

Report From Agency

REPORT TO LEGISLATURE

NR 29, Wis. Adm. Code

Board Order No. ER-10-10
Clearinghouse Rule No. CR10-069

Basis and Purpose of the Proposed Rule

The Department is required by s. 23.27(3)(b), Wis. Stats., to share Natural Heritage Inventory (NHI) information with those who request it for research, educational, environmental, land management or similar authorized purposes. The Endangered Resources (ER) Review Program (Program) meets this requirement, sharing NHI information and data on rare species and high-quality natural communities with the public in several ways. The Program evaluates specific proposed projects for potential impacts to rare species and habitats (called ER Reviews), and shares generalized NHI data (for general information and planning purposes) with the public free of charge on our website. The Program also shares detailed NHI data with Department staff and external users who request access to these data via formal NHI Data Licenses; access is provided via a specially developed online mapping application called the NHI Portal. In addition, the Program provides training and support for Department staff and external partners and customers using these data. Ch. NR 29, Wis. Admin. Code was created in 1990 and has not been modified since.

These proposed changes to Ch. NR 29, Wis. Admin. Code, were developed in response to two issues. First, a group of stakeholders met several times between Fall 2008 and Spring 2009 to consider and recommend changes to the ER Review Program that would better serve its partners and customers. Changes proposed here represent several changes recommended by program stakeholders, including establishment of a new service (Expedited ER Reviews), and development of a pilot certification program to facilitate broader sharing of detailed NHI data by ensuring that users are qualified and knowledgeable in how to interpret, apply, and protect the data. The stakeholder group was diverse, representing the broad array of customers who use services provided by the program. Stakeholders included other state and federal agencies, local units of government, developers, private and county forests, utilities, nonprofit conservation organizations, private consultants, and others. Specific organizations represented included Alliant Energy, American Transmission Company, Madison Audubon Society, Metropolitan Builders Association, Natural Resources Consulting, Inc., The Nature Conservancy, US Department of Agriculture Natural Resources Conservation Service, We Energies, Wisconsin Department of Agriculture, Trade, and Consumer Protection, Wisconsin Towns Association, and others. Internal stakeholders were also consulted regarding ways to facilitate coordination across programs and shorten permit turn around time related to the endangered resources review required for all actions that the Department conducts, funds, or approves. The Division of Forestry, Office of Energy, and Bureaus of Science Services and Watershed were represented on the internal stakeholder group. Second, fees in Ch NR 29, Wis. Adm. Code, no longer cover Department costs of collecting, storing, managing, compiling, and providing NHI information and data as required by s. 23.27(3)(b), Wis. Stats.

Fees in Ch. NR 29, Wis. Admin. Code, have not been updated in 20 years. Current fees for providing NHI information are \$20 per hour. Staff costs for provision alone far exceed this value. Similarly, current fees for providing access to all or a portion of the detailed NHI database range from \$500-\$1000, but actual costs of 1) collection, mapping, quality control, management and packaging of these data for customers, 2) the processing time necessary to complete NHI Data License agreements safeguarding the data, and 3) providing the training and technical support necessary for customers and partners to correctly use, understand and interpret the data regularly exceed this fee. With decreasing funds available to the ER Program as a whole, and to the ER Review Program in particular, the Program needs to update the fee structure in order to provide the services identified by stakeholders in a financially sound manner, ensuring the quality and consistency of services on a long-term basis.

The proposed revision to Ch. NR 29, Wis. Adm. Code, pertains to rules for providing NHI information to those who request it. Requesters are diverse, including private landowners, public agencies, utilities, local units of government, non-governmental organizations, educational institutions and many others. Fees in the rule are entirely voluntary; no person or organization is required to use the services or pay the fees described in the proposed rule. NHI information is provided as a tool to help these individuals and organizations comply with state and federal endangered species laws and to promote more effective on the ground conservation of endangered resources through informed project, local, and regional planning. Customers will now have the option to request information in an expedited manner, helping them to meet short deadlines. In addition, individuals with a documented biological background may choose to apply for certification. Certification will allow them to conduct Proposed ER Reviews for their organization or other customers, thus providing an additional service to their customers.

Summary of Public Comments

Perry Lindquist of Waukesha County asked that the Department consider ways (including lower fees) to help local units of government which are issuing permits on behalf of the Department conduct the necessary screening for endangered resources. The Department offers three options to address this concern. 1) The Program believes the existing waiver language in Ch. NR 29.04(2)(a) applies to this circumstance, and thus the Department could waive or reduce the annual fee for an NHI Data License. 2) Alternately, Waukesha County could simply require permit applicants to submit an ER Review with their permit application. The applicant could request an ER Review from the Department or a Certified ER Reviewer. In this way, Waukesha is assured that the required endangered resources review has been conducted, and there is no cost in dollars or staff to the county. 3) County staff could also become certified and conduct their own Proposed ER Reviews. It was clarified that the Department will not control what fee others can charge for providing this service. The Department also will consider the needs, roles, and circumstances of local units of government when setting fees for the pilot certification program.

Three attendees from Mid-State Consultants or its subsidiary R W Communication Services supported the proposed changes and believe they will make the endangered resources review process faster and more efficient. However, they pointed out an important need for better outreach to raise awareness of and compliance with the endangered species law. They noted that many projects in their industry currently proceed without being reviewed for endangered resources issues, and that businesses which comply with the law like their own are not operating on a level playing field with those who do not. They asked the Department to conduct a broad outreach and education initiative targeting businesses who are working on the Wisconsin landscape, including energy and utility customers. The Department agrees strongly that such an effort is needed, and is planning a comprehensive outreach initiative in association with implementation of the pilot certification program. There will be three primary aims. 1) Raise awareness of the endangered species law and what it means for landowners and project proponents that uses examples, venues and approaches tailored to the target audience. 2) Publicize the pilot certification program so that those who may wish to participate are made aware of it and of how it can benefit them and their customers. 3) Talk with local units of government across the state to raise awareness of the endangered species law and tell them about practical, low to no-cost ways in which they can help improve compliance with the law and promote conservation of Wisconsin's endangered resources.

One private forester provided written comments on the proposed changes. The individual is a Cooperating Forester, a Certified Managed Forest Law (MFL) Plan Writer, and represents Wisconsin Consulting Foresters. The individual requested that the Department provide training in an online format. The Department agrees. Basic training will be provided online; optional, field-based training may be provided in person as requested or needed at a later date. The individual also requested that costs for training be kept to a minimum and that the Division of Forestry continue to financially support provision of data to Certified MFL Plan Writers. The ER Review Program is working with the Division of Forestry to address the needs of Certified Plan Writers related to NHI data and training, and keeping costs low for small private forestry companies is an important part of this ongoing discussion.

Two utility customers (Wisconsin Public Service Corporation and We Energies) registered support for the proposed changes. Utility and energy customers work with both the Office of Energy and the ER Review

Program and have participated in this effort from the st811. They continue to support steps to help improve consistency in and shorten turnaround times for endangered resources reviews. We Energies commended the Program for working so closely with stakeholders throughout the program review in an open, action oriented process. They support the fee increases, and see them as reasonable and necessary. They also support the pilot certification program, and see this as a way for the Department to leverage additional expertise and expand their resources for accomplishing program objectives. There was a question about how utilities would pay for Department review of Proposed ER Reviews written by certified individuals. The Program anticipates that utility and energy customers will continue to pay for endangered resources review services in the same way that they do now. For most utilities, these services are funded through the existing agreement between the Public Service Commission, the Office of Energy, and regulated utilities to provide customized services to utilities through the Office of Energy. The ER Review Program will continue to work with the Office of Energy to ensure that energy and utility customers receive the services they need in a manner that is as seamless and efficient as possible.

Modifications Made

Appearances at the Public Hearing

The Department held three public hearings on the proposed changes to Ch NR 29, Wis. Adm. Code

Date	Location	Attendees	No. in Support	No. Opposed	Not indicated
7/13/10	Fitchburg	0			
7/14/10	Waukesha	1		0	1
7/16/10	Wausau	4	4	0	
Written comments		3	1	0	2

Waukesha 7/14/10:

Perry Lindquist, Waukesha, WI: Not indicated as to supporting or opposing.

Wausau 7/16/10:

Suzanne Mortensen, Eldorado, WI: in support

Darren Peper, Tomah, WI: in support

Sean Fox, Eldorado, WI: in support

Jamie Nuthals, Green Bay, WI: in support

Changes to Rule Analysis and Fiscal Estimate

Response to Legislative Council Rules Clearinghouse Report

All recommendations have been incorporated into the rule.

Final Regulatory Flexibility Analysis

Effect on small business: Individuals from small businesses (e.g., private consulting firms) may choose to use the services provided in the rule. In the case of a pilot certification program, small businesses with certified employees may benefit from the rule by being able to provide additional services to their clients. These rules impose no compliance or reporting requirements for small businesses and thus are not expected to have a significant economic impact on a substantial number of small businesses. Therefore, under s. 227.19(3m), Stats., a final regulatory flexibility analysis is not required.