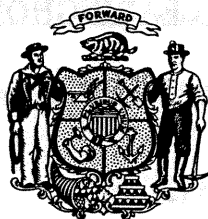


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RULES CLEARINGHOUSE

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CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

CLEARINGHOUSE RULE 00-164

AN ORDER to amend NR 103.03 (1) (g), 103.04 (4), 103.05 (3) and 103.08 (1) and (3) (b); to repeal and recreate NR 103.08 (4); and to create NR 103.07 (1m), (2m), (4) and (5) and 103.08 (1k) and chapter NR 350, relating to wetland compensatory mitigation.

Submitted by **DEPARTMENT OF NATURAL RESOURCES**

11-08-00 RECEIVED BY LEGISLATIVE COUNCIL.

12-07-00 REPORT SENT TO AGENCY.

RNS:NZ:jal

LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

Comment Attached YES NO

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

Comment Attached YES NO

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

Comment Attached YES NO

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS [s. 227.15 (2) (e)]

Comment Attached YES NO

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

Comment Attached YES NO

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL REGULATIONS [s. 227.15 (2) (g)]

Comment Attached YES NO

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

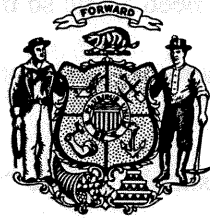
Comment Attached YES NO

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CLEARINGHOUSE RULE 00-164

Comments

[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]

1. Statutory Authority

In s. NR 350.10 (3) (b), it seems that a third party obligor could provide the department 90 days notice that it was canceling, but would still be obligated if the proponent were to fail to get a replacement. Is there statutory authority to do this?

2. Form, Style and Placement in Administrative Code

- a. Section NR 350.09 (1) should be placed in s. NR 350.08.
- b. In s. NR 103.08 (4) (a), "when it determines that" should be changed to "if it determines all of the following:". In addition, the "and" should be removed from the end of subs. 1. and 2. The same should be done in s. NR 103.08 (4) (e).
- c. Throughout the rule, semicolons at the end of a provision should be replaced by periods. See s. NR 103.07 (2m).
- d. In s. NR 350.05 (1), "may" should replace "can."
- e. In s. NR 350.09 (3) (d), would it be clearer if the last sentence were moved to the beginning of s. NR 350.09 (3) (f)?

f. In s. NR 350.10, the sentence following "Financial assurances" that appears to be an introduction should be given a number, and the following subsections should be renumbered accordingly. The new sub. (1) will also need a title so that it matches the rest of the subsections.

g. In s. NR 350.12 (3) (a), there are four subdivisions that are not connected to the preceding paragraph.

h. In s. NR 350.13 (5), "shall" should replace "will."

i. Since s. 23.321 (2), Stats., will not take effect until August 1, 2001, the rules based on this statute should have the same effective date.

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

a. In s. NR 103.07 (5), the rule defines working days as excluding holidays designated under s. 196.193 (3), Stats. However, that statutory provision deals with water and sewer rate increases.

b. In s. NR 350.06 (3) (b), the cite should be to s. NR 103.07 (2m).

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

a. In s. NR 103.08 (1k) (c), it is unclear whether submission any time during the review process is considered timely, or whether a submission must be made during the review process and also be in a timely fashion.

b. In s. NR 103.08 (1k) (d), "under" should be eliminated from the clause "... and under s. NR 2.19."

c. In s. NR 103.08 (4), the whole subsection would be clearer if it were reorganized. First, the first sentence that operates as an introduction is redundant and could be eliminated. Second, the requirements of par. (e) seem to be the default standard, while the situations described in pars. (a), (b), (c) and (d) are the exceptions. Thus, all the information in par. (e) could be moved up to become par. (a), and the current pars. (a), (b), (c) and (d) would be renumbered accordingly. In the new par. (a), "All other activities. For all activities that do not meet the conditions in par. (a), (b), (c), or (d), . . ." would be deleted, and replaced with something to the effect of "General. Except as provided in pars. (b), (c), (d), and (e), . . ."

d. In s. NR 103.08 (4) (b), (c), and (d), the use of "... do not meet the conditions in par. . . ." is unclear. Is it meant to refer to activities that are described in the previous paragraph, but fail to satisfy the requirements of the chapter as listed? Or, is it meant to refer to just the activity? For example, could an activity that falls within the definition in par. (a), but fails to satisfy par. (a) 1., 2. or 3., be an activity defined in par. (b)? Stated more explicitly, would an activity that adversely affects a wetland in an area of special natural resource interest but for which a practicable alternative exists that would avoid the adverse impacts fall within par. (b) if the activity were wetland dependant?

e. In s. NR 103.08 (4) (a) to (e), “when it determines” should be changed to “if it determines.”

f. In s. NR 103.08 (4) (b), the first sentence would be clearer if it were broken up into two or more sentences. The same applies to s. NR 103.08 (4) (c) and (d).

g. In s. NR 350.03 (1), “incorporating” should be changed to “incorporates.”

h. In s. NR 350.03 (15), what does “combination” mean in this context? Further, some words need to be added for “. . . and listed in s. NR 103.03 (1)” to make sense.

i. In s. NR 350.03 (17), what does “general visions” mean?

j. In s. NR 350.03 (28), the sentence would be clearer if it were to read “. . . a mitigation project that does not involve the purchase of bank credits.”

k. In s. NR 350.04, there needs to be some context to the rule. For example, sub. (1) talks about applicants consulting with the department without explaining who these applicants are or what they are applying for.

l. In s. NR 350.04 (3), “project specific” should be changed to “project-specific.”

m. In s. NR 350.05 (4), what is “passive maintenance and management”?

n. In s. NR 350.06 (3) (a), how many credits must be purchased? Are the credits purchased in addition to other mitigation efforts, or are the purchased credits to be the only means of mitigation?

o. In s. NR 350.07 (1), it is unclear whether the techniques used to develop the sight are being compared to the baseline and post-construction conditions, or whether they are being examined as a separate consideration in determining the number of acres.

p. In s. NR 350.07 (4), the second sentence is unclear. Is the sentence referring to management activities that have not been undertaken? If so, the wording needs to be changed to something like “. . . an approved plan for intensive management activities”

q. In s. NR 350.09 (2) (h), “letter or compliance” should be changed to “letter of compliance.”

r. In s. NR 350.09 (3) (b), the use of the passive voice makes it ambiguous who is setting the performance standards. To the extent possible, passive voice should be replaced throughout the rule.

s. In s. NR 350.09 (3) (b), the third sentence is unclear. Does it mean that the applicant or bank sponsor may impose additional objectives on itself, or that the department can impose additional objectives?

t. In s. NR 350.09 (3) (e), the word "design" should be eliminated.

u. In s. NR 350.10 (3) (a), is it supposed to say "obligor" instead of "obligee"? Presumably the department is the obligee. [See s. NR 350.10 (3) (d).] The use of a dependant clause that starts with "which" makes it seem that all forms of financial assurance must include a third party as "obligee." Is that the intent?

v. In s. NR 350.12 (1) (f), what does "milestones" mean in this context? How does "milestones" apply to monitoring?

w. In s. NR 350.13 (1), "This registry shall provide" should be changed to "The department shall provide."

x. In s. NR 350.13 (3), should the term "bank site" be defined to distinguish it from "bank"?

y. In s. NR 350.13 (4), the sentence would be clearer if everything before the word "participation" were deleted, and the sentence were to read something like: "Participation in the establishment of a mitigation bank does not constitute ultimate authorization for specific projects" Nonetheless, it is unclear to what projects the sentence is referring.

z. In s. NR 350.13 (5), should the second sentence begin: "The total potentially available credits"?

ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD
AMENDING, REPEALING AND RECREATING AND CREATING RULES

The State of Wisconsin Natural Resources Board proposes an order to amend NR 103.03(1)(g), 1033.04(4), 103.05(3) and 103.08(1) and (3)(b); to repeal and recreate NR 103.08(4); and to create NR 103.07(1m), (2m), (4) and (5), 103.08(1k) and ch. NR 350 relating to wetland compensatory mitigation

FH-47-00

Summary Prepared by Department of Natural Resources

Statutory authority: ss. 23.321, 281.15 and 227.11(2)(a), Stats.
Statutes interpreted: s. 23.321, Stats.

Wisconsin Act 147 of 1999 was signed into law on May 10, 2000, and includes two main components—enforcement authority and authority to consider wetland compensatory mitigation in permitting/approval decisions. The law granted the Department authority to enforce conditions of its water quality certification decisions, and this measure went into effect upon signing. For compensatory mitigation, the law granted general authority for the Department to consider mitigation projects in its decisions, and called for the Department to write rules for both the process and the specific requirements for compensatory mitigation projects and mitigation banking.

The proposed changes to NR 103 address the process for consideration of wetland compensatory mitigation. To make the new process clear, the department proposes a complete re-write of the decision process section of the code under NR 103.08(4). The revision would set forth a different review process depending on the type of activity or the characteristic of the wetland impact. When compensatory mitigation enters into a decision, the specifics for what is required for compensation shall be found in NR 350.

A new code, NR 350, is proposed to establish requirements for mitigation projects and mitigation banking in accordance with the requirements of the law including: a sequence of compensatory mitigation that requires practicable on-site compensation before allowing off-site compensation and/or use of banks; ratios for wetland replacement based on the type of wetland, proximity of the compensation site to the area of impact, and the type of replacement project; requirements for planning and design of compensation sites; requirements for short and long-term monitoring and management of compensation sites; financial assurances that the sites will be constructed and maintained as approved; requirements for long-term protection of sites as wetlands using easements or deed restrictions; a process for mitigation banking and the responsibilities of bank sponsors and the department; and requirements for public notification on mitigation banks and bank proposals.

SECTION 1. NR 103.03(1)(g) is amended to read:


NR 103.03(1)(g) Recreational, cultural, educational, scientific and natural aesthetic scenic beauty values and uses.

SECTION 2. NR 103.04(4) is amended to read:

NR 103.04(4) ~~Environmentally sensitive areas and environmental corridors identified in area-wide water quality management plans,~~ Unique and significant wetlands identified in special area management plans (SAMP), special wetland inventory studies (SWIS), advanced delineation and identification studies (ADID) and areas designated by the United States environmental protection agency under s. 404(c), 33 USC 1344 (c);

SECTION 3. NR 103.05(3) is amended to read:

NR 103.05(3) These procedures are promulgated under ss. 23.321, 281.11, 281.12(1) and 281.15 and 283.001, Stats.

SECTION 4. NR 103.07(1m), (2m), (4) and (5) are created to read: 

NR 103.07(1m) "Mitigation project" means the restoration, enhancement or creation of wetlands to compensate for adverse impacts to other wetlands. "Mitigation project" includes using credits from a wetland mitigation bank.

(2m) "Priority wetland" means the wetland is of a type that the department has determined to be scarce or a priority for protection. The list of priority wetlands varies depending on floristic province, defined for this subchapter as the 2 main vegetation zones located north or south of US highway 10, as follows:

(a) South of highway 10:

1. Calcareous fen;
2. Sedge meadows, fresh wet meadow or wet prairie not dominated by reed canary grass (*Phalaris arundinacea*) to the exclusion of a significant population of native species;
3. Bog;
4. Hardwood swamp;
5. Floodplain forest;
6. Conifer swamp;
7. Deep marsh; and
8. Ridge and swale complex.

(b) North of highway 10:

1. Calcareous fen;
2. Cedar swamp;
3. Floodplain forest;
4. Deep marsh;
5. Wet prairie not dominated by reed canary grass (*Phalaris arundinacea*) to the exclusion of a significant population of native species; and
6. Ridge and swale complex.

(4) "Wetland mitigation bank" means a system of accounting for wetland loss and compensation that includes one or more sites where wetlands are restored, enhanced or created to provide transferable credits to be subsequently applied to compensate for adverse impacts to other wetlands.

(5) "Working day" means any day except Saturday, Sunday and holidays designated under s. 196.193 (3), Stats. *Deck*

SECTION 5. NR 103.08(1) is amended to read:

NR 103.08(1) The department shall review all proposed activities subject to this chapter and shall determine whether the project proponent has shown, based on the factors in sub. (3), if the activities are in conformance with the provisions of this chapter. The department shall, upon request, meet with a project proponent and other interested persons to make a preliminary analysis assessment of the required scope for analysis of alternatives and the potential for compliance with this chapter.

SECTION 6. NR 103.08(1k) is created to read:

NR 103.08(1k) (a) For the purposes of reviewing an application under this chapter, the department may require submission of information consistent with s. NR 299.03(1).

(b) The department shall review the application for completeness within 30 days of receipt of the application. The department shall notify the applicant of any additional information reasonably necessary to review the application. An application may not be considered complete until the requirements of the Wisconsin environmental policy act, s. 1.11, Stats., have been met.

(c) The applicant shall submit in timely fashion, at any time during the review process, additional information which the department finds to be reasonably necessary for review of the application.

(d) The department shall protect as confidential any information, other than effluent data, submitted under this chapter which meets the requirements of s. 283.55(2), Stats., and under s. NR 2.19.

Deck
(e) For all activities that meet the criteria listed in sub. (4)(c) and that do not require authorization under ch. 30, Stats., the department shall make a final decision on an application within 60 working days of receipt of a complete application from the project proponent.

(f) The 60 working day limit does not apply if the department determines that weather conditions prevent the department from making a decision in that time frame.

SECTION 7. NR 103.08(3)(b) is amended to read:

NR 103.08(3)(b) Practicable alternatives to the proposal which will ~~not adversely impact~~ avoid or minimize adverse impacts to wetlands and will not result in other significant adverse environmental consequences;

SECTION 8. NR 103.08(4) is repealed and recreated to read: *bad intro*

NR 103.08(4) The review process varies by the type of activity and the characteristics of the application.

(a) *Areas of special natural resource interest.* For all activities that will adversely affect a wetland in an area of special natural resource interest as listed in s. NR 103.04 or that will adversely affect an area of special natural resource interest, the department shall make a finding that the requirements of this chapter are satisfied when it determines that:

1. No practicable alternative exists which would avoid adverse impacts to wetlands; and
2. If subd. 1. is met, all practicable measures to minimize adverse impacts to the functional values of the affected wetlands have been taken; and
3. If subds. 1. and 2. are met, utilizing the factors in sub. (3), the project proponent has shown that the activity will not result in significant adverse impacts to wetland functional values, significant adverse impacts to water quality or other significant adverse environmental consequences.

(b) *Wetland dependent activity or impact is 0.10 acres or less.* For all activities which do not meet the conditions in par. (a) and the activity is either wetland dependent or the surface area of the wetland impact, which includes impacts noted in s. NR 103.08(3), is 0.10 acres or less, the department, utilizing the factors in sub. (3) and considering potential wetland functional values provided by any mitigation project that is part of the subject application, shall make a finding that the requirements of this chapter are satisfied when it determines that the project proponent has shown that the activity will not result in significant adverse impacts to wetland functional values, significant adverse impacts to water quality or other significant adverse environmental consequences. The department may limit the scope of the required analysis under sub.(3)(b), as determined at the preliminary assessment meeting under sub. (1).

(c) *Wetland is less than 1 acre in size, not in 100-year floodplain, and not a priority wetland.* For all activities which do not meet the conditions in par. (a) or (b) and for which the affected wetland is less than one acre in size, is located outside a 100-year floodplain, and does not meet the definition of a priority wetland, the department, utilizing the factors in sub. (3) and considering potential wetland functional values provided by any mitigation project that is part of the subject application, shall make a finding that the requirements of this chapter are satisfied when it determines that the project proponent has shown that the activity will not result in significant adverse impacts to wetland functional values, significant adverse impacts to water quality or other significant adverse environmental consequences. The department may limit the scope of the required analysis under sub.(3)(b), as determined at the preliminary assessment meeting under sub. (1).

(d) *Cranberry operations.* For cranberry operations that do not meet conditions in par. (a), (b), or (c), the department, utilizing the factors in sub. (3) (b) to (f), shall make a finding that the requirements of this chapter are satisfied when it determines that the project proponent has shown that the activity will not result in significant adverse impacts to wetland functional values, significant adverse impacts to water quality or other significant adverse environmental consequences. For the purposes of determining whether there is a practicable alternative to a proposed expansion of an existing cranberry operation, the analysis shall be limited to alternatives within the boundaries of the property where the existing cranberry operation is located and on property immediately adjacent to the existing cranberry operation. For new cranberry operations, a practicable alternatives analysis must be conducted which shall include off-site alternatives.

(e) *All other activities.* For all activities that do not meet the conditions in par. (a), (b), (c), or (d), the department shall make a finding that the requirements of this chapter are satisfied when it determines that:

1. No practicable alternative exists which would avoid adverse impacts to wetlands; and

2. If subd. 1. is met, all practicable measures to minimize adverse impacts to the functional values of the affected wetlands have been taken; and

3. If subds. 1. and 2. are met, utilizing the factors in sub. (3) (b) to (f) and considering potential wetland functional values provided by any mitigation project that is part of the subject application, the project proponent has shown that the activity will not result in significant adverse impacts to wetland functional values, significant adverse impacts to water quality or other significant adverse environmental consequences.

(f) *Mitigation projects.* Mitigation projects and the use of wetland mitigation banks shall be carried out in accordance with ch. NR 350 and the memorandum of agreement between the department and the United States army corps of engineers that establishes guidelines for mitigation projects and wetland mitigation banks.

Note: Examples of wetland ecological evaluation methods include, but are not limited to, "Wetland Evaluation Technique" (FHWA/COE), "Wisconsin Wetland Evaluation Methodology", "Hollands-Magee" (IEP/Normandeau), "Minnesota Wetland Evaluation Methodology for the North Central United States" and the "Wisconsin Department of Natural Resources Rapid Assessment Method".

Note: Examples of available land use studies include Special Area Management Plans (SAMP), Special Wetland Inventory Studies (SWIS) and Advanced Delineation and Identification Studies (ADID).

SECTION 9. Chapter NR 350 is created to read:

Chapter NR 350 Wetland Compensatory Mitigation

NR 350.01 Purpose. (1) The purpose of this chapter is to establish standards for development, monitoring and long term maintenance of wetland compensatory mitigation projects that are approved by the department, and to establish procedures and standards for the establishment and maintenance of mitigation banks.

(2) These provisions are adopted pursuant to s. 23.321, Stats.

NR 350.02 Applicability. This chapter applies to all compensatory mitigation projects that are considered by the department as part of a decision made in accordance with ch. NR 103. This chapter does not apply to compensatory mitigation conducted by the department of transportation as part of the liaison process pursuant to s. 30.12(4), Stats. This chapter does not apply to metallic mineral prospecting or mining, which are regulated pursuant to chs. NR 131 and 132.

NR 350.03 Definitions. In this chapter:

(1) "Bank document" means a document that contains specifications pertaining to the establishment, operation and maintenance of a mitigation bank, identification of the goals, objectives, procedures for operation of the mitigation bank, and incorporating the appropriate terms and conditions of this chapter.

(2) "Bank sponsor" means any public or private entity financially responsible for establishing and, in most cases, operating a mitigation bank.

(3)"Compensation" or "compensatory mitigation" means the restoration, enhancement or creation of wetlands expressly for the purpose of compensating for unavoidable adverse impacts that remain after all appropriate and practicable avoidance and minimization has been achieved.

(4)"Compensation ratio" means the number of acres an applicant must provide at a mitigation project compared to the acres of wetland lost from a permitted project.

(5)"Compensation search area" means the geographic management unit (GMU) that the project is occurring in, the county that the project is occurring in, or an area within a 20-mile radius from the project site.

(6)"Compensation site plan" means a comprehensive document prepared by an applicant or bank sponsor that provides a thorough description of a proposed compensation project.

(7)"Corrective action" means an action taken by an applicant or bank sponsor to correct deficiencies in a wetland compensatory mitigation project as early as possible after the problem is noticed.

(8)"Creation" means a technique involving the establishment of a wetland where one did not historically exist.

(9)"Credit" means a unit of measure, in acres, representing the accrual or attainment of wetland functions and values at a compensation site.

(10)"Credit ratio" means the number of acres that can be accrued for credit through the use of a given technique, expressed as acres of credit to acres on the ground at the compensation site.

(11)"Debit" means a unit of measure, in acres, representing the loss of wetland functions and values at an impact or project site.

(12)"Degraded wetland" means a wetland subjected to deleterious activities such as drainage, grazing, cultivation, increased stormwater input, and partial filling, to the extent that natural wetland characteristics are severely compromised and where wetland function is substantially reduced.

(13)"Enhancement" means activities conducted in existing wetlands that increase one or more wetland functions.

(14)"Established" means a compensation site that the department determines has met performance standards set forth in the compensation site plan.

(15)"Functional values" means a combination of the terms: functions (the physical, chemical and biological processes or attributes that occur in a wetland system) and values (how society finds certain functions beneficial) and listed in s. NR 103.03(1).

(16)"Geographic management unit" means one of the 22 statewide management units based on the major river basins of the state.

(17)"Goals" means general visions of how a compensation site will look and function.

(18) "Management" means actions taken at a compensation site to establish and maintain desired habitat and human use conditions including water level manipulations, herbicide application, mechanical plant removal, prescribed burning, fencing, signage, and vandalism repair.

(19) "Mitigation bank" or "bank" means a system of accounting for wetland loss and compensation that includes one or more sites where wetlands are restored, enhanced or created to provide transferable credits to be subsequently applied to compensate for adverse impacts to other wetlands.

(20) "Mitigation bank review team" or "MBRT" means an interagency group of federal, state, local and tribal regulatory and resource agency representatives who oversee the establishment, use and operation of a mitigation bank.

(21) "Mitigation project" means the restoration, enhancement or creation of wetlands to compensate for adverse impacts to other wetlands. "Mitigation project" includes using credits from a wetlands mitigation bank.

(22) "Monitoring plan" means a specific program of data collection and analysis, conducted, analyzed and reported by an applicant or bank sponsor, which documents the physical, biological, hydrological and human-use characteristics of compensation site wetlands.

(23) "Objectives" mean quantifiable measures of the goals identified for a compensation site in the compensation site plan.

(24) "On-site" means a mitigation project located within one-half mile of the impacted wetland.

(25) "Performance standards" means a list of objectives, agreed to in advance by the project sponsor and the department, that must be met before a compensation site can be deemed "established".

(26) "Practicable" means available and capable of being implemented after taking into account cost, available technology, and logistics in light of overall project purposes.

(27) "Priority wetland" means a wetland type that the department has determined to be scarce or a priority for protection.

(28) "Project-specific" means a mitigation project that is not the purchase of bank credits.

(29) "Restoration" means a technique involving the re-establishment of historic wetland conditions and functions, to the maximum extent practicable, at a site where they have ceased to exist, which can include focus on re-establishing hydrologic conditions, plant communities, land contours and surrounding land conditions.

(30) "Wetlands" 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.

NR 350.04 Compensatory mitigation sequence. (1) Applicants are encouraged to consult with the department in pre-proposal conferences or during the permit application process to identify appropriate options. For any compensatory mitigation that is part of an application considered by the department under chs. NR 103 and 299, the department shall determine that the project proponent has evaluated an on-site mitigation project.

(2) If the department determines that the project proponent has demonstrated that it is not practicable or ecologically preferable to conduct an on-site mitigation project, the department shall allow off-site mitigation.

(3) Off-site mitigation shall be accomplished either through purchase of mitigation bank credits or development of a project specific mitigation project.

(4) Off-site mitigation shall occur within the compensation search area of the impacted wetland unless the department determines that the project proponent has demonstrated that it is not practicable to do so or purchase of mitigation credits will occur at a bank established prior to the effective date of this rule ...[revisor insert date].

(5) Purchase of mitigation bank credits shall be from a bank that is listed on the state registry of approved banks pursuant to s. NR 350.13.

(6) The purchaser of mitigation bank credits shall provide to the department a written affidavit that the purchase occurred, providing the name of the mitigation bank, the acres purchased and the signatures of both the applicant and the bank sponsor.

NR 350.05 Planning for a mitigation project. (1) Mitigation projects can involve one or a combination of techniques including restoration, enhancement or creation of wetlands. Restoration is the preferred technique.

(2) When practicable, compensatory mitigation should result in a project with an ecologically similar plant community to the wetland being impacted.

(3) Unless the wetland impacted by the permitted activity is a deep marsh or a shallow open water community, creation of ponds or deepwater habitats as a mitigation project may not be accepted by the department.

(4) When practicable, compensation sites should rely on passive maintenance and management.

(5) Compensation sites shall include an adequate zone of vegetated upland adjacent to the wetland to filter run-off entering the wetland.

NR 350.06 Amount of compensatory mitigation required. (1) The currency for compensatory mitigation is acres.

(2) The standard compensation ratio is 1.5:1, which means 1.5 acres of compensation for each acre of impacted wetland.

(3) The minimum compensation ratio is 1:1, which may only apply if the project proponent demonstrates to the satisfaction of the department that the following conditions are met:

(a) Credits will be purchased from a mitigation bank with an established bank site located within the compensation search area of the project; and

(b) The permitted project will not impact a priority wetland as defined in s. NR 103.08.

NR 350.07 Site crediting. (1) The total number of acres of credit at a compensation site or mitigation bank site will be calculated by the department based on a comparison of baseline and post-construction conditions and the techniques used to develop the site.

(2) The location of wetland boundaries for use in calculating acreage of wetland at a compensation site shall be made consistent with s. NR 103.08 (1m).

(3) The credit ratio for restoration shall be one credit acre for every one acre restored, or a ratio of 1:1.

(4) The credit ratio for enhancement can range from no credit to 1:1. The appropriate ratio shall be determined by the department based on a comparison of the functional values of the current condition of the site and the projected functional values of the completed compensation site. Management activities on pre-existing, fully functioning wetlands will typically receive no credit. Re-establishment of historic hydrology, land contours and plant communities on substantially degraded wetland sites will typically receive higher credit. In some cases, intensive management activities based on an approved plan and backed with financial assurances that the work will be conducted, may receive credit. Activities that result in replacement of one wetland type with another will generally not be given credit unless there is a demonstrated value in doing so.

(5) Creation shall only be allowed if the department determines that the planned creation will provide significant wetland functional values. Because of the greater difficulty, poorer track record and the longer time scale involved in the development of wetland functions for wetland creation projects, any creation accepted by the department for project-specific compensation shall be credited at 0.5:1, unless the applicant can demonstrate to the satisfaction of the department that the circumstances warrant greater credit.

(6) Restoration efforts on adjacent uplands that provide additional ecological functions to the site, beyond filtering run-off, may receive credit at the ratio of one acre of credit for every 4 acres restored.

(7) Wetland-like projects used primarily as stormwater or wastewater treatment facilities, including features covered by s. NR 103.06 (4), will not receive credit as mitigation projects.

NR 350.08 Compensation site plan requirements. (1) For any proposal to construct a compensation site, either for project-specific compensation or for a mitigation bank site, a compensation site plan shall be prepared by the applicant or bank sponsor and approved by the department.

(2) The purpose of the compensation site plan is to demonstrate that the applicant has sufficient scientific expertise to carry out the proposed compensation project work; to outline the construction plan and techniques, project goals and objectives, performance standards, monitoring plan, and long term management plan; to demonstrate that the applicant has sufficient financial resources to assure the project is built according to the plans and specifications, and will be monitored and maintained as proposed; and to provide evidence that the site will be maintained as wetland in perpetuity.

(3) An adequate compensation site plan shall include the following information: identification of the site plan developers and their expertise; general description of site plan; location of site; description of pre-project baseline conditions; site map; description of design features; goals and objectives for the site; performance standards; construction inspection plan; post-construction

monitoring plan; management plan for future maintenance of wetland conditions; provisions for long-term ownership and protection of site; implementation schedule for construction and monitoring; and a plan for financial assurances.

NR 350.09 Construction inspection and monitoring requirements. (1) The compensation site plan shall include a construction inspection plan, a post-construction monitoring plan and a management plan for each compensation site.

(2) Construction inspection. (a) The applicant shall inform the department of the progress of construction and shall provide full access to the department for site inspections.

(b) The applicant shall receive written approval from the department before implementing any substantial deviations from the approved plan.

(c) Within one month after the completion of construction, the applicant shall provide an as-built report to the department. This report shall summarize the construction activities, note any changes to the construction plan that occurred, and provide as-built plan sheets of the site. The as-built report shall serve as the basis for the final construction inspection.

(d) A final construction inspection shall be conducted by the department within one month after receipt of the as-built report in par. (c) to determine whether the site was built in accordance with plans and specifications.

(e) After the final construction inspection, the department shall provide the applicant or bank sponsor a final list of corrective actions and order completion by a specific date.

(f) The applicant or bank sponsor shall certify to the department evidence that all corrective actions identified under par. (e) have been addressed.

(g) The department shall issue a letter of compliance to the applicant or bank sponsor after the department determines that construction and all corrective actions are complete.

(h) After the department issues a letter of compliance, the department shall reevaluate the amount of required financial assurance.

(3) Post construction monitoring. (a) The purpose of post construction monitoring is to determine whether performance standards established for the site in the compensation site plan are being met, identify trends in wetland functions at the site and identify the need for corrective actions.

(b) Performance standards shall be established for each compensation site in the compensation site plan. These standards represent the minimum objectives that shall be met in order for a site to be deemed established by the department. The applicant or bank sponsor may have additional objectives to measure as part of the monitoring plan. At a minimum, the performance standards shall include all of the following:

1. The number of acres of land delineated in the final monitoring year that meet the wetland definition.
2. A description of an acceptable hydrologic regime.
3. The acceptable level of occurrence of invasive species.

(c) The monitoring plan shall take into consideration unique aspects of each site.

(d) The monitoring plan shall include a monitoring schedule of adequate frequency and duration to measure specific performance standards and to assure long-term success of the stated goals for the site. For all bank sites, a monitoring report shall be provided to the department annually for a period of at least 5 years after the date of the letter of compliance identified under sub. (2)(g).

(e) The monitoring plan design shall be sufficient to assess trends in wetland function at the site and the degree to which the performance standards for the site are met.

(f) The monitoring report shall include, but is not limited to, all of the following:

1. A restatement of the compensation site plan goals, objectives and performance standards.
2. Identification of any structural failures or external disturbances on the site.
3. A description of management activities and corrective actions implemented on the site during the past year.
4. A summary of and full presentation of the data collected during the past year.
5. A site map showing the locations of data collection.
6. An assessment of the presence and level of occurrence of invasive species.
7. An assessment of the degree to which performance standards are being met.
8. Proposed corrective actions to improve attainment of performance standards.
9. A narrative summary of the results and conclusions of the monitoring.

(g) At the end of the monitoring period, the department shall issue a final letter of compliance to the applicant or bank sponsor if the department determines that the site is successful and established.

(h) After the department issues a final letter of compliance the department shall release the financial assurances under s. NR 350.10.

NR 350.10 Financial assurances. (1) The department may require a performance bond, irrevocable letter of credit, irrevocable escrow account, irrevocable trust account or other financial assurance to insure that a mitigation project is constructed, operated, monitored and maintained in accordance with the approvals issued by the department and other agencies involved in the approval process.

(1) **TERM.** Financial assurances may be required for both site construction activities and post-construction monitoring and care. Financial assurances to guarantee adequate post-construction monitoring and care shall be for a specified time period after construction is complete, or after success criteria are met, depending on the type of project.

(2) **LEVEL OF FINANCIAL ASSURANCE.** The department shall determine the level for financial assurance based upon the estimated costs of the construction, operation, monitoring and maintenance

of the mitigation project. The costs may include any costs for corrective actions which may be required to bring the project into compliance.

(3) REQUIREMENTS FOR FINANCIAL ASSURANCE. Financial assurance instruments shall meet requirements determined by the department to be reasonably necessary to assure proper construction, operation, monitoring, and maintenance of the mitigation project. Requirements shall, at a minimum, include: *a. 20*

(a) Forms of financial assurance, which include a third party as obligee, shall be issued by an entity authorized to do business in this state.

(b) Any financial assurance shall provide that the financial assurance cannot be canceled or modified except after not less than 90 days notice in writing to the department by certified mail. Not less than 30 days prior to the cancellation or modification of the financial assurance, the project proponent shall deliver to the department a replacement for the financial assurance that is acceptable to the department. If the replacement financial assurance is not provided and accepted, the original financial assurance shall remain in effect.

(c) The financial assurance shall provide that the project proponent will faithfully perform all requirements of the approvals for the project. If the project site or the mitigation bank is transferred, the new owner or successor in interest shall provide the necessary financial assurance in the amount required for the project.

(d) The financial assurance shall be payable to the "State of Wisconsin, Department of Natural Resources".

(4) REEVALUATION OF THE AMOUNT OR FORM OF FINANCIAL ASSURANCE. In accordance with s. NR 350.09, the department may periodically reevaluate and adjust the amount or form of financial assurance to reflect completion of tasks which are required under the department's approval.

(5) MULTIPLE PROJECTS. A person who obtains approval for 2 or more mitigation projects may elect, at the time of the approval for the second or subsequent site, to provide a single form of financial assurance in lieu of separate assurances for each site.

(6) MULTIPLE JURISDICTIONS. In cases where more than one regulatory authority has jurisdiction, a cooperative financial security arrangement may be developed and implemented by the regulatory authorities to avoid requiring the applicant or bank sponsor to provide financial assurance with more than one regulatory authority for the same compensation site.

(7) CHANGING METHODS OF FINANCIAL ASSURANCE. An applicant or bank sponsor may change from one method of financial assurance to another with written approval from the department.

(8) BANKRUPTCY NOTIFICATION. An applicant or bank sponsor shall notify the department by certified mail of the commencement of any voluntary or involuntary proceeding under bankruptcy code, 111 USC, et seq., naming the applicant or bank sponsor as debtor, within 10 days of commencement of the proceeding.

NR 350.11 Long-term protection of compensation sites and mitigation bank sites. (1) A bank sponsor or person responsible for development of a project specific compensation site under this chapter shall grant a conservation easement under s. 700.40, Stats., to the department to ensure that the restored, enhanced or created wetland will not be destroyed or substantially degraded by any subsequent owner or holder of interest in the property on which the wetland is located. The

department shall revoke the permit or other approval if the holder of the permit fails to provide the conservation easement.

(2) The department shall modify or release a conservation easement issued under sub. (1) if the conditions in s. 23.321(2m)(b), Stats., apply.

NR 350.12 Process for establishing a mitigation bank. (1) A prospective bank sponsor shall prepare a draft bank document and provide copies to both the department and the United States army corps of engineers. The draft bank document shall include the following information:

- (a) Identification of the bank sponsor and purpose of the bank;
- (b) A draft compensation site plan for each proposed bank site developed in accordance with s. NR 350.08;
- (c) Information on the operation of the bank including the expected number of credits, provisions for sale of credits, accounting and reporting procedures, and provisions for site inspections.
- (d) A discussion of the persons responsible for management of the bank accounting, long-term ownership of the bank site, monitoring of bank site and maintenance and management of the bank site.
- (e) A proposed easement or deed restriction for the bank site pursuant to s. NR 350.11.
- (f) A proposed schedule that includes, at a minimum, milestones for finalizing the bank document, construction and monitoring.

(2) Upon receipt of a draft bank document, the department shall:

- (a) Facilitate a meeting of the mitigation bank review team within 60 working days;
- (b) Provide comments to the MBRT on the draft bank document;
- (c) In accordance with sub. (3), issue public notification that a draft bank document has been received and is under review;
- (d) Provide to the prospective bank sponsor the detailed comments of the MBRT and a listing of state permits or approvals that may be required for construction of any proposed bank sites.

(3) Public notification. (a) The department shall develop a news release for each draft banking document to include all of the information in subds. 1 to 4. When deemed appropriate by the department, any other department notice, including a notice required under statute or administrative rule, containing the information in subds. 1 to 4 may be used in lieu of a news release.

- 1. The name of the bank sponsor.
- 2. A brief description of the bank including all bank sites.
- 3. The name and address of a contact within the department who can receive comments and respond to questions.
- 4. A date by which the department will accept and consider comments.

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(b) The department shall distribute the news release or legal notice to appropriate news media in the vicinity of the proposed action.

(4) Once all concerns of the department and MBRT have been addressed by the prospective bank sponsor to the satisfaction of the department, the bank sponsor shall prepare a final bank document. The department shall be a signatory to the bank document pursuant to s. NR 350.13(2).

(5) Upon receipt of the final bank document with the signatures of all members of the MBRT, the department shall include the bank on the state registry pursuant to s. NR 350.13 (1).

NR 350.13 Mitigation banking. (1) The department shall maintain a registry of all mitigation banks in the state that have been approved by the department as eligible to sell credits. This registry shall provide to anyone who requests it, information on the bank sponsors, the location of bank sites and the number of available credits determined under sub. (5).

(2) The bank document is the record of department and MBRT concurrence on the objectives and administration of a mitigation bank. The secretary or designee shall sign for the department and this signature on the bank document constitutes department approval of the bank. The terms and conditions of the bank document may be amended, subject to notification and approval of the department and the MBRT. Failure to comply with the terms of the bank document may result in removal from the state registry under sub. (1).

(3) The bank sponsor is responsible for establishing a mitigation bank site in accordance with an approved compensation site plan, administration of the accounting of debits and credits, conducting required corrective actions, providing required monitoring and status reports to the department and the MBRT, and assuring long term maintenance and protection of the site. Bank sponsors may request that more than one bank site be included in a bank.

(4) Prospective bank sponsors may not construe or anticipate participation in the establishment of a mitigation bank as ultimate authorization for specific projects, as excepting the projects from any applicable requirements, or as pre-authorizing the use of credits from that bank for any particular project.

(5) The number of acres potentially available for credit at a bank will be determined by the department and the MBRT using the credit ratios in s. NR 350.07. The total available credits shall be stated in the bank document and reflected on the registry. The total credits derived from wetland creation or restoration of adjacent uplands shall be limited such that:

(a) No more than 25% of the final total credits can be the result of wetland creation; and

(b) No more than 15% of the final total credits can be the result of restoration of adjacent uplands.

(6) Site conditions and performance will determine the timeline for actual release of bank credits. Credits will be released as performance standards, established in the monitoring plan under s. NR 350.09 are met.

(7) The bank sponsor may sell or use a portion of the total potentially available credits before the mitigation bank site is deemed established by the department and MBRT. The actual schedule for release of credits shall be set forth in the bank document. In that schedule, the department may allow:

(a) Release of up to 10% of total estimated credits when the bank document is signed by all parties.

(b) Release of up to 20% of total estimated credits when the department issues the letter of compliance specified in s. NR 350.09 (2)(g).

(c) Release of up to 30% of total estimated credits upon receipt by the department of the monitoring report for year 2 after construction.

(d) Release of 100% of credits after the department receives the final year monitoring report and determines that the site has satisfactorily met all performance standards established in the compensation site plan.

(8) By January 30 of each year that a bank is in operation, the bank sponsor shall provide a report to the department that provides an accounting of bank credits and debits using the format established in the bank document. The department shall provide a letter of concurrence to the bank sponsor within 30 days of receipt of this report and shall reflect the appropriate information on the bank registry.

NR 350.14 Enforcement. (1) Violations of this chapter may be prosecuted by the department under chs. 23, 30, 31 and 281, Stats.

(2) Any agent or employee of the department shall at all times be given reasonable access to any and all parts of a project site and may enter upon any property to investigate the project.

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

(4) The department may remove a party from the approved wetland banking registry for failure to comply with the requirements of said registration after notice and an opportunity for hearing in accordance with the procedures in ch. 227, Stats.

The foregoing rules were approved and adopted by the State of Wisconsin Natural Resources Board on

The rules 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.

Dated at Madison, Wisconsin _____

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By _____
George E. Meyer, Secretary

(SEAL)