

DATE: December 3, 2008

TO: Pat Henderson – AD/8

FROM: Tim Andryk – LS/5

SUBJECT: Prohibition vs. Restriction of Public Access on Stewardship Lands

At the October 29, 2008 meeting of the Stewardship Fund Citizen Advisory Committee (CAC), I was requested to provide an opinion on whether a prohibition or a restriction of public access for a nature based outdoor activity, (NBOA), requires approval of the Natural Resources Board (NRB) as “necessary” in order to retain eligibility for Stewardship funding under s. 23.0916(2)(b), Stats. The Department is proceeding to clarify this issue by rule and has asked for CAC’s input on it. However, pursuant to CAC’s request, I address the alternative interpretations below.

#### STATUTE

Sec. 23.0916(2)(b), Stats., states:

(b). The person receiving the stewardship grant may prohibit public access for one or more nature-based outdoor activities, if the natural resources board determines that it is necessary to do so in order to do any of the following:

1. Protect public safety.
2. Protect a unique plant or animal community.
3. Accommodate usership patterns, as defined by rule by the department.

Sec. 23.0916(1)(b), Stats., states:

(b). “Nature-based outdoor activity” means hunting, fishing, trapping, hiking, cross-country skiing, and any other nature-based outdoor activity designated by rule by the department for purposes of this section.

According to the above statutes, a grantee may prohibit public access for one of the 5 NBOA’s (or additional NBOA’s specified by rule) on a property and retain stewardship funding eligibility for that property if the prohibition is deemed necessary by the NRB to accomplish the above 3 exceptions.

#### QUESTION PRESENTED

If a type of NBOA is prohibited or a NBOA is restricted (such as no spring turkey hunting, no trout fishing, no trapping for bobcats, no hiking in the spring, no skate type cross country skiing), are those restrictions considered prohibitions that need to be approved by the NRB in order to retain stewardship funding?

## ALTERNATIVE ANSWERS

No, NRB approval is required to “prohibit” a NBOA, which means the entire activity needs to be prohibited, not merely restricted, to require NRB approval for Stewardship fund eligibility.

Yes, NBOA is broadly defined and restricting or prohibiting a type of a NBOA is a prohibition of an activity that requires NRB approval.

## ARGUMENTS

### PROHIBIT DOES NOT MEAN RESTRICT

The statute uses the term “prohibit” a NBOA, such as hunting, not “restrict”. “Prohibit” is not defined in the statute, so the term is construed according to its common and accepted usage. Sec. 990.01(1), Stats. The common and ordinary meaning of “prohibit” is to forbid, prevent, preclude or ban. Webster’s Collegiate Dictionary, 10<sup>th</sup> edition. The common and ordinary meaning of “restrict” means to restrain or control an activity, but not ban it altogether. Consequently, the statute requires NRB approval when prohibiting all hunting, but not when restricting hunting by allowing some hunting but not all hunting. The statute seems to recognize that reasonable restrictions should be allowable, without requiring NRB approval.

### PROHIBITING A NBOA IS DIFFERENT THAN ALLOWING SOME TYPES OR SUBCATEGORIES OF A NBOA, BUT NOT OTHERS.

The statute requires NRB approval to prohibit a NBOA, and it defines a NBOA as 5 different activities, allowing for more activities to be added by rule. Consequently, the activity itself, such as hunting, needs to be prohibited altogether to trigger the NRB approval requirement. Prohibiting some of the activity or subcategories of the activity (such as spring turkey hunting) while allowing others (such as deer hunting) does not require NRB approval to retain eligibility for Stewardship grants.

### NBOA IS BROAD, PROHIBITING TYPES OF A NBOA IS A PROHIBITION

The Statute defines NBOA’s broadly, referring to 5 general types of activities and allowing more to be added by rule. Consequently, prohibiting a type of an NBOA, such as spring turkey hunting, is a hunting prohibition that needs to be approved by the NRB in order to retain stewardship eligibility.

### RESTRICTIONS CAN BE PROHIBITIONS

If a NBOA is restricted in a manner such that the major or most important part of it is not allowed, that is basically a prohibition of the activity. For instance if hunting or hiking are allowed only during a short period of time, so that the amount of hunting or hiking being allowed is not significant when compared to what can be allowed, these NBOA’s are being prohibited. Similarly, if cross country skiing is allowed only on groomed trails, and rarely are there groomed

trails on a property, this NBOA is essentially being prohibited and thus the prohibition needs to be approved by the NRB.

## CONCLUSION

The statute is not altogether clear, which is one of the reasons it calls for rules to clarify it. Although the arguments seem to be a little stronger for NRB approval when prohibiting a NBOA entirely. However, there are arguments for both sides and reasonable minds may differ. Thus, it is not possible to predict with certainty what a judge would do if the question came before a judge. Consequently, clarifying the statute by rule (as suggested by its legislation) is being pursued by the Department.

It seems unreasonable to interpret the statute to require NRB approval of any restriction or prohibition of a NBOA. But it also seems unreasonable to interpret the statute to allow many restrictions, without NRB approval, so that the amount of the NBOA being allowed is insignificant when compared to the NBOA activities that can be allowed. The answer is likely somewhere in-between, which is the purpose of the rule process to find that middle ground.