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# Wisconsin Legislative Council

## RULES CLEARINGHOUSE

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### CLEARINGHOUSE RULE 21-026

#### Comments

**[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Council Staff and the Legislative Reference Bureau, dated November 2020.]**

#### 1. Statutory Authority

a. The mitigation options provided in s. NR 350.004 (1) appear to differ somewhat from the required mitigation sequence provided under s. 281.36 (3r) (a), Stats. To avoid confusion and ensure consistency with the statutory requirements, s. NR 350.004 (1) should be modified to more clearly reflect the sequential order of the options for completing mitigation through a mitigation bank, as outlined in s. 281.36 (3r) (a) 1., Stats. Alternatively, the rule could be revised to incorporate the statutory sequence by reference.

b. The mitigation options in s. 281.36 (3r) (ag), Stats., also authorize the department to provide exceptions to the locational sequence in certain circumstances. As proposed, it appears that s. NR 350.004 (2) incorporates the statutory considerations for such exceptions, but the rule applies those considerations to determinations to allow mitigation using any of the statutorily enumerated methods, rather than exemptions from the locational sequence criteria. Is that the department’s intent?

c. For greater consistency with the statutes, rather than refer to the “issuance” of a statutory exemption in s. NR 350.004 (4), the rule could refer to the department’s “notification of eligibility” for an exemption.

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.?

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.

## **2. Form, Style and Placement in Administrative Code**

a. In the rule summary's listing of the deadline to submit comments, the information should specify how a reader would determine the deadline, rather than referring only to a date "to be determined".

b. The department could consider inserting a heading after the analysis for the proposed rule to indicate "Text of Rule" on the top of page four.

c. In s. NR 350.007 (3), the designation for par. (L) should be revised to an uppercase letter "L" to better distinguish the letter from the number "1". This comment also applies to sub. (6) (L). [s. 1.10 (1) (b) 4., Manual.]

## **4. Adequacy of References to Related Statutes, Rules and Forms**

Throughout s. NR 350.010, and in several provisions in s. NR 350.012, cross-references to other sections in the chapter appear to be missing a zero. The department should review all cross-references for accuracy, and correct as needed.

## **5. Clarity, Grammar, Punctuation and Use of Plain Language**

a. In the second sentence of s. NR 350.003 (1) (note), the word ", which" could be added after the third "HUC 6", and a period should be added at the end.

b. In s. NR 350.003 (15), should the word "and" be revised to "or"?

c. In s. NR 350.003 (38) (intro.), the second instance of the word "that" could be removed.

d. To be consistent with the other paragraphs in that subsection, s. NR 350.003 (38) (c) could be revised to begin: "Restore preexisting wetland funding at ...".

e. To be consistent with the other paragraphs in that subsection, s. NR 350.007 (3) (j) should be revised to remove the verbs "provide" and "include", and to also separate material with semicolons.

f. In s. NR 350.008 (1) (c) (intro.), it appears that the phrase "all of" should be inserted before "the following". Similarly, in par. (e) (intro.), it appears that the phrase "all of the following" should be inserted.

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.

h. In s. NR 350.010 (2), the word "includes" should be revised to "include".

## **6. Potential Conflicts With, and Comparability to, Related Federal Regulations**

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.”.

b. In s. NR 350.003 (40), does the department intend that the reference to the 1987 delineation manual also encompasses procedures specified in the regional supplement or other guidance issued by the U.S. Army Corps of Engineers? It appears that the department has the authority to incorporate such supplemental guidance under s. 281.36 (2m), Stats. If that inclusion is intended, that could be specified.