



State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

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June 11, 2007

The Honorable Mark Miller
Room 409 South
State Capitol
P.O. Box 7882
Madison, WI 53707

The Honorable Scott Gunderson
Room 7 West
State Capitol
P.O. Box 8952
Madison, WI 53708

Subject: WDNR Biennial Report on the Status of Wisconsin's Wetland Compensatory Mitigation Program (2002-2006)

Dear Senator Miller and Representative Gunderson:

The Department of Natural Resources is pleased to convey to the Legislature the attached report of current data on the status and activities for wetland compensatory mitigation. This is our second biennial report as required by statute. Much of the information included in this report can also be found on the Department's website:

<http://www.dnr.state.wi.us/org/water/fhp/wetlands/mitigation/index.shtml>.

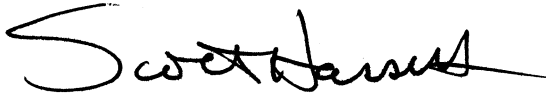
Mitigation activities began in 2002, when the Department developed administrative rules to implement 1999 WI Act 147. Through the end of 2006, 55 development projects involving wetland fill were able to proceed using compensatory mitigation.

Our report highlights the following activities and accomplishments related to wetland compensatory mitigation:

- All areas of Wisconsin are currently serviced by at least one mitigation bank, and 70% of all approved mitigation proposals resulted in the purchase of bank credits.
- Even though compensating for all permitted wetland losses is not a goal of the regulatory program, 13% of all permitted wetland fill from 2002 to 2006 included compensatory mitigation.
- Training on mitigation rules and guidelines for environmental consultants and Department staff is continuously provided.
- The Department works closely with the US Army Corps of Engineers to maintain consistent guidelines for compensatory mitigation in Wisconsin, including commenting on the new federal draft rules on compensatory mitigation.

Overall, we find that voluntary mitigation is working and we are satisfied that it is a positive addition to the regulatory decision-making process. In the next two years, we will continue to maintain an efficient application process while also evaluating the wetland functions provided by project-specific sites and mitigation banks.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott Hassett". The signature is fluid and cursive, with a large initial "S" and a long horizontal stroke at the end.

Scott Hassett, Secretary
Department of Natural Resources

cc: Senator Fred Risser
Representative Michael Huebsch

Status of Wisconsin's Wetland Compensatory Mitigation Program (2002-2006)

*Biennial Report from the Wisconsin Department of Natural Resources
to the Wisconsin State Legislature*

Purpose of this Report

The Legislature's wetland mitigation bill of 2000 added to the state's wetland regulatory process the concept of *wetland compensatory mitigation*—restoring, enhancing, or creating wetlands as compensation for permitted adverse impacts to wetlands.

This report provides data on the status and activities of the resulting wetland compensatory mitigation program through December 2006, emphasizing accomplishments and information from the past two years. This is the second status report on the wetland compensatory mitigation program; the first status report was submitted in 2005. Key information from this report can also be found on the program's website at:

<http://www.dnr.state.wi.us/org/water/fhp/wetlands/mitigation/index.shtml>, where the data is updated quarterly.

Introduction: Wisconsin Wetland Mitigation Law

By unanimous vote, both houses of the Legislature passed companion bills AB 859 and SB 447 in May of 2000, granting authority to the Department to consider wetland compensatory mitigation in its wetland permitting decision process. Compensatory mitigation involves wetland restoration, enhancement, or creation to "compensate" for wetland loss either through projects completed by the applicant or through the purchase of credits from pre-approved mitigation banks. On May 10, 2000, Governor Thompson signed into law, 1999 WI Act 147, which created s. 281.37, Wis. Stats.

Following substantial public and Legislative review, rules required by the statute went into effect on February 1, 2002. The new rules involved revisions to NR 103, the state wetland water quality standards, and a new administrative code, NR 350, which sets requirements for mitigation projects.

The January 2001 report of the National Academy of Sciences' National Research Council entitled *Compensating for Wetland Losses under the Clean Water Act* outlined ecological and administrative pitfalls made by other states and the federal government in designing and implementing their mitigation programs. Mitigation programs can be expensive to run and often result in compensating losses of high-quality, highly-functioning or rare wetland types with degraded, poorly-functioning wetlands. In many other states, wetland compensatory mitigation is a requirement for each wetland permit decision. In contrast, our state decided that mitigation should be a tool to be considered in certain circumstances to improve the regulatory decision-

making process. Wisconsin law does not require applicants to replace every acre of wetland that is impacted, nor does it allow any wetland to be destroyed as long as the applicant attempts to replace it elsewhere. Our wetland mitigation law maintains the important steps of avoiding and minimizing wetland impacts where practicable. In Wisconsin, compensatory mitigation adds flexibility for the regulated as well as the regulator, especially in cases where a project impacts a small acreage of low quality wetlands. Most mitigation applicants meet their mitigation obligation at mitigation banks.

Recent Accomplishments of the Mitigation Program

Received EPA Grant to improve program

The Department applied for and received a US Environmental Protection Agency (EPA) State Wetland Program Development grant to hire a two-year LTE position to improve and manage the wetland compensatory mitigation program. During 2005 and 2006, this position improved the wetland mitigation database and website, conducted site inspections of mitigation projects (both individual sites and bank sites), reviewed mitigation proposals and processed conservation easements and financial assurances.

Continued Consultant and Department Staff Training

The Department organized a free one-day training workshop on November 18, 2005. The focus of the Department's second consultant workshop was to review the information needed to develop a complete compensatory mitigation proposal. There were a total of seven speakers: six staff from the Department and one staff member from the US Army Corps of Engineers (ACOE). A total of 52 people attended the training, including 42 environmental consultants. Of those participants, 29 submitted evaluation forms. Overall, the evaluation forms indicated that the workshop material was clearly presented by the speakers and that the information would be useful in the participants' work activities. Department mitigation experts also provide training to internal staff on a regular basis at staff quarterly meetings.

Commented on Proposed New Federal Rules on Compensatory Mitigation

On June 23, 2006, the Department sent comments on the EPA and ACOE proposed federal rules on compensatory mitigation. (Please see Appendix A for a copy of the comments.) While the Department found that the proposed rules were generally consistent with Wisconsin's mitigation guidelines, many suggestions were given to improve the rules. The new federal compensatory mitigation rules have not yet been finalized. Once they are, the Department will work with federal agencies to review the new rules and determine whether the 2002 document *Guidelines for Wetland Compensatory Mitigation in Wisconsin* may need to be revised.

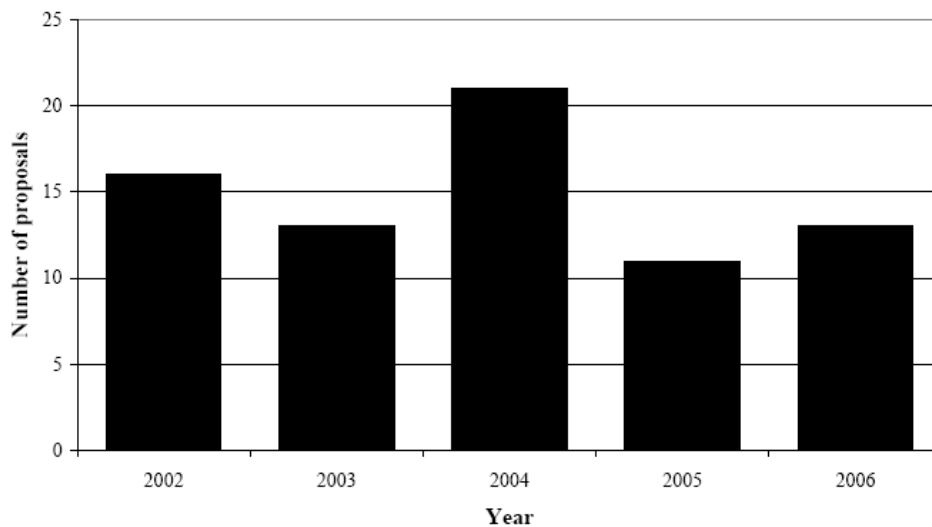
Mitigation Proposals Received Since 2002

From February 2002 to December 2006, the Department approved 55 water quality certification applications that included compensatory mitigation. Table 1 shows about 70% of approved mitigation proposals resulted in the purchase of bank credits.

Table 1: Total Mitigation Applications- February 2002 to December 2006

Mitigation Application	Number of proposals
Approved Project-Specific Mitigation	17
Approved Bank Credit Purchase	38
Subtotal	55
Application Review is Pending	10
Application Withdrawn	9
Total	74

Figure 1 provides information about the number of mitigation proposals received each year by the central office mitigation specialist.

Figure 1: Number of wetland compensatory mitigation proposals received each year

Mitigation Proposals Review Time in 2005 and 2006

We examined data on the time involved to review mitigation proposals as part of a water quality certification application. A central office mitigation specialist conducts the mitigation review, while a regional water management specialist reviews the water quality certification application and alternatives analysis. However, the mitigation specialist cannot begin review of the mitigation proposal until the water management specialist makes a preliminary decision that wetland compensatory mitigation can be considered under NR 103.

In 2005 and 2006, the average time to process a mitigation proposal from receipt of a complete mitigation application to an approval by the Department's wetland ecologist is one day. In those same years, the average time to process a mitigation proposal from receipt of a complete

mitigation plan to an approval by the Department's mitigation specialist is 33 days. Even if the mitigation plan is complete, legal documents are required for the application to be considered complete. The time difference of one versus 33 days is the average length of time it takes for applicants to submit these legal documents.

What constitutes a complete mitigation plan depends on what mitigation path is proposed by the applicant. Different plan elements are required for the three mitigation paths of project-specific on-site, project-specific off-site and off-site bank credits.

All documentation in the mitigation plan must be of sufficient quality and clarity that it is possible for the Department to prepare a list of specific revisions that must be made for the mitigation application to be approved. The mitigation application can then be approved once the revisions have been made and the finalized legal documents (including the conservation easement and financial assurance, or the affidavit of bank credit purchase) have been received. The elements of a complete mitigation application are shown in table 2.

Table 2: Elements of a Complete Mitigation Application

Project-Specific On-site	Project-Specific Off-site	Off-site Bank Credits
<ol style="list-style-type: none"> 1. Mitigation Summary Sheet 2. Compensation Site Plan 3. Conservation Easement 4. Financial Assurance 	<ol style="list-style-type: none"> 1. Mitigation Summary Sheet 2. Documentation of No On-Site Opportunity 3. Compensation Site Plan 4. Conservation Easement 5. Financial Assurance 	<ol style="list-style-type: none"> 1. Mitigation Summary Sheet 2. Documentation of No On-Site Opportunity 3. Bank Purchase Affidavit

In 2005 and 2006, the total time to receive a complete mitigation plan ranges from 0 days (when the first submittal is a complete plan) to over a year, with an average of about 4 months (123 days).

These data show that applicants and consultants who are experienced in preparing mitigation proposals and who follow the mitigation guidelines closely are more successful in getting their mitigation plan approved quickly. When applicants and their consultants submit incomplete packages the mitigation review process slows greatly. It also slows the process when applicants do not promptly submit finalized documents after being told how to complete their application. While providing training to consultants on how to prepare mitigation proposals can help create a more efficient process, many consultants also require experience developing mitigation plans before there is an improvement in the quality and completeness of application submittals.

Wetland Loss since 2002

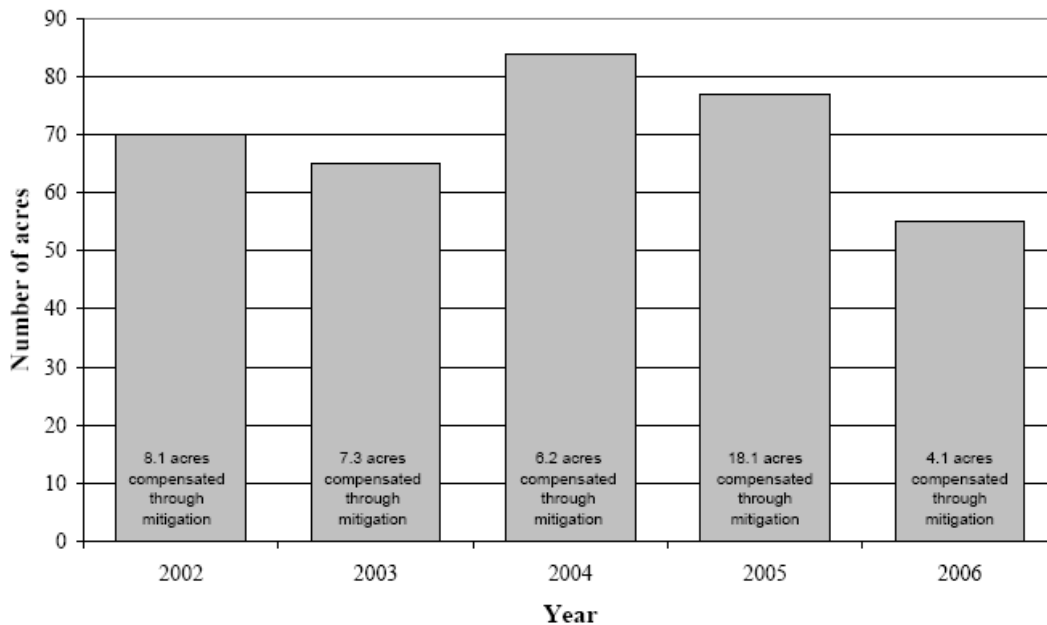
Table 3 shows that most authorized compensatory mitigation projects (87%) involve wetland fills less than one acre.

Table 3: Acres impacted by approved applications that included a compensatory mitigation proposal (February 2002 to December 2006)

Type of mitigation approved	Total wetland acres lost	Average acreage lost per proposal	Range of wetland impact acreage
Project-specific Mitigation	23.2	1.4	0.07 – 14.3
Bank Mitigation	20.6	0.5	0.01 – 2.4
Total Mitigation Acres	43.8	0.8	

Figure 2 provides data on wetland acres involved in applications for all water quality certification decisions, including Chapter 30 decisions that also impacted wetlands. Approximately 350 acres of wetland fill were permitted from 2002 to 2006. Compensatory mitigation was proposed for about 13% of total permitted acres of wetland fill.

Figure 2: Wetland acres filled through approved wetland permits



Compensation Acreage

Mitigation projects usually require compensation at ratios of 1.5:1, though the rules allow for 1:1 compensation. Two-thirds of bank credit purchases are approved with a compensation ratio of

1:1. A total of 28 credits have been purchased from mitigation banks as a result of the state program between 2002 and 2006.

If all project-specific mitigation sites (i.e., not bank sites) approved between 2002 and 2006 are successful, then we can expect a total of 49.7 acres of wetland to be restored and 4.6 acres of wetland to be created. We can also expect 5.4 acres of wetland to be enhanced, and 44.6 acres adjacent upland to be enhanced. However, we cannot know at this time what these acreages ultimately will be. Most mitigation projects are still in the construction stage or have only been monitored for one to three growing season(s) post-construction. It can be difficult to predict what ecological community will result from a wetland restoration or creation, and so we cannot report what the final acreage of wetlands restored or created is until monitoring periods have ended. Mitigation projects are typically formally delineated for wetlands at the end of the monitoring period, which can last from five to ten years. Understanding these risks, several sites have planned to restore or create a greater sized area than the minimum required under NR 350. Thus far, preliminary findings from some sites already indicate that actual acres restored or created will be smaller than planned acreages.

Wetland Compensatory Mitigation Banks

By law, when an applicant does not have feasible opportunities for on-site restoration of wetlands (defined by rule as within ½ mile of the wetland loss), that applicant may opt to purchase credits from a pre-authorized bank. Banks are established through a process that is separate from the wetland regulatory decisions. Bank sponsors can develop bank sites by restoring, enhancing and/or creating wetlands and receiving agency approval from the interagency Mitigation Bank Review Team (DNR, ACOE, EPA, Natural Resources Conservation Service and US Fish and Wildlife Service) to be in the business as suppliers of mitigation credits. These credits are accrued by completing wetland projects successfully, as defined by mutually agreed upon criteria in the site plan. “Debits” occur when an applicant for a wetland fill permit purchases credits from a bank at a price per acre determined by the bank sponsor. Bank sponsors have included private companies, non-profit organizations and county governments.

Banks Established Prior to WI Act 147

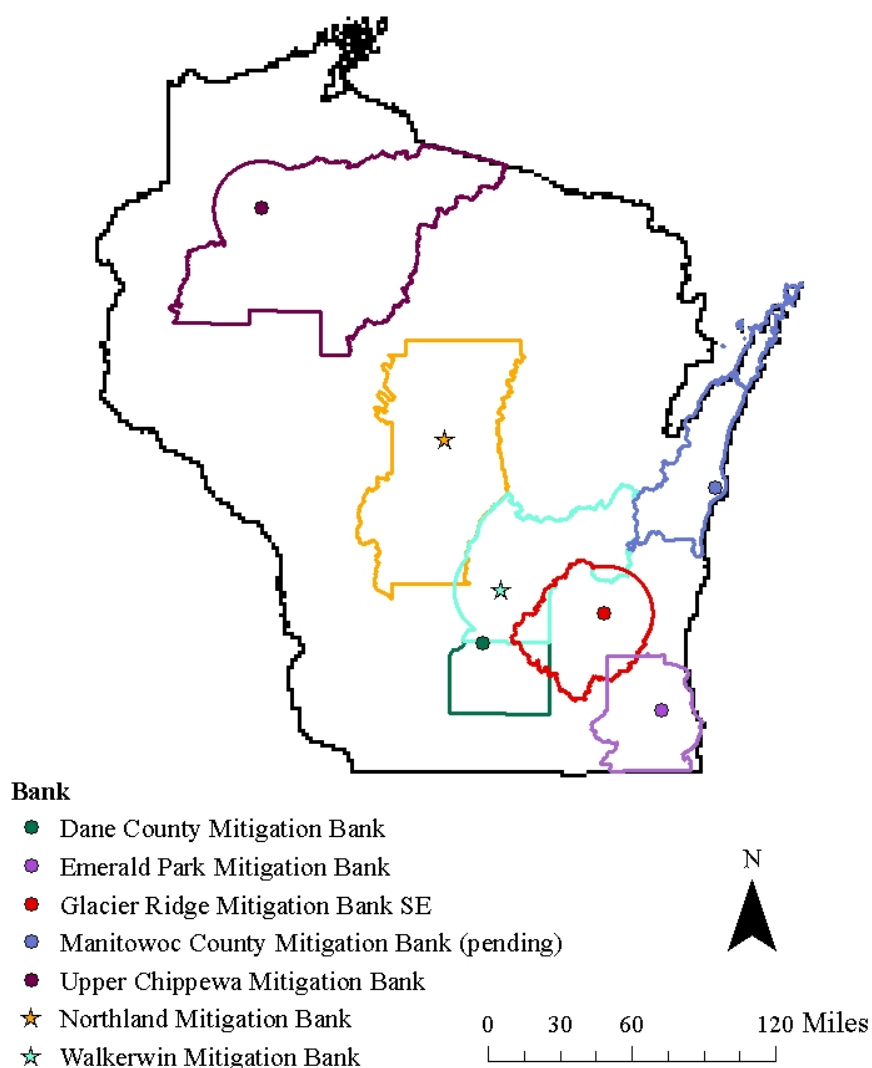
The ACOE approved four banks in Wisconsin prior to passage of the 2000 state law. One of these banks is the bank for Wisconsin DOT that now includes over 30 individual sites across the state. All the other banks only include one site and had all their credits released by ACOE:

1. A bank site for Dane County near Lodi that is only used by the county and other municipalities in the county for public projects. By the end of 2006, this bank had 21.87 credits remaining out of the 46.93 credits approved.
2. Walkerwin Bank in Columbia County operated by the Wisconsin Waterfowl Association. By the end of 2006, this bank had 1.49 credits remaining out of the 97.75 credits approved.
3. Northland Cranberry Bank in Wood County operated by Legacy Bogs, Inc. By the end of 2006, this bank had 112.61 credits remaining out of the 130.15 credits approved.

The Department maintains a registry of approved banks with credits for sale (available at <http://www.dnr.state.wi.us/org/water/fhp/wetlands/mitigation/mitigationbanks.shtml>).

NR 350 recognized that the latter two private banks were operating in good faith before the state rules went into effect and thus should be “grandfathered” to allow them to continue to sell credits on a statewide basis. New banks are allowed to sell credits within the same county as the bank, within 20 miles of the bank site, and anywhere in the major water basin or Geographic Management Unit (GMU) of the bank. The NR 350 service areas of private and county mitigation banks are depicted in Figure 3.

Figure 3: Private and County Wetland Mitigation Bank NR 350 Service Areas



The two banks symbolized by stars are the grandfathered banks that may sell statewide.
WDOT bank sites are not shown.

A concept for grandfathering the two pre-existing banks was recommended by the Senate Committee on Environmental Resources. As such, the rules required these grandfathered banks to sign a Memorandum of Understanding (MOU) with the Department that allows them to sell statewide, but requires them to facilitate wetland restoration projects in the GMU's of their customers. Both banks are in compliance with their respective MOUs, and all areas of Wisconsin are currently serviced by at least one mitigation bank.

Three New Banks Approved

Since February 2002, DNR and the interagency Mitigation Bank Review Team (MBRT) approved three banks. Only one of these wetland mitigation banks (Upper Chippewa Bank) has completed construction of the bank site and has received approval to sell credits.

1. Upper Chippewa located near Hayward (total of 41.5 estimated mitigation credits).
This is a general use bank (credits available for the public). By the end of 2006, Upper Chippewa has had 9.48 credits released by the MBRT and has sold 4.87 of those credits. This bank has a seven-year monitoring period; 2005 was the first year of monitoring and 2006 was the second year of monitoring. The first monitoring report was found by the MBRT to be out of compliance; the second monitoring report is currently under review by the MBRT.
2. Glacier Ridge near Horicon (total of 42 estimated mitigation credits).
This is a single client bank (credits only available for an affiliated Veolia Environmental Services Company) consisting of two sites: a Southeast site (23.88 credits) and a Northeast site (18.39 credits). The bank sponsor has informed the MBRT that construction of the Southeast site was completed in 2006. Twenty percent of the credits at the Southeast site will be released after the MBRT receives the as-built report and finalized financial assurance. This is anticipated to happen in early 2007. The bank sponsor has not yet begun construction at the Northeast site, and construction is not scheduled to begin until approximately 2010.
3. Emerald Park near Mukwonago (total of 43 estimated mitigation credits).
This is a general use bank. Most of the construction and planting for this site was completed in 2006. It is anticipated that construction will be completed at this site in 2007. This bank will have 20% of its credits released once the MBRT receives the as-built report and finalized financial assurance and conservation easement.

Four Banks Under Review

The Department is currently reviewing two active proposals for new banks.

1. Manitowoc County Mitigation Bank near Manitowoc
The approval of this bank and signing of the bank document will occur as soon as the finalized financial assurance and conservation easement are received by the MBRT. This is anticipated to occur in early 2007. Since site construction is also anticipated to begin in 2007, the bank's service area is shown in Figure 3.
2. City of Superior Mitigation Bank in Douglas County
A preliminary bank document was submitted in 2006. Revision of this document is presently occurring. An initial bank compensation site plan was submitted in early 2007.

In addition, two prospectuses were received in late 2006. One prospectus was received for a proposed wetland restoration in Douglas County on September 26, 2006. The MBRT met on September 25, 2006 to view the project site and made a preliminary decision that the project has potential to be an acceptable mitigation bank. The MBRT has not yet received a draft bank document or compensation site plan for this project. A second bank prospectus was received on November 6, 2006 for a proposed wetland enhancement project in Washburn County. The MBRT will meet to look at the proposed project site in spring 2007.

Wetland Compensatory Mitigation Compliance

Approved wetland mitigation banks and project-specific sites all have monitoring periods that last from three to ten years, depending on the project's size and goals. During that period, bank and project sponsors are responsible for implementing their monitoring and maintenance plans and submitting a pre-determined number of monitoring reports to the Department. The monitoring report submitted at the end of the final year in the monitoring period must demonstrate that all of the performance standards (quantitative success criteria determined prior to project implementation) have been met.

The Department has made it a high priority to monitor compliance of mitigation banks and project-specific sites. In the mitigation database, staff track when monitoring reports are due, as well as when they are received. Reminder letters are sent to project sponsors when monitoring reports are not received on time. By the spring 2006, a total of 16 monitoring reports were due to the Department for all bank and individual mitigation sites. All of those reports were received, although most were received late. The 11 first-year monitoring reports were received an average of 115 days late, and the 5 second-year monitoring reports were received an average of 50 days late. Three letters were sent out by Department staff to project sponsors whose monitoring reports were particularly late. Preliminary results indicate that reports due in late 2006 or early 2007 were generally received in a more timely fashion.

A wetland ecologist reviews every monitoring report received for compliance with NR 350.09 and completeness according to requirements outlined in individual compensation site plans. Several monitoring reports received in either 2005 or 2006 were incomplete or out-of-compliance with their permit requirements. Department staff sent five letters during this time period to project or bank sponsors outlining major problems or omissions within received monitoring reports.

Site inspections are important to verify that information found in a monitoring report is accurate. In 2005 and 2006, the Department conducted a total of five post-construction inspections of the four mitigation banks with available credits. In that same time period, Department staff also conducted 26 post-construction inspections of the 17 project-specific mitigation sites. Of those inspections, 12 were as-built inspections (the first agency inspection after the site was constructed). Only one bank, the Dane County Mitigation Bank, was not visited during this two

year period. One project specific site was not visited in either 2005 or 2006, because agency approval of that site was received prior to 2005 but by 2006 had not yet begun construction.

While the Department is hopeful that inspecting each mitigation site every year will not be necessary in the long run, inspection results thus far indicate that annual inspections are warranted. During site inspections, Department staff noted many problems with exotic or invasive vegetation colonizing mitigation sites. Only a few mitigation sites were properly implementing maintenance plans to address this problem, and many monitoring reports had understated or inadequately addressed the extent of exotic plant invasions found on-site. Most mitigation sites have performance standards limiting the acceptable amount of invasive or exotic plant species that can be present within the site, and early detection and removal of such species is critical for mitigation site success. Thus, the Department needs to take an active role in inspecting sites and notifying project sponsors of problems. In 2005 or 2006, the Department sent a total of nine letters to bank or project sponsors notifying them of problems noted during a site inspection. Most of these problems were related to invasive plant species, while other problems involved improper site construction or sponsor's planting exotic plant species not approved in the compensation site plan.

In order to improve site compliance, the mitigation specialist who reviewed project proposals in 2005 and 2006 required maintenance plans and monitoring plans to be developed in greater detail to assure that the project sponsors promptly respond to site problems.

Program Goals for 2007 and 2008

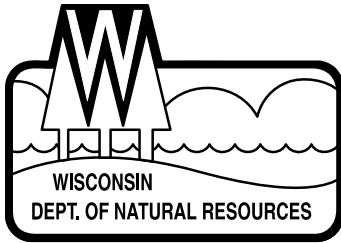
In 2006, the Department applied for and received a USEPA State Wetland Program Development grant to implement a two-year study of Wisconsin's wetland compensatory mitigation program. In addition to implementing the mitigation program and monitoring compliance with mitigation conditions of water quality certification permits, the Department has developed new goals for the wetland mitigation program that focus on completing and delivering the products of this grant.

The three new goals of the compensatory mitigation program for 2007 and 2008 are to:

1. Develop guidelines for using a watershed approach in evaluation of mitigation proposals.
2. Analyze quantitative monitoring data submitted by project proponents and collected from other wetland restoration projects to draw conclusions about the performance of project design elements (such as landscape position, buffer size, restoration technique, maintenance effort, etc).
3. Compare functional assessment tools used in site evaluation.

Achievement of these goals will improve the quality of future wetland restoration projects by providing greater assurance of compensating lost wetland functions and maintaining wetland diversity and habitat connectivity within watersheds.

APPENDIX A



State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

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June 23, 2006

USEPA Docket Center
Attention: Docket Number EPA-HQ-OW-2006-0020
1200 Pennsylvania Ave., NW
Washington, DC 20460

Subject: Comments on proposed rule on Compensatory Mitigation for Losses of Aquatic Resources, Docket # EPA-HQ-OW-2006-0020

Thank you for the opportunity to comment on the proposed rule. Wisconsin has a strong tradition of wetland protection and only recently developed wetland compensatory mitigation laws, rules and guidelines. Our compensatory mitigation program recognizes the need to avoid and minimize harm to wetlands, to replace wetland functions and to enable fair and common sense regulatory decisions.

The "Guidelines for Wetland Compensatory Mitigation in Wisconsin" is a document developed to guide regulatory agency personnel, mitigation bank sponsors, permit applicants and others in meeting wetland compensatory mitigation requirements in Wisconsin. These guidelines were written in 2002 by a committee made up of WDNR, USACE-St. Paul District, USEPA-Region V, and US Fish and Wildlife, US Natural Resources Conservation Service and representatives of the regulated community and non-governmental organizations. A Memorandum of Agreement among agencies dictates that the Guidelines be followed when reviewing wetland compensatory mitigation proposals in Wisconsin. We think that the proposed federal rules are generally consistent with our mitigation guidelines.

We are pleased that the rule makes progress toward implementing some of the recommendations of the National Research Council's 2001 Report entitled "Compensating for Wetland Losses under the Clean Water Act." Some commendable components of the rule include emphasizing the avoid, minimize, compensate sequence and requiring long-term management plans. However, our comments also highlight sections of the proposed rules that should be improved to ensure that mitigation projects adequately replace lost ecological functions. Several definitions need to be clarified, and more language needs to be added to discourage out-of-kind projects and assure adequate enforcement of mitigation permit conditions.

We offer the following recommendations and comments on the proposed rule.

Issues the EPA and Corps Requested Comments On:

- We recommend that EPA/Corps include a regulatory provision that requires permittees to obtain permission from or notify the district engineer prior to canceling financial assurances or allowing them to lapse. 120 days is an appropriate time frame for advance notification.

Comments on Specific Provisions:

s.332.1(c) Sequencing. Comment: We are pleased to see that there is no change in the avoid-minimize-compensate sequence. This sequence is essential for maintaining a strong wetland protection program.

s.332.2 Definition of “In-Kind.” Comment: This definition is not precise enough and allows too much flexibility. Our guidelines define “in-kind replacement” as “wetland loss replaced with wetland from a compensation project of the same or similar plant community type.” Otherwise, we recommend that the “or” be stricken from the proposed definition, so the definition would read “a resource type that is structurally and functionally similar to the impacted resource type.”

s.332.2 Definition of “Interagency Review Team (IRT).” Comment: We request that interagency groups that review mitigation bank sites retain the name “Mitigation Bank Review Team (MBRT).” We feel that this name is more specific to the purpose of these groups and is already written in our state’s administrative code for mitigation.

s.332.2 Definition of “On-site.” Comment: This definition includes the word “near,” but does not define what “near” is. We recommend defining a particular distance to be “on-site,” or at least clarifying that purchasing bank credits is not an “on-site” activity. In our state, we define “on-site” to mean “a compensation site located within one-half mile of the impacted wetland.” If the EPA/Corps wants to retain more flexibility, then we recommend that on-site projects must be “no more than two miles from the impacted wetland,” or that “credits from a mitigation bank may only be considered ‘on-site’ if the bank is located within one-half mile from the impacted wetland.”

s.332.2 Definition of “Watershed plan.” Comment: This definition includes many different types of plans including SAMP, ADID and watershed management plans – these do not necessarily provide a basis for making decisions on whether compensatory mitigation will compensate for lost aquatic functions. Language on watershed plans includes “consistent with” or “using the principles of” a watershed approach. This definition needs further clarification.

s.332.3(b) Location and type of compensatory mitigation. Comment: We find this section to be unclear in describing the decision tree that must be followed to select the type of compensatory mitigation. While it is stated that on-site and in-kind mitigation is preferred, this is buried and we strongly recommend that this section be reworded and reorganized so that the preferred sequence is clear. As written, this provision implies that purchasing bank credits is the preferred type of compensatory mitigation. We think that permittees need to look on-site first in order to maximize the potential to replace lost functions, values and services. S. 332.2(b)(1) should be last, and should read “where project impacts are located within the service area of an approved mitigation bank, and the mitigation bank has credits available for the type of resource impacted, the project’s compensatory mitigation requirements may be met by the purchase of an appropriate

number of credits from the mitigation bank *if the permittee has shown that there is no suitable on-site opportunity.*”

s.332.3(b) (4) Comment: If not using a watershed approach, on-site and in-kind are “considered.” If not feasible, there is the opportunity to compensate off-site and/or out-of-kind. We believe that some types of out-of-kind replacement should never be allowed, especially replacing wetland impacts with a stream mitigation project or replacing the loss of any vegetated wetland community with a pond or deep water habitat.

s.332.3(b) (4) Comment: We support locating compensation where it is most likely to successfully replace lost wetland functions, services and values and considering habitat diversity, connectivity and hydrology sources.

s.332.3(d) Site selection. Comment: We think these site selection criteria are well defined and appropriate.

s. 332.3(e) Mitigation type. Comment: This provision should provide more details on what types of mitigation activities are preferred. It should be stated that restoration (re-establishment) is the preferred compensation technique, and that creation (establishment) is rarely acceptable. The creation of ponds or deepwater habitats as compensation should also be discouraged. No mitigation credit should be given for single-function wetland-like facilities such as stormwater or wastewater treatment ponds.

s.332.3(f) Amount of compensatory mitigation. Comment: Functional assessment methods should not be used to justify less than a 1:1 mitigation ratio. In no situation should less than 1:1 acreage or linear foot replacement ratio be approved. One-to-one replacements may be appropriate if the mitigation activity is restoration, but much higher credit ratios (at least 4:1) are needed if the mitigation activity is creation or enhancement.

s.332.3(g) Use of mitigation banks. Comment: Mitigation bank credit for after-the-fact permits should specify that banks should not be used to compensate for after-the-fact permits until all appropriate federal, state and local enforcement conditions are met.

s.332.3(i) Buffers. Comment: Buffers should be mandatory for all mitigation projects. Buffers are essential for protecting newly re-established wetlands from degradation resulting from inputs of sediment and nutrients. Buffers can also provide additional upland habitat critical to many wetland-dependent species.

s.332.3(j) Relationship to other Federal, Tribal, State, and local programs. Comments: We agree that projects undertaken with federal funds, such as Wetland Reserve Program, should not be used to generate mitigation credits.

s.332.3(n) Financial assurances. Comment: Alternate mechanisms should not be accepted – ie, commitment from government agency – since local government changes can nullify or modify these commitments.

s. 332.4(b) Public review and comment. Comment: Including compensatory mitigation requirements in the application implies that avoidance and minimization have occurred to the maximum extent. Please clarify whether projects will have to be public noticed again if modifications to the original wetland fill plan occur.

s.332.4(c) Mitigation plan. Comment: This provision should state that the permittee needs to submit a draft mitigation plan to not only the Corps but also to other appropriate federal, state or local government agencies.

s.332.4(c)(6) Determination of credits. Comment: Applicants need a basis for credit determination – this rule does not establish a template for how many credits will be needed and how they are calculated for different mitigation approaches.

s.332.4(c)(7) Mitigation work plan. Comment: These requirements are well described.

s.332.4(c)(11) Long-term management plan. Comment: This is a good requirement.

s.332.6 Monitoring. Comment: The only circumstance where we anticipate that monitoring would not be practicable would be if the permittee purchases bank credits, because in that situation the bank sponsor assumes monitoring responsibilities. In all other circumstances, the permittee should be required to monitor their mitigation project. We agree with requiring that monitoring periods last a minimum of five years, with requirements for longer monitoring periods when restoring certain wetland communities. We also agree with the inclusion of language to extend the monitoring period if site problems develop and performance standards are not met.

s.332.6 Monitoring reports. This provision states that “the district engineer . . . may conduct regular (e.g., annual) on-site inspections . . .” Comment: We strongly recommend that another statement be added to this section: “The district engineer *shall* conduct a minimum of two site inspections, once after the site is initially constructed and again at the end of the monitoring period.” The 2001 NRC Report emphasized the critical importance of agency compliance inspections to ensure that sites meet mitigation goals: “The committee believes that compliance inspections should be an ‘above-the-line’ activity to ensure that the programmatic goal of no net loss of wetland functions and values is met. If the Corps recognized mitigation compliance and increased compliance as a priority activity, mitigation would more likely be carried out as specified in Section 404 permits” (page 103).

We recommend adding a provision that requires that monitoring reports be submitted to the district engineer annually during the monitoring period. We also recommend that some specific, minimum requirements for monitoring reports be established so that there is consistency in the basic information that mitigation monitoring reports provide. The State of Wisconsin requires the following elements in monitoring reports:

- 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 during the past year.

- 4) A summary of and full presentation of the data collected during the past year.
- 5) A site map showing the locations of data collection.
- 6) An assessment of the presence and level of occurrence of invasive species.
- 7) An assessment of the degree to which performance standards are being met.
- 8) Proposed corrective actions to improve attainment of performance standards.
- 9) A narrative summary of the results and conclusions of the monitoring.

s.332.7(b) Sustainability. Comment: Long-term financing mechanisms should be required for all mitigation banks.

s.332.8(b)(2) Interagency Review Team. “The IRT may also include representatives from Tribal, States, and local regulatory and resource agencies, where such agencies have authorities and/or mandates . . .” Comment: This language should be changed to say that IRT “shall” include...

s.332.8(b)(4) Interagency Review Team. Comment: The language in this provision should be improved so it is clear that all agencies that have jurisdiction over the mitigation bank must approve the bank document. If there is an agreement among agencies (such as Wisconsin’s MOA), that agreement should be followed.

s. 332.8 Mitigation Banks, approval timeline. Comment: The proposed timeline is inadequate to allow all agencies time to receive, review and comment on new banks. There should be greater flexibility, especially when climatic conditions prevent IRT members from reviewing the site. All IRT members must be able to visit the proposed bank site during the growing season. The rules should also allow an adequate length of time to review the finalized conservation easement and financial assurances documents.

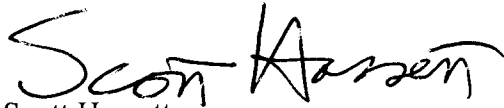
s.332.8(c)(4) Public review and comment. Comments: Issuing a public notice only when a bank prospectus is received is inadequate since the mitigation plan may be preliminary at this stage. The public should also be notified when the bank document and site restoration plan is complete.

s.332.8(c)(5)(ii) Geographic service area of the mitigation bank. Comment: The definition of “service area” is too vague and flexible. How is an agency able to determine what is economically viable? We recommend deleting this provision. Adopting a watershed approach places emphasis on replacing lost functions, values and services within a watershed and not relying upon what is economically viable for a prospective banker.

s.332.8(k)(3) Credit production. Comment: We strongly recommend that a provision be included that states that no more than 25% of the total credits can be the result of creation (establishment) to discourage projects that are not likely to succeed.

We hope that these comments are helpful to you. If you have any questions, please feel free to contact Pat Trochlell (608-267-2453) or Julia Wilcox (608-266-8117) of my staff.

Sincerely,

A handwritten signature in black ink that reads "Scott Hassett". The signature is written in a cursive, slightly slanted style.

Scott Hassett
Secretary

cc: Sue Elston - EPA Region V
Robert Whiting - ACE-St. Paul District