

## REPORT TO LEGISLATURE

NR 103 and 350, Wis. Adm. Code  
Wetland compensatory mitigation

Board Order No. FH-47-00  
Clearinghouse Rule No. 00-164

### Statement of Need

The wetland mitigation law, 1999 Wis. Act 147, authorized the Department to make rules to include consideration of wetland compensatory mitigation in the Department's decision process. The proposed rule includes a new chapter, NR 350, which sets state requirements for mitigation projects and banking. This rule will be the basis for new statewide guidelines for mitigation that will be the basis of the proposed memorandum of agreement with the U.S. Army Corps of Engineers. The goal is one set of standards for both the Department and federal agencies. Attachment 1 contains the proposed NR 103 decision process.

### Modifications as a Result of Public Hearing

#### *NR 103*

1. Elimination of the term "priority wetland". As explained in the attached response to comments, this definition raised the most concerns from commenters. The concept as intended remains in the code, but the actual term as been eliminated to avoid confusion.
2. Environmental corridors were included. These areas were eliminated from the list of areas of special natural resource interest, but based on comments, we have added that adverse impacts to these areas must be factored into a decision.
3. The process section was revised. Section NR 103.08(4) was revised based on comments to be more understandable. The concepts remain as originally proposed.

#### *NR 350*

1. Mitigation sequence and compensation search area was revised. The process still involves a search on-site for mitigation before allowing off-site (which includes using a bank). We have simplified the search area for off-site mitigation by saying that the mitigation must occur as near as practicable to the location of wetland impact and within the same DNR region.
2. Credit for buffers. The rules require that all wetland mitigation projects have an adequate vegetated upland area surrounding the site, to protect the wetland from run-off. Based on comments, we have added some acreage credit for any vegetated upland adjacent to a mitigation project that provides this minimum water quality protection. As originally proposed, additional credit will be provided for ecological restoration work in the adjacent upland area.
3. Prospectus for bankers. We have added a process that allows for department review of an early prospectus before a potential banker would proceed with additional effort or expenditure at a site.
4. The Natural Resources Board approved a variance for the compensation ration for unavoidable losses of more than 20 acres of wetland.

# Attachment 1: PROPOSED NR 103 DECISION PROCESS

		<b>EXCEPTIONS</b>			
<i>Standard NR 103 Review Process</i>		<i>Area of Special Natural Resource Interest (ASNRI)</i>	<i>Wetland impact 0.1 acre or less or activity is wetland dependent</i>	<i>Wetland &lt;1 acre, not in the 100-yr floodplain and not a "Priority Wetland"</i>	<i>Cranberry Operation</i>
Practicable Alternatives Analysis	Avoid first, THEN MINIMIZE	Avoid first, THEN MINIMIZE	Avoid and MINIMIZE	Avoid and MINIMIZE	Avoid and MINIMIZE
Functions and Values Assessment	Evaluate wetland functions and values <i>after</i> alternatives test is met.  Applicant must show no significant adverse impacts	Evaluate wetland functions and values <i>after</i> alternatives test is met.  Applicant must show no significant adverse impacts.	Evaluate wetland functions and values <i>concurrently</i> with alternatives.  Applicant must show no significant adverse impacts.	Evaluate wetland functions and values <b>CONCURRENTLY WITH ALTERNATIVES.</b>  Applicant must show no significant adverse impacts.	Evaluate wetland functions and values <i>concurrently</i> with alternatives.  Applicant must show no significant adverse impacts.
Compensatory Mitigation (see NR 350)	DNR MAY CONSIDER FUNCTIONS AND VALUES OF A COMPENSATION PROJECT VOLUNTARILY ADDED BY APPLICANT.	DNR can not consider compensation in its decision. May have Federal requirement for compensation.	DNR MAY CONSIDER FUNCTIONS AND VALUES OF A COMPENSATION PROJECT VOLUNTARILY ADDED BY APPLICANT.	DNR MAY CONSIDER FUNCTIONS AND VALUES OF A COMPENSATION PROJECT VOLUNTARILY ADDED BY APPLICANT.	DNR will not consider compensation in its decision. May have Federal requirement for compensation.
Expedited Review	None, unless as part of expedited Ch 30 application.	None, unless as part of expedited Ch 30 application.	None, unless as part of expedited Ch 30 application.	FINAL DECISION PER STATUTE WITHIN 60 WORKING DAYS OF RECEIPT OF COMPLETE APPLICATION.	None, unless as part of expedited Ch 30 application.
Other Comments		ASNRI LIST REVISED PER STATUTE TO EXCLUDE "ENVIRONMENTAL CORRIDORS"	0.1 acre minimum includes cumulative and secondary impacts	60 DAY LIMIT IS WEATHER DEPENDENT	Alternatives for expansions limited to existing or immediately adjacent property.

As in current NR 103  
**PROPOSED CHANGES**

Appearances at the Public Hearings and Their Position

December 11, 2000 – Madison

In support:

Robert Regan, BT<sup>2</sup>, Inc., 2740 Alice Circle, Stoughton, WI

In opposition:

Galen Smith, 218 DuRose Terrace, Madison, WI 53705

As interest may appear:

Chris Barden, 8025 Excelsior Drive, Madison, WI 53717

Mike Kakuska, 217 S. Hamilton St., Suite 403, Madison, WI 53703

Travis Olson, WI Coastal Management Program, DOA, P.O. Box 7868, Madison, WI 53707

Hilda McVoy, 1406 W. Skyline Drive, Madison, WI 53705

Kirk McVoy, 1406 W. Skyline Drive, Madison, WI 53705

Angela James, 3 S. Pinckney Street, P.O. Box 1784, Madison, WI 53701

Morgan Robertson, 2320 Winnebago Street, #2B, Madison, WI 53704

December 12, 2000 – Green Bay

In support:

Representative John Ainsworth, W6382 Waukechon Road, Shawano, WI 54166

Jim Johnson, 5072 Brown Road, Little Suamico, WI 54141

Floyd Van Camp, W1988 Twilight Terrace, Seymour, WI 54165

In opposition:

Robert E. Schmitz, Wolf River Watershed Alliance, 1736 Carroll Avenue, Green Bay, WI 54304

As interest may appear:

Thomas Hogan, 530 School House Road, Sobieski, WI 54171

Alden Moeller, N9154 Lawn Road, Seymour, WI 54165

Joseph H. Kieloikowski, 740 Bellevue, Green Bay, WI 54302

Patrick J. Farrell, 2859 Sunray Lane, Green Bay, WI 54313

Jan Tesch, STS Consultants, 1035 Kepler Drive, Green Bay, WI 54311

Matt Heyroth, Assistant Brown County Zoning Administrator [no address given]

David Harp, 2738 Oakwood Drive, Green Bay, WI 54304

Pete Van Airsdale, Winnebago County Land & Water Conservation Dept., 625 E. County Road Y,  
Oshkosh, WI 54901

Gary Knapton, Green Bay Field Office, U.S. Army Corps of Engineers, Suite 211, Old Fort Square,  
211 N. Broadway, Green Bay, WI

Nick Sturzl, CQM, Inc., 2679 Continental Drive, Green Bay, WI 54311

Steven Grumann, 4135 Technology Parkway, Sheboygan, WI 53083

Kurt Rubsam, 4135 Technology Parkway, Sheboygan, WI 53083

James Havel, NES Ecological Services, 2825 S. Webster Avenue, P.O. Box 2100, Green Bay, WI

Bob Stollberg, 1434 S. Locust Street, Green Bay, WI 54304

Patrick Robinson, 925 Marquette Drive, UW-Extension, Kewaunee, WI 54216  
Joel Diebl, Brown County Planning Commission, 100 N. Jefferson Street, Room 608, Green Bay, WI  
Roger Roffers, W375 EE, DePere, WI 54115  
Don Johnson, 100 W. Briar Lane, Green Bay, WI 54301  
Jeremiah L. Farrell, 723 Sunset Beach Road, Suamico, WI 54173  
Rebecca Katus, Clean Water Action Council of NE Wis., Inc., 1270 Main Street, Suite 120,  
Green Bay, WI 54311  
George & Lois Kozak, 1102 Ridge Lane, Appleton, WI 54914  
Robert A. Calewarts, 2484 St. Pat's Drive, Green Bay, WI 54313  
Robert G. Reeners, Federation of Fly Fishers, 4313 Hillcrest Drive, Oneida, WI 54155  
Lilian & Donald R. Bouche, 2191 Oakwood Drive, Green Bay, WI 54304

December 12, 2000 - Wausau

In support:

Jim Pellitteri, Marathon Co. Director of Waste Management, 18500 East Hwy. 29, Ringle, WI  
Gary Starzinski, 315 Main Street, Marathon, WI  
Melvin Buetsch, 2799 CTH S, Marathon, WI 54448

In opposition - none

As interest may appear:

Robert C. Westphal, 808 Marsh Drive, Mosinee, WI 54455  
Tom Normington, Maxim Technologies, Inc., 8001 10<sup>th</sup> Lane, Athens, WI 54411  
Robert W. Worth, 4209 Ridge Court, Stevens Point, WI 54481  
Evelyn Fisher, Becher-Hoppe Associates, P.O. Box 8000, Wausau, WI 54402  
Robert Stimers, 400 Riverside Avenue East, Merrill, WI 54452  
Monica D. Stimers, 400 Riverside Avenue East, Merrill, WI 54452  
Amy Thorstenson, Maxim Technologies, 3005 Bob O Link Avenue, Wausau, WI 54401  
David Erickson, City of Wausau, 407 Grant Street, Wausau, WI 54403  
Tom Lochner, WI State Cranberry Growers Association, 181 2<sup>nd</sup> Street South, Wis. Rapids, WI  
Bob Rybarczyk, 900 Grand Avenue, Schofield, WI 54476  
Allen O'Leary, Northland Cranberries, Inc., P.O. Box 8020, Wis. Rapids, WI 54495

December 13, 2000 - Rhinelander

In support:

Chuck Wrbelis, 3208 N. Rifle Road, Rhinelander, WI 54501  
Brian J. Shimkus, Shimkus Auto Body, Inc., 5890 Musky Bay Drive, Rhinelander, WI 54501  
William L. Ludwig, P.O. Box 312, Eagle River, WI  
Ron Sleight, 84 Wildwood Road, Manitowish Waters, WI 54545  
Richard T. Sleight, 70 Wildwood Road, Manitowish Waters, WI

In opposition - none

As interest may appear:

Shane Spencer, 829 Lake Shore Drive, Rhinelander, WI 54501  
Michael P. Meyers, 1030 W. Davenport Street, Rhinelander, WI 54501

December 14, 2000 – Spooner

In support:

Tim King, King Environmental & Planning, 1311 Duke Street, Rice Lake, WI 54868  
James Palmer, 1890 Montanis Avenue, Rice Lake, WI 54868  
Scott Kimmes, 1409 N. 76<sup>th</sup> Street, Superior, WI 54880

In opposition – none

As interest may appear:

John Donlin, 24520 Lind Road, Siren, WI 54872  
Charles Johansen, 12905 W. County OO, Hayward, WI 54843

December 14, 2000 – Eau Claire

In support:

Pam Rasmussen, Xcel Energy, Inc., 1414 W. Hamilton Avenue, P.O. Box 8, Eau Claire, WI 54702  
Christopher J. Bolt, Cedar Corporation, 604 Wilson Avenue, Menomonie, WI 54751  
Mark Iverson, Cedar Corporation, 604 Wilson Avenue, Menomonie, WI 54751  
Tim Ralston, 3237 Rolling Hills Drive, Eagan, MN 55121

In opposition – none

As interest may appear:

Bill Beskar, N7656 State Road 25, Menomonie, WI 54751  
Ritchie Brown, Ho-Chunk Nation DNR, P.O. Box 726, Black River Falls, WI 54615  
Michelle Schoolcraft, Ho-Chunk Nation Division of Natural Resources, P.O. Box 726, Black River Falls, WI 54615  
Tom Wilson, Northern Thunder, 416 E. Court Street, Viroqua, WI 54665  
Doug Brewer, 746 21<sup>st</sup> Street, Chetek, WI 54728

December 18, 2000 – Prairie du Chien

In support – none

In opposition – none

As interest may appear:

Blair E. Dillman, 800 N. Villa Louis Road, Prairie du Chien, WI 54821

December 19, 2000 – Waukesha

In support:

Gene Kramer, Superior Emerald Park Landfill, Inc., 31024 Timber Lane, Burlington, WI 53105  
Ron Williams, W287 S2002 Highway DT, Waukesha, WI 53188  
Keirston Peckham, Murn Environmental, Inc., 2707 E. Philhower Road, Beloit, WI 53511

Stevan Keith, Milwaukee County Dept. of Public Works, 2711 W. Wells Street, Room 215,  
Milwaukee, WI 53208

William W. Carity, 12720 W. North Avenue, Brookfield, WI 53005

Eric Parker, Graef, Anhalt, Schloemer & Associates, 4821 Elm Island Circle, Waterford, WI 53185

Brian J. Karczewski, Graef, Anhalt, Schloemer & Associates, 567 N. 106<sup>th</sup> St., Wauwatosa, WI

Marc E. Marszalek, Weaver Boos & Gordon, Inc., 2021 Timberbrook Lane, Springfield, IL 62702

Andrea Lorenz, Superior Services, Inc., N104 W13285 Donges Bay Road, Germantown, WI 53022

Leigh Himebauch, Metropolitan Builders Assoc., 6511 N. Bluemound Road, Milwaukee, WI 53213

In opposition - none

As interest may appear:

Pam Christenson, Dept. of Commerce Small Business Ombudsman, 201 W. Washington Avenue,  
P.O. Box 7970, Madison, WI 53703

Edward B. Witte, c/o Foley & Lardner, 777 East Wisconsin Avenue, Milwaukee, WI 53202

Ryan P. Mallery, Burke Properties, Inc., 622 N. Water Street, #200, Milwaukee, WI 53202

Joe Ramchick, 2835 N. Grandview Blvd., Pewaukee, WI 53072

Wynnie Zuchowski, 2835 N. Grandview Blvd., Pewaukee, WI 53072

Mark Jenks, Waukesha Co. Dept. of Parks & Land Use, 1320 Pewaukee Road, Room 260,  
Waukesha, WI 53188

Michael A. Dodge, Reinhart, Boerner, Van Deuren, Norris & Rieselbach, 1000 N. Water Street,  
Milwaukee, WI 53203

Senator Margaret Farrow, W262 N2402 Deer Haven Drive, Pewaukee, WI 53072

Jeffrey A. Mierow, Mierow Building Company, 17635 Bolter Lane, Brookfield, WI 53045

Sandy Scherer, Waukesha Co. Dept. of Parks & Land Use, 1320 Pewaukee Road, Room 230,  
Waukesha, WI 53188

Donald A. Smith, Superior Glacier Ridge Landfill, N7296 Hwy. V, Horicon, WI 53032

#### Response to Legislative Council Rules Clearinghouse Report

The comments were accepted, except as noted:

1. Change made to make the term "obligor." The language in this section was modeled after financial assurance requirements used in the solid waste and Chapter 30 programs. The language proposed is routinely followed in those programs.

2.i. The date August 1, 2001 was not added because the proposed rule will not be taking effect until sometime after that date. The effective date will not be known until after legislative review has been completed.

3.a. The comment correctly noted that the wrong citation was included. The final rule omits all references to timelines which is planned for a forthcoming rule. This subsection was deleted.

3.b. The comment was correct. Rather than reference a list in NR 103, the revision includes the list in NR 350.06 (2)(b).

5.a. As discussed above, all references to timelines for review and the associated language pertaining to what is considered a complete application (which triggers certain timelines), has been removed from NR 103 and will be the subject of one comprehensive rule on timelines.

5.b. See 5a.

5.c. Per Leg Council comments, the entire section NR 103.08(4) has been revised and reorganized.

5.d. See 5c

5.f. See 5c

5.i. Definition deleted

5.k. This section revised to address the comment.

5.n. The section revised to be clearer.

5.s. The section has been revised to provide more on who is responsible for what action.

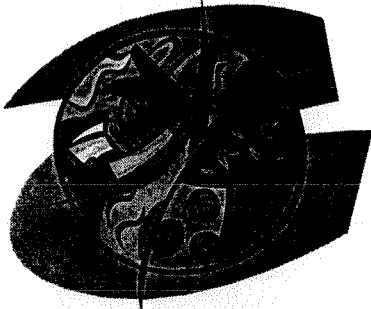
5.u. revised per comment to be obligor

5.v. revised to "timeline"

5.x. The term "bank" is defined. Bank sites are simply compensation sites used in a bank. No change made.

#### Final Regulatory Flexibility Analysis

The proposed rules do not directly regulate small business. Therefore, a final regulatory flexibility analysis is not required.



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**ASSEMBLY  
COMMITTEE  
ON ENVIRONMENT**  
**State Representative Neal Kedzie, Chair**

August 15, 2001

Darrell Bazzell, Secretary  
Wisconsin Department of Natural Resources  
101 S. Webster, Fifth Floor  
Madison, WI 53703

Dear Secretary Bazzell,

The Assembly Environment Committee has voted (Ayes, 7; Noes, 0; 3 Not Present) pursuant to s. 227.19 (4) (b) 2., Stats., to request that the Department of Natural Resources agree to modify Clearinghouse Rule 00-164, relating to wetland compensatory mitigation. The rule was recently submitted to the Legislature by the Department and was referred to the Assembly Environment Committee and the Senate Environmental Resources Committee.

The Assembly Committee held a public hearing on the Rule on August 14, 2001, and had concerns regarding the lack of time limits for the DNR decision-making process, the use of regions rather than geographic management units for off-site mitigation sites, and the clarity of the type of mitigation bank available under s. NR 350.06 (2) (a).

Specifically, the Committee recommends the following:

1. Include statutory timelines for permits as required under Act 147, s. 281.37 (3m) into CR 00-164.
2. Replace the five (5) DNR regions used throughout the rule to locate off-site mitigation with the original rule proposal of 22 geographic management units with a 20 mile radius, including the following:
  - Add language under NR 350.03, Definitions to read:
  - "Geographic management unit" means one of the 22 statewide management units based on the major five river basins.



- "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.
- Delete definition of "Region" under NR 350.03 (23)

3. Add language under the NR 350.04 [(5)] Compensatory mitigation sequence to read:

Off-site mitigation shall occur within the compensation search area of the impacted wetland unless the department determines 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]

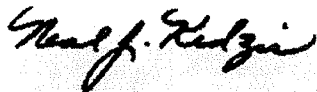
4. Amend language under NR 350.06 (2)(a) to read:

Credits will be purchased from a registered mitigation bank under NR 350.13

Pursuant to this request, the Committee may request additional modifications upon further review if additional issues arise. Please inform me, in writing by August 24, 2001, as to whether or not the Department agrees to this request.

Thank you for consideration of this recommendation.

Sincerely,



Neal Kedzie  
State Representative  
Chair, Assembly Environment Committee

NJK: dj

Cc: Assembly Environment Committee members

August 31, 2001

Darrell Bazzell, Secretary  
WI Department of Natural Resources  
101 South Webster St. - GEF 2  
Madison, WI 53702

Dear Secretary Bazzell:

On August 30, 2001, the Senate Environmental Resources Committee took executive action on CR Rule 00-164, and by a vote of 5 Ayes, 0 Noes and) Absent, the committee passed the following motion.

*Combined Motion*

August 30, 2001

***SENATE COMMITTEE ON ENVIRONMENTAL RESOURCES  
MOTION ON CLEARINGHOUSE RULE 00-164,  
RELATING TO WETLAND COMPENSATORY MITIGATION***

The Senate Environmental Resources Committee recommends that the Department of Natural Resources agree to consider modifying Clearinghouse Rule 00-164, relating to wetland compensatory mitigation under s. 227.19 (4) (b) 2., Stats., to do all of the following:

1. Require that off-site mitigation be located as near as practicable to the location of the adversely effected wetland and, rather than within the same department region, within the same department geographic management unit 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 (also known as the "compensation search area").
2. Alter the compensatory mitigation sequence in s. NR 350.04 so that if the department determines that a project proponent has demonstrated that it is not practicable or ecologically preferable to conduct an on-site mitigation project, the department shall allow the project proponent to use of any of the following off-site mitigation options:
  - a. Purchase of mitigation credits from a bank established prior to the effective date of the rule if the operator of the bank commits to the department, by use of a written memorandum of understanding with the department, to facilitate additional wetland restoration projects at agreed-to locations, within an agreed-to time frame.

- b. Development of a project-specific mitigation site if the site is located within the same compensation search area, as defined in point #1, as the adversely affected wetland.
  - c. Purchase mitigation credits from a bank established after the effective date of the rule if the site is located within the same compensation search area, as defined in point #1, as the adversely affected wetland.
3. Delete the compensation ratio variance in s. NR 350.06 (3).
  4. Clarify, either through a note to the rule or an amendment to the text of the rule, that, based upon the recently issued report on wetlands mitigation by a committee of the National Research Council, monitoring to determine compliance with performance standards, and management to ensure this compliance, is likely to take more time than the five-year minimum specified in s. NR 350.09 (3) (f) (intro.).
  5. Specify in the rule the minimum requirements for the long-term management plan referenced in ss. NR 350.08 (2) and (3) and 350.09 (1), including information on how the site will be used and maintained, who will be responsible for these activities and the schedule for these activities.
  6. Clarify that the department may require the implementation of some or all of the corrective actions identified in a monitoring report under s. NR 350.09 (3) (f) 8. or other corrective actions identified by the department necessary to improve attainment of the site's performance standards.
  7. Clarify and use consistently throughout the rule the acceptable methods for providing for the long-term protection of compensation and mitigation bank sites. (Section NR 350.11 (1) refers to conservation easements and s. NR 350.12 (3) (e) refers to conservation easements and deed restrictions.)
  8. Clarify that a conservation easement used to provide long-term protection of compensation or mitigation bank sites under s. NR 350.11 (1) must include any zone of vegetated upland adjacent to the wetland identified under s. NR 350.05 (5) and credited under s. NR 350.07 (6).
  9. Correct the outdated references in the rule to s. 23.321, Stats. (Section 23.321, Stats., was renumbered to s. 281.37, Stats., by 2001 Wisconsin Act 6.)

If the department does not agree, in writing, to consider the modifications set forth in the motion by September 14, 2001, the committee will object to the rule.

Sincerely,



Jim Baumgart, Chair  
Senate Environmental Resources  
Committee



State Representative  
**Neal J. Kedzie**  
43rd Assembly District

October 11, 2001

Darrell Bazzell, Secretary  
Wisconsin Department of Natural Resources  
101 S. Webster Street, Fifth Floor  
Madison, WI 53702

Dear Secretary Bazzell,

This letter is to inform you that on October 11, 2001 the Assembly Environment Committee held an Executive Session and voted (Ayes, 6; Noes, 4; ) to object to proposed s. NR 350.04 in its entirety pursuant to s. 227.19 (4) (d) 6., Stats. as set forth in the modified version of Clearinghouse Rule 00-164, relating to wetland compensatory mitigation, received by the committee on October 1, 2001 on the grounds that the section is arbitrary and capricious.

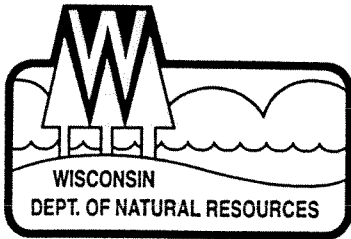
Thank you for your consideration.

Sincerely,

A handwritten signature in cursive script that reads "Neal J. Kedzie".

**Neal Kedzie**  
Chair, Assembly Environment Committee  
State Representative  
43rd Assembly District

NJK: dj



State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Scott McCallum, Governor  
Darrell Bazzell, Secretary

101 S. Webster St.  
Box 7921  
Madison, Wisconsin 53707-7921  
Telephone 608-266-2621  
FAX 608-267-3579  
TTY 608-267-6897

September 28, 2001

Honorable James R. Baumgart, Chair  
Senate Committee on Environmental Resources  
Room 306 South  
State Capitol

Honorable Neal Kedzie, Chair  
Assembly Committee on Environment  
Room 307 North  
State Capitol

Re: Clearinghouse Rule No. 00-164  
Wetland compensatory mitigation

Gentlemen:

On August 15, 2001, the Assembly Committee on Environment requested the Department of Natural Resources to modify Clearinghouse Rule No. 00-164 relating to wetland compensatory mitigation. On August 31, 2001, the Senate Committee on Environmental Resources also requested modifications. At its September 26, 2001 meeting, the Natural Resources Board adopted modifications. Attached is a copy of the proposed rule as adopted by the Natural Resources Board as well as a draft copy highlighting the modifications that were made.

Both committees suggested changes to the sequence for mitigation in s. NR 350.04, specifically looking at how the Department "grandfathers" existing banks that were developed prior to the rules. The Department proposes using the Senate's recommendation, though it appears that this is not different in intent from the Assembly's version. The Senate also recommended eliminating the ratio variance language for those filling more than 20 acres of wetland. The Department does not propose to make that change. The remainder of the recommended changes are more technical in nature and are included.

Under s. 227.19(4)(b)2., Stats., the Department of Natural Resources refers this rule to your Committees for an additional 10 working day review on the modifications. If the Department does not hear from you within 10 working days of the receipt of this notification, the Department will continue processing this rule.

Sincerely,

Darrell Bazzell  
Secretary

cc: Scott Hausmann – FH/3  
Dave Siebert – SS/BW  
Carol Turner – LS/5  
Michael Cain – LS/5

Attach.

October 10, 2001

Darrell Bazzell, Secretary  
WI Department of Natural Resources  
101 South Webster St. - GEF 2  
Madison, WI 53702

Dear Secretary Bazzell:

Please be advised that the Senate Environmental Resources Committee, on October 9, 2001, took executive action on Clearinghouse Rule 00-164, relating to wetland compensatory mitigation.

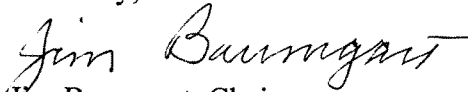
The committee adopted the following motion on October 9, 2001:

“The Senate Environmental Resources Committee objects under s. 227.19 (4) (d) 6., Stats. to proposed s. NR 350.06 (3), as set forth in the modified version of Clearinghouse Rule 00-164 received by the committee on October 1, 2001, on the grounds that this subsection is arbitrary and capricious.”

The vote, by polling, for adoption of the motion was

Ayes: (5) Senators Baumgart, Hansen, Wirch, Cowles and Schultz.  
Noes: (0) None.  
Absent: (0) None.

Sincerely,



Jim Baumgart, Chair  
Senate Environmental Resources Committee

JR:ae



# Wisconsin Builders Association

*Dedicated to Preserving and Promoting the American Dream*

**President**  
Chuck Elliott  
Madison

**President-Elect**  
Mary Anne Moore-  
Church  
Appleton

**Treasurer**  
Jack Sjoström  
Hayward

**Secretary**  
Mike Lotto  
Green Bay

**Assoc Advisor to the  
Senior Officers**  
Ron Kneebone  
Madison

**Area Vice Presidents  
1999-2002**  
Judy Carpenter  
La Crosse

Mike Marthaler  
Eau Claire

George Robak  
Greenfield

Esther Stange  
Green Bay

**2000-2003**  
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Madison

Jim Leppla  
Appleton

Lana Ramsey  
Union Grove

Dave Kautza  
Antigo

Charlie Johansen  
Hayward

**2001-2004**  
John Anderson  
Menasha

Ken Pavlik  
Janesville

Mark Janowski  
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Mark Etrheim  
La Crosse

Keith Weller  
Wausau

**Executive  
Vice-President**  
Bill Wendle

**Deputy Executive  
Vice-President**  
Jerry Deschane

November 14, 2001

Senator Robson, Representative Grothman,  
Members of the Joint Committee for Review of Administrative Rules

Dear Committee members:

The Wisconsin Builders Association asks that you **take no action on the wetland mitigation rule**. We ask this so that the parties can come together one final time to address concerns of the supply of credits. It is our firm belief that those concerns can be addressed with few, if any, modifications and clarifications.

The current draft language may have many negative impacts on Wisconsin's economy and environment, including:

- It is possible that only eight months' worth of wetland mitigation credits will be available.
- New credits may not be available for up to 10 years
- Some areas may never see new credits available.
- Rural areas will probably not have access to mitigation banks.
- The DNR will be given power to establish policies through MOU's above and beyond the law and rule.
- One bank will be given "monopoly" power over bank credits.

We supported the Assembly objection because it restored the consensus agreement reached between the business community, environmental community, DNR and wetland bankers. (Please see Sierra Club testimony-attached.) Like the Sierra Club, our organization supported the creation of wetland mitigation on the basis of that consensus.

A new concept was introduced in the draft language; the concept of restoration in addition to bank credits. We are not opposed to this concept, provided it facilitates the availability of credits, and is not merely a "surcharge." Today we ask for time to meet with the proponents of this concept, and to make sure that it will work.

We thank you for your support on this matter.

Sincerely,

  
Jerry Deschane





**SIERRA  
CLUB**  
FOUNDED 1892

John Muir Chapter

see  
page  
two

Before the Assembly Environment Committee  
IN SUPPORT of Wetland Mitigation, Clearinghouse Rule 00-164

August 14, 2001

Caryl Terrell, Legislative Coordinator

Wetland protection is a high priority with our members. Our goal is to stop the unnecessary destruction of the state's remaining legacy of wetlands and to restore and enhance wetlands that have been degraded over time.

We continue to have reservations that any wetland compensatory program will adequately protect Wisconsin's wetland resources. We still maintain that the science or art of wetland restoration and creation is extremely complex and poorly understood. While we are supportive of the many private efforts to restore degraded wetlands by groups, such as the WI Waterfowl Association, we know the track record for mitigation in Wisconsin and the Midwest is not good.

This concern was further substantiated by a recent major US study. In late June the National Academy of Sciences, the prestigious group of scientists that advises Congress, issued a major report that highlighted the shortcomings and mistakes made in other states and by the Army Corps of Engineers with their compensatory mitigation programs. The National Academy of Sciences found that some mitigation projects are never undertaken or are not completed, and of those completed, the "new" or restored wetlands failed to provide the same benefits compared to nearby natural wetlands.

Keeping these reservations in mind, on behalf of the Sierra Club-John Muir Chapter, I served on the DNR Wetland Compensatory Mitigation Advisory Committee, starting in mid-1996. The charge of the committee was to "formulate a compensatory mitigation program including necessary legislation and administrative rules, for the unavoidable loss of wetlands associated with state approved or certified actions..." The committee worked for many months to develop a Memorandum of Understanding, MOU, between the Army Corps of Engineers and other federal agencies, who also served on the committee, and the DNR and then tackled developing formal Guidelines for Compensatory Mitigation in Wisconsin.

These documents were major accomplishments of the Committee. The documents are based on good science, candid assessment of mitigation programs in other states and the give and take of the committee members in reaching reasonable compromises. The involvement of the Sierra Club in negotiations that lead to the adoption of 1999 WI Act 147 was largely based on our "comfort" level with the Guidelines for Compensatory Mitigation in Wisconsin.

The DNR developed Clearinghouse Rule 00-164 after the Committee finished its work and after 1999 WI Act 147 was adopted. The Sierra Club submitted several comments critical of the proposed rule, especially are on-going objection to minimal compensation ratios based simply on the precedent of a previous DNR-DOT interagency agreement. We feel that more compensation should be sought from private parties seeking to destroy Wisconsin's valuable wetlands, a natural resource heritage being held in public trust for this and future generations. Our comments did note our continued support for using the Guidelines for Compensatory Mitigation in Wisconsin.



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.

SENATOR JUDITH B. ROBSON  
 CO-CHAIR  
 PO BOX 7882  
 MADISON, WI 53707-7882  
 (608) 266-2253



REPRESENTATIVE GLENN GROTHMAN  
 CO-CHAIR  
 PO BOX 8952  
 MADISON, WI 53708-8952  
 (608) 264-8486

**JOINT COMMITTEE FOR  
 REVIEW OF ADMINISTRATIVE RULES**

***Motion Form***

Date: November 14, 2001 Location: 201 Southeast

Moved by Robson, Seconded by Grobschmidt

THAT, CR 00-164

concur in Senate & non-concur in Assembly  
objection object NR 350.06(3)

COMMITTEE MEMBER	Aye	No	Absent
1. Senator ROBSON	✓		
2. Senator GROBSCHMIDT	✓		
3. Senator HANSEN	✓		
4. Senator WELCH		✓	
5. Senator COWLES	✓		
6. Representative GROTHMAN		✓	
7. Representative SERATTI	✓		
8. Representative GUNDERSON		✓	
9. Representative TURNER	✓		
10. Representative HEBL	✓		
Totals			

Motion Carried

Motion Failed

*\* voted by polling*

SENATOR JUDITH B. ROBSON  
 Co-CHAIR  
 PO Box 7882  
 MADISON, WI 53707-7882  
 (608) 266-2253



REPRESENTATIVE GLENN GROTHMAN  
 Co-CHAIR  
 PO Box 8952  
 MADISON, WI 53708-8952  
 (608) 264-8486

**JOINT COMMITTEE FOR  
 REVIEW OF ADMINISTRATIVE RULES**

*Motion Form*

Date: November 14, 2001 Location: 201 Southeast

Moved by Robson, Seconded by Cowles

THAT, CR 00-164

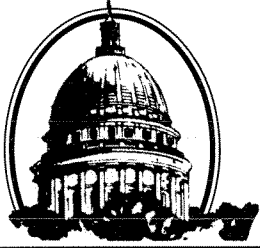
non-concur in Assembly objection

COMMITTEE MEMBER	Aye	No	Absent
1. Senator ROBSON	✓		
2. Senator GROBSCHMIDT	✓		
3. Senator HANSEN	✓		
4. Senator WELCH		✓	
5. Senator COWLES	✓		
6. Representative GROTHMAN		✓	
7. Representative SERATTI	✓		
8. Representative GUNDERSON		✓	
9. Representative TURNER	✓		
10. Representative HEBL	✓		
Totals			

Motion Carried

Motion Failed

\* voted by polling



State Senator  
**James R. Baumgart**

State Capitol: P. O. Box 7882, Madison, WI 53707-7882 • Telephone (608) 266-2056  
Toll-free: 1-888-295-8750 • E-Mail: sen.baumgart@legis.state.wi.us

---

November 13, 2001

Senator Judy Robson, Co-chair  
Joint Committee for Review of Administrative Rules  
State Capitol, 15 South

Dear Senator Robson:

As you know, the Senate Environmental Resources Committee and the Assembly Environment Committee have both objected to portions of the wetland mitigation rules.

These rules went through extensive public hearings. Both in the Legislature and during the formation process. It is clear from those hearings that the public believes it is imperative for the restoration to occur as close as possible to where the loss has occurred. The language that the Senate Environmental Resources Committee proposed in a bi-partisan manner accomplishes this goal. This language will not lead to a decreased opportunity for developers to mitigate wetlands. If they are not able or willing to purchase mitigation credits they may undergo their own mitigation project within the search area.

Those industries that impact Wisconsin's wetlands have been promoting this mitigation statute from its inception and the Legislature has provided the option for them. We ought to design a system where the restored wetlands, and their functional values, are located as near to the wetland loss as possible before considering out-state options. The Senate rules will allow for a fair process. I urge you to not concur with the Assembly Environment Committee's objection and allow the bi-partisan compromise worked out in the Senate to be implemented.

Additionally, the Senate Committee objected to the inclusion of a variance from the mitigation ratio of 1.5 acres of restored wetland for every 1 acre that is destroyed for projects that are going to impact over 20 acres of wetlands. The committee found no reasonable basis for including this variance. I would ask that you concur in this objection and protect our largest wetlands from being mitigated to a lesser extent.

Sincerely,

JIM BAUMGART

State Senator  
9<sup>th</sup> Senate District

"As stewards for this and future generations, we must use the land wisely." - Jim Baumgart

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*"Dedicated to the Conservation of  
Wisconsin's Waterfowl and Wetland Resources"*

WISCONSIN WATERFOWL ASSOCIATION, INC.  
78 Enterprise Rd., Suite A  
Delafield, WI 53018  
(262) 646-5926  
(262) 646-5949 (Fax)

TO: Representative Glenn Grothman, Co-Chair  
Senator Judy Robson, Co-Chair  
Committee for Review of Administrative Rules

FROM: Jeff Nania, Executive Director  
Wisconsin Waterfowl Association

DATE: November 12, 2001

RE: Wetland Mitigation Rule Objection

I am writing in opposition to the Assembly Environment Committee's objection to section 350.04 of Clearing House Rule 00-164 relating to wetlands on behalf of the Wisconsin Waterfowl Association.

The Wisconsin Waterfowl Association has been working to conserve Wisconsin's waterfowl and wetland resources for over 18 years. Our membership has now grown to over 7,500 members throughout Wisconsin. In 2000 alone these members help us to restore 333 acres of Wetland habitat and 555 acres of upland nesting cover in Wisconsin.

We worked closely with Senator Schultz and the Department of Natural Resources to adopt the new language in section 350.04 relating to mitigation sequencing. The language allows existing mitigation banks to sell their mitigation statewide while also working with the DNR to find a mitigation location within the region of the wetland fill. This provides important environmental enhancements to habitat in the area of the State where a filled wetland occurs. It is important the functional values of newly mitigated wetlands benefit the region where a fill occurs. The DNR Board at their September meeting adopted these changes.

Wetland mitigation banks are a tool that provides a viable wetland to replace a wetland that may be filled during a development or agriculture project. Our wetland bank is located in Columbia County and has been providing credits in Wisconsin since May of 1996. It is important to understand during the wetland mitigation debate over 1999 Act 147 mitigation banks were only meant to be one option for an owner to mitigate a wetland fill. The owners also have the opportunity to mitigate on their own in the same region of the fill site.

For the last five years we have provided credits for wetland impacts in several different areas of the State. Our program is unique in that the most significant portion of the proceeds of our bank goes to fund our non-profit wetland restoration program. While we do these restorations statewide, we especially target those areas where there have been wetland impacts that we have compensated for through our bank. We have provided additional high quality wetland restoration in those areas.

As a private mitigation bank we entered into an agreement of the Mitigation Bank Review Team, consisting of representatives from the U.S. Army Corps of Engineers, DNR, EPA, Natural Resource Conservation Service and U.S. Fish & Wildlife. Though this process we have followed the rules of bank establishment to the letter.

As an option for owners existing wetland mitigation banks and new banks will provide plenty of options for years to come. We currently have 80 acres available for banking. A new bank by Superior Landfill is already under construction in Southeastern Wisconsin. It was just this summer that the Northland Company brought their bank to the DNR's attention and conveyed their intent to sell credits outside their industry.

In 1999 Act 147 the legislature directed the department to create "rules for the conditions under which credits in a wetland mitigation bank may be used for wetland compensatory mitigation." Through numerous public hearings via the department and legislature the public expressed their desire for compensatory wetlands to occur as near as practicable to the location of the adversely impacted wetland. Allowing wetland fills to occur in one corner of the state without in turn requiring the mitigation to occur in the same region would be detrimental to Wisconsin's habitat and environment.

The Waterfowl Association has worked hard to build a valuable and viable wetland mitigation bank. We agree with the need to require statewide banks to work in the region where the wetland fill takes place and undertake additional projects.

If the objection by the Assembly Committee on Environment were concurred in by JCRAR the committee would be denying the area of the State where a filled wetland occurs the functional values of newly mitigated wetlands or projects in that region. We urge you to object to the Assembly Environment Committee's objection to section 350.04 of Clearing House Rule 00-164 relating to wetlands

Thank you for your consideration. Please feel free to contact our representative Sean Dilweg or myself with any further questions on this issue.

Cc: Members, Committee for Review of Administrative Rules

## Austin, David

---

**From:** Bill McClenahan [bill@martinschreiber.com]  
**Sent:** Monday, November 12, 2001 4:29 PM  
**To:** David.Austin@legis.state.wi.us  
**Subject:** wetland mitigation

On behalf of the Forest County Potawatomi Community, I hope the committee upholds the Senate objection to the provision allowing a lower mitigation ration for taking larger than 20 acres. The proposed Crandon mine, for instance, would destroy more than 20 acres.

Bill McClenahan  
Martin Schreiber & Associates  
bill@martinschreiber.com  
608 / 259-1212 Ext. 4  
414 / 405-1051 cellular



*"Dedicated to the Conservation of  
Wisconsin's Waterfowl and Wetland Resources"*

WISCONSIN WATERFOWL ASSOCIATION, INC.  
78 Enterprise Rd., Suite A  
Delafield, WI 53018  
(262) 646-5926  
(262) 646-5949 (Fax)

TO: Representative Glenn Grothman, Co-Chair  
Senator Judy Robson, Co-Chair  
Committee for Review of Administrative Rules

FROM: Jeff Nania, Executive Director  
Wisconsin Waterfowl Association

DATE: November 14, 2001

RE: CR 00-164 regarding wetland mitigation rules.

I appreciate the opportunity to testify before the committee today and am appearing in opposition to the Assembly Environment Committee's objection to section 350.04 of Clearing House Rule 00-164 relating to wetlands as the Executive Director for the Wisconsin Waterfowl Association.

The Wisconsin Waterfowl Association has been working to conserve Wisconsin's waterfowl and wetland resources for over 18 years. Our membership has now grown to over 7,500 members throughout Wisconsin. In 2000 alone these members help us to restore 333 acres of Wetland habitat and 555 acres of upland nesting cover in Wisconsin.

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In 1999 Act 147 the legislature directed the department to create "rules for the conditions under which credits in a wetland mitigation bank may be used for wetland compensatory mitigation." Through numerous public hearings via the department and legislature the public expressed their desire for compensatory wetlands to occur as near as practicable to the location of the adversely impacted wetland. Allowing wetland fills to occur in one corner of the state without in turn requiring the mitigation to occur in the same region would be detrimental to Wisconsin's habitat and environment.

The Waterfowl Association has worked hard to build a valuable and viable wetland mitigation bank. We agree with the need to require statewide banks to work in the region where the wetland fill takes place and undertake additional projects.

There has been talk about the memorandum of understanding between the existing mitigation banks and the DNR. We are planning on meeting with the DNR during the next few weeks on the MOU. We look forward to working out the details of such an agreement.

We urge the committee to object to the Assembly Environment Committee's objection to section 350.04 of Clearing House Rule 00-164 relating to wetlands

Thank you for your consideration.



State Representative  
**Neal J. Kedzie**

43rd Assembly District

November 7, 2001

State Senator Judy Robson  
Co-Chair, Joint Committee on Review of Administrative Rules  
Room 15 South, State Capitol

State Representative Glenn Grothman  
Co-Chair, Joint Committee on Review of Administrative Rules  
Room 15 North, State Capitol

Dear Chairs Robson and Grothman,

On October 11, 2001, the Assembly Environment Committee objected to section NR 350.04 of Clearinghouse Rule 00-164. CR 00-164 is the proposed rule for 2000 Wisconsin Act 147 (compensatory wetland mitigation) which state Senator Rob Cowles and I authored. This letter is to request consideration by the Joint Committee on Review of Administrative Rules to concur with the Assembly Environment Committee's objection.

Initially, the Assembly Environment Committee was poised to make modifications to NR 350.04. Those modifications were in response to the actions by the Senate Environmental Resources Committee, which quickly drafted and adopted new language to NR 350.04. That new language was never afforded any discussion or debate by the myriad of interested parties that worked years to craft the language of Act 147 and the subsequent rules.

In addition, it is my opinion that the new language will drastically reduce the supply of mitigation bank credits in the state of Wisconsin. Further, the new language allows the Department of Natural Resources to establish a Memorandum of Understanding (MOU) for approval of pre-rules and post rules mitigation banks. When asked about the MOU's in committee, department officials could not offer any information about the criteria or parameters of the MOUs. Put simply, the MOU would allow department staff to create policy within policy with no oversight by the standing committees of the Legislature.

If the Legislature grants that power to the department, the department, in turn, could set standards for wetlands mitigation banking that may distort the intent of Wisconsin Act 147. In addition, allowing the department free reign over the MOUs would continue the slow erosion of legislative control of the department.

***Letter to JCRAR Chairs - Wetland Mitigation Rule  
November 7, 2001; page 2 of 2***

Since my first days in office, I have worked very closely with representatives from the department, development and building community, environmental groups and legislators on both sides of the aisle and respective houses in order to produce a truly consensus piece of legislation.

The rules process has been no different, up until this point. In fact, the Assembly Environment Committee's recommendations to the department were suggested by the Sierra Club in committee and agreed to by the Wisconsin Builders Association. The committee instructed the department to return to the original language crafted by an advisory group made up of individuals from all interested parties. In short, the Assembly Environment Committee held true to the original intent and agreements established throughout this process.

Unfortunately, the Senate Environmental Resources Committee's adoption of new language in the last days of the process severely upset four years of a delicate consensus arrangement. Additionally, the Senate Environment Committee blocked efforts by the Assembly Environment Committee to make modifications to that new language.

Prior to executive action by the Assembly Environment Committee, the Senate Environmental Resources Committee objected to an unrelated portion of the rule. That action limited the Assembly Environment Committee's ability to discuss and possibly modify NR 350.04, which again upset this long and arduous process. Thus, the Committee was left no option but to object to the section in its entirety.

For those reasons stated, I ask the Joint Committee on Review of Administrative Rules to concur with the objection made by the Assembly Environment Committee and uphold the integrity of a long-standing, bi-partisan, consensus effort by numerous individuals on all sides of this issue.

Thank you for your time and consideration of my request.

Sincerely,



**Neal Kedzie**  
Chair, Assembly Environment Committee  
State Representative  
43rd Assembly District

cc: Members, Joint Committee on Review of Administrative Rules  
State Senator Jim Baumgart, Chair - Senate Environmental Resources Committee  
Members, Assembly Environment Committee  
Members, Senate Environmental Resources Committee



State Senator  
**Kevin Shibilski**

---

November 5, 2001

State Senator Judy Robson  
State Representative Glenn Grothman  
Co-Chairs, Joint Committee on Review of Administrative Rules

Dear Chairs Robson and Grothman:

I am writing to request that the Joint Committee for the Review of Administrative Rules (JCRAR) approve the Assembly position on NR 350, specifically as it relates to NR 350.04 and the banking of mitigation credits.

At minimum, **the proposed rule should not apply retroactively** to existing mitigation banks, bank creation projects that have submitted application to proper authorities, or mitigation projects where an application has been received by the proper authority.

The US Army Corps of Engineers should remain the primary authority in the administration and enforcement of rules and standards for mitigation banking. Northland Cranberries Inc. has been operating a mitigation bank in good faith since 1999. Regardless of the intent of the most recently proposed NR 350, it changes the rules after agreements have been made and contracts have been entered into in accordance with the 1993 Interagency Coordination Agreement.

The Department of Natural Resources should certainly be a partner on the Mitigation Banking Review Team (MBRT), but the Department should not adopt a pattern of creating rules that supercede existing standards adhered to in good faith by the regulated community for the last several years.

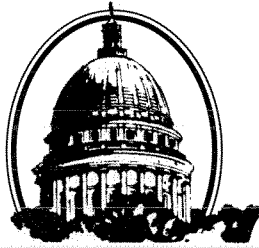
In addition, NR 350.03 defines Mitigation Bank Service Areas that are, again, retroactive and far too restrictive. It is patently unfair to redefine existing geographic boundaries with new, unworkable areas. Agreements and contracts have been entered into and should not be breached by retroactive changes to existing regulations.

Thank you for your consideration of these requests, and please feel free to contact me on this issue.

Sincerely,

KEVIN SHIBILSKI  
State Senator  
24<sup>th</sup> Senate District

cc: Senator James Baumgart, Chair, Senate Committee on Environmental Resources  
Members, Joint Committee for Review of Administrative Rules  
Members, Senate Committee on Environmental Resources



# State Senator James R. Baumgart

State Capitol: P. O. Box 7882, Madison, WI 53707-7882 • Telephone (608) 266-2056  
Toll-free: 1-888-295-8750 • E-Mail: sen.baumgart@legis.state.wi.us

## MEMO

October 23, 2001

TO: Members of the Joint Committee for Review of Administrative Rules

Senator Judy Robson, Co-chair  
Senator David Hansen  
Senator Rob Cowles

Senator Richard Grobschmidt  
Senator Robert Welch

Rep. Glenn Grothman, Co-chair  
Rep. Scott Gunderson  
Rep. Tom Hebl

Rep. Lorraine Seratti  
Rep. Robert Turner

FROM: Senator Jim Baumgart, Chair  
Senate Environmental Resources Committee

RE: Wetland Mitigation Rules: Mitigation Banking Language and 20-acre  
Variance Request Objections.

As you may be aware, the Senate and Assembly Environment Committees have objected to different portions of the proposed administrative rules relating to wetland mitigation. Last session, on a bi-partisan basis, the legislature passed Act 147 allowing for mitigation of wetland losses during development. It is imperative that these rules be both workable and insure the protection of our natural resources. That authority now rests with you.

### BACKGROUND:

Currently, there are three wetland banks that are approved to sell credits for restoration projects they have already completed. When the Department of Natural Resources (DNR) began writing these rules, these three banks were to be allowed to sell their credits statewide, regardless of where the wetland loss occurred. However, after the public comment period ended, it was clear that the mitigation ought to take place as close as possible to the site of the loss. The Department then drafted rules requiring the mitigation occur as close as possible within the designated search area. This, of course, considerably reduces the number of customers for the banks.

"As stewards for this and future generations, we must use the land wisely." - Jim Baumgart

### **ACTIONS OF THE SENATE ENVIRONMENTAL RESOURCES COMMITTEE:**

Working in a bi-partisan fashion, the members of the Senate Committee on Environmental Resources were able to craft a compromise between those who wanted to be able to sell mitigation credits statewide and those who want the restorations as close as possible to the area of loss. Under our proposal, the bank may sell their mitigation credits statewide, but then they must work with the DNR to find a location within the relevant search area and undertake an additional project. If the bank is located within the search area of the wetland loss no further action is necessary. This compromise was accepted by members of the wetland restoration industry and by the members of the Senate Environmental Resources Committee by a vote of 5 to 0.

### **ACTIONS OF THE ASSEMBLY ENVIRONMENT COMMITTEE:**

The Assembly Committee, on a 6 to 4 vote, decided to object to this language and allow credits to be sold statewide. Unfortunately, this will deny the area of the functional values that each destroyed wetland provided. I believe that this would be detrimental for the environment as well as lead to increased flooding, especially in the southeastern corner of the state.

### **RECOMMENDATION TO JCRAR:**

I would like to urge you all to very carefully consider the objections. The majority of the mitigation that will occur will be done through this banking system and it is imperative that we create a process that protects our resources. Therefore, I would ask that the Committee not concur with the Assembly objection, but allow these rules to be promulgated with the Senate language intact.

The rules call for a mitigation ratio of 1.5 acres of restored wetland for every 1 acre of destroyed wetlands. Unfortunately, the DNR Board included a provision allowing for a variance from this ratio for projects impacting over 20 acres of wetlands. The Senate Environment Committee saw no logical reason for this provision. The committee asked for it to be removed but the Board did not honor this request and therefore we felt the need to object and as a result ask that you uphold this objection.

Thank you for your consideration of these important issues and if you have any questions please feel free to contact me.



# Wisconsin Builders Association

*Dedicated to Preserving and Promoting the American Dream*

**President**  
Chuck Elliott  
Madison

**President-Elect**  
Mary Anne Moore-  
Church  
Appleton

**Treasurer**  
Jack Sjostrom  
Hayward

**Secretary**  
Mike Lotto  
Green Bay

**Assoc Advisor to the  
Senior Officers**  
Ron Kneebone  
Madison

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1999-2002**  
Judy Carpenter  
La Crosse

Mike Marthaler  
Eau Claire

George Robak  
Greenfield

Esther Stange  
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**2000-2003**  
Brian McKee  
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Lana Ramsey  
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Mark Janowski  
Green Bay

Mark Etrheim  
La Crosse

Keith Weller  
Wausau

**Executive  
Vice-President**  
Bill Wendle

**Deputy Executive  
Vice-President**  
Jerry Deschane

November 14, 2001

Senator Robson, Representative Grothman,  
Members of the Joint Committee for Review of Administrative Rules

Dear Committee members:

The Wisconsin Builders Association asks that you **take no action on the wetland mitigation rule**. We ask this so that the parties can come together one final time to address concerns of the supply of credits. It is our firm belief that those concerns can be addressed with few, if any, modifications and clarifications.

The current draft language may have many negative impacts on Wisconsin's economy and environment, including:

- It is possible that only eight months' worth of wetland mitigation credits will be available.
- New credits may not be available for up to 10 years
- Some areas may never see new credits available.
- Rural areas will probably not have access to mitigation banks.
- The DNR will be given power to establish policies through MOU's above and beyond the law and rule.
- One bank will be given "monopoly" power over bank credits.

We supported the Assembly objection because it restored the consensus agreement reached between the business community, environmental community, DNR and wetland bankers. (Please see Sierra Club testimony-attached.) Like the Sierra Club, our organization supported the creation of wetland mitigation on the basis of that consensus.

A new concept was introduced in the draft language; the concept of restoration in addition to bank credits. We are not opposed to this concept, provided it facilitates the availability of credits, and is not merely a "surcharge." Today we ask for time to meet with the proponents of this concept, and to make sure that it will work.

We thank you for your support on this matter.

Sincerely,

  
Jerry Deschane



**NAHB**



**SIERRA  
CLUB**  
FOUNDED 1892

John Muir Chapter

see  
page  
two

Before the Assembly Environment Committee  
IN SUPPORT of Wetland Mitigation, Clearinghouse Rule 00-164  
August 14, 2001  
Caryl Terrell, Legislative Coordinator

Wetland protection is a high priority with our members. Our goal is to stop the unnecessary destruction of the state's remaining legacy of wetlands and to restore and enhance wetlands that have been degraded over time.

We continue to have reservations that any wetland compensatory program will adequately protect Wisconsin's wetland resources. We still maintain that the science or art of wetland restoration and creation is extremely complex and poorly understood. While we are supportive of the many private efforts to restore degraded wetlands by groups, such as the WI Waterfowl Association, we know the track record for mitigation in Wisconsin and the Midwest is not good.

This concern was further substantiated by a recent major US study. In late June the National Academy of Sciences, the prestigious group of scientists that advises Congress, issued a major report that highlighted the shortcomings and mistakes made in other states and by the Army Corps of Engineers with their compensatory mitigation programs. The National Academy of Sciences found that some mitigation projects are never undertaken or are not completed, and of those completed, the "new" or restored wetlands failed to provide the same benefits compared to nearby natural wetlands.

Keeping these reservations in mind, on behalf of the Sierra Club-John Muir Chapter, I served on the DNR Wetland Compensatory Mitigation Advisory Committee, starting in mid-1996. The charge of the committee was to "formulate a compensatory mitigation program including necessary legislation and administrative rules, for the unavoidable loss of wetlands associated with state approved or certified actions..." The committee worked for many months to develop a Memorandum of Understanding, MOU, between the Army Corps of Engineers and other federal agencies, who also served on the committee, and the DNR and then tackled developing formal Guidelines for Compensatory Mitigation in Wisconsin.

These documents were major accomplishments of the Committee. The documents are based on good science, candid assessment of mitigation programs in other states and the give and take of the committee members in reaching reasonable compromises. The involvement of the Sierra Club in negotiations that lead to the adoption of 1999 WI Act 147 was largely based on our "comfort" level with the Guidelines for Compensatory Mitigation in Wisconsin.

The DNR developed Clearinghouse Rule 00-164 after the Committee finished its work and after 1999 WI Act 147 was adopted. The Sierra Club submitted several comments critical of the proposed rule, especially are on-going objection to minimal compensation ratios based simply on the precedent of a previous DNR-DOT interagency agreement. We feel that more compensation should be sought from private parties seeking to destroy Wisconsin's valuable wetlands, a natural resource heritage being held in public trust for this and future generations. Our comments did note our continued support for using the Guidelines for Compensatory Mitigation in Wisconsin.



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.

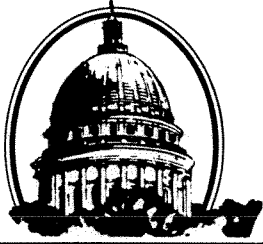
**NR 350.06 Amount of compensatory mitigation required.** (1) The currency for compensatory mitigation is acres.

(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.



State Senator  
**James R. Baumgart**

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November 13, 2001

Senator Judy Robson, Co-chair  
Joint Committee for Review of Administrative Rules  
State Capitol, 15 South

Dear Senator Robson:

As you know, the Senate Environmental Resources Committee and the Assembly Environment Committee have both objected to portions of the wetland mitigation rules.

These rules went through extensive public hearings. Both in the Legislature and during the formation process. It is clear from those hearings that the public believes it is imperative for the restoration to occur as close as possible to where the loss has occurred. The language that the Senate Environmental Resources Committee proposed in a bi-partisan manner accomplishes this goal. This language will not lead to a decreased opportunity for developers to mitigate wetlands. If they are not able or willing to purchase mitigation credits they may undergo their own mitigation project within the search area.

Those industries that impact Wisconsin's wetlands have been promoting this mitigation statute from its inception and the Legislature has provided the option for them. We ought to design a system where the restored wetlands, and their functional values, are located as near to the wetland loss as possible before considering out-state options. The Senate rules will allow for a fair process. I urge you to not concur with the Assembly Environment Committee's objection and allow the bi-partisan compromise worked out in the Senate to be implemented.

Additionally, the Senate Committee objected to the inclusion of a variance from the mitigation ratio of 1.5 acres of restored wetland for every 1 acre that is destroyed for projects that are going to impact over 20 acres of wetlands. The committee found no reasonable basis for including this variance. I would ask that you concur in this objection and protect our largest wetlands from being mitigated to a lesser extent.

Sincerely,

**JIM BAUMGART**  
State Senator  
9<sup>th</sup> Senate District

"As stewards for this and future generations, we must use the land wisely." - Jim Baumgart

Printed on recycled paper.

155 Sen. Robinson (David)



State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

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November 15, 2001

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Subject: Meeting to Discuss Memorandum of Understanding on NR 350 (Wetland  
Compensatory Mitigation Rules

Dear Mitigation Partners:

As was discussed at yesterday's hearing of the Joint Committee for the Review of Administrative Rules, the Department is committed to working with our key partners to make the proposed wetland compensatory mitigation rules fair and workable. As such, I would like to invite you to a meeting on Monday, November 26, at 1:00pm in Room 415NW at the Capitol. The meeting will be hosted by the offices of Senator Jim Baumgart and Representative Neil Kedzie. My agency will be represented at the meeting by Deputy Secretary Franc Fennessy, Paul Heinen, and Dave Siebert.

The subject of the meeting will be to discuss and gain substantial agreement on the details of the MOU as envisioned by proposed NR 350.04(4)(c). At the meeting we will share with you a proposed first draft of the MOU that can be used to start the meeting.

If you have any questions, please call Dave Siebert at 608-264-6048. I appreciate your efforts in the development of these rules.

Sincerely,

*Darrell*  
Darrell Bazzell  
Secretary

cc: Catherine Stepp, Natural Resources Board  
Scott Kelly, Office of Governor Scott McCallum  
Matt Hauser, Office of Governor Scott McCallum  
Honorable James Baumgart, State Senator (Attn: Pat Henderson)  
Honorable Neil Kedzie, State Representative (Attn: Dan Johnson)  
Members, Joint Legislative Committee on the Review of Administrative Rules  
Members, Senate Committee on Environmental Resources  
Members, Assembly Committee on Environment