter NWTF; WI Bearhunters; WI Chapter-SCI; NRA; WI T-Force
- Virgil Schroeder, Cottage Grove — Wisconsin Trappers Association

Appearances for Information Only

- Jim Sullivan, Wauwatosa — Senator, 5th Senate District
- Peter Cannon, Madison — Madison Audubon Society

Registrations For

- Curt Witynski, Madison — League of Wisconsin Municipalities
- Wallace Thiel — Village of Hartland

Registrations Against

- Mike Huebsch, LaCrosse — Representative, 94th Assembly District
- Joan Baudhuin, Sturgeon Bay — herself
- Jolene Plautz, Madison — United States Sportsmen's Alliance

Registrations for Information Only

- None.

April 1, 2010

EXECUTIVE SESSION HELD

Present: (5) Senators Miller, Jauch, Wirch, Kedzie and Olsen.

Absent: (0) None.

Moved by Senator Miller, seconded by Senator Kedzie that **Clearinghouse Rule 09-077** be recommended for modifications requested.

Ayes: (5) Senators Miller, Jauch, Wirch, Kedzie and Olsen.

Noes: (0) None.

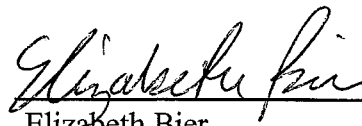
MODIFICATIONS REQUESTED RECOMMENDED, Ayes 5, Noes 0

June 1, 2010

Modifications received.

June 16, 2010

No action taken.



Elizabeth Bier
Committee Clerk

Vote Record Committee on Environment

Date: 4.1.10

Moved by: Miller

Seconded by: Kedzie

AB _____

SB _____

Clearinghouse Rule 09-077

AJR _____

SJR _____

Appointment _____

AR _____

SR _____

Other _____

A/S Amdt _____

A/S Amdt _____ to A/S Amdt _____

A/S Sub Amdt _____

A/S Amdt _____ to A/S Sub Amdt _____

A/S Amdt _____ to A/S Amdt _____ to A/S Sub Amdt _____

Be recommended for:

- | | | | | |
|---|------------------------------------|---------------------------------------|---|--|
| <input checked="" type="checkbox"/> Passage | <input type="checkbox"/> Adoption | <input type="checkbox"/> Confirmation | <input type="checkbox"/> Concurrence | <input type="checkbox"/> Indefinite Postponement |
| <input type="checkbox"/> Introduction | <input type="checkbox"/> Rejection | <input type="checkbox"/> Tabling | <input type="checkbox"/> Nonconcurrence | |

Committee Member

Senator Mark Miller, Chair

Senator Robert Jauch

Senator Robert Wirch

Senator Neal Kedzie

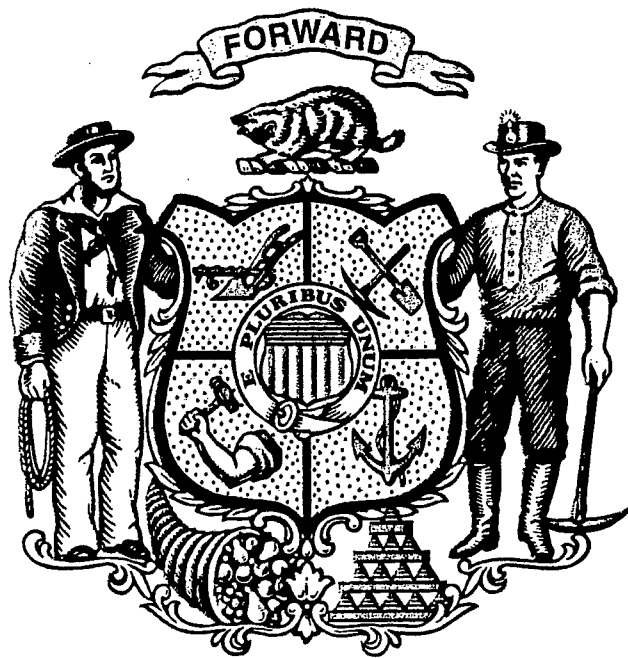
Senator Luther Olsen

<u>Aye</u>	<u>No</u>	<u>Absent</u>	<u>Not Voting</u>
<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
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Totals: 5 _____

Motion Carried

Motion Failed





WISCONSIN LEGISLATIVE COUNCIL

*Terry C. Anderson, Director
Laura D. Rose, Deputy Director*

TO: SENATOR DALE SCHULTZ

FROM: Mark C. Patronsky, Senior Staff Attorney

RE: Questions Regarding Public Access and Use of Land Purchased in Part With a Stewardship Grant

DATE: October 28, 2008

This memorandum is in response to your request for analysis of one of the new statutory requirements regarding public access to land that is purchased in part with Stewardship funding. (2007 Wisconsin Act 20, creating s. 23.0916, Stats.)

The Legislature adopted new requirements for public access to Stewardship lands in the 2007-2009 Budget Act. A copy of this statute is included as an attachment to this memorandum.

Your first question is whether s. 23.0916, which requires the recipient of a Stewardship grant to permit public access to the land "for nature-based outdoor activities," requires the grantee to make that land accessible for all of the activities in the definition. The definition of "nature-based outdoor activity" is "hunting, fishing, trapping, hiking, cross-country skiing, and any other nature-based outdoor activity designated by rule by the department for purposes of this section." "This section" is a cross-reference to the new statute on Stewardship land access. The Department of Natural Resources (DNR) has not yet adopted administrative rules that would add any activities to the current list of statutory activities.

Based on my analysis of this statute, I believe that the grant recipient must allow access for all of the nature-based outdoor activities, unless specific approval is obtained from the Natural Resources Board to prohibit public access for one or more of these activities. The statute, both for nondepartment land (i.e. land acquired by local governmental units and nonprofit conservation organizations) and department land, permits two options. The first option is that the grant recipient "shall permit public access to the land for nature-based outdoor activities." The other option is that the grant recipient "may prohibit public access for one or more nature-based outdoor activities," as determined necessary by the Natural Resources Board. I believe the statute is clear that the only way for the grant recipient to prohibit any public access is with the approval of the Natural Resources Board. Therefore, the grant

recipient must otherwise allow access for all nature-based outdoor activities, because the grant recipient may only prohibit one of those activities with the approval of the Natural Resources Board.

Your second question is whether the Natural Resources Board itself must review any application to prohibit public access for any nature-based outdoor activities on Stewardship land, or whether the Natural Resources Board may establish criteria for this decision and delegate the decision to DNR staff. The statute clearly requires the Natural Resources Board to determine the necessity of prohibiting any public access. The statute does not authorize delegation of this decision. However, the Natural Resources Board could delegate fact-finding responsibilities to the staff, with a staff report and recommendation presented to the Natural Resources Board for its final decision. This interpretation of the statute is supported by the Wisconsin Supreme Court in *Park Building Corporation v. Industrial Commission*, 100 N.W.2d 571 (1960). The Supreme Court in this case relied on an earlier case to determine the extent to which a public officer or agency may delegate its authority:

The extent to which a public officer or administrative agency may subdelegate to subordinates an express delegated power, such as in the instant case to make an order, is well stated in *School Dist. No. 3 of Town of Adams, v. Callahan*, 237 Wis. 560, 576, 297 N.W. 407, 415 (1941), as follows:

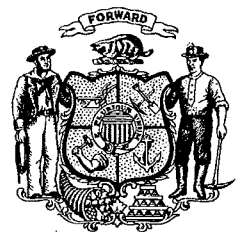
“However, the rule that requires an executive officer to exercise his own judgment and discretion in making an order of such nature does not preclude him from utilizing, as a matter of practical administrative procedure, the aid of subordinates directed by him to investigate and report the facts and their recommendation in relation to the advisability of the order, and also to draft it in the first instance. [citing cases] It suffices that the judgment and discretion finally exercised and the orders finally made by the superintendent were actually his own.”

If I can provide further information on this subject, please feel free to contact me.

MCP:jb;wu
Attachment



WISCONSIN STATE LEGISLATURE



CORRESPONDENCE/MEMORANDUM

DATE: November 20, 2009
TO: Pat Henderson – AD/8
FROM: Tim Andryk – LS/8 *Ta*
SUBJECT: NRB Stewardship Access Determinations

STATUTE

According to sec. 23.0916(2)(b), Stats., public access for a nature based outdoor recreation activity (NBOA) may be prohibited “if the natural resources board determines that it is necessary to do so in order to do any of the following:

1. Protect public safety.
2. Protect a unique plant or animal community.
3. Accommodate usership patterns, as defined by rule by the department.”

QUESTION

Does s. 23.0916(2)(b), Stats authorize and require the Natural Resources Board (NRB) to make individual determinations that it is necessary to prohibit access for each grant property, or does it require the NRB to make broad policy determinations, commensurate with the NRB’s policy making role, in order to prohibit access on Stewardship grant properties?

ANSWER

The NRB is required by sec. 23.0916(2)(b), Stats., to make a determination that it is necessary to prohibit public access in order for it to be prohibited on Stewardship grant properties. However, because the NRB’s authority is “policy-making” and “not administrative” according to s. 15.05(1)(b), Stats., the NRB is charged with making broad policy making determinations, including factors, criteria and a process for individual determinations to be made for each grant property by the Department, since all of the administrative powers and duties are vested in the Secretary, according to s. 15.05(1)(b), Stats.

ANALYSIS

According to s. 15.05(1)(b), Stats., “the powers and duties of the board shall be regulatory, advisory, and policy-making, and not administrative. All of the administrative powers and duties of the department are vested in the secretary, to be administered by him or her under the direction of the board.” The NRB exercises their authority by adopting rules (regulatory) with broad policy determinations that include factors, criteria and a process for the Department to exercise its administrative authority in making individual determinations for each license, permit, or grant application.

The 2007 Stewardship statute, s. 23.0916(2)(b), Stats., does not include a reference to the statute on the NRB’s authority, s. 15.05(1)(b), Stats., so it does not specifically amend the requirement that the NRB’s authority is “policy making” and “not administrative”. Consequently the two statutes must be interpreted in a harmonious fashion. Wyss v. Albee, 193 Wis. 2d 101, (1995). In order to prohibit access on Stewardship grant properties, the NRB is required to make the broader policy determinations that the

Department is to follow in making individual (administrative) determinations for each grant property according to factors, criteria and a process established by the NRB through rule-making, under its regulatory authority.


Individual determinations for each grant property are final decisions subject to appeal according to s. 227.42, Stats., and 227.52, Stats. If the NRB were to make individual determinations, their determinations would be subject to appeal, which would be contrary to their role as a regulatory and policy setting citizens board in which their decisions and determinations are not appealable under the State Constitution's sovereign immunity clause, upheld in court in Lister v. Board of Regents, 72 Wis. 2d 282 (1976). The NRB's role and authority under s. 15.05(1)(b), Stats., ie. "not administrative", would have to be specifically modified if the NRB was going to act in an administrative capacity in making individual determinations for each grant property that would subject the NRB to contested case hearings and lawsuits challenging their decisions.

CONCLUSION

The proposed rules on access to properties purchased with Stewardship funds, ch. NR 52, Wis. Adm. Code, are intended to be consistent with the NRB's "policy-making" and "not administrative" authority, under s. 15.05(1)(b), Stats. As required by s. 23.0196(2)(b), Stats., in the proposed rules the NRB makes the determination that it is necessary to prohibit public access to protect public safety, protect a unique plant or animal community, or to accommodate usership patterns. The proposed rules specify criteria, factors and a process for the Department to administer in making individual access determinations for each grant property. In addition, the proposed rules include an oversight role for the NRB in reviewing at each NRB meeting a report of the individual access determinations made by the Department. In response to the report the NRB may, pursuant to its policy-making and regulatory duties, direct the Department to proceed with a rule change to ch. NR 52, and/or pursue a change in how the Department implements its administrative duties in making individual determinations for each grant property.

DATE: January 8, 2010

TO: Natural Resources Board

FROM: Matthew J. Frank 

SUBJECT: NRB adoption for Facilities and Lands Rule Order LF-08-09,

I am requesting Natural Resources Board adoption of LF 08-09, creating CH. NR 52 regarding public use of lands acquired under the Knowles Nelson Stewardship Program.

2007 Stewardship Reauthorization

The 2007-2009 state budget reauthorized the Knowles Nelson Stewardship Program and increased funding to \$86 million annually beginning in July, 2010. (2007 Act 20). The Stewardship Program is the primary funding source for land acquisition for conservation and public outdoor recreation in Wisconsin. The 2007 reauthorization of the Stewardship Program also directed the promulgation of rules to more explicitly lay out public access requirements.

The proposed rule reinforces the presumption, and the historical practice, that Stewardship lands must provide public access and that limitations are to be the exception rather than the rule. Through the 2007 reauthorization and other legislation enacted over the years, the legislature has also recognized that there are situations in which it is appropriate to have some limitations on public access.

2007 Act 20 further defined the public access requirement, requiring that lands acquired with funds from the stewardship program are required to be open to the public for hunting, trapping, fishing, hiking and cross country skiing (NBOA's-Nature Based Outdoor Activities) unless it is necessary to prohibit one or more of these NBOAs to protect public safety, protect unique plant and animal communities, or to accommodate usership patterns as defined by rule. The rule proposal incorporates the new law and harmonizes it with existing law. Act 20 did not change other laws governing state land use, land acquisition or stewardship grant subcategories.

The History of Public Access under the Knowles Nelson Stewardship Program

Since its inception twenty years ago, the Stewardship Program has a solid record of providing public access for a wide range of outdoor enthusiasts. The Stewardship Fund has assisted in the purchase of more than 515,000 acres of land that is open to the public with 473,000 acres of that land open to public hunting and much of it open to public trapping, as well. Over the years, the legislature has enacted numerous laws designed to serve a multitude of goals that serve the public interest through the Stewardship Program, including land conservation and scenic beauty, protection of fish and wildlife habit, preservation of forest and plant communities, as well as providing a wide range of outdoor recreation opportunities for all of Wisconsin's citizens, both in rural and urban areas.

Stewardship serves a wide variety of outdoor recreational opportunities. One of the things we cherish most in Wisconsin is the richness of our natural resources and how much they enhance our quality of life. Wisconsin citizens enjoy the outdoors in a wide variety of activities ranging from hunting, fishing, trapping, hiking, biking, cross country skiing, wildlife viewing, canoeing, and horseback riding to

camping, boating, snowmobiling, and ATV'ing, to name a few. It is the Department's responsibility to serve all of Wisconsin's citizens and maintain a wide range of outdoor recreation opportunities.

Wisconsin's Stewardship program is a national model which has significantly enhanced Wisconsin's strong hunting, fishing and trapping heritage. Whether through land preservation to forever protect existing hunting opportunities, opening up private lands to public hunting that were previously closed, or by restoring wildlife habitat to expand hunting opportunities which were previously limited, the Stewardship program has greatly expanded outdoor opportunities for sports men and women. No other state in the country has done a better job than Wisconsin in strengthening its hunting heritage through a public land purchase program supported by all state taxpayers.

Since its creation, the Stewardship fund has assisted in the purchase of more than 515,000 acres of land that is open to the public with 473,000 acres of that land open to public hunting and much of it open to public trapping as well. Lands that might be closed to hunting or trapping include state park lands, wildlife refuges, administrative facilities and land surrounding fish hatcheries, forest nurseries and administrative sites and lands within municipal boundaries subject to local ordinances.

Stewardship funds are conservatively estimated to have leveraged \$200,000,000 additional dollars from government, land trust and federal sources. Land Trusts alone have completed over 400 separate real estate transactions protecting nearly 40,000 acres of land and local governments have completed over 500 transactions protecting more than 15,000 acres. Of the 55,000 acres protected by local government and land trust partners, 40,000 acres are open to some form of public hunting.

Accountability and Transparency

The rule preserves the success the Stewardship program has achieved in two critical areas- making timely decisions to take advantage of land buying opportunities, and leveraging state Stewardship dollars with dollars from other governmental and non-governmental partners to greatly expand the number of acres that are acquired for public benefit. The accountability and transparency provisions of the proposed rule retain the flexibility of the Stewardship program to take full advantage of public land acquisition opportunities.

The proposed rule establishes new accountability and transparency provisions that have not previously existed, creating new checks and balances over the Department's decisions regarding public access. The proposed rule sets up a process and criteria for department decisions about when certain activities will be limited on parcels of land acquired with Stewardship funds as well as a system for the Natural Resources Board to monitor public access decisions. The criteria, decision process and monitoring provide greater accountability and transparency for department decision making and create a framework under which citizens who disagree with a department decision can appeal the decision.

For example, the rule specifies internal procedures that the Department must use to provide an opportunity for public input whenever it considers limiting public access in a particular land acquisition.

For the first time, clear standards and a decision-making process are set forth in a rule that will be subject to oversight by the Natural Resources Board. With the enactment of the rule, the Board will enhance its authority to exercise oversight by modifying Department policy on public access to Stewardship lands through rule amendments or modifications as approved by the Board. The rule requires the Department to publish data and information regarding public access and to file regular reports with the Board, which will enhance the ability of the public and the Board to monitor the Department's performance.

In addition, for the first time, citizens or organizations who wish to challenge a public access decision can do so through a chapter 227 administrative appeal. Previously, in the absence of a rule, parties had no access to a review by an independent third party and could only appeal to the Department. Under the proposed rule, parties will be able to appeal a Department decision to an administrative law judge and ultimately to circuit court.

In addition to promulgating this rule, the Department is working hard to develop a more robust system so that all of our citizens can more easily find and access public land. These efforts include improving signage as well as enhancing website and internet information to make information instantaneously available.

Summary of the Rule:

Chapter NR 52 creates standards and criteria that will be used by the department to determine when it is necessary prohibit one or more NBOA to protect public safety, unique plant or animal communities or to accommodate usership patterns. The rule identifies the factors that will be considered in setting a prohibition and creates a process for reviewing land acquisition proposals for compliance with the law. Decisions to prohibit an NBOA will be based on sound science, legitimate safety issues and other factual data pertaining to incompatible uses. Chapter NR 52 requires that when one or more NBOAs are proposed to be prohibited the department will notify the public by internet posting with the capability for individual subscriptions to updates. The web posting will include a checklist indicating which NBOAs are available at the site and if NBOAs will be limited, the reason for the limitation. The public will have a chance to comment on the proposal to limit NBOAs. The department will evaluate the public comments and apply the standards and criteria identified in the rule when determining whether the limitation meets the intent of s. 23.0916, Stats. Further, department decisions under this chapter will be appealable under Ch. 227.

2007 Act 20 directs the Natural Resources Board to establish a process for the review of determinations under ss. 23.0916. Stewardship land is presumed to be open unless one of the exceptions provided by the Legislature is present. Consistent with the Board's policy role outlined in s. 15.05(1) (b), the proposed rule provides a process for the Board to monitor the Department's day to day actions under this rule and consider whether any changes in policy are needed. Each month the Department staff will provide the NRB with a report that summarizes all stewardship land purchases that have been made and the determinations on public access that have been made under the rule. The NRB will then have an opportunity to hear testimony from the public on this report on a biannual basis.

Public Hearing Summary:

In August the Natural Resources Board authorized public hearings on the draft rule, CH. NR 52. The Department held five public hearings during October. The locations of the hearings were: Eau Claire; Green Bay; West Bend; Rhinelander; and Madison. Approximately 113 people registered at the public hearings with about half of those provided testimony; an additional 175 people commented by e-mail and 28 by US mail service. Appendix 1 to this memo contains a detailed summary of, and response to all public comments. Major themes from the comments can be summarized as follows:

1. Modify the rule to provide for more Natural Resources Board (NRB) review of individual decisions or to provide some appeal authority to the NRB of individual decisions made by the department.

As discussed in the rule summary, the proposed rule is intended to be consistent with the NRB's policy making authority. Under s. 15.05 (1)(b), Stats., the NRB's authority is "policy making" and "not administrative". The NRB is charged with making broad policy making determinations, including factors, criteria and a process for individual determinations to be made for the Department to exercise its administrative authority in making individual determinations for each license, permit or grant application. All administrative duties and powers are vested in the Secretary, according to s. 15.05 (1)(b).

The proposed rules specify criteria, factors and a process for the Department to administer in making individual access determinations for each grant property. In addition, the proposed rules include an oversight role for the NRB in reviewing at each NRB meeting a report of the individual access determinations made by the Department.

2. Remove or modify certain sections of the rule related to factors that will be considered when making a determination to prohibit an NBOA.

The factors listed in the rule that guide the department's decision making for public access determinations were agreed upon by the Citizen Advisory Committee. The factors provide the criteria for the agency to decide when one of the statutory exemptions applies to a stewardship project. The department believes it is important to provide flexibility in the rule and follow, as closely as possible, the CAC recommendations on the factors.

3. Support the rule as written.

4. Add biking and mountain biking as a 6th NBOA.

The department recommends that Department master plans and other similar planning efforts at the local level continue to dictate public use for biking and all of the many other activities listed in NR 51.002(19).

4. Provide special consideration for state natural areas as the statutory purpose of this program is to protect unique plant and animal communities rather than to provide recreation.

s. 23.0916 Stats. does not give the Department any authority to exempt programs such as the natural areas program from the law

5. Recognize the need for local units of government to make local decisions about these activities based on local comprehensive plans, local ordinances and local safety issues.

The department does recognize the importance of local ordinances, local plans and local control in making decisions about public access and has included such references in the proposed rule. The Public Safety section includes a local ordinance as a factor to be considered when limiting public access under this exemption. In addition, the definition of "primary purpose" and the General Provisions section reference the importance of local and regional plans in helping to determine the primary purpose for the land acquisition.

6. Provide exceptions for southeast Wisconsin.

s. 23.0916 Stats., does not give the Department any authority to create geographical exceptions for southeast Wisconsin.

Response to Legislative Clearinghouse Report

The department has responded to the Legislative Clearinghouse Report by incorporating suggested changes where appropriate. The department's response to the Clearinghouse on the issues raised, but not responded to in the rule follows below.

The Clearinghouse raised a question on the statutory authority that exists for individual grant decision making by the department.

Under the rule, the Natural Resources Board (NRB) is not delegating decision making responsibility to the department. The NRB is making the broad determination required by s. 23.0916, Stats., in the rule, the department is administering it.

The proposed rules on access to properties purchased with Stewardship funds, ch. NR 52, Wis. Adm. Code, are intended to be consistent with the NRB's "policy-making" authority. Under s. 15.05(1)(b), Stats, the NRB's authority is "policy making" and "not administrative". The NRB is charged with making broad policy making determinations, including factors, criteria and a process for individual determinations to be made for the Department to exercise its administrative authority in making individual determinations for each license, permit or grant application. All administrative duties and powers are vested in the Secretary, according to s. 15.05 (1)(b).

As required by s. 23.0196(2)(b), Stats., in the proposed rules the NRB makes the determination that it is necessary to prohibit public access to protect public safety, protect a unique plant or animal community, or to accommodate usership patterns. The proposed rules specify criteria, factors and a process for the Department to administer in making individual access determinations for each grant property. In addition, the proposed rules include an oversight role for the NRB in reviewing at each NRB meeting a report of the individual access determinations made by the Department. In response to the report the NRB may, pursuant to its policy-making and regulatory duties, direct the Department to proceed with a rule change to ch. NR 52, and/or pursue a change in how the Department implements its administrative duties in making individual determinations for each grant property.

The 2007 Stewardship statute, s. 23.0916(2)(b), Stats., does not include a reference to the statute on the NRB's authority, s. 15.05(1)(b), Stats., so it does not specifically amend the requirement that the NRB's authority is "policy making" and "not administrative". "All of the administrative powers and duties of the department are vested in the secretary, to be administered by him or her, under the direction of the Board." Consequently the above two statutes must be interpreted in a harmonious fashion. Wyss v. Albee, 193 Wis. 2d 101, (1995). In order to prohibit access on Stewardship grant properties, the NRB is required to make the broader policy determinations that guides the Department in making individual (administrative) determinations for each specific grant property according to factors, criteria and a process established by the NRB through rule-making, under its regulatory authority.

Further, individual determinations for each grant property are final decisions subject to appeal according to s. 227.42, Stats., and 227.52, Stats. If the NRB were to make individual determinations, their determinations would be subject to appeal, which would be contrary to their role as a regulatory and policy setting citizens board in which their policy setting decisions are not appealable under the state constitution's sovereign immunity clause and as upheld by the courts in Lister v. Board of Regents, 72 Wis. 2d 282 (1976). The NRB's role and authority under

s. 15.05(1)(b), Stats., i.e. “not administrative”, would have to be specifically modified if the NRB was going to act in an administrative capacity in making individual determinations for each grant property that would subject the NRB to contested case hearings and lawsuits challenging their decisions. The Board does not make administrative decisions on individual permits, licenses or grants. They remain the policy setting body for the DNR.

For further information on this issue, please see Appendix 2, attorney Tim Andryk’s memo to Deputy Secretary Henderson, dated November 20, 2009.

The Clearinghouse raised a question about using the term “assessment” in 52.04 (1)(d).

The department believes that the term “assessment” is proper in this section of the rule rather than using the term “initial determination”. Later in the rule, it is made clear that the department will be making a determination on each project. It does not make sense procedurally to make a determination decision twice for each stewardship project.

The Clearinghouse commented on the location of substantive material in the Purpose and Applicability section of the rule.

The language in the Purpose and Applicability section of the rule discussing “restrictions” and “prohibitions,” has been moved to the Definition section in a definition of the term “prohibition.”

Stakeholder Involvement

In addition to the public hearings that were held in September and October, the Department conducted an extensive public process through an appointed Citizen Advisory Committee (CAC). In July of 2008, the department appointed a 28 member citizen advisory committee to provide input on developing these administrative rules. The CAC included members from a diverse group of recreational users. A complete listing of the members of the citizen advisory committee can be found at <http://dnr.wi.gov/org/caer/news/PDF/stewmembers.pdf>.

The citizen advisory committee met 6 times between July 2008 and January 2009. A professional facilitator was hired to manage the meetings and lead the group through a variety of exercises intended to identify important issues. The CAC developed recommendations on each of the NBOA public access exceptions identified in the statute and the department staff used these recommendations to prepare four concept papers on the following topics: A Process for the Review of Determinations Made Under s. 23.0916, Stats., Public Safety; Unique Plant and Animal Communities; and Usership Patterns. These concept papers were used by department staff to draft proposed CH. NR 52. The final drafts of these concept papers can be found at: <http://dnr.wi.gov/stewardship/CAC/>.

Small Business and Regulatory Flexibility Analysis:

Chapter NR. 52, Wis. Admin. Code relating to hunting, trapping, hiking, cross country skiing and fishing is applicable to the Department, local units of government and non-profit conservation organizations and to individuals and imposes no compliance or reporting requirements for small businesses, nor are any design or operational standards contained in the rule that affect small business. Therefore, under s. 227.19 (3m) Stats., a final regulatory flexibility analysis is not required.

Environmental Analysis:

The Department has determined that these rules are a Type III action under Chapter 150, Wis. Adm. Code, and no environmental analysis is required.

Conclusion

In conclusion the Department believes the proposed rule reflects the original vision of the Knowles Nelson Stewardship program to create a funding source that will provide for the preservation of Wisconsin's most unique and threatened land and water resources and meet the diverse outdoor recreational needs of Wisconsin's residents both in its most urban places and in the wildest most remote corners of the state.



STATE OF WISCONSIN

Natural Areas Preservation Council

P.O. BOX 7921 · MADISON · WISCONSIN · 53707



Natural Areas Preservation Council Members and State Natural Areas Program Staff

Arranged by appointing authority, with term expiration date. Terms expire June 30 of indicated year.

Wisconsin Academy of Sciences, Arts & Letters

Charles Luthin (Chair) Executive Director Natural Resources Foundation of Wisconsin P.O. Box 2317 Madison, WI 53701	(608)261-4384 Office (608)245-1026 Home (608)266-2452 FAX charles.luthin@wisconsin.gov	2011
Susan E. Lewis (Vice Chair) Associate Professor of Biology Department of Biology Carroll University 100 North East Ave. Waukesha, WI 53186	(262)524-7279 Office (262)524-7112 FAX lewiss@cc.edu	2011
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Wisconsin Department of Natural Resources

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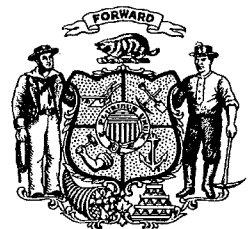
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WISCONSIN STATE LEGISLATURE



Sen. Miller

**ORDER OF THE STATE OF WISCONSIN
NATURAL RESOURCES BOARD
CREATING RULES**

The Wisconsin Department of Natural Resources proposes an order to create ch. NR 52, to ensure lands acquired with funding from the stewardship program under ss. 23.0915 and 23.0917, Stats., are open to public hunting, trapping, fishing, hiking and cross country skiing.

LF-08-09

Analysis Prepared by the Department of Natural Resources

Statutes Interpreted: s. 23.0916, Stats.

Statutory Authority: ss. 23.0916, 227.10, and 227.11, Stats.

Explanation of agency authority: s. 23.0916, Stats. directs the department to promulgate rules that create provisions relating to public access for nature based outdoor activities for department lands and non-department land acquired in whole or in part with funding from the stewardship program under ss. 23.0915 and 23.0917, Stats.

Related statute or rule: ss. 23.0915 and 23.0917, Stats., establish the stewardship program. General guidelines for department land acquisition are located in ch. NR 1 and ch. NR 51 provides guidelines for the administration of the stewardship program for non-department land acquisition authorized in ss. 23.0915 and 23.0917, Stats.

Plain language analysis: Chapter NR 52 creates standards and criteria that will be used by the department and the natural resources board to determine whether it is reasonable to prohibit one or more nature based outdoor activities, defined as hunting, trapping, hiking, fishing and cross country skiing. The rule identifies three primary reasons for prohibiting one or more of these activities. The three reasons are; to protect public safety, to protect unique plant and animal communities and to accommodate usership patterns. The rule also requires that when one or more nature based outdoor activities is proposed to be prohibited the department will notify the public by posting the information on the department's website. The public will have a chance to comment on the proposal to buy the land and prohibit the activity. The department and the natural resources board will evaluate the public comments and apply the standards and criteria identified in the rule when determining whether the prohibition meets the intent of s. 23.0916, Stats.

Summary of, and comparison with, existing or proposed federal regulations: The Land and Water Conservation Fund is a federal funding program administered by the national park service. This program provides funding for the acquisition of land and the development of facilities for public outdoor recreation. The program does not include a specific requirement that lands and facilities be open to all nature based activities, rather the use of the funds is directed by the Statewide Comprehensive Outdoor Recreation Plan which identifies general trends in outdoor

recreation and identifies broad regional and statewide needs for land acquisition and recreational facility development.

The US fish and wildlife service administers several programs that provide funding to the department for land acquisition and facility development. Most of these funds are targeted to a specific purpose such as the protection of habitat for endangered species, coastal areas and wetlands. In addition there are funds for motor boat access acquisition and development; for wildlife habitat protection and management and for fisheries habitat protection and development. Generally land acquired with funds from the fish and wildlife service must be open to the public. There are some limited restrictions on the types of activities that are allowed to occur on these federally funded properties.

Comparison with rules in adjacent states: Minnesota, Michigan, Iowa and Illinois all have land acquisition programs that allow for the purchase of land, either through easements or fee simple purchases. Many of these programs are similar to the stewardship program. However, these programs do not have the requirement that they be open to the public for hunting, fishing, trapping, hiking, and cross-county skiing.

Minnesota: The Natural and Scenic Areas Grant Program was created to increase, enhance and protect Minnesota's natural and scenic areas. The program provides \$500,000 in matching grants each year for fee simple purchases and conservation easements of environmentally important lands. There is no requirement of public access for nature based outdoor recreational activities. http://www.dnr.state.mn.us/grants/land/natural_scenic.html

Michigan: The Michigan Natural Resources Trust provides approximately \$35 million in financial assistance each year to local governments and the Michigan DNR to purchase land or rights in land for public recreation or for environmental protection or scenic beauty. It also provides financial assistance for the development of land for public outdoor recreation. This program lists public access and hunting and fishing opportunities as a scoring criteria and special initiative but does not require the land to be open to these specific activities. http://www.michigan.gov/dnr/0,1607,7-153-10366_37984_37985-124961--,00.html

Iowa: The Resource Enhancement and Protection (REAP) grant program in Iowa was created to enhance and protect Iowa's natural and cultural resources. This program provides up to \$20 million in funding annually to acquire land for recreational purposes. Iowa's program does not specifically require the land to be used for hunting, fishing, trapping, hiking, or cross country skiing. <http://www.iowadnr.gov/reap/index.html>

The Wildlife Habitat Promotion with Local Entities provides funding to county conservation boards for the acquisition and development of wildlife habitat. Land acquired through this program must be open to hunting and trapping and other compatible uses such as fishing, hiking, nature studying, cross-county skiing, etc. <http://www.iowadnr.gov/grants/wildlife.html>

Illinois: The Open Space Lands Acquisition and Development Program in Illinois provides approximately \$20 million in funding assistance annually to local government agencies for acquisition and development of land for public parks and open space. There is no specific requirement for access for hunting, trapping, fishing, hiking and cross country skiing. <http://www.dnr.state.il.us/ocd/newoslad1.htm>

Summary of factual data and analytical methodologies: 2007 Act 20 included reauthorization of the stewardship program which is the primary funding source for land

acquisition for conservation and public outdoor recreation. Reauthorization included a provision requiring that certain lands acquired with funds from the stewardship program under ss. 23.0915 and 23.0917, Stats., be open to hunting, trapping, hiking, fishing and cross country skiing. The Act provided for exceptions if the natural resources board determines it is necessary to prohibit one or more of the activities to protect public safety, protect unique plant and animal communities or to accommodate usership patterns. After the budget was approved, the department administered the stewardship program according to an interim protocol adopted by the natural resources board in December of 2007. The interim protocol can be found at <http://dnr.wi.gov/stewardship/interim.html>.

The natural resources board also established a subcommittee to evaluate the new law and gather public opinion about the law. The sub-committee held three listening sessions in April of 2008 and invited public comment by personal testimony, e-mail, and written comment. Over 130 people testified in person and the subcommittee received almost 500 communications in total. Information gathered at these listening sessions can be found at <http://dnr.wi.gov/stewardship/rule.html>.

The natural resources board stewardship program subcommittee reported the results of these listening sessions to the full board on June 19, 2008. The subcommittee's full report can be found at <http://dnr.wi.gov/stewardship/rule.html>.

In July 2008 the department appointed a 28 member citizen advisory committee to provide input on developing these administrative rules. The citizen advisory committee included members from a diverse group of recreational users. A complete listing of the members of the citizen advisory committee can be found at <http://dnr.wi.gov/org/caer/ce/news/PDF/stewmembers.pdf>.

The citizen advisory committee met 6 times between July 2008 and January 2009. A professional facilitator was hired to manage the meeting and lead the group through a variety of exercises intended to identify important issues. The department prepared 4 concept papers on the following topics: A Process for Review of Determinations Made Under s. 23.0916, Stats., Public Safety, Unique Plant and Animal Communities and Usership Patterns. The papers were presented to the committee by department staff and the committee discussed the various concepts included in the papers and recommended changes. The final draft of these concept papers can be found at <http://dnr.wi.gov/stewardship/CAC/>.

All of the above mentioned information has been reviewed by the department to assist with the drafting of these administrative rules.

Analysis and supporting documents used to determine effect on small business or in preparation of economic impact report: These rules and the legislation which grants the department rule making authority do not have a significant fiscal effect on the private sector or small businesses.

Effect on small business: No specific direct effect on small business is anticipated. This rule provides further guidance for the implementation of existing programs. No new funding or business activity will be created.

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Section 1. Ch. NR 52 is created to read:

Chapter 52. STEWARDSHIP LAND ACCESS

52.01 Purpose and Applicability. (1) Pursuant to s. 23.0916, Stats., lands acquired in whole or in part with funding from the stewardship program are open for public hunting, trapping, hiking, fishing and cross country skiing unless public access is prohibited pursuant to this chapter. Decisions to prohibit public access for these activities will be reviewed by the department using professional judgment and will be based on sound science, legitimate safety issues, factual data and relevant information. A restriction of a nature based outdoor activity may be considered a prohibition if the restriction prevents a major or a significant amount of the nature based activity from occurring.

(2) The purpose of this chapter is to implement s. 23.0916, Stats., which directs the department to establish standards and criteria for prohibiting public access for hunting, fishing, trapping, hiking and cross-country skiing, defined as nature based outdoor activities under s. 23.0916 (1) (b), Stats. This chapter applies to land acquired in whole or in part with funding from the stewardship program under ss. 23.0915 and 23.0917, Stats. The rules in this chapter are intended to maximize the number of compatible users and uses, to the extent practical, on lands subject to s. 23.0916, Stats.

(3) Pursuant to s. 23.0916 (5) (a), Stats., the natural resources board has determined that ss. NR 1.61 and NR 51.07 (3) (e) govern public access on all other lands funded in whole or in part with funding from the stewardship program under ss. 23.0915 and 23.0917, Stats that are not referred to in sub. (1) or (2).

52.02 Definitions. In this chapter

(1) "Accommodate Usership Patterns" means to consider the factors found in s. NR52.05 (1) (c) when making a determination to prohibit an NBOA.

(2) "Department" means the Wisconsin department of natural resources

(3) "Department land" means land acquired by the department in fee title, or with an easement on former managed forest land on or after October 27, 2007, with stewardship program funds under s. 23.0917, stats.

(4) "Former managed forest land" has the meaning given in s. 23.0916 (1) (a), Stats.

(5) "Hunting" means shooting, shooting at, taking, catching or killing any wild animal, other than by trapping, or pursuing for the purpose of shooting, shooting at, taking, catching or killing any wild animal.

(6) "Natural values" has the meaning given in s. 23.27 (1) (f), Stats.

(7) "NBOA" means the nature based public outdoor activity of hunting, fishing, trapping, hiking or cross-country skiing as described in s. 23.0916 (1) (b), Stats.

(8) "Non-department land" means land acquired in fee title, or with an easement on former managed forest land on or after October 27, 2007, by a non-profit conservation organization or local unit of government with the assistance of a stewardship program grant under s. 23.0917, stats.

(9) "Primary purpose" means the recreational or conservation purpose for which the property is being acquired as guided by ss. 23.09 (2), 23.09(20) (am), 23.0915, and 23.0917, Stats., by s. NR 51.05, and by state, regional or local plans that support the project.

(10) "Prohibit access for an NBOA" means not to allow the activity in its entirety, or to restrict the activity so that a major or significant amount of the activity is not allowed.

Note: A temporary restriction of an NBOA for department approved land management practices is not considered a prohibition of an NBOA.

(11) "Stewardship program" means the Knowles-Nelson Stewardship Program authorized under ss. 23.0915 and 23.0917, Stats.

(12) "Unique animal or plant community" means a natural community composed of different plant and animal species, along with their associated geological and archaeological features, that exist together in a specific area, time and habitat. A unique animal or plant community is one identified as endangered, threatened, rare or ecologically sensitive. A unique plant or animal community may also be critical species habitat or an ecological reference area. The sources for identifying unique animal and plant communities include reports or databases, such as the natural heritage inventory, wildlife action plan, regional planning commission reports or other publications accepted by conservation biologists.

Note: References for, or copies of such databases, publications and reports may be viewed or obtained at the Department of Natural Resources, Bureau of Endangered Resources, 101 S. Webster Street, PO Box 7921, Madison, WI 53707-7921.

52.03 General Provisions. (1) DEPARTMENT LAND. (a) All department land transactions are subject to s. NR. 1.41.

(b) The department shall incorporate an evaluation of the requirements of s. 23.0916 (3), Stats., in master plans under ch. NR 44, feasibility studies and other planning documents that include land acquisition as an implementation strategy. This paragraph applies to new plans as well as any plan updates that may be undertaken for existing department projects that are subject to s. 23.0916 (3), Stats.

(2) NON-DEPARTMENT LAND. In addition to the requirements of ch. NR. 51, stewardship program grant applications to acquire non-department lands subject to s. 23.0916 (2), Stats., shall include all of the following:

(a). A description of the public uses proposed for the property being acquired and a checklist indicating which of the specific NBOAs shall be permitted on the property. The checklist shall be in a format determined by the department and shall include at a minimum:

1. An indication as to whether a specific NBOA shall be allowed on the property.

2. For hunting, the checklist shall include information for allowing waterfowl, small game, turkey and big game hunting and shall include gun and archery hunting.

3. For trapping, the checklist shall include information for allowing water trapping and upland trapping.

4. For fishing, the checklist shall include information for permitting shore fishing and boat fishing.

5. For hiking, the checklist shall include information for allowing trail hiking and hiking off-trail.

6. For cross-country skiing, the checklist shall include information for allowing groomed trail skiing and off-trail skiing.

(b). An explanation of the primary purpose for the acquisition. The primary purpose for the acquisition shall be based on ss. 23.09 (2), 23.09(20) (am), 23.0915, or 23.0917, Stats. and s. NR 51.05 and on state, regional or local plans that support the acquisition. The application shall include the name of the plan being used and a description of the formal or informal public input received.

(c). A description of the NBOAs to be prohibited on the property and the reason for the prohibition. The reason for the prohibition shall be consistent with s. NR 52.05 and the applicant shall address in the application the specific factors in s. NR 52.05 that apply.

(3) DETERMINATIONS MADE IN ACCORDANCE WITH S. 23.0916, Stats., and S. NR 52.05. (a) When a determination has been made in accordance with s. 23.0916, Stats., and s. NR 52.05 to prohibit one or more NBOAs on department land the feasibility study and master plan for the project where the NBOA will be prohibited shall be amended to describe the prohibited activity and a rule change may be initiated to enforce it.

(b) The stewardship grant contracts executed between the department and sponsor under s. NR 51.07 that are subject to s. 23.0916 Stats., and this chapter, shall describe any determination to prohibit one or more NBOAs and require the sponsor to contact the department if any of the factors identified in s. 52.05 changes such that a prohibition may be necessary, or is no longer necessary. The department shall evaluate those changes to determine the applicability to this chapter.

(4) Public use of lands purchased in whole or in part with funding from the stewardship program under s. 23.0917, Stats., shall be subject to all applicable federal, state and local laws.

52.04 Public Notice. (1) In addition to the public notice requirements of ch. NR. 150, the department shall provide individual notification over the internet to any person requesting to receive a notice of any proposal to prohibit an NBOA on department or non-department land subject to s. 23.0916 (2) or (3), Stats. Any public notice regarding a proposal to prohibit an NBOA shall include all of the following:

(a) The name, address and phone number of the department's contact person for the project.

(b) The checklist described in s. NR 52.03 (2) (a).

(c) A summary of the NBOAs to be prohibited and the factors that were considered under s. NR 52.05.

(d) The department's initial assessment of the need to prohibit the NBOA pursuant to ss. 23.0916(2) (b) or (3) (b), Stats.

(2) (a) Public comments concerning the proposal to prohibit an NBOA shall be submitted in writing to the department. The comment period shall be 15 business days beginning on the day immediately following the day the department sends out the notice electronically.

(b) Objections must show the proposed prohibition of an NBOA to be inconsistent with ss. 23.0916(2) (b) or 23.0916(3) (b), Stats., and s. NR 52.05.

(c) If an objection is received during the 15 business day comment period the department shall have up to 15 additional business days following the close of the comment period to evaluate the public comment, including any objections. The department may contact the parties during this 15 day evaluation period to gain more information about the proposal to prohibit an NBOA.

(d) The department may extend the 15 business day department evaluation period in par. (b), to further the purpose of s. 23.0916, Stats., when such extension will not affect the purchase closing or acquisition deadline.

(e) The department shall create a written summary of its determination on the proposal to prohibit one or more NBOAs at the conclusion of the public comment and evaluation periods in pars. (c) and (d). The department's written determination shall be based on ss. 23.0916(2) (b) or (3) (b), Stats., and s. NR 52.05 and the department shall provide the written summary to anyone that submitted an objection in accordance with par. (a), and to the person that requested the stewardship program funding.

(f) The department shall submit to the natural resources board at each meeting a report that summarizes stewardship program land purchases and determinations made by the department under this chapter. The natural resources board shall hear public testimony concerning the department's report to the board three months after the effective date {revisor adds date} of this section and biannually thereafter.

Note: Public testimony to the natural resources board under par. (f) is for information only and is for the purpose of allowing the natural resources board to review the determinations made under par. (d). Appeal rights for individual determinations are found in par. (g).

(g) The department's determination made under par. (e) is subject to appeal rights under ss. 227.42 and 227.52, Stats.

52.05 Natural Resources Board Determinations. (1) In accordance with s. 23.0916, Stats., the natural resources board has determined that it is necessary to prohibit one or more NBOAs on department or non-department land for one or more of the following reasons listed below. In accordance with s. 15.05 (1) (b), Stats., the department shall make administrative determinations for each individual proposal to prohibit an NBOA, under the direction of the board, utilizing the process established in ss. NR 52.03 and 52.04, and based on the following reasons and factors.

(a) To protect public safety. One or more of the factors to consider when evaluating a proposal to prohibit an NBOA to protect public safety include:

1. The primary purpose for the project.
2. Laws and ordinances that may impact one or more NBOAs on the property.

Note: NBOAs may be affected by local laws or ordinances and may change as local laws or ordinances change.

3. Potential user conflicts that may create public safety issues and impact one or more NBOAs on the property.

4. The physical characteristics of the property including size, shape, groundcover, topography or proximity to inhabited buildings that create public safety issues and influence NBOAs on the property.

(b) To protect a unique animal or plant community. One or more of the factors to consider when evaluating a proposal to prohibit an NBOA to protect a unique animal or plant community include:

1. The primary purpose for the project.

2. The necessity to prohibit an NBOA to protect and enhance the biological diversity, composition and ecological functions of natural communities exhibiting relatively little human disturbance or that have the capacity to be easily restored to such conditions.

3. The potential for an NBOA to impact the natural values of the site, according to s. 23.28 (3), Stats.

4. The potential for an NBOA to accelerate or increase over time and cause damage to the natural values of a site.

5. The potential for an NBOA to increase the risk of poaching rare plant or animal species, or the removal or destruction of rare geological or archeological features.

(c) To accommodate usership patterns. One or more of the factors to consider when evaluating the necessity to prohibit an NBOA to accommodate usership patterns include:

1. The primary purpose for the project.

2. The NBOAs available at the location of the acquisition at the time of purchase or that existed previously, if any.

3. User incompatibility and how this incompatibility may lead to the primary purpose of the project being significantly altered or curtailed.

4. The complexity, feasibility, practicality and cost effectiveness of separating activities by time and space or any other manner that might mitigate user incompatibility and or reduce the need for enforcement.

5. The size, shape and location of the property as well as surrounding land uses, including the use of other nearby public lands which may or may not have been funded with stewardship funds.

6. The mix of NBOAs that, to the extent practicable, will provide a quality experience for all compatible users and uses.

Section 2. Effective dates. This rule 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.

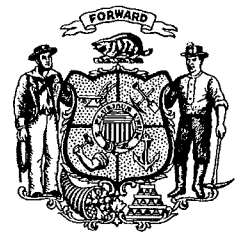
Section 3. Board adoption. This rule was approved and adopted by the State of Wisconsin Natural Resources Board on January 26th, 2010.

Dated at Madison, Wisconsin _____.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By _____
Mathew J. Frank, Secretary

(SEAL)





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

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3/15/10
Senator Mark Miller, Chair
Senate Committee on the Environment
P.O. Box 7882
Madison, WI 53707-7882

Dear Senator Miller and Committee Members,

On March 16, 2010 your committee will be hearing one of the most critical rules ever put forward regarding the future of hunting, fishing and trapping. I am referring to NR 52 the rule dealing with access to properties purchased with Knowles Nelson Stewardship funds. This affects 1,000 of acres of land in your district.

The Wisconsin Waterfowl Association (WWA), is a statewide non-profit organization with 30 chapters in Wisconsin. WWA has been actively involved with the Knowles-Nelson Stewardship program for many years. In fact our habitat team has been a critical part of over 30 habitat restorations on stewardship properties.

In 2007 WWA worked closely with your office as well as other legislators to see the reauthorization of the program through the budget. Prior to these efforts we had raised concerns regarding purchased properties that limited access for hunters, anglers and trappers. It was this reason that language was put in place to make certain that where appropriate these uses would be allowed.

The DNR convened a committee to develop rules regarding access to these properties. WWA again sat on this committee and work diligently towards a reasonable conclusion. It became apparent that some people were there only to try to manipulate the process. Protests from the hunting, fishing and trapping community were largely ignored.

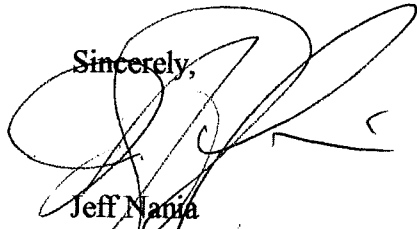
During the time since the law was passed we have seen grants awarded by DNR to organizations that go against not only the spirit but also the letter of the law. Including allowing an NGO to place restrictions on waters of our state in violation of the Public Trust Doctrine.

Legal opinions by legislative council and letters from legislators that supported our position have been ignored. An orchestrated misinformation campaign has made people believe that this is about hunters in blaze orange hiding behind swing sets on playgrounds.

The only thing the hunting, fishing and trapping community ever wanted was a reasonable discussion about compatible uses of these properties purchased. We recognize that not every property should be open to hunting, fishing and trapping. We have never sought to restrict anyone from sharing these properties with us and as a matter of fact during the rule committee meetings we tried diligently to uncover records of user conflicts between hunters, anglers and trappers and other users on multi-use properties, no one could come up with any evidence that these conflicts actually exist.

In our opinion and in the opinion of the many members of the hunting, fishing and trapping community this is the biggest issue that the future of our traditions will face. We ask you to vote to send these rules back to DNR and require that they get them right. We will live with these rules a long time, time spent now is time well spent.

Sincerely,



Jeff Nania
Special Projects Coordinator
Executive Director (retired)

any questions 608-697-7002



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

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Senate Committee on The Environment
Senator Mark Miller, Chair
P.O. Box 7882
Madison, Wi 53707-7882

3/16/10

Dear Chairman Miller and Committee Members,

These are our comments on the proposed rule, NR 52. We have been a working part of the development of this rule, since it's inception. We strongly encourage you to send this rule back to DNR, it needs more work. We seek only to have a fair process by which to determine compatible uses of these public properties. We recognize that not all properties will be open to hunting, fishing and trapping. We hope that the process of review regarding compatible uses will be based on quantifiable fact, not personal prejudice or supposition.

The Wisconsin Waterfowl Association, a non-profit organization with 30 chapters across Wisconsin, is pleased to have been an active partner in the Stewardship program. Whether it is working with the legislature for reauthorization, developing rules for access or completing over 30 wetland projects on Stewardship properties, our commitment to this program has been unwavering. Establishing fair rules and successful implementation will help make sure that this program survives and prospers now and in the future.

As we move forward with these rules we feel it is important that we make note of a concern. We do not feel that it is appropriate for non-governmental organizations whose staff and overhead costs are in part funded by the DNR to lobby on these rules. There are several organizations that receive operational funds from the DNR that have been very active on this issue.

Hunting

We continue to see information distributed by both DNR and various NGOs that make statements regarding the amount of Stewardship property that is open to hunting. Hunting is defined by statute as reflected in the proposed rule. If a property is open for only deer hunting we do not believe that this means the property is open to hunting. It is very misleading to refer to this limited hunting as *open to hunting*.

Public Notice 52.04

We object to determinations regarding prohibitions of NBOAs be undertaken by DNR staff. This should fall to the Natural Resources Board. We believe this is contrary to the

law. We strongly concur with the legal opinion of Wisconsin Legislative Council Senior Staff Attorney Mark Patronsky. He stated, "Based on my analysis of this statute, I believe the grant recipient must allow access for all of the nature-based outdoor activities, unless specific approval is obtained from the **Natural Resources Board** to prohibit public access for one or more of these activities." To us this means the properties purchased with public Stewardship funds are presumed to be open for all NBOAs unless closed by specific action undertaken by the Natural Resources Board.

The primary purpose for the project 52.05

This is defined in the rule as "means recreational or conservation purpose for which the property is being acquired as guided by ss.23.09(2), 23.09(20) (am), 23.0915, 23.0917, Stats., s. NR51.05 and by state, regional or local plans that support the project. "Primary purpose" became a point of discussion in the advisory committee that most often referred to limiting one or more of the NBOAs particularly hunting and trapping. We strongly suggest that "The primary purpose for the project." Be deleted completely from the rule. This is will become a major point of contention in that we are concerned that it will be used as a means to establish prohibitions that are otherwise unwarranted.

52.05 c 2 The NBOAs available at the location of the acquisition at the time of purchase or that existed previously, if any

52.05 c 5 The size shape and location of the property and surrounding land uses, including the use of other nearby public lands which may or may not have been funded with stewardship funds.

Previous land uses and current uses of adjoining land should have no bearing on new purchases. This should be deleted from the rule.

Signage for stewardship properties

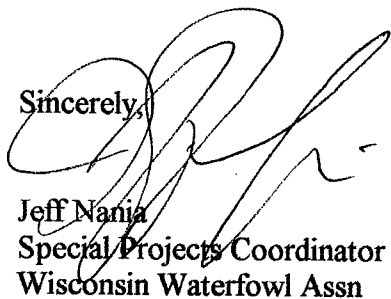
We believe that the rule should require that adequate signage be placed on all properties purchased with any stewardship funds. These signs should clearly show boundaries, compatible uses and contact information for the property managers. The Natural Resources Board should adopt a rule that allows signage to be covered with stewardship funds.

In conclusion we wish to note that there are several areas in the sections regarding appropriate reasons for prohibitions that are extremely difficult if not impossible to quantify or predict. An example would be **52.05 (b) 4 The potential for an NBOA to accelerate or increase over time and cause damage to the natural values of a site.**

The more objective the review of these properties the less potential there is for conflict during this process. It is critical that the criteria used to determine which NBOAs will be allowed or prohibited be as clear as possible.

Thank you for taking our comments.

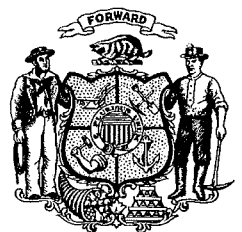
Sincerely,

A handwritten signature in black ink, appearing to read "Jeff Nania", is written over the typed name and title. The signature is fluid and cursive, with a large initial "J" and "N".

Jeff Nania
Special Projects Coordinator
Wisconsin Waterfowl Assn



WISCONSIN STATE LEGISLATURE



Stewardship Access Rule (NR 52)
Wisconsin Senate Environment Committee

March 16, 2010

Madison Audubon Society - Comments

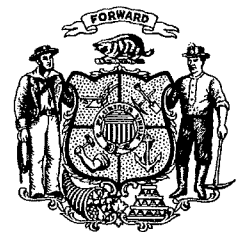
My name is Peter Cannon, 420 Sidney St., Madison, WI 53703 and I'm here representing the Madison Audubon Society, with 2,500 members in seven counties in south central Wisconsin.

Imagine, if you will, how much the members of a chapter of the National Audubon Society want to go out on a lovely fall afternoon and watch people shoot ducks! Bird watching and duck hunting are simply not compatible activities.

Half the money used in any Stewardship land purchase by Madison Audubon and other Non-profit Conservation Organizations comes from non-state funds. The Stewardship half comes from general fund and forest tax dollars. Less than a quarter of the Stewardship funds go to NCGs, yet you are being asked by some of those here today to force us to open land which is purchased with general fund dollars and non-state money raised by the NCO to be open to hunting.

The statute and rule in question here today call for land purchased with Stewardship Fund dollars to be open to "nature-based outdoor activities", hunting fishing, trapping, hiking, cross-country skiing and other nature-based activity designated by rule by the department. But many of those speaking today are really saying that one "nature-based activity", hunting, takes precedence over all other activities. They say that hunting does not interfere with other uses of the land. Our members, including many who hunt, disagree. Many of our members do not go into any area open to hunting during hunting season.

What you are hearing today is an attempt on the part of certain elements within the hunting community to hijack general fund dollars intended to buy land



**Gathering Waters Conservancy's Testimony to the Senate Environment Committee
on Administrative Rule NR 52
March 16, 2010**

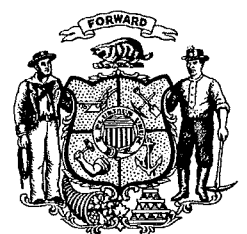
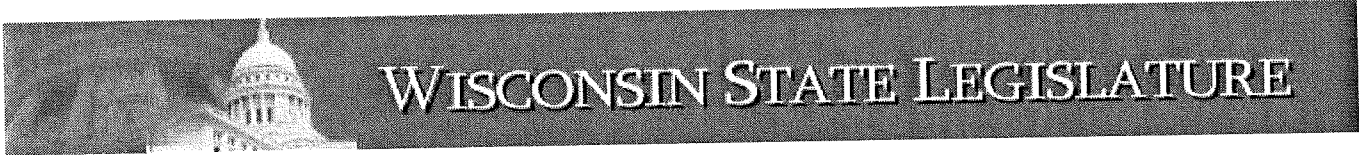
Thank you for the opportunity to comment this afternoon in support of Administrative Rule NR 52. My name is Mike Carlson, and I am here representing Gathering Waters Conservancy. Gathering Waters is the statewide service center for Wisconsin's fifty land trusts, and we build the capacity of these land trusts through consulting, education, outreach and public policy advocacy.

To date, land trusts and local governments have raised nearly \$200 million in federal, local, and private funds to match Stewardship grants, and have protected more than 60,000 acres of land in Wisconsin. Virtually all of this land is open to the public for a wide range of recreational opportunities, and this investment represents an enduring legacy that everyone in Wisconsin should be proud of.

From the beginning of this rulemaking process, Gathering Waters recognized that the final rule would have to represent a compromise among many diverse interests. All that we asked from the beginning was that the rule, while following the letter of the law, provide adequate flexibility and predictability for land trusts and local governments to continue protecting Wisconsin's special places and continue providing high quality public access of all kinds. While there are certainly aspects of the rule that we wish were different, we believe that the overall rule represents a reasonable compromise, and effectively captures the input of the diverse Administrative Rule Citizen Advisory Committee.

This 29-person Committee included 10 individuals from hunting, trapping and fishing organizations, 6 individuals representing land trusts, 6 individuals representing local governments, and 7 individuals representing a range of other interests. It was a diverse and opinionated committee, but the DNR did an effective job of turning the group's input into rule language.

We are hopeful that the current draft of NR 52 will provide a reasonable amount of flexibility. When considering a prohibition of certain activities the rule takes into account many reasonable factors, such as the size and shape of the property, user compatibility, local ordinances, surrounding land uses, and the primary purpose of the project, among many others. These factors are all crucial to help inform what it means "to be necessary to prohibit an activity to protect public safety, to protect a unique plant and animal community, and to accommodate usership patterns."



Date: March 16, 2010

TO: Senate Environment Committee spoken testimony

FROM: Sandy Heidel, Onalaska

RE: CR - 09-077 NR 52 Stewardship Public Access Rule

Thank you Senator Miller and members of the Senate Environment Committee for holding this public hearing on this very important rule.

I was a member of the DNR's Citizen Advisory Committee and it is my opinion that this rule fails to provide the legal framework for Stewardship grant recipients. It continues to allow them to use their own policies to restrict and prohibit public use of Stewardship land.

This rule also sidesteps the legislative directive that placed the responsibility squarely on the shoulders of the Natural Resources Board when hunting, fishing and trapping were restricted or prohibited on Stewardship lands. The buck needs to stop with the NRB.

Please modify this rule to restore this important responsibility to the NRB.

One recent grant to The Nature Conservancy for a project in the Baraboo area said bears that MAY be present needed protection under the unique animal community exception. On another property coyotes were given protected status. I don't believe this exception was intended for this purpose.

Please add to the rule a mandatory review by the DNR Wildlife Division staff of any restriction or prohibition to see if it consistent with current hunting, fishing and trapping regulations and management plans. Please also require that any approved restriction or prohibition be brought to the spring hearings and codified as part of the state hunting and trapping regulations.

The Nature Conservancy current prohibits and restricts fishing on many of the lakes in its Catherine Wolter Wilderness Area. These prohibitions on the public use of these navigable waters of the state are in my opinion a violation of the Public Trust Doctrine.

Please require that DNR Fish Managers review any grant application that includes any restriction or prohibition of fishing. Please also require that any approved restriction or prohibition be brought to the spring hearings and codified as part of the state fishing regulations.

TNC also recently was awarded a grant that prohibits waterfowl hunting on another navigable lake. Waterfowl hunting on navigable waters is a specific right afforded to all citizens under the Public Trust Doctrine

Please modify this rule and require that DNR evaluate all grant applications for Public Trust violations and not allow the wishes of a grant recipient to supersede this very important constitutional right of the public.

In conclusion, I don't believe that this rule clarifies when prohibitions can be made on Stewardship funded lands. What I had hoped from the beginning of the reauthorization process is what sportsmen and women across the state asked for - that access for hunting, fishing and trapping be the same on all Stewardship funded lands no matter if they are DNR owned or grant funded and owned by a land trust or municipality. This rule does not achieve that.

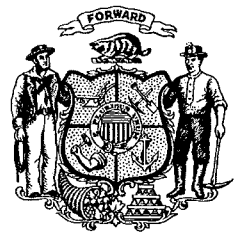
I would like to ask that you send this rule back for modification and bring forward a rule that secures public access for hunting, fishing and trapping now and in the future and protects the interest of the public and the public's right to use the navigable waters of the state and does not bow to the wishes of the grant recipients.

Sandy Heidel
W 8043 County Road ZN
Onalaska, WI 54650

608-781-7620
skheidel@charter.net



WISCONSIN STATE LEGISLATURE





Mike
HUEBSCH
STATE REPRESENTATIVE

Written Testimony in Opposition to CR 09-077
Senate Committee on the Environment
March 16, 2010

Dear Chairman Miller and Committee Members,

Thank you for scheduling a hearing on Clearinghouse Rule (CR) 09-077 and for allowing public comment on its consequences. As you know, it is the Legislature who originally wrote the related law and it is essential that our body communicates with the agency responsible for implementing it.

Protecting our public lands is one of the most fundamental ways to maintain our sporting heritage and is critically important to today's sportsmen and women and tomorrow's hunters, anglers and trappers. However, I am concerned that the language of CR 09-077 does not reflect the legislative intent of the language contained in State Statute 23.0916, which guarantees open access for hunting, fishing and trapping on Wisconsin's stewardship lands. In addition, it eliminates any accountability to our constituents by absolving the Natural Resources Board from upholding this important responsibility.

Statutes 23.0916(2)(b) and (3)(b) clearly state that prohibitions on any of the nature based activities can only occur "if the natural resources board determines that it is necessary to do so in order to do any of the following: 1. Protect public safety, 2. Protect a unique animal or plant community, or 3. Accommodate usership patterns, as defined by rule of the department."

Serving as Assembly Speaker throughout the 2007-09 budget negotiations, I know firsthand the significance of the details in the negotiated extension of the Knowles-Nelson Stewardship Program. Access to the land for hunting, fishing and trapping was an essential component of the agreement, a key part of the negotiation which extended the Stewardship program with funding of \$86 million annually beginning in July, 2010.

With no point of contention raised, representatives of the Doyle administration, were in complete agreement with the meaning of this language; that if any parcel is being purchased using stewardship money, it must be open to nature-based activities unless the board specifically granted an exemption on that parcel. To renege on the agreement board specifically granted an exemption on that parcel. To renege on the agreement simply because the Governor is not facing the voters again is dishonest.

Serving The Coulee Region's 94th Assembly District

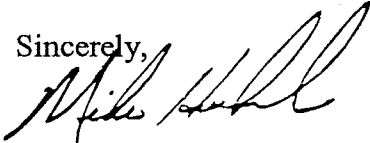
Instead, CR 09-077 will water down this agreement and identifies new factors that may be considered when a prohibition is proposed. In addition, it allows the DNR, not the Natural Resources Board, to evaluate the information supporting the prohibition. The Department is only required to provide a monthly report to the Natural Resources Board on its actions.

I ask that we not turn our back on an agreement made in good faith and maintain current Stewardship procedure when it comes to prohibition of public access on land trusts. CR 09-077 should be returned to the Department for further modification and bring forward a rule that secures the original legislative intent—a strong commitment to public access for hunting, fishing and trapping.

Should the Department reconsider these changes, NR 52 should be amended to require full board approval for any parcel acquisition when exemptions to the nature-based activities requirement are requested and all proposed prohibitions should be covered by this requirement.

Thank you for your consideration.

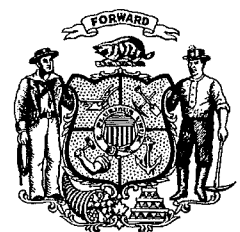
Sincerely,

A handwritten signature in black ink, appearing to read "Mike Huebsch", written in a cursive style.

Mike Huebsch
State Representative
94th Assembly District



WISCONSIN STATE LEGISLATURE



STEVEN D. SCHMUKI

ATTORNEY AT LAW

11430 West Bluemound Road, Suite 200
Wauwatosa, Wisconsin 53226

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WISCONSIN STATE SENATE

Committee on the Environment

Comments of the Waukesha County Environmental Action League (WEAL)

March 16, 2010

WEAL was formed in 1978 with a mission of *“Representing the Waukesha County community for protection of Waukesha County’s natural resources through dedicated grass-roots participation and action.”* As a part of that mission WEAL has partnered with local units of government, non-profit conservation organizations, and friends groups to help acquire, manage and preserve lands for outdoor recreation and habitat protection in Waukesha County. WEAL has partnered with these entities not only to support acquisitions for nature based outdoor activities (NBOA’s) but also acquisitions solely to protect the intrinsic conservation values of the property.

WEAL is not an anti-hunting organization. WEAL is not opposed to hunting per se, as a recreational pursuit and takes no position regarding hunting as a NBOA.

However, WEAL’s membership believes NR 52, clearinghouse rule 09-077, as written is broad and overreaching. WEAL does not believe the rule as it pertains to land purchased by nonprofit conservation organizations or local units of government with assistance of the Knowles-Nelson stewardship fund fairly represents the state of Wisconsin’s demographics.

We oppose NR 52 outright and ask the Committee at a minimum send the rule back to the Department of Natural Resources for redrafting so that it might more fairly reflect all of Wisconsin’s outdoor recreation enthusiasts. We ask the Committee send the rule back for the following reasons:

1. The rule as currently written panders to a vocal minority of the state’s outdoor recreation enthusiasts. By mandating public access for all forms of hunting during all times such hunting may be legally pursued, the rule limits access for a significant majority of Wisconsin’s other outdoor recreational enthusiasts. Many WEAL members, who are birders,

photographers, hikers and the like are not comfortable sharing the landscape knowing others also may be there with weapons.

2. The rule as written will diminish the effectiveness of the Knowles-Nelson Stewardship fund. As you know the Stewardship fund was first established by the legislature in Act 31 in 1989. It was codified in Chapter 23 of the Wis. Stats. which outlines Wisconsin's conservation priorities and history.

In Section 23.09(1) it states.....

WEAL is already aware of a number of NCO's who will be reluctant to participate in the program if every property they protect must be open to all forms of hunting. WEAL does not believe that this is what was envisioned by the authors of this legislation and certainly not by its namesakes.

3. In late 2009, numerous parties spoke out at public hearings on this proposed rule. Many asked that the rule be written with more flexibility in mind. Instead, the rule since those hearings has been redrafted to be even more rigid. Language has been added to the purpose section and the definitions to say that even a *restriction* of some hunting could be interpreted as a *prohibition*. This goes to far. WEAL believes and supports the proposition that there are many sites that may, for any number of science based reasons, need to be restricted from hunting or for that matter any of the other NBOA's. To have the rule read that *any restriction* can now be considered an illegal *prohibition* completely handcuffs the NCO or local unit of government from practicing sound resource management.

Finally, WEAL requests that if the Committee continues to move the rule forward it add the following amendatory language to sections 52.05 (a) (b) and (c) as an additional criteria to be used in determining whether to prohibit NBOAs to accommodate usership patterns, protect public safety or protect unique plant or animal communities.

Does the NBOA materially interfere with the mission and/or specific management goals of the NCO or local unit of government acquiring the non-departmental land.

If the Committee believes as WEAL does that the purpose of the Knowles-Nelson Stewardship fund is to protect the best of Wisconsin's outdoors, not

only for NBOAs but all of the lands unique and intrinsic values as well, then you should have no problem sending this back for a rewrite or at least adding additional flexibility as WEAL has proposed. To do any less, is in WEAL's view, to eviscerate the intent and purpose of the Stewardship fund itself.

2's

We are creating this imbalance now
to send up 80% of the land acquired by Stewardship

Why does the States 50% turning the private
50%

If you do send this back for rewrite please
be sure to include Scientists who look @ land
preservation for its intrinsic Conservation values -