



April 15, 2021

To: Thomas Pearce – In-Lieu Fee Project Manager – Wisconsin Department of Natural Resources

RE: WT-02-19 – Board Order to Repeal and Recreate NR 350 relating to requirements for Wetland Mitigation

Dear Mr. Pearce:

Please accept these comments regarding WT-02-19, the Wetland Mitigation administrative rule revision, on behalf of the League of Wisconsin Municipalities and the Wisconsin Realtors Association. Representing cities, villages, and residents in the State of Wisconsin, our organizations understand the need for balance between economic development, housing and protecting and restoring our natural environment. It is our hope that the department will work with our organizations addressing the recommendations we outline below before this rule is advanced to the Natural Resources Board to ensure the rules are clear, equitable and implementable. We appreciate the opportunity to offer the following comments regarding the draft guidance document:

### **1. Relationship with Corps Process and Timing - NR 350.003 and NR 350.008**

While there is now a more detailed definition of the IRT (interagency review team), the relationship between NR 350 and federal approval process itself is still unclear. The federal approval process under 33 CFR 332.8 has a detailed three step approval process involving the Corps and IRT along with a number of specific timetables. In NR 350 there are only a few references to the IRT and those come after banks or ILF have been established. There are even fewer references to the Corps. Moreover, unlike the permit timetables for Chapter 30 projects and wetland permitting there are almost no timetables in NR 350.

**Recommendation.** NR 350 should provide recommended timetables for review that are no greater than those prescribed for the Corps and IRT. Such a timetable should integrate the Corps/IRT review.

### **2. Wetland Mitigation Sequencing - NR 350.004**

There are several issues that should be clarified. As a preliminary matter, NR 350.004 is entitled, “mitigation sequence” but the actual section does not prescribe a sequence. A sequence is inferred only by the order in which the options are listed and the title.

Second, to the extent that the proposed rule intends to establish a sequence in the order of the options, that sequence should be reconsidered and further clarified. There are several related points. Current NR 350.04(3) expressly lists on-site mitigation as the preferred mitigation option. Subsequent to the enactment of current NR 350, the legislature weighed in on mitigation, to note that all three options of mitigation are available: (1) banks, (2) in lieu fee and (3) on site (within ½ mile of the project). The only sequencing prescribed by the legislation is with respect to banks. Section 281.36(3r)(a) requires mitigation credits be purchased in the following order: HUC 8, bank service area and finally the basin. The legislation also provides that mitigation banks and in lieu fee are “preferred types of mitigation.”

**Recommendation.** NR 350 should be revised to more accurately reflect the sequencing set forth in the statute. In particular, the rule should note the following: (1) all three mitigation types are authorized and the applicant should be allowed to choose the mitigation option that best fits the circumstances, wetland impact and project; (2) if mitigation banks are utilized, only at that time is the sequencing in the statute required to be followed; and (3) there is a preference but not a mandate for banks within HUC 8 and in lieu fee programs.

### **3. Amount of Mitigation - NR 350.005**

Proposed NR 350 establishes the ratio for mitigation banks and on-site as “not less than 1.2:1. The rule also creates some general parameters for when the department can increase the ratio (e.g. “out of kind”). However, there is very little guidance about how those factors are to be considered or whether there is an expectation on a maximum. In addition, the in-lieu fee program has a default ratio of 1.45 :1 and it is not clear why the amount required is significantly higher than for banks. If the mitigation selected is a choice why is the department incentivizing one type over others with differing credit ratios?

**Recommendation.** NR 350 should include greater certainty for when the ratio can be increased. It should detail specific criteria the department will use to increase ratios. The rule should also not create a disparate mitigation ratio for in lieu fee that was not authorized in the legislation.

### **4. Monitoring and Financial Assurance - NR 350.008(2) and NR 350.009**

Both monitoring and financial assurance requirements can significantly impact the financial calculus for banking. The default timeframes for monitoring are now included in this section and range from 5 to 7 to 10 years depending on wetland type. Proposed NR 350 states that monitoring is required for “no fewer than” the default and can be extended if the site does not meet performance standards. It is not clear whether the department can extend those periods for reasons in addition to the failure to meet performance standards. Similarly, the amount of discretion associated with the financial assurance requirements is considerable.

**Recommendation.** Greater clarity on monitoring and financial assurance requirements should be added to the rule, or in the alternative a commitment to issue additional guidance within a prescribed time period should be specified.

### **5. Credit Release - NR 350.010**

In section 281.36 (3w) the legislature specified in some detail the parameters for the release of banking credits. Those parameters are not included or even referenced in proposed NR 350, which merely notes that, “site conditions and performance will determine the timeline for actual release of bank credits.” The statute also calls for DNR to authorize quicker release based on financial assurances but that is not referenced in proposed NR 350. Credit release is another critical factor in determining bank viability and certainty is needed.

**Recommendation.** The statutory requirements for banking credit release must be referenced and incorporated into NR 350. The department cannot interpret the authorizing statute without include specific parameters outlined in that statute. There should be additional specifics on how the department intends to implement the provisions in section 281.36(3w)(b) added to the rule.

The League of Wisconsin Municipalities and the Wisconsin Realtors Association support our partnership with Department of Natural Resources. We greatly appreciate the opportunity to provide the above comments on NR 350 and would request the department address and remedy the issues outlined prior to advancing the rule for Natural Resources Board approval. Please feel free to contact us at your convenience if you have questions or would like to discuss this issue further.

Kind Regards,

Toni Herkert, Government Affairs Director  
Wisconsin League of Municipalities

Tom Larson, Executive Vice President  
Wisconsin Realtors Association