

CR 09-077

ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD CREATING RULES

The Wisconsin Department of Natural Resources proposes an order to create ch. NR 52, to ensure lands acquired with funding from the stewardship program under ss. 23.0915 and 23.0917, Stats., are open to public hunting, trapping, fishing, hiking and cross country skiing.

LF-08-09

Analysis Prepared by the Department of Natural Resources

Statutes Interpreted: s. 23.0916, Stats.

Statutory Authority: ss. 23.0916, 227.10, and 227.11, Stats.

Explanation of agency authority: s. 23.0916, Stats. directs the department to promulgate rules that create provisions relating to public access for nature based outdoor activities for department lands and non-department land acquired in whole or in part with funding from the stewardship program under ss. 23.0915 and 23.0917, Stats.

Related statute or rule: ss. 23.0915 and 23.0917, Stats., establish the stewardship program. General guidelines for department land acquisition are located in ch. NR 1 and ch. NR 51 provides guidelines for the administration of the stewardship program for non-department land acquisition authorized in ss. 23.0915 and 23.0917, Stats.

Plain language analysis: Chapter NR 52 creates standards and criteria that will be used by the department and the natural resources board to determine whether it is reasonable to prohibit one or more nature based outdoor activities, defined as hunting, trapping, hiking, fishing and cross country skiing. The rule identifies three primary reasons for prohibiting one or more of these activities. The three reasons are; to protect public safety, to protect unique plant and animal communities and to accommodate usership patterns. The rule also requires that when one or more nature based outdoor activities is proposed to be prohibited the department will notify the public by posting the information on the department's website. The public will have a chance to comment on the proposal to buy the land and prohibit the activity. The department and the natural resources board will evaluate the public comments and apply the standards and criteria identified in the rule when determining whether the prohibition meets the intent of s. 23.0916, Stats.

Summary of, and comparison with, existing or proposed federal regulations: The Land and Water Conservation Fund is a federal funding program administered by the national park service. This program provides funding for the acquisition of land and the development of facilities for public outdoor recreation. The program does not include a specific requirement that lands and facilities be open to all nature based activities, rather the use of the funds is directed by the Statewide Comprehensive Outdoor Recreation Plan which identifies general trends in outdoor

recreation and identifies broad regional and statewide needs for land acquisition and recreational facility development.

The US fish and wildlife service administers several programs that provide funding to the department for land acquisition and facility development. Most of these funds are targeted to a specific purpose such as the protection of habitat for endangered species, coastal areas and wetlands. In addition there are funds for motor boat access acquisition and development; for wildlife habitat protection and management and for fisheries habitat protection and development. Generally land acquired with funds from the fish and wildlife service must be open to the public. There are some limited restrictions on the types of activities that are allowed to occur on these federally funded properties.

Comparison with rules in adjacent states: Minnesota, Michigan, Iowa and Illinois all have land acquisition programs that allow for the purchase of land, either through easements or fee simple purchases. Many of these programs are similar to the stewardship program. However, these programs do not have the requirement that they be open to the public for hunting, fishing, trapping, hiking, and cross-county skiing.

Minnesota: The Natural and Scenic Areas Grant Program was created to increase, enhance and protect Minnesota's natural and scenic areas. The program provides \$500,000 in matching grants each year for fee simple purchases and conservation easements of environmentally important lands. There is no requirement of public access for nature based outdoor recreational activities. http://www.dnr.state.mn.us/grants/land/natural_scenic.html

Michigan: The Michigan Natural Resources Trust provides approximately \$35 million in financial assistance each year to local governments and the Michigan DNR to purchase land or rights in land for public recreation or for environmental protection or scenic beauty. It also provides financial assistance for the development of land for public outdoor recreation. This program lists public access and hunting and fishing opportunities as a scoring criteria and special initiative but does not require the land to be open to these specific activities. http://www.michigan.gov/dnr/0,1607,7-153-10366_37984_37985-124961--,00.html

Iowa: The Resource Enhancement and Protection (REAP) grant program in Iowa was created to enhance and protect Iowa's natural and cultural resources. This program provides up to \$20 million in funding annually to acquire land for recreational purposes. Iowa's program does not specifically require the land to be used for hunting, fishing, trapping, hiking, or cross country skiing. <http://www.iowadnr.gov/reap/index.html>

The Wildlife Habitat Promotion with Local Entities provides funding to county conservation boards for the acquisition and development of wildlife habitat. Land acquired through this program must be open to hunting and trapping and other compatible uses such as fishing, hiking, nature studying, cross-county skiing, etc. <http://www.iowadnr.gov/grants/wildlife.html>

Illinois: The Open Space Lands Acquisition and Development Program in Illinois provides approximately \$20 million in funding assistance annually to local government agencies for acquisition and development of land for public parks and open space. There is no specific requirement for access for hunting, trapping, fishing, hiking and cross country skiing. <http://www.dnr.state.il.us/ocd/newoslad1.htm>

Summary of factual data and analytical methodologies: 2007 Act 20 included reauthorization of the stewardship program which is the primary funding source for land

acquisition for conservation and public outdoor recreation. Reauthorization included a provision requiring that certain lands acquired with funds from the stewardship program under ss. 23.0915 and 23.0917, Stats., be open to hunting, trapping, hiking, fishing and cross country skiing. The Act provided for exceptions if the natural resources board determines it is necessary to prohibit one or more of the activities to protect public safety, protect unique plant and animal communities or to accommodate usership patterns. After the budget was approved, the department administered the stewardship program according to an interim protocol adopted by the natural resources board in December of 2007. The interim protocol can be found at <http://dnr.wi.gov/stewardship/interim.html>.

The natural resources board also established a subcommittee to evaluate the new law and gather public opinion about the law. The sub-committee held three listening sessions in April of 2008 and invited public comment by personal testimony, e-mail, and written comment. Over 130 people testified in person and the subcommittee received almost 500 communications in total. Information gathered at these listening sessions can be found at <http://dnr.wi.gov/stewardship/rule.html>.

The natural resources board stewardship program subcommittee reported the results of these listening sessions to the full board on June 19, 2008. The subcommittee's full report can be found at <http://dnr.wi.gov/stewardship/rule.html>.

In July 2008 the department appointed a 28 member citizen advisory committee to provide input on developing these administrative rules. The citizen advisory committee included members from a diverse group of recreational users. A complete listing of the members of the citizen advisory committee can be found at <http://dnr.wi.gov/org/caer/ce/news/PDF/stewmembers.pdf>.

The citizen advisory committee met 6 times between July 2008 and January 2009. A professional facilitator was hired to manage the meeting and lead the group through a variety of exercises intended to identify important issues. The department prepared 4 concept papers on the following topics: A Process for Review of Determinations Made Under s. 23.0916, Stats., Public Safety, Unique Plant and Animal Communities and Usership Patterns. The papers were presented to the committee by department staff and the committee discussed the various concepts included in the papers and recommended changes. The final draft of these concept papers can be found at <http://dnr.wi.gov/stewardship/CAC/>.

All of the above mentioned information has been reviewed by the department to assist with the drafting of these administrative rules.

Analysis and supporting documents used to determine effect on small business or in preparation of economic impact report: These rules and the legislation which grants the department rule making authority do not have a significant fiscal effect on the private sector or small businesses.

Effect on small business: No specific direct effect on small business is anticipated. This rule provides further guidance for the implementation of existing programs. No new funding or business activity will be created.

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Section 1. Ch. NR 52 is created to read:

Chapter 52. STEWARDSHIP LAND ACCESS

52.01 Purpose and Applicability. (1) Pursuant to s. 23.0916, Stats., lands acquired in whole or in part with funding from the stewardship program are open for public hunting, trapping, hiking, fishing and cross country skiing unless public access is prohibited pursuant to this chapter. Decisions to prohibit public access for these activities will be reviewed by the department using professional judgment and will be based on sound science, legitimate safety issues, factual data and relevant information. A restriction of a nature based outdoor activity may be considered a prohibition if the restriction prevents a major or a significant amount of the nature based activity from occurring.

(2) The purpose of this chapter is to implement s. 23.0916, Stats., which directs the department to establish standards and criteria for prohibiting public access for hunting, fishing, trapping, hiking and cross-country skiing, defined as nature based outdoor activities under s. 23.0916 (1) (b), Stats. This chapter applies to land acquired in whole or in part with funding from the stewardship program under ss. 23.0915 and 23.0917, Stats. The rules in this chapter are intended to maximize the number of compatible users and uses, to the extent practical, on lands subject to s. 23.0916, Stats.

(3) Pursuant to s. 23.0916 (5) (a), Stats., the natural resources board has determined that ss. NR 1.61 and NR 51.07 (3) (e) govern public access on all other lands funded in whole or in part with funding from the stewardship program under ss. 23.0915 and 23.0917, Stats that are not referred to in sub. (1) or (2).

52.02 Definitions. In this chapter

(1) “Accommodate Usership Patterns” means to consider the factors found in s. NR 52.05 (1) (c) when making a determination to prohibit an NBOA.

(2) “Department” means the Wisconsin department of natural resources

(3) “Department land” means land acquired by the department in fee title, or with an easement on former managed forest land on or after October 27, 2007, with stewardship program funds under s. 23.0917, stats.

(4) “Former managed forest land” has the meaning given in s. 23.0916 (1) (a), Stats.

(5) “Hunting” means shooting, shooting at, taking, catching or killing any wild animal, other than by trapping, or pursuing for the purpose of shooting, shooting at, taking, catching or killing any wild animal.

(6) “Natural values” has the meaning given in s. 23.27 (1) (f), Stats.

(7) “NBOA” means the nature based public outdoor activity of hunting, fishing, trapping, hiking or cross-country skiing as described in s. 23.0916 (1) (b), Stats.

(8) “Non-department land” means land acquired in fee title, or with an easement on former managed forest land on or after October 27, 2007, by a non-profit conservation organization or local unit of government with the assistance of a stewardship program grant under s. 23.0917, stats.

(9) “Primary purpose” means the recreational or conservation purpose for which the property is being acquired as guided by ss. 23.09 (2), 23.09(20) (am), 23.0915, and 23.0917, Stats., by s. NR 51.05, and by state, regional or local plans that support the project.

(10) “Prohibit access for an NBOA” means not to allow the activity in its entirety, or to restrict the activity so that a major or significant amount of the activity is not allowed.

Note: A temporary restriction of an NBOA for department approved land management practices is not considered a prohibition of an NBOA.

(11) “Stewardship program” means the Knowles-Nelson Stewardship Program authorized under ss. 23.0915 and 23.0917, Stats.

(12) “Unique animal or plant community” means a natural community composed of different plant and animal species, along with their associated geological and archaeological features, that exist together in a specific area, time and habitat. A unique animal or plant community is one identified as endangered, threatened, rare or ecologically sensitive. A unique plant or animal community may also be critical species habitat or an ecological reference area. The sources for identifying unique animal and plant communities include reports or databases, such as the natural heritage inventory, wildlife action plan, regional planning commission reports or other publications routinely referenced by conservation biologists. Individual game species shall not be considered as unique animal species for purposes of this chapter.

Note: References for, or copies of such databases, publications and reports may be viewed or obtained at the Department of Natural Resources, Bureau of Endangered Resources, 101 S. Webster Street, PO Box 7921, Madison, WI 53707-7921.

52.03 General Provisions. (1) DEPARTMENT LAND. (a) All department land transactions are subject to s. NR. 1.41.

(b) The department shall incorporate an evaluation of the requirements of s. 23.0916 (3), Stats., in master plans under ch. NR 44, feasibility studies and other planning documents that include land acquisition as an implementation strategy. This paragraph applies to new plans as well as any plan updates that may be undertaken for existing department projects that are subject to s. 23.0916 (3), Stats.

(2) NON-DEPARTMENT LAND. In addition to the requirements of ch. NR 51, stewardship program grant applications to acquire non-department lands subject to s. 23.0916 (2), Stats., shall include all of the following:

(a). A description of the public uses proposed for the property being acquired and a checklist indicating which of the specific NBOAs shall be permitted on the property. The checklist shall be in a format determined by the department and shall include at a minimum:

1. An indication as to whether a specific NBOA shall be allowed on the property.

2. For hunting, the checklist shall include information for allowing waterfowl, small game, turkey and big game hunting and shall include gun and archery hunting.

3. For trapping, the checklist shall include information for allowing water trapping and upland trapping.

4. For fishing, the checklist shall include information for permitting shore fishing and boat fishing.

5. For hiking, the checklist shall include information for allowing trail hiking and hiking off-trail.

6. For cross-country skiing, the checklist shall include information for allowing groomed trail skiing and off-trail skiing.

(b). An explanation of the primary purpose for the acquisition. The primary purpose for the acquisition shall be based on ss. 23.09 (2), 23.09(20) (am), 23.0915, or 23.0917, Stats. and s. NR 51.05 and on state, regional or local plans that support the acquisition. The application shall include the name of the plan being used and a description of the formal or informal public input received.

(c). A description of the NBOAs to be prohibited on the property and the reason for the prohibition. The reason for the prohibition shall be consistent with s. NR 52.05 and the applicant shall address in the application the specific factors in s. NR 52.05 that apply.

(3) DETERMINATIONS MADE IN ACCORDANCE WITH S. 23.0916, Stats., and S. NR 52.05. (a) When a determination has been made in accordance with s. 23.0916, Stats., and s. NR 52.05 to prohibit one or more NBOAs on department land the feasibility study and master plan for the project where the NBOA will be prohibited shall be amended to describe the prohibited activity and a rule change may be initiated to enforce it.

(b) The stewardship grant contracts executed between the department and sponsor under s. NR 51.07 that are subject to s. 23.0916 Stats., and this chapter, shall describe any determination to prohibit one or more NBOAs and require the sponsor to contact the department if any of the factors identified in s. 52.05 changes such that a prohibition may be necessary, or is no longer necessary. The department shall evaluate those changes to determine the applicability to this chapter.

(4) Public use of lands purchased in whole or in part with funding from the stewardship program under s. 23.0917, Stats., shall be subject to all applicable federal, state and local laws; including but not limited to the public trust doctrine.

(5) Contributions of separate property used as sponsor match under ch. NR 51., subch. 1., are not subject to this chapter.

(6) An organization with an identified policy prohibiting or restricting one or more NBOAs must comply with the provisions of this chapter regardless of the organization's policies.

52.04 Public Notice. (1) In addition to the public notice requirements of ch. NR 150, the department shall provide individual notification over the internet to any person requesting to receive a notice of any proposal to prohibit an NBOA on department or non-department land

subject to s. 23.0916 (2) or (3), Stats. Any public notice regarding a proposal to prohibit an NBOA shall include all of the following:

(a) The name, address and phone number of the department's contact person for the project.

(b) The checklist described in s. NR 52.03 (2) (a).

(c) A summary of the NBOAs to be prohibited and the factors that were considered under s. NR 52.05.

(d) The department's initial assessment of the proposal to prohibit the NBOA pursuant to ss. 23.0916(2) (b) or (3) (b), Stats. The department's assessment shall include an evaluation of s. NR 52.05 (1) (a) through (c) and shall involve the department's resource management professionals at the local, regional and statewide level.

(2) (a) Public comments concerning the proposal to prohibit an NBOA shall be submitted in writing to the department. The comment period shall be 15 business days beginning on the day immediately following the day the department sends out the notice electronically.

(b) Objections must show the proposed prohibition of an NBOA to be inconsistent with ss. 23.0916(2) (b) or 23.0916(3) (b), Stats., and s. NR 52.05.

(c) If an objection is received during the 15 business day comment period the department shall have up to 15 additional business days following the close of the comment period to evaluate the public comment, including any objections. The department shall contact anyone that submitted an objection under par. (a) and the person that requested the stewardship program funding to notify them that the objection was received and to gain more information about the proposal to prohibit an NBOA.

(d) The department shall create a written summary of its determination on the proposal to prohibit one or more NBOAs at the conclusion of the public comment and evaluation periods in pars. (c) and (d). The department's written determination shall be based on ss. 23.0916(2) (b) or (3) (b), Stats., and s. NR 52.05 and the department shall provide the written summary to anyone that submitted an objection in accordance with par. (a), and to the person that requested the stewardship program funding.

(e) The department shall submit to the natural resources board for each regularly scheduled meeting a report that summarizes determinations made under par. (d). The report shall contain the information made available to the public under s. NR 52.04 (1), public comments, including any objections, gathered under s. NR 52.04 (2), and the department's written determination made under par. (d). The department shall deliver the report to the natural resource board and make the information available to the public over the internet at least five working days preceding the next regularly scheduled meeting of the board. The natural resources board shall allow public participation to receive public testimony regarding the department's determinations and vote whether to ratify prohibitions on non-department land that appear on the monthly report.

52.05 Natural Resources Board Determinations. (1) In accordance with s. 23.0916, Stats., the natural resources board has determined that it is necessary to prohibit one or more NBOAs on department or non-department land for one or more of the following reasons listed below. In accordance with s. 15.05 (1) (b), Stats., the department shall make administrative

determinations for each individual proposal to prohibit an NBOA, under the direction of the board, utilizing the process established in ss. NR 52.03 and 52.04, and based on the following reasons and factors.

(a) To protect public safety. One or more of the factors to consider when evaluating a proposal to prohibit an NBOA to protect public safety include:

1. The primary purpose for the project.
2. Laws and ordinances that may impact one or more NBOAs on the property.

Note: NBOAs may be affected by local laws or ordinances and may change as local laws or ordinances change.

3. User conflicts that may create public safety issues and impact one or more NBOAs on the property.

4. The physical characteristics of the property including size, shape, groundcover, topography or proximity to inhabited buildings that create public safety issues and influence NBOAs on the property.

5. A proposal to prohibit one or more NBOAs on a parcel 5 acres or smaller, located within the boundaries of cities and villages, shall be determined to be necessary in order to protect public safety and shall not be subject to s. NR 52.04 unless:

- a. The parcel is adjacent to a parcel where the NBOAs to be prohibited already exist or;
- b. The parcel is adjacent to a public waterway.

(b) To protect a unique animal or plant community. One or more of the factors to consider when evaluating a proposal to prohibit an NBOA to protect a unique animal or plant community include:

1. The primary purpose for the project.

2. The necessity to prohibit an NBOA to protect and enhance the biological diversity, composition and ecological functions of natural communities exhibiting relatively little human disturbance or that have the capacity to be easily restored to such conditions.

3. The potential for an NBOA to impact the natural values of the site, according to s. 23.28 (3), Stats.

4. The potential for an NBOA to accelerate or increase over time and cause damage to the natural values of a site.

5. The potential for an NBOA to increase the risk of poaching rare plant or animal species, or the removal or destruction of rare geological or archeological features.

(c) To accommodate usership patterns. One or more of the factors to consider when evaluating the necessity to prohibit an NBOA to accommodate usership patterns include:

1. The primary purpose for the project.
2. User incompatibility and how this incompatibility may lead to the primary purpose of the project being significantly altered or curtailed.
3. The complexity, feasibility, practicality and cost effectiveness of separating activities by time and space or any other manner that might mitigate user incompatibility and or reduce the need for enforcement.
4. The size, shape and location of the property as well as surrounding land uses, including the use of public lands immediately adjacent to the property which may or may not have been funded with stewardship funds. The use of adjacent lands shall not be used as the sole factor in making a determination to prohibit an NBOA to accommodate usership patterns.
5. The mix of NBOAs at the location of the property that, to the extent practicable, will provide a quality experience for all compatible users and uses.

Section 2. Effective dates. This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22(2)(intro.), Stats.

Section 3. Board adoption. This rule was approved and adopted by the State of Wisconsin Natural Resources Board on May 26th, 2010.

Dated at Madison, Wisconsin_____.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By_____
Mathew J. Frank, Secretary

(SEAL)