

NR 1.95



State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Anthony S. Earl
Secretary

BOX 7921
MADISON, WISCONSIN 53707

IN REPLY REFER TO: _____

STATE OF WISCONSIN)
)
DEPARTMENT OF NATURAL RESOURCES) ss

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OCT 30 1979
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REVISOR OF STATUTES
BUREAU

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETINGS:

I, Anthony S. Earl, Secretary of the Department of Natural Resources and custodian of the official records of said Department, do hereby certify that the annexed copy of Natural Resources Board Order No. WR-29-79 was duly approved and adopted by this Department on September 26, 1979. I further certify that said copy has been compared by me with the original on file in this Department and that the same is a true copy thereof, and of the whole of such original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of the Department at General Executive Facility #2 in the City of Madison, this 25TH day of October, 1979.

Anthony S. Earl, Secretary

(SEAL)

ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD

REPEALING AND RECREATING RULES

.....
 IN THE MATTER of repealing and recreating .
 section NR 1.95 of the Wisconsin Adminis- .
 trative Code pertaining to the preservation, . WR-29-79
 protection and management of wetlands .

Analysis Prepared by Department of Natural Resources

Proposed section NR 1.95, Wis. Adm. Code, is meant to provide guidance to Department of Natural Resources staff in making those decisions within the agency's existing authority which may affect wetlands. The purpose is to promote uniformity in dealing with wetlands where the Department has authority to do so; it does not expand Department control over wetlands.

Under the proposed rule, Department staff would be required to consider specific wetland values (or functions) when evaluating proposals with the potential to affect wetlands. Decisions would continue to be based on the staff's best professional judgment and on the presumption that wetlands should not be adversely affected; however, in those situations where there are no reasonable alternatives which avoid adverse effects on wetlands, proposals which minimize those effects may proceed (provided, of course, that they comply with other requirements of the law). A balance with other environmental requirements is recognized by specifying that proposals also have the minimum overall adverse impact on the environment.

Department resource management activities in wetlands must be for the purpose of enhancing one or more wetland values. At the same time, these activities are limited to what is necessary to achieve resource management objectives specified by law and must not create adverse wetland effects which are significant or irreversible.

Finally, the proposed rule requires that existing procedures continue to be followed; it does not establish new procedures for making decisions affecting wetlands. However, the rule requires that the Department be accountable to the Natural Resources Board for its actions affecting wetlands and that individual decisions must be documented and contain a statement of how wetland impacts were considered.

The following is a more detailed discussion of the provisions of the proposed rule.

PURPOSE

The purpose of the proposed rule is to establish a uniform policy to be applied by the Department of Natural Resources in the execution of its existing regulatory and management authorities. The policy requires that consideration be given to wetland values and to the effects on wetlands of proposed actions over which the Department has jurisdiction. It does not expand the Department's authority beyond its existing limits.

AUTHORITY

Specific authority to adopt policy as an administrative rule is found in s. 227.014(2)(c), Stats. In addition, the Attorney General, in an opinion dated September 17, 1979 has recognized the Department's authority to adopt wetland rules of this type.

The Department would base decisions under this policy primarily on s. 144.025, Stats., where the Department is designated as the central unit of state government responsible for protecting, maintaining and improving the quality of the waters of the state. "Marshes" are listed as waters of the state, and therefore are to be protected from pollution. Additional authorities that the Department would rely on in making decisions include the Public Trust Doctrine (found in the Wisconsin Constitution), the Wisconsin Environmental Policy Act, and various statutes and administrative codes relating to resource management.

NATURAL RESOURCES BOARD FINDINGS

The Natural Resources Board in adopting the proposed rule recognizes that the characteristics of wetlands restrict the range of human activities which can reasonably take place in and adjacent to them. The Board also recognizes that the State has a strong statutory policy which creates a presumption against activities that adversely affect those waters of the state, including wetlands, which come under the Department's jurisdiction or control.

The proposed rule also contains a brief outline of specific values or functions which wetlands serve in the human environment. They provide habitat or living space for many different plant and animal species. In some cases, wetlands are critical to the survival of these species and may be the only suitable habitat for them. Wetlands also serve important physical and chemical functions in relation to other waters of the state. Their ability to trap and absorb sediments and pollutants may have a substantial effect on the quality of related water bodies. Some wetlands associated with lakes and streams help to retard the rate of surface water runoff and thereby lessen the severity of flood events. Wetlands along the margins of major water bodies can slow the rate of shoreline erosion.

Some wetlands have substantial recreational value, provide opportunities for nature study, or make significant contributions to the economic base and/or cultural heritage of certain people. The harvest of various plant and animal products is a generally recognized value of wetlands.

When considering wetland values, attention should be given to the relative scarcity of the wetland type and to the influence of the wetland on other wetlands and waters of the state within the region.

STATEMENT OF POLICY

The stated policy of the Natural Resources Board is that wetlands shall be preserved, protected and managed to maintain, enhance or restore their values in the human environment. The preservation, protection and management would be accomplished by the Department where its existing authority allows. The policy recognizes that it is in the public interest for Department decisions which may affect wetlands to be based on the intention to preserve, protect and manage them. The definition of wetlands in this proposed code is virtually identical to that contained in the present section NR 1.95.

GENERAL STANDARDS TO BE APPLIED IN DECISIONS AFFECTING WETLANDS

The Department already has authority in many of its regulatory programs to give consideration to effects on wetlands. Where this authority exists, the Department shall evaluate proposed actions and all reasonable alternatives to proposed actions with the intent of avoiding adverse impacts on wetlands while minimizing overall adverse environmental impacts. Among the alternatives to be considered is that of denying a requested permit or approval. When all reasonable alternatives result in adverse impacts on wetlands, the alternative selected shall minimize the adverse impacts on wetlands as well as the overall adverse environmental impacts of the proposal. Therefore, preference is given to avoiding adverse wetland impacts; however, overall adverse environmental impacts must also be minimized.

In situations where its authority allows, the Department will require a convincing demonstration by sponsors of actions that would affect wetlands that their proposals need to be located in or adjacent to the wetland(s) in question; are technically, economically, and environmentally feasible; and meet other requirements of the law. The term "convincingly demonstrate" does not establish a recognized legal burden of proof. However, it is an admonishment to Department staff to give wetlands the benefit of the doubt when evaluating proposed projects.

Department management actions affecting wetlands must be aimed at enhancing a specific wetland value or values without creating adverse effects which are either significant or irreversible. Actions will be limited in scope to what is necessary to achieve the objectives of resource management authorized by the Legislature.

IMPLEMENTATION

The proposed rule also provides specific guidance to particular aspects of the Department's programs which interact with wetlands. In making regulatory decisions and where its existing authority allows, the Department is to evaluate all proposals in light of the values of the particular wetland in question. In addition, the Department must consider the potential reversibility of the action proposed, the presence or absence of physical alternations which may affect wetland values, the possibility of other uses of wetlands in the region, the accumulated effect of individual actions on wetlands, and the effects of the use of nonwetland areas on adjacent wetlands and on other waters of the state. In looking at uses of nonwetland areas, the Department is limited to the review of activities which come under its existing authority. The Department must also consider the potential impact of proposed actions on other scarce resources in the area. This should prevent the substitution of adverse effects on other scarce resources for adverse wetland impacts.

The proposed rule contains specific requirements for Department land acquisition, enforcement activities, interagency liaison and proposals for administrative rules and for legislation and also states that, when evaluating proposed actions, the Department shall not consider unrelated trade-offs of land, etc., as offsetting adverse impacts on wetlands.

The Department is required to establish procedures within its existing decision-making framework to make wetland evaluations and arrive at decisions under the standards specified in the rule. Its decisions must be documented, must be available for review, and must indicate how wetland impacts were considered. No major changes in decision procedures are necessary or expected.

MONITORING AND REPORTING

The Natural Resources Board expects the Department to be responsible for carrying out the requirements of this policy and for keeping the Board informed on progress in achieving the objectives set forth in the proposed rule.

Pursuant to the authority vested in the State of Wisconsin Natural Resources Board by sections 144.26 and 227.014, and chapter 30, Wisconsin Statutes, the State of Wisconsin Natural Resources Board hereby repeals and recreates rules as follows:

SECTION 1 - Section NR 1.95 is repealed and recreated to read:

NR 1.95 Wetland preservation, protection and management. (1) Purpose.

It is the intent of the natural resources board to establish rules for the preservation, protection and management of wetlands in the state of Wisconsin.

The rules shall be applied in such a manner as to avoid or minimize the adverse effects on wetlands due to actions over which the department has regulatory or management authority and to maintain, enhance and restore wetland values.

(2) Authority. The department, under existing law, has the responsibility of making regulatory and management decisions which, directly or indirectly, affect the quantity and quality of many Wisconsin wetlands.

(a) Wisconsin has a history of active water resource protection under the public trust doctrine which originated in the northwest ordinance of 1787, the enabling act under which Wisconsin became a state, and the Wisconsin constitution.

(b) The department is designated under s. 144.025, Stats., as the central unit of state government responsible for protecting, maintaining and improving the quality of the waters of the state. Department actions must be consistent with the goal of maintaining, protecting and improving water quality.

(c) Under the Wisconsin environmental policy act, s. 1.11, Stats., the department is required to study, develop and describe appropriate alternatives to recommended courses of action for proposals which involve unresolved conflicts concerning alternative uses of available resources and to make decisions with the knowledge of their effects on the quality of the human environment.

(d) The department, pursuant to ss. 23.09 and 29.02, Stats., and section NR 1.015, Wis. Adm. Code, must provide for the protection, development and use of forests, fish and game, lakes, streams, plant life, flowers and other outdoor resources of the state. The department is obliged to develop and implement appropriate scientific management practices to achieve these objectives.

(3) Natural resources board findings. (a) Introduction. The presence of wetlands signifies physical characteristics which are limiting factors in the human activities which may occur in and adjacent to them. What may be limitations for one use of a wetland may also be the principal values supporting a different use. The state's policy as articulated in its trusteeship of navigable waters and the statutes enacted to further the protection and enhancement of the quality of its waters, creates a presumption against activities which adversely affect those wetlands under department jurisdiction or control.

(b) Wetland values. Wetlands are known to possess a wide range of natural and human values, some or all of which may apply to a particular wetland under review. Assessing the value of a wetland is a complex procedure requiring thoughtful analysis of all possible wetland values and functions.

1. Biological functions. Wetlands are environments in which a variety of biological functions occur. In many cases, wetlands are very productive ecosystems which support a wide diversity of aquatic and terrestrial organisms. Many wetland areas are vital spawning, breeding, nursery or feeding grounds for a variety of indigenous species. Some wetlands are the habitats for state or federally designated rare, threatened or endangered species.

2. Watershed functions. In addition to their biological functions, wetlands may serve important physical and chemical functions with respect to other wetlands and waters of the state. A specific wetland (or set of wetlands) may play a critical role in maintaining the stability of the entire system to which it is physically and functionally related. This functional role may include the maintenance of both the hydrologic patterns and the physical and chemical processes of related wetlands and other related waters of the state.

a. Hydrologic support functions. A particular wetland may function to maintain the hydrologic characteristics, and thereby the physical and chemical integrity of an entire aquatic ecosystem.

b. Groundwater functions. Groundwater may discharge to a wetland, recharge from a wetland to another area, evaporate from and/or flow through a wetland.

c. Storm and flood water storage. Some wetlands may be important for storing water and retarding flow during periods of flood or storm discharge. Even wetlands without surface water connections to other water bodies may serve this function. Such wetlands can reduce or at least modify the potentially damaging effects of floods by intercepting and retaining water which might otherwise be channelled through open flow systems. The importance of a given wetland for storm and flood water storage may be modified by the cumulative effects of the proposed activities and previous activities within the watershed.

d. Shoreline protection. Wetlands also function to dissipate the energy of wave motion and runoff surges from storms and snowmelt, and thus lessen the effects of shoreline erosion. Wave action shielding by wetlands is not only important in preserving shorelines and channels, but also in protecting valuable residential, commercial and industrial acreage located adjacent to the aquatic ecosystems.

e. Other watershed functions. A wetland may perform a variety of other important functions within a watershed. Wetlands may degrade, inactivate or store materials such as heavy metals, sediments, nutrients, and organic compounds that would otherwise drain into waterways.

3. Recreational, cultural and economic value. Some wetlands are particularly valuable in meeting the demand for recreational areas (for uses such as hunting, canoeing, hiking, snowshoeing, and nature study), directly or indirectly, by helping to maintain water quality and providing wildlife habitat. To some people and cultures certain wetlands provide an important part of their economic base and/or contribute to their cultural heritage.

4. Scarcity of wetland type. Certain wetland types (e.g., fens, wild rice lakes) which are statewide or regionally scarce possess special resource significance. Scarcity or rareness depends on the frequency of occurrence of the type, the area of the type in existence prior to settlement, the historical conversion of the type and its resultant degree of destruction, and the amount of similar habitat in the present landscape of the region.

5. Aquatic study areas, sanctuaries and refuges. Through various local, state and federal actions, large areas of the nation's wetlands have been designated and preserved by public agencies for scientific study, and the protection of aquatic and terrestrial habitats. Many public and private groups have also established sanctuaries and refuges in wetlands.

6. The ecosystem concept in a regional context. The previous sections suggest that wetlands may not only have important functions within their boundaries, but may also interact with ecosystems of the surrounding region. The potential impact of wetland modification may influence distant wetlands if they are structurally and functionally related in the region. Similarly, the functions and values of any wetland may be affected by other existing and potential water resource activities in the region. Therefore, consideration should be given to those impacts which are shown to be of regional concern.

(4) Statement of policy. (a) The board is concerned with the continuing reduction in the quantity and quality of wetlands in this state. A large percentage of Wisconsin's wetlands have been altered or destroyed in the years since settlement. It is the policy of the natural resources board that wetlands shall be preserved, protected and managed to maintain, enhance or restore their values in the human environment.

(b) It is in the public interest that department decisions which lead to alteration of or effects on wetlands under its jurisdiction or control are based on the intent to preserve, protect and manage them for the maintenance or enhancement of their values.

(c) Definition. Wetlands are those areas characterized by surface water or saturated soils during at least a part of the growing season such that moist soil vegetation or shallow water plants can thrive. The permanent channels of streams and rivers and the open water areas of lakes and reservoirs are not included in this definition.

(5) General standards to be applied in decisions affecting wetlands.

(a) Department regulatory actions. The department shall consider proposals which require its approval with the presumption that wetlands are not to be adversely impacted or destroyed and that the least overall adverse environmental

impact shall result. Therefore, the department shall give primary consideration to reasonable alternatives, including the alternative of denying the requested approval, that avoid adverse impacts on wetlands and that result in the least overall adverse environmental impact. When all reasonable alternatives necessarily result in adverse impacts on wetlands, the proposed activity shall be conducted in a manner which minimizes the loss of wetlands and the loss of functions which those wetlands may serve with respect to related wetlands and other waters of the state both in and outside the proposed area of use, and which results in the least overall adverse environmental impact. Where consistent with its existing authority, the department shall require that sponsors of actions affecting wetlands convincingly demonstrate that their proposals:

1. Need to be located in or adjacent to the wetland(s) in question,
2. Are technically, economically and environmentally feasible, and
3. Meet other applicable criteria as provided by law.

(b) Department management actions. The department shall select resource management techniques which enhance wetland values with no significant or irreversible adverse effects. Actions shall be limited to those specifically required to meet the objectives enumerated in NR 1.95(2)(d).

(6) Implementation. (a) In making a regulatory decision where adverse wetland impacts may result, and where its existing authority allows, the department shall evaluate the proposed action and all reasonable alternatives, including the alternative of no action, through consideration of the wetland values enumerated in NR 1.95(3)(b). In its evaluation, the department shall also consider:

1. The potential reversibility or irreversibility of wetland impacts which would result from implementation of proposed actions;

2. The potential impacts of proposed actions on other scarce natural resources in and outside the proposed area of use;

3. The effects of the use of nonwetland areas, which may alter adversely the biological, hydrological, physical or chemical characteristics of wetlands and other waters of the state in and outside the proposed area of use;

4. The presence or absence of physical alterations resulting from human activity;

5. Other existing or potential uses of wetlands in the region; and

6. The cumulative effects on wetlands of piecemeal alterations.

(b) The department shall conduct its resource management activities in a manner consistent with NR 1.95(5)(b).

(c) The department's land acquisition program shall place special emphasis on obtaining wetlands that provide quality fish and wildlife habitat, particularly for threatened or endangered species; that significantly affect the maintenance or improvement of water quality; that have special value as scientific or natural areas; or that are imminently threatened with extensive alteration or destruction.

(d) The department's enforcement activities shall include steps to assure, to the fullest extent practicable, the restoration of wetlands which were unlawfully altered.

(e) In its liaison activities with federal, local and other state agencies and in the absence of regulatory authority, the department shall strongly recommend avoidance of wetland areas and concur with their use or alteration only when necessary to minimize the overall environmental impacts of a proposal. In such cases, the recommended amount of wetland use or alteration shall be held to the minimum.

(f) The department, in evaluating the wetland effects of proposed actions, shall not recognize the conveyance of land (or other consideration) to local

units of government, the state of Wisconsin or the federal government as offsetting the adverse impacts of the proposal and shall only consider the net effects of the action by itself.

(g) The department shall ensure that its proposals for administrative rules and for legislation include appropriate provisions, consistent with this rule, except as otherwise provided by law.

(h) The department shall cooperate with appropriate governmental units, the public and private groups to further the protection and enhancement of wetlands and to provide opportunities for education on wetland values and ecology.

(i) For its activities subject to the requirements of this rule, the department shall establish procedures, within the existing decision-making framework, to cause evaluations to be made and decisions rendered in accordance with the standards described in NR 1.95(5). The department shall also take steps to ensure that its decisions altering or affecting wetlands are documented and available for review. The department shall, in selecting a course of action, indicate how impacts on wetlands were considered in the decision-making process.

(7) Monitoring and reporting. The board intends that the department shall evaluate and monitor its own progress in achieving the objectives of this rule and shall establish procedures, subject to board approval, for reporting such progress to the board.

The foregoing rules were approved and adopted by the State of Wisconsin Natural Resources Board on September 26, 1979.

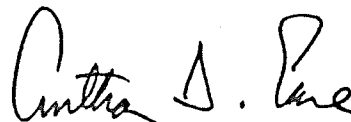
The rules contained herein shall take effect upon publication.

Dated at Madison, Wisconsin 25 October 1979

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES

(SEAL)

By



Anthony S. Earl. Secretary



State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

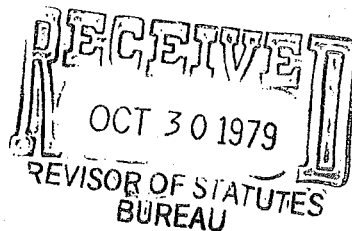
Anthony S. Earl
Secretary

October 30, 1979

BOX 7921
MADISON, WISCONSIN 53707

IN REPLY REFER TO: 1020

Mr. Orlan L. Prestegard
Revisor of Statutes
411 West
C A P I T O L



Dear Mr. Prestegard:

Enclosed are two copies, including one certified copy, of State of Wisconsin Natural Resources Board Order No. WR-29-79. These rules were submitted to the Assembly Environmental Resources Committee and the Senate Natural Resources Committee pursuant to section 227.018, Stats. There were no objections.

You will note that this order takes effect upon publication. Kindly publish it in the Administrative Code accordingly.

Sincerely,


Anthony S. Earl
Secretary

Enc.