

Report From Agency

REPORT TO LEGISLATURE NR 350 Wis. Adm. Code

Board Order No. WT-02-19
Clearinghouse Rule No. CR 21-026

Basis and Purpose of the Proposed Rule

Wetland mitigation is regulated by both federal (33 CFR Part 332) and state (ss. 281.36 (3r) and 281.37, Wis. Stats.) requirements. The department is required to promulgate rules relating to wetland mitigation. Wetland mitigation has been regulated in Wisconsin since 2001.

The proposed language updates the mitigation requirements and alternatives for permittees and exempt applicants to be consistent with federal regulations and state statutes. The proposed mitigation alternatives preference of purchase of mitigation bank credits or purchase of in-lieu fee credits to permittee-responsible mitigation matches federal regulations, state statute, and current practice. The proposed updated requirements for mitigation bank instruments and operation, including compensation site plan requirements, financial assurances, monitoring, site protection, and long-term management are consistent with current federal regulations and state statute. The proposed language regarding the in-lieu fee subprogram meets statutory requirements as well as the federally approved Wisconsin Wetland Conservation Trust Program Instrument, which is the operating document for the subprogram.

Summary of Public Comments

The USACE provided comments on December 10, 2020, following a courtesy review of the proposed rules. The public comment period for the draft rule occurred from April 22nd–30th. Written comments were received from Wisconsin Manufacturers and Commerce and from a joint submittal by the League of Wisconsin Municipalities and the Wisconsin Realtors Association (WRA). A third set of comments was received from an individual but did not include any proposed changes.

Modifications Made

As a result of the comments from USACE, some definitions and mitigation bank review and development process steps were updated or clarified. Also, mitigation bank requirements for long-term management and site protection were expanded and clarified. Comments from the League of Wisconsin Municipalities and WRA resulted in clarifications to the mitigation alternatives, credit release schedule for mitigation banks, monitoring and financial assurances requirements for mitigation banks, and language clarifying the roles of the DNR and the USACE as members of the Interagency Review Team that oversees mitigation banks in Wisconsin. The DNR worked closely with members of the Wetland Study Council to improve clarity and certainty in the final rule language.

Appearances at the Public Hearing

The public hearing on the draft rule was held on April 22, 2021. Thirty people attended the hearing. None of the attendees registered to comment and thus no verbal comments were received.

Changes to Rule Analysis and Fiscal Estimate

No changes were made to the plain language rule analysis, or fiscal estimate as a result of public comments or testimony, as no comments were received. One comment from WMC regarding credit ratios resulted in a clarification of the ILF credit ratio in the final economic impact analysis.

Response to Legislative Council Rules Clearinghouse Report

Comments received from the Wisconsin Legislative Council Rules Clearinghouse (LCRC) were related to form, style, and placement in administrative code; adequacy of references to related statutes, rules, and forms; clarity, grammar, punctuation, and use of plain language; potential conflicts with, and comparability to, related federal regulations. The Department made all requested changes except as follows:

Comment 1.d. In s. NR 350.005 (2) (b) 1., is the requirement to purchase credits in “the same service area” consistent with the sequence for the location of mitigation under s. 281.36 (3r) (a), Stats.?

Response

Under proposed s. NR 350.003 (1), “bank service area” and “service area” have the same meaning as defined in s. 281.36 (1) (ad), Wis. Stats., with the added language referring to in-lieu fee program instruments in the rule definition.

Comment 1.e. Sections NR 350.007 (6) (j) and 350.010 (5) could be revised to reflect that any proposed schedule for the release of credits must be consistent with the credit release timeline specified under s. 281.36 (3w), Stats., except when federal law requires otherwise. Those provisions could also be modified, in conjunction with s. NR 350.007 (6) (n), to allow for a faster credit release timetable with additional financial assurance, as authorized under s. 281.36 (3w) (c), Stats.

Response

Proposed s. NR 350.008 (2) has been added reflecting the allowance of an accelerated credit release schedule, as stated in s. 281.36 (3w), Wis. Stats., pending department review of the factors listed in par. (c) and ultimate federal decision-making regarding mitigation bank instrument approval as stated in s. NR 350.008 (1) (g).

Comment 5.g. Throughout s. NR 350.008 (2), the phrases “financial assurance” and “financial assurances” appear to be used interchangeably. Although the plural form appears elsewhere in the administrative code, it appears that the singular form is more commonly used and is more consistent with uses of that phrase in the statutes.

Response

As mitigation bank programs may be required to have multiple financial assurances to cover the full cost of the project over several uses, the plural use of the phrase is intended where written in s. NR 350.008 (3) (which was previously numbered s. NR 350.008 (2)). The department has reviewed each instance of the phrase and made edits when appropriate.

Comment 6.a. In s. NR 350.003 (14) and (35), which mirror the definitions in 40 CFR 230.92, an explanatory note or more detailed definitions might help avoid confusion between the terms “enhancement” and “rehabilitation”. For example, the background for the 2008 federal rule explains that “rehabilitation differs from enhancement in that rehabilitation is intended to result in a general improvement in the suite of the functions performed by a degraded aquatic resource. In contrast, enhancement activities focus on increasing one or two functions, rather than all the functions being performed by an existing aquatic resource.”

Response

Proposed s. NR 350.006 (5) and (6) clarify that “rehabilitation” involves functional lift of multiple wetland functions of an existing wetland while “enhancement” involves functional lift of degraded vegetation of an existing wetland and generally does not include wetland conversion. We feel that these provide clarification to the definitions.

Final Regulatory Flexibility Analysis

The agency anticipates that an estimated 1% of permittees and exempt applicants that require wetland mitigation are small businesses and these are different entities each year. In comparing the proposed rule language to the existing rule, the compliance cost estimate for small businesses is \$23,805 annually. The proposed rule language also adds a one-time mitigation bank review fee of \$800, which is estimated to apply to 3.75 small business mitigation bank sponsors annually, for a total of \$3,000. Mitigation bank sponsors that are small businesses are also expected to receive an additional \$875,756 in credit sale revenue annually, resulting in a cost benefit of \$838,256 annually.

Response to Small Business Regulatory Review Board Report

The Small Business Regulatory Review Board did not prepare a report on this rule proposal.