

Report From Agency

REPORT TO LEGISLATURE
NR 52, Wis. Adm. Code
LF-08-09
Clearinghouse Rule No. 09-077

Basis and Purpose of the Proposed Rule

2007 Act 20 included reauthorization of the Knowles Nelson Stewardship Program which is the primary funding source for acquiring land for conservation and public outdoor recreation. Act 20 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 the following nature based outdoor activities: hunting, trapping, hiking, fishing and cross country skiing (NBOAs). The Act provides 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. The Act also directed the Natural Resource Board to develop rules to implement the new requirements.

Chapter NR 52 creates standards and criteria that will be used by the Department and the Natural Resources Board to determine whether it is necessary to prohibit one or more NBOAs. The rule identifies factors that may be considered when a prohibition is proposed 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 on factual data and information pertaining to usership patterns. The rule requires that when one or more NBOAs are proposed to be prohibited the department will request public comment on the proposal. The Department will evaluate the information received during the public comment period and make a final written determination on the proposal. The Department will also provide a monthly report to the Natural Resources Board summarizing actions taken under NR 52 during the previous month and the Natural Resources Board will provide a chance for additional public comment on the Department's actions.

Summary of Public Comments

The Department held five public hearings between October 13, 2009 and October 22, 2009. The hearings were held in Eau Claire, Rhinelander, Madison, Green Bay and West Bend. In total 113 people registered at the hearings and comments were generally mixed between support for the rule as written and support for the rule with some changes requested. The table below summarizes the registrations at the hearings.

	Registered Support	Registered Opposition	No Position Taken	As Interest May Appear
Eau Claire	3	2	5	7
Rhinelander	1	0	5	4
Madison	7	2	7	7
Green Bay	7	1	8	2
West Bend	10	10	5	10
Total	28	15	30	30

In addition to the comments received at public hearing there were 175 comments submitted by e-mail and an additional 28 were received by mail. One comment was taken over the telephone. A memo from the Wisconsin Legislative Council to Senator Dale Schultz was also submitted for the public record by the

Wisconsin Hunter's Rights Coalition. The topic of the memo is "Questions Regarding Access and Use of Land Purchased in Part With a Stewardship Grant".

There were more than 50 comments requesting biking and/or mountain biking be added as an additional NBOA. Most of these comments referenced the Statewide Comprehensive Outdoor Recreation plan as supporting and documenting high levels of participation in both trail and off-trail biking across the state. Many of these public comments also referenced studies that indicate mountain biking has about the same impact on the landscape as hiking.

The Department is not recommending that biking be included as an additional NBOA due to the fact that biking is an acceptable use/activity on Stewardship funded lands already (NR 51.002(19)). The Department believes biking and other similar activities should be evaluated and planned for through a master planning process for the property or the particular parcel being purchased with Stewardship funds.

There were also many general comments received about the importance of the Stewardship program, the need to have public hunting lands and the need to be flexible to allow conservation projects to be completed at the local level.

Specific public comments received and the Department's response to those comments can be found below.

Comment: The Natural Resources Board or a committee of the Board should make the final decision on proposals to prohibit an NBOA.

Department Response: The Department, in consultation with the Natural Resources Board, believes that individual determinations are administrative in nature and as such should be made by the Department (see reference to this subject elsewhere in the NRB memo).

Comment: The Definition for "unique plant and animal community" must be consistent with those used in the State Natural Areas Program.

Department Response: State Natural Areas program staff developed the definition included in the rule and believes it is consistent with the Natural Areas Program.

Comment: The primary purpose for which a property is purchased should not supersede the purpose of the Stewardship program or sub programs or be the justification for allowing prohibitions.

Department Response: The definition of primary purpose included in the rule cross references statutory Stewardship Program acquisition purposes, statutory Department acquisition purposes and statutory Stewardship program requirements that local government projects be based on Local Comprehensive Outdoor Recreation Plans. The primary purpose of a project is not a reason to prohibit an NBOA; it is one of the factors to consider when evaluating a proposal to prohibit an NBOA.

Comment: Grants should not be given to organizations with policies that prohibit or restrict hunting, fishing or trapping.

Department Response: The public access statute, s. 23.0916 Stats., does not give the Department authority to look at an organization's mission when making determinations to prohibit an NBOA.

Comment: Grants to local units of government with restrictive ordinances that prohibit NBOAs should be reviewed by DNR and conform to the Stewardship program.

Department Response: All proposals to prohibit an NBOA will be looked at by the Department. The rule lists local ordinances as one factor to consider under the "public safety" exemption. The Department has the ability to challenge local ordinances that prohibit or restrict hunting under s. 29.038 Stats.

Comment: Grants to expand existing lands must be treated as new projects when considering access restrictions and prohibitions.

Department Response: All proposals to prohibit NBOAs will be subject to the rule.

Comment: The term “affected party” is without merit and any citizen is affected when land is purchased with public dollars.

Department Response: This term was removed from the rule.

Comment: The rule should be amended to clarify that any restriction of a subset of hunting is a prohibition.

Department Response: Hunting subsets are considered in the rule. See s.52.03 (2) (a).

Comment: Previous land uses and current use of adjoining land including past and current public recreational uses should have no bearing on new purchases.

Department Response: The Department believes land uses on adjoining lands are an important safety consideration and that public use of adjoining lands is an important consideration when evaluating whether it is necessary to prohibit an NBOA to accommodate usership patterns.

Comment: It is critical that criteria used to determine which NBOAs will be allowed or prohibited is as clear as possible.

Department Response: The 3 reasons to prohibit an NBOA are given in statute. The factors to consider when making a decision for any of the 3 reasons developed in conjunction with the Citizen Advisory Committee consisting of stakeholder groups that utilize Stewardship program funding or the lands acquired under the Stewardship program.

Comment: The rule should be changed to allow appeals to the Natural Resources Board of Department decisions to prohibit an NBOA.

Department Response: The Department believes the appropriate appeal process is ss. 227.42 and 227.52 Stats.

Comment: The rule should not allow for the prohibition of an NBOA on the mere speculation that an activity may increase over time.

Department Response: The reasons to prohibit an NBOA are to protect public safety, protect unique plant and animal communities and to accommodate usership patterns. The likelihood that an activity might increase overtime is a factor to consider under the “protect plant and animal community” exception and is one of the ways that Department conservation biologist can assess the risk that increased public use might pose to a unique plant or animal community.

Comment: Request that NR52 include a reevaluation instrument for natural area properties that are open to all or any of the NBOAs.

Department Response: This issue is outside of the scope of the rule but Natural Areas staff is aware of the importance of reevaluating the use of public land for possible harm to unique plant and animal communities.

Comment: NR52 should analyze the distinctive character of each Natural Area property.

Department Response: Each individual proposal to purchase Natural Area lands under the Stewardship program is reviewed by Natural Areas staff.

Comment: The preamble to NR52 states that “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.” State Natural Areas should be excepted from this and language should be added accordingly.

Department Response: There is no exception in s. 23.0916 Stats., for the Natural Areas program.

Comment: The rule should anticipate the possibility of rare or new biological discoveries that might require that an NBOA be prohibited.

Department Response: Anytime an NBOA is proposed to be prohibited a determination must be made under the rule. It may not necessarily occur at the time of purchase.

Comment: State statutes that pertain to State Natural Areas, specifically s. 23.27 Stats., should be included in the definition of primary purpose.

Department Response: The definition of primary purpose pulls in the State Natural Areas land protection authorities.

Comment: There should be a process to prohibit an NBOA if it is found to have deleterious impact on a SNA.

Department Response: The rule creates a process for prohibiting an NBOA to protect unique plant and animal communities.

Comment: The decision to prohibit an NBOA on a state natural area should be scientific and not political. There should not be any appeal to the Natural Resources Board. The decision should be made by conservation biologists.

Department Response: The factors to consider under “protect unique plant and animal communities” are generally scientific in nature. Natural Areas program staff will play a role in all evaluations to prohibit an NBOA on Natural Areas lands.

Comment: The rule should be amended to exempt southeast Wisconsin.

Department Response: There is no exemption in s. 23.0916 Stats., for geographical exceptions to the law.

Comment: Restrictions of activities are a land management issue and owners should have the flexibility to make site by site decisions.

Department Response: Restrictions that prevent a major or significant amount of an NBOA will be subject to the rule. Lesser restrictions on non-Department land will be worked out with Department staff at the time of application or in subsequent land management plans for the property. Lesser restrictions on Department land will be dictated by property master plans, Chapter NR 45 or by other state statutes or administrative codes that guide the use of Department land.

Comment: The process for awarding grants should be timely so that land protection opportunities are not lost.

Department Response: The rule is drafted to try and limit delays.

Comment: Recreational opportunities should be considered at a regional level to evaluate supply and demand for different activities in order to provide the highest quality recreational opportunities for the maximum number of users.

Department Response: There is no consideration for this level of planning or evaluation in s 23.0916 stats.

Comment: While it is true that not every parcel is appropriate for mountain biking it is also true that excluding mountain biking from every parcel is not appropriate. We urge you to allow mountain biking on Stewardship lands, where appropriate.

Department Response: The Department is recommending that all activities other than the 5 NBOAs listed in s. 23.0916 Stats., are best dealt with in a master planning process for a parcel or project.

Comment: Simply overlaying the same public use onto every property regardless of size, shape and other considerations is not only unrealistic but potentially unsafe and ecologically unsound.

Department Response: The Stewardship public access law, s. 23.0916 stats., and NR 52 do allow for parcel to parcel considerations to determine whether all 5 NBOAs are required.

Comment: As a direct result of the broad and confusing implementation of NR 52 I will no longer permit hunters to access my lands in Door County. These 100 plus acres have had a usership pattern of hunting for decades, but they will no longer be available due to the confusion of NR52.

Department Response: The rule was not intended to have any impact on private lands.

Comment: I am sure you are aware that in many urbanized areas local ordinances prohibit or severely restrict any hunting, trapping or the discharge of firearms primarily for public safety reasons.

Department Response: Local ordinances are a consideration in the rule.

Comment: I feel that the proposed changes which include limiting funding for only projects that include hunting, fishing, trapping, hiking and skiing goes too far. Stewardship funds have helped the town of Menasha and other municipalities to continue a strong tradition of providing quality park and recreation opportunities to our residents.

Department Response: The rule does not eliminate the Stewardship programs that direct funding to local units of government however proposals to prohibit NBOAs under these local funding programs are subject to the rule.

Comment: While ensuring plentiful hunting and trapping opportunities in our state is a worthwhile goal, local governments need to retain the flexibility to decide what is best for their own park systems and local communities.

Department Response: The rule does not eliminate the Stewardship programs that direct funding to local units of government however proposals to prohibit NBOAs under these local funding programs are subject to the rule.

Comment: Add language stating that a local ordinance banning the discharge of firearms within a community creates a presumption that banning hunting on lands purchased with Stewardship funds is necessary to protect public safety.

Department Response: Local ordinances are a consideration in the rule.

Comment: Add language stating that the existence of a local ordinance banning the discharge of firearms will not be viewed by DNR as a negative factor when evaluating grant applications submitted by local governments.

Department Response: NR 52 will not be used to rank or prioritize projects.

Comment: Add language that when making a decision to prohibit an NBOA on land being purchased by a local government that the local comprehensive outdoor recreation plan be the primary basis for the agency decision when the reason to prohibit is to accommodate usership patterns.

Department Response: The definition of primary purpose in the rule does cross reference the statutory requirement that grants to local units of governments be based on local comprehensive outdoor recreation plans.

Comment: Local governments should not be penalized by a denial or restriction of Stewardship funding for having ordinances protecting public safety or for fulfilling local planning obligations.

Department Response: NR 52 will not be used to rank or prioritize projects.

Comment: We are concerned that these changes will negatively affect our ability to achieve our stated goal of assisting the City of Green Bay in acquiring land in the Baird Creek Parkway and to help enhance the Parkway's value as an ecological, recreational and educational resource for Northeastern Wisconsin.

Department Response: All proposals to prohibit an NBOA are subject to the rule and it is impossible to anticipate how the rule will affect any particular project or program until a specific proposal to prohibit an NBOA is evaluated under the rule.

Comment: The proposed rule should consider land that was already acquired with Stewardship funds limiting hunting, fishing and trapping on property that is not suitable for these types of activities.

Department Response: The rule does consider adjoining land uses under the "public safety" and "accommodate userhsip pattern" exceptions.

Comment: As NR52 is being created I believe bicycling should be included in an expanded definition of nature based activities.

Department Response: The Department believes biking and other similar activities should be evaluated and planned for through a master planning process for the property or the particular parcel being purchased with Stewardship funds.

Comment: Mandating that bicycling is a legitimate outdoor activity to be considered on Stewardship funded land will help ensure off-road opportunities throughout Wisconsin.

Department Response: The Department believes biking and other similar activities should be evaluated and planned for through a master planning process for the property or the particular parcel being purchased with Stewardship funds.

Modifications Made

The Department made the following modifications to the rule:

- A variety of formatting and editorial changes to conform to drafting guidelines and clearinghouse comments.
- Added s. 52.05(10) and renumbered the section accordingly.
- Modified s. 52.03 to include a cross reference to NR 1.41, approval of department real estate transactions.
- Added language to s. 52.03(b) requiring that the department be notified of any changes that might result in a prohibition being required or no longer needed.
- Removed language regarding "affected party" in s. 52.04.

- Added language in s. 52.05 clarifying the role of the NRB and the Department in making determinations to prohibit NBOAs.

Changes to Rule Analysis and Fiscal Estimate

None.

Response to Legislative Council Rules 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.

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.

Final Regulatory Flexibility Analysis

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.