

The statement of scope for this rule, SS 043-19 was approved by the Governor on April 29, 2019, published in Register No. 761A1 on November 6, 2019, and approved by the Natural Resources Board on August 14, 2019. This rule was approved by the Governor on August 13, 2021.

ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD
REPEALING, RENUMBERING, RENUMBERING AND AMENDING, AMENDING, REPEALING
AND RECREATING AND CREATING 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(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 (USACE) 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 32 CFR Part 332 and in the 2013 Guidelines for Wetland Compensatory Mitigation in Wisconsin.

Wetland mitigation is regulated at the federal level by 33 CFR Part 332, which establishes the Interagency Review Team as a group of federal, tribal, state, and/or local regulatory agency representatives that

reviews documentation for, and advises the relevant USACE District Engineer on, the establishment and management of a mitigation bank or an in-lieu fee program. The USACE seeks to include all public agencies with a substantive interest in the establishment of mitigation sites on the IRT but retains final authority over its composition. The Wisconsin Department of Natural Resources (DNR) serves as an IRT member for review and approval of wetland mitigation banks in Wisconsin. The USACE St. Paul District serves as the Chair of the Wisconsin IRT.

As an IRT member, the DNR facilitates the establishment of mitigation banks by reviewing the prospectus, compensation site plan, instrument, and other appropriate documents, and providing comments to the USACE St. Paul District. The DNR may also choose to sign the final instrument, indicating its agreement with the terms of the instrument. The DNR also reviews monitoring reports, recommends remedial or adaptive management measures, reviews credit release requests, and reviews modifications to an instrument and provides comments on any of these aspects to the USACE St. Paul District.

As established in 33 CFR Part 332, the IRT and the USACE intend to operate on the following timelines for review of mitigation proposals. For a mitigation bank prospectus submittal, the USACE notifies the sponsor within 30 days whether or not the submittal is complete, provides a comment period for public notice of 30 days within 30 days of the completeness determination, and provides an initial evaluation letter to the bank sponsor within 30 days of the end of the public comment period. The DNR reviews the prospectus during the public comment period and sends any comments to the USACE by the end of the 30 days. For a draft mitigation bank instrument submittal, the USACE notifies the sponsor within 30 days whether or not the submittal is complete, provides a 30-day comment period for IRT members once the submittal is determined to be complete, and within 90 total days notifies the sponsor of the status of the IRT review, indicating if the draft instrument is generally acceptable and what changes, if any, are needed before submitting a final instrument. During the IRT comment period, the DNR reviews the draft instrument and submits any comments to the USACE by the end of the 30 days. For a final mitigation bank instrument submittal, the USACE notifies the sponsor within 30 days whether they intend to approve the instrument. If no IRT member intends to object to the approval, the USACE will approve the final instrument within 45 total days of receipt. See 33 CFR Part 332.8 (e) for the IRT dispute resolution process for final mitigation bank instruments. For credit release requests, the USACE provides 15 days for IRT review, and may require a site visit to be scheduled as soon as is practicable, which would then be followed by a 15-day review period for IRT comments. The USACE then makes a decision on the credit release within 30 days. For standard instrument modifications, which require a prospectus submittal, a draft instrument modification submittal, and a final instrument modification submittal, the department sends any comments to the USACE following the previously described timelines for each of these phases. For streamlined instrument modifications, the USACE provides a 30-day comment period for IRT members, and, within 60 days, notifies the IRT of their intent to approve or disapprove of the modification. The USACE then has 15 days to notify the sponsor of the decision. During the IRT comment period, the DNR reviews the streamlined instrument modification and sends any comments to the USACE by the end of the 30 days. Should the USACE be delayed beyond the stated timeline in sending out a status update or intent to approve letter in one of the review phases, the DNR's comments may be subsequently delayed.

The USACE St. Paul District gives full consideration to any timely comments and advice from the DNR on mitigation, but the St. Paul District alone retains final authority for approval of a mitigation bank instrument, a credit release request, and any instrument modifications when a mitigation bank is used to satisfy compensatory mitigation requirements for federal wetland permits.

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 increase 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.

TEXT OF THE RULE

CHAPTER 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) "As-built report" means a document summarizing the completed construction activities on a mitigation bank site, including any changes to the construction plan that occurred.

(2) "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 an agreement between the department and the U.S. army corps of engineers and referenced 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 an 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 portions of several HUC 6 watersheds adjacent to Lake Superior are combined and referred to as "Lake Superior."

(3) “Basin” means the Lake Superior, Lake Michigan, or Mississippi River basin.

(4) “Compensation” or “compensatory mitigation” means the restoration, enhancement, creation, or preservation 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.

(5) “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 service area, and basin as the search is conducted.

(6) “Compensation site plan” means a comprehensive document prepared by an applicant or 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, permittee-responsible mitigation project, 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)).

(7) “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.

(8) “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.

(9) “Credit” means a unit of measure representing the attainment of wetland function earned over a finite area at a mitigation bank or ILF project.

(10) “Credit ratio” means a multiplier used to determine the amount of wetland function over a finite area that requires mitigation due to wetland impacts as a result of an exempt or permitted project and used to determine the amount of wetland function over a finite area that is gained by mitigation activities on a mitigation project.

(11) “Debit” means a unit of credit that is withdrawn from a mitigation project upon approval of a credit sale or upon approval of credits used by mitigation sponsors to fulfill mitigation requirements on their own exempt or permitted projects.

(12) “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.

(13) “Department” means the Wisconsin Department of Natural Resources.

(14) “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.

(15) “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 that targeted wetland function but may also lead to a decline in other wetland function and does not result in a gain in wetland resource area.

(16) “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.

(17) “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.

(18) “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).

(19) “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).

(20) “In-lieu fee program” means a mitigation subprogram established by the department under s. 281.36 (3r) (e), Stats., or sponsored by a government or nonprofit entity that sells advanced or released 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.

(21) “Interagency review team” means the group of federal, tribal, state, and/or local regulatory agencies that facilitate the establishment of wetland mitigation banks and in-lieu fee programs through review and oversight of project development and operation.

Note: As described in 33 CFR 332.8(b), the U.S. army corps of engineers is the interagency review team Chair and other federal, tribal, state, and/or local regulatory agencies may participate with authority from the U.S. army corps of engineers, and as appropriate to review specific mitigation sites. The U.S. army corps of engineers seeks 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. Members of the interagency review team review prospectuses, compensation site plans, mitigation bank instruments, construction as-built reports, monitoring reports, credit release requests, mitigation bank 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 approval for a mitigation bank or in-lieu fee program that is used to satisfy compensatory mitigation for federal wetland permits.

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

(23) “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.

(24) “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.

(25) “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.

(26) “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.

(27) “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.

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

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

(30) “Performance standards” are observable or measurable physical, including hydrological, chemical, and/or biological attributes that are used to determine if a compensatory mitigation project meets its objectives.

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

(32) “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.

(33) “Preservation” means removing a threat to, or 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.

(34) “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.

(35) “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.

(36) “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.

(37) (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.

(38) “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.

(39) “Temporary impacts” means adverse impacts to wetlands that are not permanent and are the result of a permitted or exempt project and 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) Restore preexisting wetland function 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.

(40) “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.

(41) “Wetland delineation” means the standard procedure for determining the boundary of a wetland area, following the process required under s. 281.36(2m), Stats.

NR 350.004 Mitigation Alternatives. (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 (4n) (c), Stats., the department may, in consultation with the U.S. army corps of engineers, allow mitigation to be completed using a wetland mitigation bank, participating in the in lieu fee program, or completing a permittee-responsible project in the same service area as the site of the discharge.

(2) For wetland mitigation banks, mitigation shall be allowed according to the following order of preference:

(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 mitigation bank credits in the same basin as the wetland impacted by the discharge.

(3) The department may allow credits to be purchased from a different mitigation bank than one under sub. (2) or allow mitigation to be done through the in lieu fee program if it determines that doing so

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. The department may also consider economic factors when making this determination as described in s. 281.36 (3r) (ag), Stats.

(4) Mitigation through the use of mitigation banks or the in-lieu fee program shall be preferred over permittee-responsible mitigation. However, permittee-responsible mitigation in the same service area as the wetland impacted by the discharge may be allowed upon review of all of the following factors:

- (a) Technical feasibility.
- (b) Ecological suitability.
- (c) Likelihood of self-sustainability.
- (d) Appropriateness of site location relative to proposed wetland impacts.
- (e) Ability to offset lost wetland functions incurred by a proposed project.

(5) 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 project name.
- (c) The project location, including township, range, and section, and municipality.
- (d) The HUC 8 name and the service area name where the impacts will occur.
- (e) The relevant agency permit number or exemption number.
- (f) Acreage of impacts by wetland community type, if applicable.
- (g) The number of credits purchased by wetland community type, if applicable.
- (h) The signatures of both the permittee or exempt project proponent and the mitigation bank sponsor.

(6) The department shall not issue a wetland individual permit or submit a notification of eligibility for an 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 the Wisconsin rapid assessment method, or another department approved method designed to measure impacts to wetland functions and values.

(b) The department may use a crediting system based on wetland type, location, or function 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 impacts for mitigation bank credits purchased in the same service area and of the same wetland community type. The department may require a higher mitigation ratio for bank credits under the following circumstances:

a. The ratio may be increased for the purchase of mitigation bank credits out-of-kind from the impacted wetland community type.

b. The ratio may be increased for the purchase of mitigation bank credits in a different service area than where the wetland impacts are to occur.

c. The ratio may be increased for the purchase of mitigation bank credits to offset temporal loss of wetland functional values associated with the mitigation credits.

d. The ratio may increase to fully compensate for impacts to wetland function and acreage.

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 impacts to compensate for the adverse impacts to wetlands and to account for the temporal loss of wetland acres and function.

Note: The department makes decisions on the amount of mitigation required in consultation with

the U.S. army corps of engineers and in accordance with federal wetland mitigation regulations and guidelines.

3. If the department determines that the permittee or exempt project proponent shall complete a permittee-responsible mitigation project for direct wetland impacts, the starting mitigation ratio shall be no less than 1.2 credits per one acre of direct impacts. 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 350.008 to NR 350.009, and permittee-responsible mitigation projects under s. NR 350.012, 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 the Wisconsin rapid assessment method, or another department approved method designed to measure wetland impacts.

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

(2) The location of existing 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 350.007 (6) and may also use field collected data by the department or by a partner agency.

(4) Reestablishment of 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 multiple wetland functions 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 less credit than other restoration or enhancement activities 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 imminent based on demonstrable evidence 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 and current site conditions and are proposed to be constructed according to the best available scientific understanding of natural, self-sustaining conditions.

(10) If engineered structures that require active management, such as berms, dikes, or water control structures, are proposed to be constructed on the site, all of the following apply:

(a) The structures must only be necessary to restore the site to the extent practicable considering historic and current site conditions, historic and current watershed features, and will result in wetland communities that are appropriate for the hydrology on site and in the proximate watershed.

(b) The mitigation sponsor shall provide maintenance and monitoring plans, identify the person or entity 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 under s. NR 350.007 (4).

(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 or conditions. The department may 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) 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. Any credits produced from upland restoration activities will be released as wetland credit based on the proportion of the total acreage projected for each proposed wetland type.

(13) 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) PROSPECTUS. For mitigation bank projects as described in ss. NR 350.008 to NR 350.009, a mitigation sponsor shall prepare and submit a prospectus.

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

(3) PROSPECTUS REQUIREMENTS. 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*. Assurance of sufficient water supply and drainage rights to sustain the proposed water regimes on the site in both the short- and long-term; 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; 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) *Supporting Justification*. Information that supports the appropriateness, feasibility, and practicability of the compensatory mitigation project.

(4) **COMPENSATION SITE PLAN**. 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 Part 332.4(c).

(5) **COMPENSATION SITE PLAN PURPOSE**. 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) **COMPENSATION SITE PLAN REQUIREMENTS**. 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, enhanced, or created wetland function that shall include all of the following:

1. The acres of wetland by wetland type and mitigation activity type 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 for meeting specific project milestones, including final mitigation bank instrument approval 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 350.008 (3) 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). *Supporting Justification*. Information that supports 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 350.007 (1) to (3).

(b) Within 90 days of receipt of a bank prospectus, the department shall provide through email or mail 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 all of the following:

1. A complete compensation site plan under s. NR 350.007 (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 350.009.
 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 350.008 (3).
 5. A proposed conservation easement for the site pursuant to s. NR 350.008 (4).
 6. A proposed schedule that includes a timeline for submittal of a final mitigation bank instrument, construction, and monitoring under s. NR 350.007 (6).
- (d) Within 90 days of receipt of a complete draft mitigation bank instrument, the department shall provide through email or mail a status update letter that may include any of the following:
1. The department may recommend that the sponsor prepare and submit a final mitigation bank instrument.
 2. The department may require supplemental information regarding specific components of the draft mitigation banking instrument prior to the preparation and submittal of the final mitigation banking instrument.
 3. The department may require a revised draft mitigation banking instrument submittal if the original proposal is determined to have a high likelihood of failure or key components were missing from the submittal.
- (e) If the sponsor completes a submittal under (d) 1. or (d) 2., the department shall provide through email or mail a written description of any missing items that must be included and concerns that need to be addressed to make the final mitigation bank instrument approvable.
- (f) 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 all of the following:
1. Any changes requested by the department, as described in s. NR 350.008 (1) (d).
 2. Final versions of the construction and post construction financial assurances that are put in place under s. NR 350.008 (3).
 3. A final version of the conservation easement or comparable legal instrument for the site under s. NR 350.008 (4).

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

1. Within 30 days, notify the mitigation bank sponsor whether the department intends to approve the final mitigation bank instrument.

2. Once the U.S. army corps of engineers determines that the instrument will be approved, the department shall 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.

Note: As an interagency review team member, the department will review mitigation bank prospectus submittals and issue any comments to the U.S. army corps of engineers within 90 days of receipt; will review draft mitigation bank instrument submittals and issue any comments to the U.S. army corps of engineers within 90 days of receipt; and the department will review final mitigation bank instrument submittals and notify its intent to approve or object within 30 days of receipt. Should the U.S. army corps of engineers' review of any of these documents extend beyond the stated timeline, the department's comments may be subsequently delayed in reaching a mitigation bank sponsor.

(2) CREDIT RELEASE SCHEDULE. (a) The department shall require a credit release schedule as part of a mitigation bank instrument under s. NR 350.007 (6) and review a credit release schedule proposal as part of its review of the draft and final mitigation bank instrument proposals under s. NR 350.008 (1).

(b) The credit release schedule for a mitigation bank may include scheduled releases at project milestones, including but not limited to mitigation bank instrument approval and signing; the letter of compliance from the department stating that construction, as documented in the as-built report under s. NR 350.009 (2) (c), and all corrective actions, if applicable, are complete; and approval of a monitoring report that documents fulfillment of performance standards.

(c) The department shall review a proposed credit release schedule in accordance with s. 281.36 (3w) (b), Stats., based on the following considerations:

1. The level of financial assurances proposed for construction, maintenance, and monitoring of a mitigation project.

2. The level of risk associated with a proposed mitigation project design, including but not limited to the amount of engineered structures, extent of excavation, and invasive plant species considerations.

(d) If a preservation activity is proposed for an area or areas of a mitigation bank project, a credit release schedule that allows for the full release of credits after the site protection mechanism is recorded and the mitigation bank instrument is approved may be proposed for preservation areas of the mitigation bank.

(3) FINANCIAL ASSURANCE REQUIREMENTS. (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 ss. NR 350.007 (4) and 350.009 (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) 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.

(c) 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.

(d) The mitigation bank sponsor shall submit a proposal for financial assurances as part of the draft and final mitigation bank instrument. This proposal shall include an estimate of costs for construction, operation, maintenance, and monitoring.

(e) The department shall evaluate the proposed amount of financial assurances and may require an updated proposal in the subsequent mitigation bank instrument submittal or as supplemental information.

(f) 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 assurance shall remain in effect.

3. The financial assurances 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 assurances shall be payable to the "State of Wisconsin, Department of Natural Resources."

(g) 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.

(h) 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.

(i) 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.

(4) LONG-TERM PROTECTION OF MITIGATION BANK SITE. (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, preserved, or created wetland and any creditable uplands will not be destroyed or substantially degraded by any subsequent owner of or holder of interest in the property on which the bank site 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.

(5) LONG-TERM MANAGEMENT. (a) The department shall require a long-term management plan as part of a mitigation bank instrument under s. NR 350.007 (6).

(b) The long-term management plan must identify all of the following:

1. The party responsible for ownership and all long-term management and protection of the mitigation project site.
2. Any legal mechanisms required as part of the mitigation site's long-term management.
3. A description of planned long-term management needs and actions including a schedule of predicted activities.
4. An annual cost estimate to complete the long-term management needs and actions.
5. A description of the funding source or mechanism that will be used to pay for long-term management needs and actions, including the planned investment, forecasted fund growth, and a narrative describing the sustainability of the funds.

(c) A mitigation bank sponsor may choose to be responsible for the long-term management or they may propose to transfer the responsibility to a land stewardship entity, such as a public agency, non-governmental organization, or private land manager.

(d) The department may consider any of the following as viable long-term funding mechanisms:

1. Non-wasting endowment.
2. Legally established trusts.
3. Contractual agreements with future responsible parties.
4. Other legally established funding mechanisms, as appropriate.

(e) A mitigation bank sponsor may propose to transfer control and responsibility of the long-term management funding source to a land stewardship entity, such as a public agency, non-governmental

organization, or private land manager.

(6) PUBLIC NOTICE. (a) The department shall provide online public notification for a received prospectus.

(b) The department shall develop a public notice for each prospectus 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.

(7) 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 Bank Operation. (1) GENERAL. (a) 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.

(b) 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 include more than one compensation site in a mitigation bank instrument.

(c) 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.

(d) 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 350.009 (3) (i).

(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, seeding and planting, 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.
10. A credit release request, as specified in the project's compensation site plan.

(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) If the department determines that corrective actions are needed to bring the site into compliance with the compensation site plan, the department shall provide the mitigation bank sponsor a list of corrective actions to be completed 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 through email or mail after the department determines that construction and all corrective actions are complete.

(h) After the department issues a letter of compliance, the mitigation bank sponsor shall request the department to 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 350.007 (6) (i) are being met.

2. Identify trends in wetland functions at the site.

3. Identify the need for corrective actions.

(b) The department will evaluate the site against the established performance standards described in the project's approved compensation site plan in s. NR 350.007 (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) A minimum of 5 monitoring reports shall be required during the monitoring period and a mitigation bank sponsor may submit additional monitoring reports if performance standards are not met in the number of monitoring years as approved in the final mitigation bank instrument.

(h) Monitoring shall occur for the length of time specified in the approved compensation site plan under s. NR 350.007 (6) (k). The monitoring period for restoration, enhancement, or creation activities will be required for no fewer than five years for all wetland communities. Shrub and wooded wetland communities, and wetland types that are more difficult to restore, such as bog or fen wetlands, may require more than five years of monitoring to meet performance standards, become successfully established on a site, or both. The length of the required monitoring period for each vegetation community will be based on the performance standards developed in the approved compensation site plan. The Department may extend the length of the monitoring period if the site does not meet performance standards in the monitoring time frame listed in the approved compensation site plan.

(i) 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 by each vegetation community survey

method and the locations of monitoring wells.

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.
9. Any proposed credit releases, as outlined in the site's approved compensation site plan.

(j) 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 agreed upon in the mitigation bank instrument.

(k) At the end of the monitoring period, the department shall provide a final letter of compliance by email or mail if the department determines that the site is successful and established.

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

(4) CREDIT RELEASE REQUESTS AND APPROVAL. (a) As part of an as-built report under sub. (2) (c) and as part of a monitoring report under sub. (3) (h) a mitigation bank sponsor may submit a credit release to the department when performance standards have been achieved according to the mitigation bank instrument.

(b) A credit release request shall include all of the following:

1. Documentation that appropriate milestones and performance standards have been achieved, as described in s. NR 350.008 (2).
2. An explanation of any previous credit releases that have been granted to the mitigation bank, including the amount of credits released and when those credits were released.

(c) Within 45 days of receiving or within 30 days after a necessary site visit has been completed, the department shall provide a recommendation by email or mail to the U.S. army corps of engineers on whether or not to release credits. The Department may recommend releasing partial credit if the performance standards in question have only been achieved in part.

Note: Should the U.S. army corps of engineers' review of credit release requests extend beyond the stated timeline, the department's comments may be subsequently delayed in reaching a mitigation bank sponsor.

(5) ADAPTIVE MANAGEMENT AND INSTRUMENT MODIFICATION. (a) The mitigation bank sponsor may request to use the adaptive management plan described in s. NR 350.007 (6) in the event that the site or an area of the site is developing differently than designed and may adversely affect the success of the mitigation bank.

(b) Prior to completing adaptive management strategies that would result in wetland functions that are not comparable to those described in the mitigation bank's approved compensation site plan, such

as but not limited to filling, grading, exaction, or hydrologic manipulations, the mitigation bank sponsor shall provide all of the following information to the department:

1. The issue that requires an adaptive management strategy.
2. The adaptive strategy that will be used to rectify the issue, including when and how the adaptive management strategy will be implemented.
3. The expected outcome of the adaptive management strategy.

(c) If the adaptive management strategy involves activities such as but not limited to excavation or hydrologic manipulations, or will result in wetland functions that are not comparable to those described in the mitigation bank's approved compensation site plan, the department may require a mitigation bank instrument modification. If required, a mitigation bank instrument modification shall include all of the following:

1. Revised performance standards based on the anticipated adaptive management outcome.
2. Revised credit allocations based on the anticipated adaptive management outcome.
3. A revised credit release schedule based on the anticipated adaptive management outcome.
4. A revised long-term management plan based on the anticipated adaptive management outcome.

(d) The department's completion of a modified bank instrument review shall be dependent upon whether the modification qualifies as a standard or streamlined review.

(e) The department may use a streamlined review for the following instrument modifications:

1. A request for a greater or lesser amount of credits for a mitigation project.
2. A request for a change to a credit release schedule.
3. Any other request for a change that the department deems appropriate.

(f) The department shall complete a streamlined instrument modification review within 60 days of receipt of such a request. The department shall either recommend to approve the streamlined modification request, recommend to deny the streamlined modification request, or provide information to the mitigation bank sponsor explaining the information needed to make the streamlined modification request approvable.

(g) The department shall use a standard modification review process for all requests that do not meet the standards listed in s. NR 350.009 (5) (e).

(h) A standard instrument modification review shall follow the process outlined in s. NR 350.008 (1).

Note: As an interagency review team member, the department will review standard and streamlined instrument modification submittals according to the timelines stated above and will issue its recommendations to the U.S. army corps of engineers. Should the U.S. army corps of engineers' review

of these requests extend beyond the stated timelines, the department's comments may be subsequently delayed in reaching a mitigation bank sponsor.

(6) LONG-TERM MANAGEMENT. (a) The party responsible for the site's long-term management shall follow the long-term management plan per the approved compensation site plan described in s. NR 350.007 (6) to ensure the mitigation bank's long-term sustainability.

(b) The party responsible for the site's long-term management shall fund the long-term management plan per the approved compensation site plan described in s. NR 350.007 (6) to ensure the mitigation bank's long-term sustainability.

NR 350.010. 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, remediation or adaptive management activities, 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 June 30. If the department determines that it is necessary to revise credit fees based on a full cost accounting of a wetland mitigation project, the department shall set the new prices on January 1 of the following calendar year and will post the changes on the in-lieu fee program website. The department shall provide an annual report to the U.S. army corps of engineers for each fiscal year that includes justification for 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 unless the U.S. army corps of engineers approves a comparable legal instrument.

(b) The department shall place a restrictive covenant on mitigation sites owned by the department unless a comparable site protection mechanism is already or is planned to be recorded on the property, as approved by the U.S. army corps of engineers.

(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 350.011. 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 350.008 (4) shall apply to a permittee-responsible mitigation project.

(3) **FINANCIAL ASSURANCES.** The requirements for financial assurances in s. NR 350.008 (3) shall apply to a permittee-responsible mitigation project.

(4) **DEVELOPMENT.** (a) An applicant shall prepare a compensation site plan, as described in s. NR 350.007 (4) to (6) of this chapter, excluding s. NR 350.007 (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). The required monitoring period will be no fewer than five years for herbaceous wetland communities. Shrub and wooded wetland communities may require more than five years of monitoring to meet performance standards, become successfully established on a site, or both. 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.

(5) **LONG-TERM MANAGEMENT.** The requirements for long-term management in s. NR 350.008 (5) shall apply to a permittee-responsible mitigation project.

NR 350.012 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 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 June 23, 2021.

Dated at Madison, Wisconsin _____.

STATE OF Wisconsin DNR

DEPARTMENT OF NATURAL RESOURCES

BY _____

For Preston D. Cole, Secretary