

ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD
CREATING RULES

The State of Wisconsin Natural Resources Board proposes an order to create NR 150.03 (8)(a)22. and 23. and ch. NR 353 relating to wetland conservation activities.

FH-8-02

Summary Prepared by Department of Natural Resources

Statutory authority: ss. 23.09, 281.11, 281.12, 281.15, 281.36, 30.12,30.124, 30.19, 30.195, 30.20, 31.02, 31.12, 227.10 and 227.11, Stats.

Statutes interpreted: ss. 44.40, 281.36, 30.12, 30.124, 30.19, 30.195, 30.20, 31.02 and 31.12 and 88.91, Stats.

Wisconsin has lost about half of its original wetland acreage. Because of this and the important functions that wetlands serve, wetland conservation (restoration, enhancement, protection and maintenance) and management activities are a state and national priority. Wetland conservation and management is an important and significant program component of many of the natural resource agencies and non-governmental organizations operating in Wisconsin.

To encourage wetland conservation and management projects, the department is proposing to create a short form permit process for specific activities used in wetland conservation projects. In addition, the proposed rule establishes a process to authorize maintenance activities by owners of existing wetlands.

SECTION 1: NR 150.03(8)(a)22. and 23. are created to read:

NR 150.03(8)(a)

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| 22. Wetland conservation permits | Issuance of permits under s. NR 353.07 or 353.10 | IV |
| 23. Wetland conservation permits | Issuance of permits under NR 353.09. | III |

SECTION 2: NR 353 is created to read:

Chapter NR 353
Wetland Conservation Activities

NR 353.01 Purpose and policy. (1) This chapter will facilitate the regulation of projects whose purpose is wetland conservation by establishing a process to review activities associated with the restoration of former wetlands, the enhancement of degraded wetlands, and the maintenance or management of existing wetlands.

(2) Wisconsin has lost almost half its historic wetland acreage and it is recognized that the protection, management and restoration of wetlands in the state will benefit fish, wildlife, water quality, flood control, biodiversity and natural scenic beauty. Pursuant to s. NR 1.95, it is the policy of the department to reverse the loss of wetlands in Wisconsin and to encourage and facilitate the protection, management and restoration of wetlands.

NR 353.02 Applicability. This chapter applies to projects whose purpose is wetland conservation and which are reviewed by the department under ss. 281.36, 30.12, 30.124, 30.19, 30.195, 30.20, 31.02 and 31.12, Stats., and s. NR 1.95 and chs. NR 103, 107, 115, 116, 150, 216, 299, 300, 333 and 350.

Note: This chapter does not authorize an activity unless the purpose of the project is wetland conservation. For example, this chapter does not authorize the construction of a detention basin in wetlands for stormwater management, even if the detention basin or the project of which the basin is a part will also result in habitat creation or enhancement. Similarly, this chapter does not authorize a flood control project that may also result in creation or enhancement of some wildlife habitat.

NR 353.03 Definitions. For the purposes of this chapter:

- (1) "Aquatic community" means lake or river biological resources.
- (2) "Complete application" means a completed and signed application form, the information specified in s. NR 353.06(2) and any other information which can reasonably be required from an applicant and which the department needs to make a decision.
- (3) "Degraded wetland" means a wetland subjected to deleterious activities such as drainage, excess nutrient runoff, grazing, cultivation, increased stormwater input and partial filling, to the extent that natural wetland characteristics are compromised and where wetland function is reduced.
- (4) "Early successional hydrophyte" means a plant adapted to quickly colonize open, disturbed wetlands, which do not persist over time and are replaced by perennials that hold space and persist over time. Examples of these plants include nut sedge (*Cyperus* spp.), nettle (*Urtica dioica*), smartweed (*Polygonum* spp.), wild millet (*Echinochloa* spp.), ragweed (*Ambrosia* spp.), Beggar's ticks (*Bidens* spp.) and foxtail (*Setaria* spp.).
- (5) "Enhancement" means the manipulation of the physical, chemical or biological characteristics of a degraded wetland to heighten, intensify or improve specific functions or for a purpose such as water quality improvement, flood water retention or wildlife habitat.
- (6) "Functional values" means the physical, chemical and biological processes or attributes that occur in a wetland and how society finds certain functions beneficial as listed in s. NR 103.03(1).
- (7) "Invasive plant" means plant species that invade natural plant communities and wild areas and replace desirable native vegetation. Plants known to be invasive in Wisconsin wetlands include, but are not limited to: purple loosestrife (*Lythrum salicaria*); reed canary grass (*Phalaris arundinacea*); cattails (*Typha latifolia* and *T. angustifolia* and their hybrid); common and glossy buckthorn (*Rhamnus cathartica* and *R. frangula*) and common reed (*Phragmites australis*).
- (8) "Maintenance" means the removal of a threat to, or preventing decline of, wetland conditions and includes activities commonly associated with preservation.
- (9) "Management" means actions taken at a wetland to establish and maintain desired habitat and human use conditions including water level manipulations, herbicide application, wetland species introduction and control, fencing, monitoring, signage and vandalism repair
- (10) "Monoculture" means a single species occupying a large area.
- (11) "Post settlement deposition" means sediment accumulated over original hydric surface soils since European settlement of the area.
- (12) "Preservation" means the protection of ecologically important wetlands in perpetuity through the implementation of appropriate legal and physical mechanisms.
- (13) "Restoration" means the manipulation of the physical, chemical or biological characteristics of a site with the goal of returning natural or historic functions to former or degraded wetland.

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

(15) "Wetland conservation" means activities used in the restoration, enhancement, preservation and management of wetlands.

NR 353.04 Eligibility for a shortform wetland conservation permit. (1) To be eligible for a shortform wetland conservation permit, the department shall determine that all of the following conditions are met:

(a) The project purpose is wetland conservation.

(b) The project proponent has demonstrated that site conditions exhibit impacts to topography, soils, native vegetation or hydrology that have degraded a wetland and are potentially reversible.

(c) The project proponent has demonstrated that the project involves only listed wetland conservation activities as specified in s. NR 353.05 or that the proposed activity is maintenance of a preexisting wetland conservation project under s. NR 353.10.

(d) The project does not involve any activities in navigable waters with prior stream history, or is otherwise determined to not cause significant adverse impacts to those waters.

(e) The project does not cause significant adverse impacts to a cold water community, as defined in s. NR 102.04(3)(a).

(f) The project does not cause significant obstruction of fish passage to existing spawning areas.

(f) The project does not cause significant adverse impacts to state threatened or endangered resources.

(g) The project does not cause significant adverse impacts to historical or cultural resources and will comply with s. 44.40, Stats.

(h) Any proposed dikes, embankments or low berms as defined in s. NR 353.05(3), will have a height of less than 6 feet measured from natural ground to design top of the structure and will result in less than 50 acre-feet total storage, and have been designed by a professional engineer registered in the state of Wisconsin or submitted by a county, state or federal agency. A project with a design embankment height 2 feet or less above the natural ground and with less than 50 acre-feet of storage does not have to be designed a professional engineer.

(i) The project does not involve the planned introduction of non-native or invasive wetland plants.

(j) The project does not involve the control of native wetland plant species unless the project proponent has demonstrated that the activity is to maintain a wetland community or to diversify a monoculture or a monotypic stand of invasive wetland plants. Removal of monotypic stands of invasive herbaceous vegetation may include excavation only if incidental soil removal and deposition occurs on uplands or like monoculture adjacent to the area of removal.

Note: This provision applies only to incidental soil associated with plant removal and is not intended to allow conversion of wetlands to uplands.

(2) Project proposals which include activities listed in s. NR 353.05 (3) to (5) and have existing wetlands on or adjacent to the project area are eligible for the short form wetland conservation permit only if both of the following conditions are met:

(a) Agricultural crops, invasive wetland species or early successional hydrophyte species dominate the project area.

(b) The proposed activities will not cause significant adverse impacts to undisturbed wetland plant communities on-site or adjacent to the project area.

NR 353.05 Wetland conservation activities and design specifications. Unless otherwise specified in this section, wetland conservation activities should be designed and constructed to applicable Natural Resources Conservation Service Field Office Technical Guide Standard Conservation Practice 378 – Pond (7/01), 410 – Grade Stabilization Structure (7/01), 638 – Water and Sediment Control Basin (7/01) and 657 – Wetland Restoration (9/00). Wetland conservation activities include:

Note: These materials are available at the United States Department of Agriculture Wisconsin Natural Resources Conservation Service website: www.wi.nrcs.usda.gov/tech.html or from the county NRCS office or the Wisconsin Land and Water Conservation Association office, Madison, WI at (608) 833 -1833. Copies of the materials are available for inspection in the offices of the department of natural resources, secretary of state and revisor of statutes in Madison, Wisconsin.

(1) Removing or disabling a section of drain tile in the project area.

(2) Disabling surface drains by filling lengths of the ditch downstream of the drainage system to be altered. Ditch fills may be added upstream of ditch plugs.

(3) Constructing dikes, embankments and low berms to Natural Resources Conservation Service Field Office Technical Guide Standard Conservation Practice 657, 378, 410 or 638, that impede surface water drainage or runoff.

(4) Removing soil and vegetation or post European settlement deposition that has accumulated over historic wetland soils or creating micro-topography to enhance hydrologic diversity including shallow scrapes, channels, submerged islands and interconnected open water areas.

(5) Altering the hydrology of an area by removing pumps, breaching structures such as dikes, or re-routing artificial drainage features or manipulation of water control structure.

(6) Introducing plants by planting, cultivating, stocking or releasing. Controlling plants by cutting, removing, destroying or suppressing using manual or mechanical methods, introducing United States department of agriculture approved biological agents, manipulating water levels, burning, or using a United States environmental protection agency registered herbicides and chemicals applied according to the label instructions.

(7) Installing and maintaining devices such as staff gauges, water level recording devices, small weirs and flumes whose purpose is to measure and record scientific data for monitoring of the conservation activity, periodic water quality testing and periodic sampling to show changes in flora and fauna composition and abundance.

NR 353.06 Application and information requirements. (1) An application to the department is required before commencing any regulated wetland conservation activity.

(2) In addition to the information listed in s. NR 353.04, the applicant shall provide the following information:

(a) Location of the project site delineated on the appropriate United States geological survey 1:24,000 quadrangle map or map copy.

(b) A general description of the site and any adjacent wetlands including any aerial photographs of the proposed restoration area.

(c) A description of existing site conditions including soils, hydrologic conditions, current land-use, plant communities present and wetland delineation, if applicable.

(d) A narrative description of the planned project including how it meets the eligibility requirements listed in s. NR 353.04.

(e) A sketch of the project with dimensions, including a top, cross-sectional and side view of the project. For projects under s. NR 353.05(3), design plans and specifications shall be provided.

(f) Goal and objectives for the project including long-term site management.

(g) Sufficient information to demonstrate compliance with s. 88.91(1), Stats.

(h) If the department determines the proposed project will reduce the effective flood flow capacity of the waterway by obstruction of existing flow area, information sufficient for the department to conduct a hydrologic or hydraulic analysis.

(3) This section is not applicable to a person applying to the department under s. NR 353.10 for maintenance of a preexisting wetland conservation project.

NR 353.07 Department determinations. Upon receipt of a complete application, the department shall determine:

(1) Whether the project purpose is wetland conservation.

(2) If the department determines that the project purpose is not for wetland conservation, the department shall notify the applicant of his or her option to do any of the following:

(a) Apply for a permit under other authorities.

(b) Revise the project to comply with the requirements of this chapter.

(c) Withdraw the request.

(d) Appeal the department's decision under s. 227.42, Stats.

(3) If the department determines that the project purpose is for wetland conservation and is maintenance of a project constructed prior to August 1, 1991, the procedures established in s. NR 353.10 shall be followed.

(4) If the department determines that the project purpose is wetland conservation and that the proposed project activities comply with s. NR 353.04, the project may proceed upon receipt of written notice from the department.

(5) If the department determines the project is not eligible for a short form wetland conservation permit, the procedures in s. NR 353.09 shall be followed.

NR 353.08 Wetland conservation permit conditions. All approvals issued under ss. NR 353.04, 353.07(4) and 353.10 shall be subject to the following conditions:

(1) The applicant submits a completed and signed application form.

(2) The proposed project shall be constructed in compliance with this chapter and applicable statutes, and the conditions in the wetland conservation permit.

(3) The project proponent shall maintain the project in compliance with the terms and conditions of the short form wetland conservation permit, this chapter and applicable statutes. The applicant may conduct maintenance activities described in the application without any further approval by the department.

(4) Approvals issued in compliance with this chapter and applicable statutes are valid only if all other necessary approvals are received from local, state or federal jurisdictions.

(5) Wherever possible, project sites should include an adjacent zone of vegetated upland pursuant to NRCS Technical Guide Standard Conservation Practice 657- Wetland Restoration (9/00), unless the site conditions or configuration will not accommodate such a zone.

Note: This practice is available at the United States Department of Agriculture Wisconsin Natural Resources Conservation Service website: www.wi.nrcs.usda.gov/tech.html or from the county NRCS office or the Wisconsin Land and Water Conservation Association office, Madison, WI at (608) 833 -1833. A copy of the practice is available for inspection in the offices of the department of natural resources, secretary of state and revisor of statutes in Madison, Wisconsin.

(6) Any removed vegetation or soil shall be deposited on uplands or used in other approved wetland conservation activities.

(7) During project establishment, all applicable provisions of NRCS Technical Guide Standard Conservation Practice 657 shall apply. Applicable practices shall be those that adequately control or prevent erosion, and prevent damage to waterways and wetland soils. Where purple loosestrife (*Lythrum salicaria*); reed canary grass (*Phalaris arundinacea*) or common reed (*Phragmites australis*) are present, equipment washing or other practices to prevent accidental dispersal shall be utilized.

(h) If the department determines that species of special concern listed in the Wisconsin natural heritage inventory are known to be present in the project area, the department may notify and advise the applicant of reasonable activities to prevent significant adverse impacts or to enhance the habitat for the species of concern. Notification and recommendation shall take place within the permit review period specified in ch. NR 300.

NR 353.09 Individual permits for wetland conservation projects. (1) If the department determines that the proposed project is for wetland conservation but is not eligible for a shortform wetland conservation permit under s. NR 353.04 or 353.10, the project may not proceed without an individual permit from the department issued pursuant to applicable laws.

(2) The department shall give full consideration to the benefits to wetland functional values together with the potential adverse effects on aquatic community values and public rights and uses. The department shall grant the individual wetland conservation permit if it finds:

(a) That the primary purpose of the project is wetland conservation;

(b) The proposed project will meet the requirements of the applicable laws.

NR 353.10 Maintenance of pre-existing wetland conservation projects. (1) An owner of any wetland conservation project constructed prior to August 1, 1991, may conduct maintenance activities if all the following conditions are met:

Note: The construction and maintenance of wetland conservation projects has been regulated since August 1, 1991, the effective date of ch. NR 103, Wetland Water Quality Standards.

(a) The owner submits to the department a description and a diagram of existing site conditions which includes: the location of the project; hydrologic characteristics of the site; existing plant communities on the site; the location and condition of existing dikes, ditches, nesting islands, water level

control structures and pumps, and other project infrastructures; current land use for the site; and past management and maintenance activities that have occurred on the site.

(b) The owner submits to the department a description of proposed maintenance activities including areas to be excavated and cross-sections of proposed enhancements to existing dikes and nesting islands. A hydrologic or hydraulic analysis may be required if the proposed project includes alteration to the height or cross-section of the dike. If the analysis is required, the applicant may be required to retain an engineer registered in the state of Wisconsin, to prepare this analysis.

(c) Upon receipt of the descriptions and diagram under pars. (a) and (b), the department and the applicant shall conduct a field review of the project.

(d) After field review and modifications deemed necessary to the maintenance project, the department shall approve the maintenance activities if it determines the plan is consistent with the purpose of enhancing wetland functional values.

(e) The applicant shall allow department employees access to make inspections to assure that the maintenance activities are in compliance with the approved plan.

(2) The department may approve excavation of material from a wetland or from any existing ditches, if the purpose of the excavation is to enhance wetland functional values related to wildlife habitat.

(3) Upon approval of the plan under sub. (1)(d), the applicant may conduct the maintenance activities described in the plan without any further approval by the department.

NR 353.11 Enforcement. (1) Violations of this chapter shall be subject to enforcement under the enforcement and penalty provisions of chs. 23, 29, 30, 31, 281 and 283, Stats.

(2) Department employees may obtain access under applicable statutes to make inspections for the purpose of assuring that activities performed under this chapter are in compliance with the applicable provisions of law.

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

The foregoing rules were approved and adopted by the State of Wisconsin Natural Resources Board on August 14, 2002.

The rules shall take effect on the first day of the month following publication in the Wisconsin administrative register as provides in s. 227.22 (2) (intro.), Stats.

Dated at Madison, Wisconsin _____

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By _____
Darrell Bazzell, Secretary

(SEAL)