

Clearinghouse Rule 21-026

DRAFT #1

ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD REPEALING AND RECREATING RULES

The Wisconsin Natural Resources Board proposes an order to **repeal and recreate** NR 350 relating to requirements for wetland mitigation.

WT-02-19

Analysis Prepared by the Department of Natural Resources

1. Statute Interpreted: Sections 23.41(2), 227.22, 281.36(1), 281.36(3g), 281.36(3r), 281.36(3t), 281.36(3w), 281.36(8m), 281.36(12), 292.31(3), and 700.40.

2. Statutory Authority: Sections 23.41(2), 227.22, 281.36(1), 281.36(3g), 281.36(3r), 281.36(3t), 281.36(3w), 281.36(8m), 281.36(12), 292.31(3), and 700.40.

3. Explanation of Agency Authority: The proposed rules replace and update current rules that regulate wetland mitigation requirements. The current purpose of the code is to establish standards for the development, monitoring and long-term maintenance of wetland compensatory mitigation projects that are approved by the department, and to establish procedures and standards for the establishment and maintenance of mitigation banks.

Wis. Stat. s. 281.36(3t). directs the department to develop rules for the mitigation program which are to include requirements for the analysis of practicable alternatives as part of the wetland permitting process, the purchase of credits from mitigation banks, enforcement requirements, baseline study requirements, plan and design requirements for mitigation projects, standards for comparing mitigation projects to proposed discharges, standards for measuring the success and requirements for monitoring of mitigation projects and banks, and remedial actions for unsuccessful mitigation projects.

The original code was drafted in 2002, and many legislative and programmatic changes require that the code be updated. Additions to the rule will include provisions governing the department's in-lieu fee mitigation program and the purchase of in-lieu fee credits (Wis. Stat. s. 281.36(3r)(e), 2011 Wis. Act 118; Wis. Stat. s. 281.37, 2017 Wis. Act 183) and required mitigation for non-federal wetland exemptions (Wis. Stat. s. 281.36(4n); 2017 Wis. Act 183).

The discharge of fill material to federal wetlands is also regulated by the U.S. Army Corps of Engineers under federal law. Wisconsin's wetland law is designed to achieve a level of consistency with the federal requirements in order to achieve permitting efficiency for the regulated community. Revisions to the rule will address consistency with federal mitigation requirements, as outlined in the 2013 guidelines for wetland compensatory mitigation in Wisconsin.

4. Related Statutes or Rules: Sections 281.36 (3m) and 281.36(3n), Wis. Stats., describe the Wetland Individual Permit approval process. Sections 281.36(4m) and 281.36(4n), Wis. Stats., describe certain wetlands that are exempt from the permitting process, which require a wetland mitigation component.

This chapter applies to all wetland compensatory mitigation projects that are considered by the

department as part of a review process conducted in accordance with chs. NR 103, 131, and 132, Wis. Admin. Code.

This chapter does not apply to wetland compensatory mitigation conducted by the department of transportation as part of the liaison process pursuant to s. 30.2022, Wis. Stats. This chapter does not apply to compensatory mitigation conducted as a requirement of a federal permit issued prior to February 1, 2002. This chapter does not apply to compensatory mitigation for ferrous mining or bulk sampling activities in accordance with s.295.60 (8), Wis. Stats.

5. Plain Language Analysis: The purpose of this chapter is to establish standards for mitigation decisions related to regulated wetland impacts and to establish standards and procedures for the planning, establishment, maintenance, and monitoring of wetland compensatory mitigation in Wisconsin, including private mitigation banks, in-lieu fee programs and their projects, and permittee-responsible mitigation projects. This chapter also establishes procedures and standards for the department's in-lieu fee subprogram.

6. Summary of, and Comparison with, Existing or Proposed Federal Statutes and Regulations: The Army Corps of Engineers regulates compensatory mitigation for federal wetland discharge permits under 33 CFR Part 332. The federal mitigation requirement is similar to the state mitigation requirements in that they have similar standards for the amount, type and location of required mitigation, standards for planning and documentation for mitigation projects, ecological performance standards, monitoring and management standards, and requirements for mitigation banks and in-lieu fee programs. The department and the U.S. Army Corps of Engineers jointly issued Guidelines for Wetland Compensatory Mitigation in Wisconsin in 2002, with an updated version in 2013, which captures the process for complying with both state and federal law. The Guidelines reflect that while there are language differences between state and federal regulations, there are not significant conflicts between the two. The revised rule will follow the process for consistency identified in these guidelines.

7. Comparison with Similar Rules in Adjacent States: States analyzed included Illinois, Iowa, Michigan, and Minnesota.

In Illinois, wetland mitigation is primarily implemented by the Army Corps of Engineers under 33 CFR Part 332, and is therefore similar to Wisconsin's state mitigation requirements.

In Iowa, wetland mitigation is primarily implemented by the Army Corps of Engineers under 33 CFR Part 332, and is therefore similar to Wisconsin's state mitigation requirements.

In Michigan, wetland mitigation is jointly implemented by Michigan Department of Environment, Great Lakes, and Energy (EGLE) and the Army Corps of Engineers. EGLE implements their wetland mitigation requirements under Administrative Rule 281. Administrative Rule 281 does not allow wetland enhancement as a mitigation option, requires "onsite" mitigation where practical, requires higher mitigation ratios, sets minimum size thresholds for mitigation banks, and utilizes a different mitigation bank credit release schedule, but otherwise is similar to Wisconsin's mitigation regulations.

In Minnesota, wetland mitigation is jointly implemented by the Army Corps of Engineers under 33 CFR Part 332, and by administrative rule 8420. Under administrative rule 8420 wetland mitigation requirements are determined through a combination of the watershed approach and a comparison of current versus historic wetland acreages. Administrative rule 8420 also has specific wetland mitigation requirements for wetlands that are being converted to cultivated land, and requires the regulatory agencies overseeing wetland mitigation banks to charge administrative fees to wetland mitigation banks, but

otherwise is similar to Wisconsin's mitigation regulations.

8. Summary of Factual Data and Analytical Methodologies Used and How Any Related Findings Support the Regulatory Approach Chosen: This rule is largely procedural in nature. The department worked with U.S. Army Corps of Engineers, Waterways Program staff and attorneys, and an external Technical Advisory Committee to determine the protocols contained in the rule. In addition, the department considered statutory changes and consulted current state and federal guidance to ensure consistency with current laws and practices.

9. Analysis and Supporting Documents Used to Determine the Effect on Small Business or in Preparation of an Economic Impact Report: Because this rule simply updates current rules already expressly allowed by state statutes and recognized in existing code, and because this rule is designed to achieve a level of consistency with current federal requirements that are currently being practiced, the creation of this rule is not expected to incur costs to small businesses.

10. Effect on Small Business (initial regulatory flexibility analysis): The revised rule is not likely to have a significant economic impact, including for small businesses as the statutory mitigation requirements and methods remain unchanged. The rule may achieve some measure of positive economic impact, as it is expected to provide efficiency for the regulated community, mitigation bankers, and mitigation project developers.

11. Agency Contact Person:

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12. Place where comments are to be submitted and deadline for submission:

Written comments may be submitted at the public hearings, by regular mail, or email to:

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Written comments may also be submitted here: DNRAAdministrativeRulesComments@Wisconsin.gov

Hearing dates and the comment submission deadline are to be determined.

SECTION 1. NR 350 is repealed and recreated to read:

NR 350.001 Purpose. (1) The purpose of this chapter is to establish standards for mitigation decisions related to regulated wetland impacts and to establish standards and procedures for the planning, implementation, maintenance, and monitoring of wetland compensatory mitigation in Wisconsin, including private mitigation banks, in-lieu fee programs and their projects, and permittee-responsible mitigation projects. This chapter also establishes procedures and standards for the department's in-lieu fee subprogram.

(2) This chapter is adopted pursuant to s. 281.36, Stats.

Note: Additional information can be found in Guidelines for Wetland Compensatory Mitigation in Wisconsin Version 1.

NR 350.002 Applicability. (1) This chapter applies to all the following:

(a) Permitted and exempt wetland impacts requiring mitigation under s. 281.36, Stats.

(b) Wetland compensatory mitigation projects, including private mitigation bank, in-lieu fee program, and permittee-responsible projects, that are considered by the department as part of a review process conducted in accordance with chs. NR 103, 131, and 132.

(2) This chapter does not apply to any of the following:

(a) Wetland compensatory mitigation conducted by the department of transportation as part of the liaison process pursuant to s. 30.2022, Stats.

(b) Compensatory mitigation conducted as a requirement of a federal permit issued prior to February 1, 2002.

(c) Compensatory mitigation for ferrous mining or bulk sampling activities in accordance with s. 295.60 (8), Stats.

NR 350.003 Definitions. In this chapter:

(1) "Bank service area" or "Service area" means the geographic area corresponding to a HUC 6 watershed within which impacts to a wetland from a discharge can be mitigated at a specific mitigation bank or an in-lieu fee program as determined in a mitigation bank or in-lieu fee program instrument.

Note: The terms "bank service area" and "service area" refer to the same watersheds as described in the memorandum of agreement between the department and the United States army corps of engineers that adopts guidelines for wetland compensatory mitigation in Wisconsin. There are 12 service areas that correspond to HUC 6 watersheds, except for the Wisconsin River

HUC 6 which is split into Upper and Lower Wisconsin, and the Southwestern Lake Superior HUC 6 is shortened to the name "Lake Superior"

(2) "Basin" means the Lake Superior, Lake Michigan, or Mississippi River basin.

(3) "Compensation" or "compensatory mitigation" means the restoration, enhancement, or creation of wetlands expressly for the purpose of compensating for unavoidable adverse impacts that remain after all appropriate and practicable avoidance and minimization has been achieved.

(4) "Compensation search area" means the geographic areas within which impacts to a wetland from a discharge can be mitigated at a specific mitigation bank, including, in order, the HUC 8 watershed, the HUC 6 service area, and basin as the search is conducted.

(5) "Compensation site plan" means a comprehensive document prepared by a mitigation sponsor that provides a description of baseline conditions, restoration activities and design, and desired outcomes of a proposed wetland mitigation project, is approved by the department as part of a mitigation bank instrument or non-department in-lieu fee program instrument modification, and is synonymous with the mitigation plan described in the Federal Mitigation Rule (33 CFR 332.4(c)).

(6) "Corrective action" means an action taken by a mitigation sponsor to correct deficiencies in a wetland mitigation project as early as possible after the problem is noticed.

(7) "Creation" means the manipulation of the physical, chemical, or biological characteristics present to develop an aquatic resource that did not previously exist at an upland site that results in a gain in wetland resource area and functions.

(8) "Credit" means a unit of measure representing the attainment of wetland function at a mitigation site.

(9) "Credit ratio" means the amount of mitigation a project proponent shall provide at a mitigation project compared to the acres of wetland lost from a permitted or exempt impact.

(10) "Debit" means a unit of wetland function that is withdrawn from a mitigation bank upon approval of a credit sale.

(11) "Degraded wetland" means a wetland subjected to deleterious activities, such as drainage, grazing, cultivation, increased stormwater input, or partial filling, to the extent that natural wetland characteristics are severely compromised and wetland function is substantially reduced.

(12) "Department" means the Wisconsin Department of Natural Resources.

(13) "Direct impacts" means adverse impacts to wetlands that occur immediately as the result of a permitted or exempt activity and that result in the loss of wetland function and area.

(14) "Enhancement" means the manipulation of physical, chemical, or biological characteristics

of an existing wetland resource to heighten, intensify, or improve a specific wetland function that results in the gain of selected wetland function but may also lead to a decline in other wetland function and does not result in a gain in wetland resource area.

(15) “Exempt project proponent” means an entity or individual that discharges dredged or fill material into wetlands but is exempt from permit requirements pursuant to s. 281.36 (4), (4m), and (4n), Stats.

(16) “Functional values” or “wetland function” means one or more of the following ecological or cultural services that wetlands provide, including storm and flood water storage and retention; hydrologic functions; filtration or storage of sediments, nutrients, or toxic substances; shoreline protection against erosion; habitat for aquatic organisms; habitat for resident and transient wildlife species; and recreational, cultural, educational, scientific, and natural scenic values.

(17) “HUC 6” means a watershed delineated by the U.S. geological survey using a nationwide system based on surface hydrologic features at the 6-digit basin scale (the hydrologic unit code 6).

(18) “HUC 8” means a watershed delineated by the U.S. geological survey using a nationwide system based on surface hydrologic features at the 8-digit sub-basin scale (the hydrologic unit code 8).

(19) “In-lieu fee program” means a mitigation subprogram established by the department under s. 281.36 (3r) (e), Stats., or sponsored by a public or nonprofit entity that sells advanced mitigation credits to permittees or exempt project proponents to satisfy their mitigation requirements and uses funds from the sale of credits for restoration, enhancement, creation, or preservation of wetlands.

(20) “Interagency review team” means the group of federal, tribal, state, and/or local regulatory agencies that review and approve wetland mitigation banks and in-lieu fee programs.

Note: As described in 33 CFR 332.8(b), the U.S. army corps of engineers is the lead agency on the interagency review team and the U.S. environmental protection agency, the U.S. fish and wildlife service, the natural resources conservation service, noaa fisheries, and other agencies may participate as appropriate to review specific mitigation sites. The U.S. army corps of engineers will seek to include all public agencies with a substantive interest in the establishment of a mitigation bank or in-lieu fee program on the interagency review team. The department may participate on the interagency review team for mitigation banks and any non-department in-lieu fee programs at the discretion of the U.S. army corps of engineers. Wisconsin tribes and the state bureau of aeronautics may serve as interagency review team members when they have interest in mitigation projects. Members of the interagency review team shall review prospectuses, compensation site plans, mitigation bank and in-lieu fee program instruments, construction reports, monitoring reports, credit release requests, mitigation bank and in-lieu fee program instrument modification requests, and other documents as needed and provide comments to the U.S. army corps of engineers. The U.S. army corps of engineers will give full consideration of

any timely comments from other members but retains final authority for instrument and all other approvals for a mitigation bank or in-lieu fee program that is used to satisfy compensatory mitigation for federal wetland permits.

(21) “Mitigation” means the restoration, enhancement, creation, or preservation of wetlands to compensate for adverse impacts to other wetlands.

(22) “Mitigation bank” means a system of accounting for wetland loss and compensation that includes one or more sites where wetlands are restored, enhanced, created, or preserved to provide credits to be subsequently applied or purchased in order to compensate for adverse impacts to other wetlands.

(23) “Mitigation bank instrument” means a legal document governing the establishment and operation of a mitigation bank, which includes the compensation site plan, financial and mitigation credit provisions, site ownership and legal protection, and long-term management plans.

(24) “Mitigation project” or “mitigation site” means a wetland restoration, enhancement, creation, or preservation site that is developed with the intention of selling credits to permittees or exempt applicants in need of mitigation or a site developed by a permittee or exempt applicant to fulfill their mitigation requirements.

(25) “Mitigation sponsor” or “sponsor” means any public or private individual or entity responsible for establishing and operating a mitigation bank, in-lieu fee program, or permittee-responsible mitigation project.

(26) “Monitoring plan” means a narrative describing the data collection, analysis, and reporting requirements for documenting the change in wetland function on mitigation sites in a compensation site plan approved by the department.

(27) “Nonfederal wetland” means a wetland that is not subject to federal jurisdiction under 33 USC 1344.

(28) “On-site” means a mitigation project located within one-half mile of the impacted wetland.

(29) “Performance standards” means quantifiable physical, chemical, or biological measures or objectives required for the mitigation site in a compensation site plan approved by the department.

(30) “Permittee” means an applicant for a wetland general or individual permit under s. 281.36, Stats.

(31) “Permittee-responsible mitigation project” means a mitigation project developed by a permittee or exempt project proponent, or their authorized agent or contractor, to complete required mitigation and for which the permittee or exempt project proponent retains full legal responsibility.

(32) “Preservation” means preventing the decline of ecologically significant or rare or high-quality wetlands through long-term site protection that alone does not result in a gain of wetland resource area or functions.

(33) “Prospectus” means a preliminary wetland mitigation project design prepared by a mitigation sponsor and including descriptions of existing site conditions, site ownership and management, mitigation goals and objectives, and ecological suitability of the project.

(34) “Re-establishment” means the manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning ecological functions to a former wetland resource that results in a gain in wetland resource area and function.

(35) “Rehabilitation” means the manipulation of the physical, chemical, or biological characteristics of a site with the goal of repairing ecological functions to a degraded existing wetland resource that results in a gain in wetland resource functions but does not result in a gain in wetland resource area.

(36) (a) “Restoration” means the manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning ecological functions to a former or degraded wetland resource.

(b) Restoration includes re-establishment and rehabilitation.

(37) “Secondary impacts” means impacts to wetlands that are causally linked to the proposed project.

Note: Secondary impacts may include, but are not limited to, hydrologic impacts, changes in wildlife use due to habitat fragmentation or habitat conversion, or the introduction or increase of invasive or non-native plant species to a wetland.

(38) “Temporary impacts” means adverse impacts to wetlands that are not permanent and are the result of a permitted or exempt project and that meet one or more of the following requirements:

(a) Only occur during the non-growing season.

(b) Result in negligible impacts to wetland function or area.

(c) Preexisting wetland function is restored at or soon after the conclusion of the permitted or exempt activity.

Note: Temporary impacts may include, but are not limited to, open trenching, timber mat placement, or temporary vegetation clearing.

(39) "Wetland" means an area where water is at, near, or above the land surface long enough to be capable of supporting aquatic or hydrophytic vegetation and which has soils indicative of wet conditions.

(40) "Wetland delineation" means the standard procedure for determining the boundary of a wetland area according to procedures contained in the wetland delineation manual published in 1987 by the U.S. army corps of engineers.

(41) "Wetland quantification tool" means a coordinated set of numeric measures scientifically developed by the department or a contractor for the purpose of calculating potential wetland function loss due to permitted or exempt adverse impacts to wetlands and for calculating the gain in wetland function at wetland mitigation sites.

NR 350.004 Mitigation Sequence. (1) For mitigation required under the issuance of wetland individual permits per s. 281.36 (3n) (d), Stats., and for a discharge that is exempt from permitting requirements under s. 281.36 (4n) (b) Stats., or under s. 281.36 (4n) (c), Stats., the department shall allow mitigation to be accomplished by any of the following methods:

(a) Purchase of mitigation bank credits in the same HUC 8 watershed as the wetland impacted by the discharge.

(b) Purchase of mitigation bank credits in the same service area as the wetland impacted by the discharge.

(c) Purchase of in-lieu fee program credits in the same service area as the wetland impacted by the discharge.

(d) Completing a permittee-responsible mitigation project within the same service area of the site of the discharge.

(e) Purchase of mitigation bank credits in the same basin as the wetland impacted by the discharge.

(2) The department may, in consultation with the U.S. army corps of engineers, require mitigation to be completed using any of the methods in (a) to (e) that are available if the department determines it would better serve natural resource goals, such as retaining flood water, improving water quality, improving hydrologic function, improving or restoring wildlife habitat, or more closely matching the impacted wetland type.

(3) If the department requires a permittee or exempt project proponent to purchase mitigation bank credits, the permittee or exempt project proponent shall purchase credits from a bank with a mitigation bank instrument that has been approved by the department and is listed on the department mitigation banking website and shall submit to the department an affidavit that the purchase is completed. The affidavit shall include all the following:

(a) The name of the mitigation bank.

- (b) The HUC 8 name and the service area name where the impacts will occur.
- (c) The wetland type impacted.
- (d) The number of credits purchased.
- (e) The signatures of both the permittee or exempt project proponent and the mitigation bank sponsor.

(4) The department shall not issue a wetland individual permit, or exemption unless one or more of the following applies:

(a) The permittee or exempt project proponent has provided proof that mitigation requirements have been completed, including an affidavit of credit purchase from a mitigation bank sponsor or an in-lieu fee program sponsor, or an approved compensation site plan for a permittee-responsible mitigation project.

(b) The department and permittee have agreed to a restoration plan for temporary or secondary impacts.

(c) The department has issued a wetland individual permit approval which specifies that the permittee must complete mitigation requirements prior to a discharge.

NR 350.005 Amount of Compensatory Mitigation Required. (1) The department shall determine the amount of mitigation required for adverse impacts to wetlands associated with a wetland individual permit under s. 281.36 (3n) (d), Stats., or an exemption under s. 281.36 (4n) (b) or (c), Stats., based on the criteria in this section and shall inform the permittee or exempt project proponent of the determination.

(2) The department will determine the amount of mitigation required on a case-by-case basis based on the quality and type of wetlands impacted, the duration of the impacts, the measure of lost wetland function, the temporal loss of wetland function, and the location of the proposed mitigation. The department shall ensure that the loss of wetland function due to adverse impacts associated with an individual permit or exemption is compensated for with an appropriate mitigation amount. The department shall evaluate the lost function of impacted wetlands using one of the following methods:

(a) The department may use an appropriate wetland functional or condition assessment method such as a wetland quantification tool, or other suitable metrics designed to measure wetland impacts.

(b) The department may use a crediting system based on wetland type and location to measure wetland impacts and wetland mitigation potential. If mitigation is required for adverse impacts to wetlands and the department uses a crediting system to evaluate the impacts, all of the

following apply:

1. If the department requires the permittee or exempt project proponent to purchase mitigation bank credits from a wetland mitigation bank, the mitigation required for the wetland impacts shall be no less than 1.2 credits per one acre of direct impact for mitigation bank credits purchased in the same service area and of the same wetland type.

a. The department may require the permittee or exempt project proponent to purchase mitigation bank credits at higher than the 1.2:1 ratio under the following circumstances:

b. The ratio may increase for the purchase of mitigation bank credits out of kind from the impacted wetland type.

c. The ratio may increase for the purchase of mitigation bank credits in a different service area from where the wetland impacts are to occur.

d. The department may determine that an increased ratio is necessary to fully compensate for impacts to wetland function.

2. If the department requires the permittee or exempt project proponent to purchase credits from an approved in-lieu fee program, the ratio for mitigation shall be no less than 1.45 credits per one acre of direct impact to compensate for the adverse impacts to wetlands and to account for the temporal loss of wetland acres and function.

3. If the department determines that the permittee or exempt project proponent shall complete a permittee-responsible mitigation project, the starting mitigation ratio shall be no less than 1.2 credits per one acre of direct impact. The required mitigation amount for a permittee-responsible mitigation project shall be determined on a case-by-case basis and may include ratio increases for impacts to rare wetland types, out of kind wetland mitigation, temporal wetland functional loss, or for mitigation in a different service area than where the discharge occurred.

(3) The department may determine that mitigation is required for secondary impacts to wetlands associated with wetland individual permits or exemptions.

Note: The department may require mitigation for secondary impacts to wetlands such as conversion of wetland type or hydrologic impacts.

(4) The department may determine that mitigation is required for temporary impacts to wetlands associated with wetland individual permits or exemptions.

Note: The department may require mitigation for temporary impacts to wetlands such as forested wetland clearing, or temporary impacts to any wetland plant community that is dominated by native plant species.

NR 350.006 Site Crediting. (1) For mitigation bank projects under ss. NR 350.08 to NR 350.10, in-lieu fee program projects under s. NR 350.11, and permittee-responsible mitigation

projects under s. NR 350.12, the department may evaluate the wetland function that will be restored, created, enhanced, or preserved by a mitigation project with any of the following methods:

(a) A wetland functional or condition assessment method such as a wetland quantification tool, or other suitable metrics designed to measure wetland impacts.

(b) A crediting system tied to wetland type and acres.

(2) The location of wetland boundaries for use in calculating acreage of wetland at a mitigation site shall be made by a mitigation sponsor through the completion of a wetland delineation under s. 281.36 (2m), Stats., or by an alternative method approved by the department.

(3) If the department uses a crediting system, the department shall calculate the appropriate amount of credit produced by a mitigation site based on information provided in the compensation site plan under s. NR 350.07 (6).

(4) Reestablishment of historic hydrology, land contours and native plant communities on a former wetland site with hydric soils will receive up to one credit for every one acre restored.

(5) Rehabilitation of hydrology and plant communities on an existing wetland site will generally receive less credit than reestablishment but may receive up to one credit for every one acre restored.

(6) Credit for enhancement of degraded vegetation on an existing wetland site will generally receive less credit than reestablishment or rehabilitation but may receive up to one credit for every one acre enhanced. Proposed activities that result in conversion of one wetland type to another wetland type will generally not be given credit. The department may consider calculating credit for these activities on a case-by-case basis when the mitigation sponsor demonstrates that conversion activities will enhance wetland functions.

(7) The department will only allow creation if the department determines that the planned creation will provide significant wetland function. Any creation accepted by the department will generally receive lower credit than reestablishment or rehabilitation but may receive up to one credit for every one acre created. A permittee-responsible mitigation project involving creation shall adequately compensate for adverse impacts to wetlands.

(8) The department will allow preservation at no higher than 0.125 credits per acre if the proposed mitigation project meets all of the following criteria:

(a) The mitigation project will preserve wetland resources under demonstrable threat of destruction or adverse modifications. Threat of destruction or adverse modifications includes water quality degradation, water quantity loss, or habitat destruction as the result of development, logging, mining, or other land use changes that are currently planned or are likely to be planned on or adjacent to the proposed mitigation site.

(b) The mitigation project will preserve wetland resources that provide important physical, chemical, or biological functions for the watershed.

(c) The mitigation project will preserve wetland resources that contribute significantly to the ecological sustainability of the watershed or are considered rare and high-quality wetlands.

(d) The mitigation project permanently protects the preserved site through an appropriate real estate or other legal instrument, such as a conservation easement or title transfer to a public agency or land trust.

(9) The department may allow credit for wetland areas according to their mitigation activity type if a mitigation project proposes to include areas of shallow or deep marsh if all of the following are met:

(a) The shallow or deep marsh areas on the site may receive credit if they provide increased wetland function, meet approved performance standards, and allow the other areas of the site to provide increased wetland function and meet performance standards.

(b) The shallow or deep marsh areas of the site are ecologically suitable to the landscape as evidenced by historic or current site conditions and are proposed to be constructed according to the best available scientific understanding of natural, self-sustaining conditions.

(c) If engineered structures that require active management, such as berms, dikes, or water control structures, are proposed to be constructed on the site, the structures must only be necessary to restore the site to the extent practicable considering watershed features and not with the goal of restoring or creating more shallow or deep marsh than may have been historically present considering changes to the watershed.

(d) If engineered structures that require active management are proposed to be constructed on the site, the mitigation sponsor shall provide maintenance and monitoring plans, identify the person responsible for long-term maintenance, and identify financing mechanisms to ensure continued operation of those structures and these shall be reviewed by the department as part of a compensation site plan.

(10) If a mitigation project includes areas of vegetation establishment on uplands, the department will allow credit at no higher than one credit for every four acres established and the total upland buffer credits on a project shall not exceed 25% of the total mitigation project credits.

(11) The department may require a buffer zone on the mitigation site boundary to protect the site from potential adverse impacts from neighboring land uses. The department will award less credit for restoration, enhancement, or creation activities in a buffer zone than for similar restoration, enhancement, or creation activities not occurring in the buffer zone.

(12) The department will not award mitigation credit for projects used primarily as stormwater or wastewater treatment facilities or similar projects under s. NR 103.06 (4).

NR 350.007 Prospectus and Compensation Site Plan Requirements. (1) For mitigation bank projects as described in ss. NR 350.08 to NR 350.10 and in-lieu fee program projects as described in s. NR 350.11, a mitigation sponsor shall prepare and submit a prospectus.

(2) The purpose of the prospectus is to provide a mitigation project concept regarding potential restoration, creation, enhancement, or preservation activities.

(3) A complete mitigation site prospectus shall include all of the following information:

(a) *Owner and agent.* The names of the mitigation sponsor, all involved landowners, any consultants or experts to be involved in the planning, design, and implementation of the mitigation site, and the mitigation sponsor's agent or agents, if applicable.

(b) *Qualifications.* The qualifications of the mitigation sponsor and members of the project team to successfully complete the types of mitigation projects proposed, including information describing any past activities completed by the sponsor and the project team.

(c) *Objectives.* A description of the specific objectives that will be accomplished by the proposed mitigation project.

(d) *Operation.* A description of how the mitigation site will be established and operated.

(e) *Service area.* A description of the proposed service area.

(f) *Need.* A description of the general need for the proposed mitigation project.

(g) *Technical feasibility.* A narrative that provides a description of the existing land uses; a concept of the restoration actions that could occur on site; the functional lift that would occur as a result of the project; and the likelihood that the site will develop into a successful wetland mitigation bank or in-lieu fee program project.

(h) *Ownership and long-term management.* A description of the proposed ownership arrangements and long-term management strategies for the mitigation site.

(i) *Ecological suitability.* A description of the suitability of the mitigation site to achieve the proposed objectives, including the physical, chemical, and biological characteristics of the site and how they will support the planned types of wetland resources and functions; and a description of any known or anticipated actions that are currently occurring, or that have a high likelihood of occurring in the future, that could negatively impact the success of the project, such as mineral or vegetation removal, or the alteration of surface or ground water regimes.

(j) *Hydrology.* Provide assurance of sufficient water supply and drainage rights to sustain the proposed water regimes on the site in both the short- and long-term. Include documentation of any existing or anticipated right of the landowner or others to remove water, soil, minerals, or

plants from within or adjacent to the site boundary. Also include documentation of any existing or anticipated right to drain water through, from, or onto the project site or impound water on the project site, such as tile outlets onto the property, ditches through the property, flooding easements, flowage easements, drainage easements, and maintenance easements.

(k) *Site Maps*. Maps that show the proposed mitigation bank location, ownership, soils, topography, mapped existing wetlands, existing easements and infrastructure, floodplains and floodways, and existing hydrologic manipulations such as ditches, drain tiles, or berms.

(l) *Other information*. Any other information that the department may require to determine the appropriateness, feasibility, and practicability of the compensatory mitigation project.

(4) For all mitigation bank, in-lieu fee, and permittee-responsible mitigation project proposals, the mitigation sponsor shall prepare a compensation site plan. The compensation site plan is synonymous with the mitigation plan as described in the federal mitigation rule under 33 CFR 332.4(c).

(5) The compensation site plan shall do all of the following:

(a) Demonstrate that the applicant has sufficient scientific expertise to carry out the proposed mitigation project work.

(b) Outline the construction plan and techniques, project goals and objectives, performance standards, monitoring plan and long-term management plan.

(c) Demonstrate that the applicant has sufficient financial resources to assure the project is built according to the plans and specifications and will be monitored and maintained as proposed.

(d) Provide evidence that the site will be protected and maintained as wetland in perpetuity.

(6) A complete compensation site plan shall include all of the following information:

(a) *Objectives*. A description of the wetland resource type and amount that the mitigation sponsor will provide, the mitigation method, such as restoration, establishment, enhancement, or preservation, and how the provided wetland resource functions will address the needs of the watershed where the project is located.

(b) *Site selection*. A description of the factors considered during the site selection process. The description should include consideration of watershed needs, on-site alternatives if applicable to permittee-responsible mitigation projects, how the mitigation project fulfills goals from a compensation planning framework for in-lieu fee mitigation sites, and the practicability of accomplishing ecologically self-sustaining wetland resource restoration, establishment, enhancement, or preservation at the site.

(c) *Service area.* A description of the proposed service area.

(d) *Site protection instrument.* A description of the legal arrangements and instrument, including site ownership, that the mitigation sponsor will use to ensure the long-term protection of the site.

(e) *Baseline information.* A description of the ecological characteristics of the proposed site including historic and existing plant communities; historic and existing hydrology sources and processes, including inputs, outputs and alterations; soil conditions; a map showing the locations of mitigation site and the geographic coordinates for the site; and other site characteristics appropriate to wetland mitigation. The baseline information should also include a delineation of waters of the United States, including wetlands, on the proposed site.

(f) *Determination of credits.* A description of the number of proposed credits the mitigation project will generate, including a brief explanation of the rationale for this determination.

(g) *Mitigation work plan.* Detailed written specifications and work descriptions for the mitigation project, including all of the following:

1. The geographic boundaries of the project.
2. Construction methods, timing, and sequence.
3. Sources of water, including connections to existing wetlands and uplands.
4. Methods for establishing the desired plant communities.
5. Plans to control invasive plant species.
6. The proposed grading plan including elevations and slopes of the substrate.
7. Soil management.
8. Erosion control measures.

(h) *Maintenance plan.* A description and schedule of maintenance requirements after construction is completed to ensure the continued viability of the mitigation site.

(i) *Performance standards.* Objective, measurable, and enforceable performance standards based on restored wetland function that shall include all of the following:

1. The acres of wetland, by wetland type, restored at a mitigation site. The mitigation sponsor shall complete this requirement using a wetland delineation per s. 281.36 (2m), Stats., and appropriate vegetative community mapping practices.

2. A set of hydrology performance standards for the site for each wetland community type, including groundwater levels, periods of inundation or saturation, or other metrics that show hydrology goals for the site have been achieved.

3. A set of vegetation performance standards for the site for each wetland community type, including native and invasive species cover, hydrophytic vegetation cover, unvegetated areas, or other metrics that show vegetation goals for the site have been achieved.

4. Any other objective, measurable attributes that document increased wetland function, as required by the department.

(j) *Credit Release Schedule*. A proposed schedule for credit releases listing the percentage of total credits that will be released when the interagency review team approves specific project milestones, including the final mitigation bank instrument or the in-lieu fee project final compensation site plan, the as-built report, and interim and final performance standards achievement.

(k) *Monitoring plan*. A description of parameters to be monitored in order to determine if the project is on track to meet performance standards and if adaptive management under par. (m) is needed. A schedule for monitoring and reporting on monitoring results.

(l) *Long-term management plan*. A description of how the mitigation sponsor will manage the site after performance standards have been achieved to ensure the long-term sustainability of the resource, including long-term financing mechanisms and the party responsible for long-term management. The management plan shall be clear as to what conditions will trigger needs for certain maintenance or management activities.

(m) *Adaptive management plan*. A management strategy to address unforeseen changes in site conditions or other components of the compensatory mitigation project, including the party or parties responsible for implementing adaptive management measures. The adaptive management plan shall guide decisions for revising compensatory mitigation plans and implementing measures to address both foreseeable and unforeseen circumstances that adversely affect compensatory mitigation success.

(n) *Financial assurances*. A description of the financial assurances that the mitigation sponsor will provide under s. NR 350.08 (2) and how they ensure a high level of confidence that the mitigation sponsor will successfully complete the project, in accordance with its performance standards.

(o) *Other information*. Any other information that the department may require to determine the appropriateness, feasibility, and practicability of the compensatory mitigation project.

NR 350.008. Process for Establishing a Mitigation Bank. (1) PROCESS (a) A mitigation bank sponsor shall prepare and submit a mitigation bank prospectus to the department

under s. NR 350.07 (1) to (3).

(b) Upon receipt of a bank prospectus, the department shall provide through email or mail to the mitigation bank sponsor the department's written opinion of the likelihood that the proposed compensation site will comply with the requirements of this chapter. The department may request a site visit prior to providing its written opinion.

(c) Based on comments received from the department a prospective mitigation bank sponsor shall prepare and submit a draft mitigation bank instrument to the department. A complete draft mitigation bank instrument shall include the following:

1. A complete compensation site plan under s. NR 350.07 (6).
2. Information on the operation of the bank including the expected number of credits, provisions for the sale of credits, accounting and reporting procedures, and provisions for site inspections pursuant to s. NR 350.09.
3. A discussion of the persons responsible for management of the bank accounting, long-term ownership, monitoring, maintenance, and long-term management of the site.
4. Proposed financial assurances for the site pursuant to s. NR 350.08 (2).
5. A proposed conservation easement for the site pursuant to s. NR 350.08 (3).
6. A proposed schedule that includes a timeline for submittal of a final mitigation bank instrument, construction, and monitoring under s. NR 350.07 (6).

(d) Upon receipt of a complete draft mitigation bank instrument, the department shall provide to the prospective mitigation bank sponsor any changes or updates that are needed to make the final mitigation bank instrument approvable. If the department determines that the mitigation bank is not likely to be approved, the department will provide its concerns in writing to the mitigation bank sponsor.

(e) Based on comments received from the department a prospective mitigation bank sponsor shall prepare a final mitigation bank instrument. The final mitigation bank instrument shall include:

1. Any changes requested by the department, as described in s. NR 350.08 (1) (d).
2. Final versions of the construction and post construction financial assurances that are put in place under s. NR 350.08 (2).
3. A final version of the conservation easement or comparable legal instrument for the site under s. NR 350.08 (3).

(f) After a mitigation bank sponsor submits a final mitigation bank instrument to the department, the department shall do all of the following:

1. Within 15 days, notify the mitigation bank sponsor whether the department approves the final mitigation bank instrument.
2. Be a signatory to the final mitigation bank instrument.
3. Include the bank on a mitigation banking web page listing banks that are open and approved to sell credits. If bank sponsors choose to include contact information and a project narrative the department shall provide this information on the mitigation banking web page.

(2) FINANCIAL ASSURANCES. (a) The department shall require the mitigation bank sponsor to submit a performance bond, irrevocable letter of credit, irrevocable escrow account, irrevocable trust account or other financial assurance to ensure that a mitigation project is constructed, operated, monitored and maintained according to s. NR 350.09 (2) to (3) and in accordance with the approvals issued by the department and other agencies involved in the approval process. The department may waive the requirement for financial assurances for construction on a case-by-case basis if the first credit release for a mitigation bank is scheduled to occur after the mitigation bank sponsor has submitted and the department has approved the as-built report.

(b) The department shall require financial assurances to guarantee adequate post-construction monitoring and maintenance for a specified time period after construction is complete, or after performance standards are met, depending on the type of mitigation project.

(c) The department shall determine the amount of financial assurances required based on the estimated costs of the construction, operation, monitoring and maintenance of the mitigation project. The costs may include any costs for corrective actions that may be required to bring the mitigation project into compliance.

(d) The mitigation bank sponsor shall submit financial assurance instruments that meet requirements determined by the department to be reasonably necessary to assure proper construction, operation, monitoring, and maintenance of the mitigation project. Requirements shall, at a minimum, include all of the following:

1. Forms of financial assurance, which include a third party as obligor, shall be issued by a person authorized to do business in this state.

2. Any financial assurance instrument shall provide that the financial assurance cannot be canceled or modified except after not less than 90 days' notice in writing to the department by certified mail. Not less than 30 days prior to the cancellation or modification of the financial assurance, the mitigation bank sponsor shall deliver to the department a replacement for the financial assurance. The department shall then notify the mitigation bank sponsor by email or mail whether the replacement instrument is acceptable. If the replacement financial assurance is

not provided and accepted, the original financial assurances shall remain in effect.

3. The financial assurance shall provide that the mitigation bank sponsor will perform all requirements of the approvals for the project. If the project site or the mitigation bank is transferred, the new owner or successor in interest shall provide the necessary financial assurance in the amount required by the department for the project.

4. The financial assurance shall be payable to the “State of Wisconsin, Department of Natural Resources.”

(e) The department may periodically reevaluate and approve modifications to the amount or form of financial assurance to reflect completion of tasks that are required under the department’s approval.

(f) When multiple regulatory authorities have jurisdiction over a mitigation project, the regulatory authorities may develop and implement a cooperative financial security arrangement to avoid requiring the mitigation bank sponsor to provide financial assurances with more than one regulatory authority for the same mitigation project.

(g) A mitigation bank sponsor may submit a request to the department to change from one method of financial assurance to another. The department may approve or deny the request.

(h) A mitigation bank sponsor shall notify the department by certified mail of the commencement of any voluntary or involuntary proceeding under bankruptcy code, 11 USC, naming the mitigation bank sponsor as debtor, within 10 days of commencement of the proceeding.

(3) LONG-TERM PROTECTION OF MITIGATION BANK SITES. (a) A mitigation bank sponsor shall grant a conservation easement under s. 700.40, Stats., to the department or shall execute a comparable legal instrument approved by the department to ensure that the restored, enhanced, or created wetland will not be destroyed or substantially degraded by any subsequent owner of or holder of interest in the property on which the wetland is located. The department shall revoke approval for a mitigation bank if the bank sponsor fails to provide the conservation easement.

(b) The department shall modify or release a conservation easement issued under sub. (1) if the conditions in s. 281.36(8m), Stats. apply.

(4) PUBLIC NOTICE. (a) The department shall provide online public notification for a received draft mitigation bank instrument.

(b) The department shall develop a public notice for each draft mitigation bank instrument to include all of the following information:

1. The name of the mitigation bank sponsor.

2. A brief description of the mitigation bank including all mitigation bank sites.
3. The name, email address, and phone number of a department staff member who can receive comments and respond to questions.
4. A date by which the department will accept and consider comments.

(c) The department shall distribute the public notice to appropriate news media in the vicinity of the proposed action.

(5) REVIEW FEE. The department shall charge a fee pursuant to s. 281.36 (12) (b), Stats., for reviewing, investigating, and making decisions to approve or not approve mitigation bank instruments at the time that a mitigation bank sponsor submits a draft mitigation bank instrument to the department. The submittal fee for a draft mitigation bank instrument shall be \$800.

NR 350.009. Mitigation Site Inspection and Monitoring. (1) GENERAL. The compensation site plan shall include a monitoring plan as stated in s. NR 350.07 (6) (k). The mitigation bank sponsor shall complete monitoring activities as approved in the compensation site plan. A monitoring plan shall address construction monitoring and post construction monitoring as required under subs. (2) and (3).

(2) CONSTRUCTION MONITORING. (a) The mitigation bank sponsor shall inform the department of the progress of construction and shall provide full access to the department for site inspections.

(b) The mitigation bank sponsor shall receive written approval from the department before implementing any substantial deviations from the approved compensation site plan.

(c) The mitigation bank sponsor shall provide an as-built report to the department to verify that the project was completed in accordance with the approved plans and specifications. This report shall summarize the construction activities, note any changes to the construction plan that occurred, and provide as-built plan sheets of the site. The as-built report shall be organized according to the following outline:

1. Site identification. Include the bank name or permit number, designer or consultant, and sponsor. Include a written description of the location, such as landmarks, perimeter information, and coordinates.
2. Identification of the construction contractor.
3. Dates of construction, completion, and site inspections by a qualified wetland consultant.
4. Description of any changes to the original plan.
5. Description of any problems encountered during construction and actions taken to correct the problems.

6. List of follow-up corrective actions needed, schedule for corrective actions, and persons responsible for corrective actions.
7. As-built plan sheets.
8. Photos showing before and after conditions of the constructed area.
9. Description of the existing conditions of all wetlands at the completion of construction activities.

(d) A final construction inspection may be conducted by the department after receipt of the as-built report under par. (c) to determine whether the site was built in accordance with plans and specifications.

(e) After the final construction inspection, the department shall provide the mitigation bank sponsor a list of corrective actions for the mitigation bank sponsor to complete by a specific date.

(f) The applicant or bank sponsor shall certify to the department evidence that all corrective actions identified under par. (e) have been addressed.

(g) The department shall issue a letter of compliance to the mitigation bank sponsor after the department determines that construction and all corrective actions are complete.

(h) After the department issues a letter of compliance to the mitigation bank sponsor, the department shall reevaluate the amount of required financial assurance.

(3) POST CONSTRUCTION MONITORING. (a) The purpose of post construction monitoring is to do all of the following:

1. Determine whether performance standards established for the site under s. NR 350.07 (6) (i) are being met.

2. Identify trends in wetland functions at the site.

3. Identify the need for corrective actions.

(b) The department shall establish performance standards for the site as approved in the compensation site plan in s. NR 350.07 (6) (i).

(c) A monitoring plan shall take into consideration unique aspects of the site.

(d) A monitoring plan shall include a monitoring schedule of adequate frequency and duration to measure specific performance standards and to assure long-term success of the stated goals for the site.

(e) A monitoring plan shall be sufficient to assess trends in wetland function at the site and the degree to which the performance standards for the site are met.

(f) A mitigation bank sponsor shall provide a monitoring report to the department as agreed upon in the approved compensation site plan.

(g) Monitoring shall occur for the length of time specified in the approved compensation site plan under s. NR 350.007 (6) (k). Monitoring will be required for no fewer than five years for herbaceous wetland communities, no fewer than seven years for shrub wetland communities, and no fewer than ten years for wooded wetland communities. The Department may extend the final length of the monitoring period if the site does not meet performance standards in the time frame as approved in the compensation site plan.

(h) Monitoring report requirements shall include all of the following:

1. A restatement of the compensation site plan goals, objectives, and performance standards.

2. Identification of any structural failures or external disturbances on the site.

3. A description of management activities and corrective actions implemented on the site during the past year.

4. A summary of and full presentation of the data collected during the past year.

5. A site map showing the locations of data collection.

6. An assessment of the degree to which performance standards are being met.

7. Proposed corrective actions to improve attainment of performance standards.

8. A narrative summary of the results and conclusions of the monitoring.

(i) If after review of the monitoring report, the department identifies conditions that indicate a site is unlikely to meet performance standards, the department may require corrective actions to the sponsor that may allow the mitigation site to meet the performance standards as required in the mitigation bank instrument.

(j) At the end of the monitoring period, the department shall issue a final letter of compliance to the mitigation bank sponsor if the department determines that the site is successful and established.

(k) After the department issues a final letter of compliance, the department shall release financial assurances as appropriate.

NR 350.010. Mitigation Bank Operation. (1) An approved mitigation bank instrument is the record of department and interagency review team concurrence on the objectives and administration of a mitigation bank. The secretary or the secretary's designee shall sign for the department and this signature on the mitigation bank instrument constitutes department approval

of the bank. A mitigation bank sponsor may amend the terms and conditions of the mitigation bank instrument, subject to notification and approval of the department and interagency review team.

(2) A mitigation bank sponsor is responsible for establishing a mitigation bank site in accordance with an approved mitigation bank instrument, administration of the accounting of debits and credits, conducting required corrective actions, providing required monitoring and status reports to the department, and assuring long-term maintenance and protection of the site. A mitigation bank sponsor may request that the department includes more than one compensation site in a mitigation bank instrument.

(3) Participation in the establishment of a mitigation bank does not constitute ultimate authorization for specific activities, as excepting the activities from any applicable requirements, or as pre-authorizing the use of credits from that bank for any activity.

(4) The department shall determine the total potentially available credits at a mitigation bank site under s. NR 350.06. The total available credits shall be stated in the approved mitigation bank instrument.

(5) Site conditions and performance will determine the timeline for actual release of bank credits. The department and interagency review team will review mitigation site data under s. NR 350.07 (6) (k) to determine if the site has met performance standards under s. NR 350.07 (6) (i). The department shall submit comments to the interagency review team regarding its conclusion on release of credits. The U.S. army corps of engineers shall have final authority to release credits under s. NR 350.07 (6) (j).

(6) By January 30 of each year that a mitigation bank is in operation, the mitigation bank sponsor shall provide a report to the department that provides an accounting of credits and debits using the format described in the mitigation bank instrument under s. NR 350.09 (3) (h). The department shall provide a letter of concurrence to the mitigation bank sponsor within 30 days of receipt of this report.

(7) The department may require a mitigation bank instrument to be modified to reflect the performance of the site during the monitoring period and to ensure that the amount of credit or other measure of function approved for the mitigation bank reflects the function that is being provided by the site.

NR 350.011. Department In-Lieu Fee Program Operation. (1) GENERAL. The department shall sponsor an in-lieu fee mitigation program to provide mitigation options to permittees required to mitigate for adverse impacts associated with a wetland individual permit under s. 281.36 (3n) (d), Stats., or for exempt project proponents required to mitigate for adverse impacts associated with a wetland exemption under s. 281.36 (4n) (b) or (c), Stats. The department in-lieu fee program established under s. 281.36 (3r) (e), Stats., shall have a program instrument approved by the U.S. army corps of engineers and shall be consistent with federal regulations.

(2) INSTRUMENT. The department shall create an in-lieu fee program instrument, which shall include a description of proposed service areas, accounting procedures, default and closure provisions, reporting protocols, specification of the initial allocation of advanced credits, a credit fee methodology, a description of the program account, and a compensation planning framework that details mitigation priorities.

(3) SERVICE AREAS. The department in-lieu fee program may sell advanced credits and complete mitigation projects to fulfill sold advanced credits in all service areas in Wisconsin as approved by the U.S. Army Corps of Engineers.

(4) CREDIT FEE SCHEDULE. The department in-lieu fee program will periodically review and revise the credit fee in each service area taking into account the cost factors associated with a full wetland mitigation project, including administration, appraisals, surveys, title insurance, land acquisition, conservation easements, design and planning, permit fees, engineering and modeling, construction, maintenance, monitoring, long-term management, and other factors as deemed necessary to project success by the U.S. Army Corps of Engineers. The department will evaluate credit fees after the end of each state fiscal year on July 1. If the department decides to revise credit fees, the department shall set the new prices on January 1 of the following year and will indicate the changes on the in-lieu fee program website. The department shall create an annual report for each fiscal year that justifies changes made to credit fees.

(5) PROJECT DEVELOPMENT. (a) The department shall use a request for proposals application process and the department shall use internal site identification methods to identify suitable mitigation projects.

(b) The department request for proposals process may be developed for consultants to provide partial delivery, which could include one or more of design and planning, construction, maintenance, or monitoring project aspects, or full delivery, which includes all aspects of a wetland mitigation project. The department shall advertise funds available for mitigation projects in each service area on the department website for at least one round of proposals prior to contracting with a partner to pursue a prospectus.

(c) The department shall create a project application and publish the application form on the in-lieu fee program website. The department will accept mitigation project proposals from any person. The department will answer questions from potential applicants regarding the application form or the request for proposals process. The department will publish staff contact information on the in-lieu fee program website.

(d) The department shall establish scoring criteria to be used to review mitigation proposals. The scoring criteria shall ensure to the most practicable extent that selected projects compensate for wetland function on the landscape and shall include criteria pertaining to the ability of the proposal to generate mitigation credits to meet in-lieu fee program regulatory requirements, the ability of the site to meet watershed goals as documented in the in-lieu fee program instrument, the ecological suitability of the site, site hydric soils, and site hydrology. The department shall publish the scoring criteria on the in-lieu fee program website. The

department shall periodically review and revise the scoring criteria to comply with federal regulations.

(e) The department will announce and publish a request for proposals for mitigation projects on a quarterly rolling basis. The department shall notify applicants of the status of their proposals within 30 days after the request for proposals close date.

(f) The department will search for potential mitigation projects on public and private land in addition to finding sites through the request for proposals process.

(g) The department in-lieu fee program may pursue any potential mitigation site at any time in order to meet construction timelines or other federal requirements.

(h) If the department identifies a mitigation site on department land, the department may develop a prospectus to submit to the U.S. army corps of engineers. The department may request a contractor to complete additional or all remaining phases of the mitigation project using a request for proposals process.

(i) The department may choose to contract for services according to each project phase, including prospectus development, compensation site plan development, construction, monitoring and maintenance, and long-term management. Contract payments will typically be made on a quarterly schedule through an invoice of services and materials costs.

(6) SITE PROTECTION. (a) The department shall record a conservation easement or comparable legal instrument on mitigation sites not owned by the department. If an easement with similar protections is already recorded on the property, the department may waive this requirement if the U.S. army corps of engineers approves the existing legal protection.

(b) The department shall place a restrictive covenant on mitigation sites owned by the department unless a comparable site protection mechanism is already recorded on the property.

(7) LONG-TERM MANAGEMENT. (a) The department shall establish a mechanism for financial reserves for long-term mitigation project management to be used for annual easement inspection, invasive species control, and any other site maintenance and monitoring needs on closed mitigation projects.

(b) The department may establish a non-wasting endowment for project funds to be used annually for long-term site management. Other mechanisms may also be used, if necessary, to ensure sufficient funds for long-term site management.

(c) When credit generation is complete and a mitigation project is closed, the department may contract with a private, public, or nonprofit partner to implement annual long-term management according to the compensation site plan. A contracted partner may provide additional funds for long-term maintenance.

NR 350.012. Permittee-Responsible Mitigation. (1) GENERAL. A permittee-

responsible mitigation project must ensure that wetland impacts are compensated for through long-term site protection as described under sub. (2), through the implementation of an approved compensation site plan as described under sub. (4), and by assurance that the mitigation project is financially viable as required under sub. (3).

(2) LEGAL SITE PROTECTION DOCUMENT. The requirements for site protection in s. NR 350.08 (3) shall apply to a permittee-responsible mitigation project.

(3) FINANCIAL ASSURANCES. The requirements for financial assurances in s. NR 350.08 (2) shall apply to a permittee-responsible mitigation project.

(4) DEVELOPMENT. (a) An applicant shall prepare a compensation site plan, as described in s. NR 350.07 (4) to (6) of this chapter, excluding s. NR 350.07 (6) (j).

(b) Monitoring shall occur for the length of time specified in the approved compensation site plan under s. NR 350.007 (6) (k). Monitoring will be required for no fewer than five years for herbaceous wetland communities, no fewer than seven years for shrub wetland communities, and no fewer than ten years for wooded wetland communities. The Department may extend the final length of the monitoring period if the site does not meet performance standards in the time frame as approved in the compensation site plan.

(c) When the department approves a permittee-responsible compensation site plan, it shall incorporate the compensation site plan as a condition of any permit it issues to the permittee or as a condition of the exemption determination for an exempt project applicant.

NR 350.013 Enforcement. (1) Violations of this chapter may be prosecuted by the department under chs. 23, 30, 31, 281, and 283, Stats.

(2) Any agent or employee of the department shall at all times be given reasonable access to any and all parts of a project site and may enter upon any property to investigate the project.

(3) A violation of a permit, approval, contract or order issued relating to a project under this chapter is a violation of the statutes or rules relating to the issuance of that permit, approval, contract or order.

(4) The department may remove or revoke wetland mitigation bank approvals for failure to comply with the requirements of the registration after notice and an opportunity for hearing in accordance with the procedures in ch. 227, Stats.

SECTION 2. EFFECTIVE DATE. This rule takes 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 [DATE].

Dated at Madison, Wisconsin _____.

STATE OF Wisconsin DNR

DEPARTMENT OF NATURAL RESOURCES

BY _____

Preston D. Cole, Secretary

(SEAL)