

Clearinghouse Rule 10-069

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

The Wisconsin Natural Resources Board proposes an order to **amend** NR 29.04(1)(a) and (b), and to **create** 29.04(1)(am), (c) and (d), and 29.05(title) relating to Endangered Resources Information Fees.

ER-10-10

Analysis Prepared by Department of Natural Resources

Statutes Interpreted: In promulgating this rule, s. 227.11(2)(a), Stats., has been interpreted as allowing the department the authority to develop rules to implement a program to provide natural heritage inventory information to the public. Section 23.27(3)(b), Stats., has been interpreted as directing the department to share natural heritage inventory information and data with those who request it for specific authorized purposes.

Statutory Authority: The state statutes that authorize the promulgation of this rule include Section 23.27(3)(b), Stats., and Section 227.11, Stats.

Explanation of Agency Authority: These sections grant rule-making authority and fee establishment to the department and direct the department to make natural heritage inventory information and data available to those who request it.

Related Statute or Rules and Plain Language Analysis: Section 23.27(3)(b), Wis. Stats., requires the Department to share Natural Heritage Inventory (NHI) information with those who request it for research, educational, environmental, land management or similar authorized purposes. Ch. NR 29, Wis. Admin. Code, outlines mechanisms and fees for sharing this information. The proposed changes to Ch. NR 29, Wis. Admin. Code, will update fees for providing NHI information to customers to reflect the actual cost of collecting, storing, managing, compiling and providing this information and data as required by s. 23.27(3)(b), Stats. The rule will also create a new expedited endangered resources review service and establish a pilot certification program.

Fees in Ch. NR 29, Wis. Adm. Code, have not been updated in 20 years. The proposed rule updates fees for one-time NHI information requests (commonly referred to as ER Reviews) from \$20/hour to \$75/hour, and reduces the minimum charge from three hours of staff time (currently \$60) to one hour of staff time (\$75).

It should be noted that generalized NHI information is available for free to the public on our website at <http://dnr.wi.gov/org/land/er/review> under 'Free, Online Resources'. The data are available in several formats, including printouts by township. These data are used frequently by consultants, students, land use planners, landowners, non-profit organizations, local units of government, educators, and others for a variety of purposes including research, pre-screening projects for regulatory purposes, gathering information for community/land use planning initiatives, and informing conservation and restoration efforts.

Summary of, and Comparison with, Existing or Proposed Federal Regulations: The proposed rules are related to provision of information on rare species (including those classified as endangered and threatened at the state and federal levels) and high-quality natural communities. These rules do not relieve individuals from any restrictions, requirements or conditions of federal statutes or regulations

related to endangered species. In fact, providing this information to the public facilitates compliance by the regulated community with existing state and federal endangered species laws.

All projects that the Department conducts, funds or approves must also be in compliance with federal and state endangered species laws. Examples include land acquisition, land and water planning and development projects, sustainable forestry certification, Managed Forest Law plan development, NEPA compliance for receipt of federal aid, and Department permit review. Because federal compliance is required for receipt of federal grants (federal Sport Fish Restoration and Pittman-Robertson funds granted to the Department totaled nearly \$23 million last year), the ER Review Program has worked with the U.S. Fish and Wildlife Service to develop procedures for screening proposed projects for potential impacts to endangered resources. The foundation of the screening procedure is the NHI database. The provision of timely and accurate NHI data through the NHI Portal along with the technical support and services provided by the ER Review Program help ensure that federal grants are not held up by the US Fish and Wildlife Service for noncompliance, that all Department programs comply with state and federal endangered species laws, and that Department permits are issued in a timely manner.

We are not aware of a federal law requiring provision of information on federally protected rare species and habitats to the public. As with Wisconsin, generalized information on rare species locations in Wisconsin is available for free at the US Fish and Wildlife Service website: <http://www.fws.gov/midwest/Endangered/lists/Wisc-cty.html>. However, information in this table is generalized much more broadly: species locations are generalized to the county level. In contrast, locational information for species in Wisconsin is available to the township level on the Department website at <http://dnr.wi.gov/org/land/er/review/> under 'Free, Online Resources'. In addition, it should be noted that most information US Fish and Wildlife Service provides in their table comes from NHI data that the Department shares with US Fish and Wildlife Service via a formal NHI Data License.

Comparison with Rules in Adjacent States: Fees for provision of NHI information vary across the Midwest and across the nation. The majority of states use some variety of fee formula, usually based on an hourly rate for time needed to complete the request or a per quadrangle fee. Florida, Rhode Island, and West Virginia all charge \$75/hr, with a one-hour minimum. Several other states such as Delaware and New Jersey follow this formula, although the fees range from \$20 to \$100/hr. Four states plus the Navajo Nation base their fees on the number of quadrangles reviewed, with charges ranging from \$20 to \$45 per quadrangle. New Mexico, Wyoming, and Colorado utilize a tiered fee structure, charging a base fee and adding additional charges based on variables such as whether the search returned any results, project area, number of species found, etc. All three states have a base fee of around \$100; the maximum charge can range up to \$25,000 in Wyoming.

Fees for NHI information in the Midwest also vary, as in the country as a whole. Illinois and Iowa both provide free reports upon request. Michigan charges a \$100 base fee plus \$.607/mi², while Indiana and Ohio both charge around \$50 per half hour. South Dakota charges \$30 for a computer search and \$30/hr for a manual search. Minnesota uses a tiered system similar to New Mexico's, charging a base fee of \$60 plus an additional \$30/hr or \$25 for queries by species plus \$5 per additional species. Wisconsin's \$75 minimum fee is low to average when compared to states both nationally and in the Midwest.

Summary of Factual Data and Analytical Methodologies: The proposed rules are related to provision of information on rare species (including those classified as endangered and threatened at the state and federal levels) and high-quality natural communities. The proposed rules seek to provide information to the public facilitating compliance by the regulated community with both state and federal endangered species laws. This information is also provided to other Department staff, facilitating Department compliance with state endangered species laws (see above). These rules do not relieve individuals from any restrictions, requirements or conditions of state statutes or regulations related to endangered species.

These rules were developed with the assistance of the Bureau of Endangered Resources, Legal Services and with input from stakeholders of the ER Review Program. A group of ER Review Program 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 customers. This proposed rule change represents

several changes recommended by the group. Stakeholders included other state and federal agencies, local units of government, developers, private and county forests, utilities, non-profit 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 about ways to facilitate coordination across programs and shorten permit turnaround 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. Another stakeholder meeting is scheduled for April 23, 2010 to share information about the rule process. One more stakeholder meeting will be held after the anticipated July 2010 public hearings to share input received at the public hearings with stakeholders.

Fees for providing access to the detailed NHI data (provided via a formal NHI Data License) are updated from a minimum of \$500 to a minimum of \$850, and from a maximum of \$1000 to a maximum of \$1500. Most other states do not provide external customers with direct access to the underlying NHI database (the same database used by the Department for regulatory and conservation purposes). The Department feels this is a critical service, providing trained and knowledgeable users with the detailed data they need to better protect endangered resources, often accomplished by better siting and planning projects which may cover large geographic areas (e.g., utility lines) to take into account endangered resources. The range in fees provided by the updated values allows the Department to provide flexibility in costs for users depending on the format and geographic extent of the data requested.

The rule also creates a new expedited service (Expedited ER Reviews) to meet the needs of customers faced with very short deadlines for commencing project activities. The product is provided in a guaranteed, short timeframe (7 working days) for a higher fee: \$140/hour with a minimum charge of three hours (\$420). Stakeholders, both internal and external, requested this service to help enable projects on very short deadlines (e.g., stimulus projects) to comply with endangered species laws. The program has been piloting this service for the last six months to provide a mechanism for quickly reviewing proposed stimulus projects. The pilot was accomplished via contract for a similar but slightly lower fee (\$100/hour, \$360 minimum), and quality products were provided on time to customers. Based on the success of the initial pilot and consistent requests from stakeholders for this service, the Department is now proposing this change to allow Department staff to provide this service as a regular function of the ER Review Program.

The proposed rule clarifies that users with access to detailed NHI data may be required to take training and/or an exam to ensure that they have the knowledge and skills to correctly access, interpret, apply and ensure the security of these sensitive data, and establishes that the Department may charge fees for training and exams to cover Department costs. The rule also directs the Department to establish a pilot certification program to allow external individuals with a documented biological background who demonstrate specific skills and knowledge be authorized to conduct preliminary evaluations of potential impacts of proposed projects on endangered resources. These changes are a response to training needs that have been identified consistently by both customers and Department staff, and were reiterated by stakeholders in the recent program review. Those requesting direct access to the NHI data are currently required to take online training (approximately four hours) and an exam before being provided access to the data. However, there is a need to create better and more comprehensive training targeting specific user groups to allow each to better understand, interpret, and apply these data to their specific projects and uses. And, there is a need to continue to ensure that this information has been effectively conveyed and understood through completion of an exam. In anticipation of this proposed rule change, the ER Review Program has been working with two small groups of stakeholders since Fall 2009 to develop a list of competencies, an exam, and a training plan for providing users of these data with the skills, tools, and information that they need to best use the data. One group consists of forestry users, while the second group encompasses other types of users (utilities, agencies, non-profit organizations, private consultants, and others). These groups are expected to finish their work in Fall 2010. The exam, training, and certification program will all be guided by the recommendations of these two working groups. More

information about this initiative is available online at <http://dnr.wi.gov/org/land/er/review/proposedChanges.asp>.

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Place where comments are to be submitted and deadline for submission: The deadline for written comments is to be determined. Comments may be submitted to Sarah Carter. The program will also provide an online form for electronic submission of comments at the following website once this request is approved: <http://dnr.wi.gov/org/land/er/review/NR29change.asp>. In addition, comments may be submitted electronically at <http://adminrules.wisconsin.gov>.

Section 1. NR 29.04(1)(a) is amended to read:

The department shall charge a minimum fee of ~~\$60-75~~ per request, for which the department will provide up to ~~3 hours~~ one hour of staff time. The ~~\$60-75~~ fee includes the associated administrative costs in compiling, interpreting and providing appropriate natural heritage inventory information and the cost of collecting, storing, managing, compiling, interpreting, and providing the natural heritage inventory data. The department shall charge an additional ~~\$20-75~~ for each hour, or any portion thereof, of staff time required in excess of ~~3 hours~~ one hour to answer the request.

Section 2. NR 29.04(1)(am) is created to read:

The department shall charge a minimum fee of \$420 per expedited request, for which the department will provide up to three hours of staff time. The \$420 fee includes the associated administrative costs in collecting, storing, managing, compiling, interpreting, and providing appropriate natural heritage inventory information within 7 working days and the cost of collecting, storing, managing, compiling and providing the natural heritage inventory data. The department shall charge an additional \$140 for each hour, or any portion thereof, of staff time required in excess of three hours to answer the expedited request.

Section 3. NR 29.04(1)(b) is amended to read:

~~For frequent requesters of natural heritage inventory information, the~~ The department may set and charge an annual fee for providing updated copies of all or any portion of the actual natural heritage inventory data and for providing ~~training and~~ support in the use and interpretation of ~~this~~ these data. This annual fee shall be no less than ~~\$500~~ 850 and no greater than ~~\$1,000~~ 1,500. The fee includes the associated administrative costs in compiling and providing appropriate natural heritage inventory data and the cost of collecting, storing, and managing the natural heritage inventory data.

Section 4. NR 29.04(1)(c) is created to read:

The department may require requesters of natural heritage inventory data to have formal education, training, or experience in interpreting natural heritage inventory information. The department may require requesters to take training and an exam prior to being provided access to natural heritage inventory data. The department will charge fees for training and exams to help cover the department's costs of providing the data.

Section 5. NR 29.04(1)(d) is created to read:

The department will establish a certification program for individuals using natural heritage inventory data to prepare preliminary evaluations of potential impacts of proposed projects on native plant and animal communities, including endangered, threatened, and critical species. The department will charge fees for

certification to cover the department's costs. These preliminary evaluations shall be approved by the department before becoming final.

Section 6. EFFECTIVE DATE. This rule shall take effect the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22(2)(intro.), Stats.

Section 7. BOARD ADOPTION. This rule was approved and adopted by the State of Wisconsin Natural Resources Board on _____.

Dated at Madison, Wisconsin _____.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By _____
Matthew J. Frank, Secretary

(SEAL)