

SUBJECT: Adoption of Board Order ER-10-10, revisions to NR 29 relating to Endangered Resources information fees

FOR: AUGUST 2010 BOARD MEETING

TO BE PRESENTED BY: Erin Crain, Section Chief, Endangered Resources

SUMMARY:

This is Board Order ER-10-10 for revisions to Ch. NR 29, Wis. Adm. Code, to update fees for provision of Natural Heritage Inventory (NHI) information and data to the public services provided by the Endangered Resources (ER) Review Program, and to consider improved service alternatives requested by stakeholders. The ER Review Program reviews projects for potential impacts to rare species and habitats, shares NHI data on rare species and habitats with customers, and provides training and support for Department staff and external partners and customers. Fees for providing NHI information and data (contained in Ch. NR 29, Wis. Adm. Code: Endangered Resources Information Fees) need to be updated; the last update was 20 years ago. The Department proposes to amend Ch. NR. 29, Wis. Adm. Code to: update fees; establish a new expedited endangered resources review service; authorize the Department to require that requesters of detailed NHI data have formal education, training, or experience in interpreting NHI information and that they take training and an exam prior to being provided with access to the data; establish a pilot certification program; and charge fees for provision of training, exams, and certification to cover Department costs.

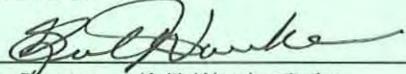
The Department held public hearings on the proposed changes to Ch. NR 29, Wis. Adm. Code, in Fitchburg, Waukesha, and Wausau. Five people attended the hearings, and three written comments were received. No opposition to the proposed changes was expressed.

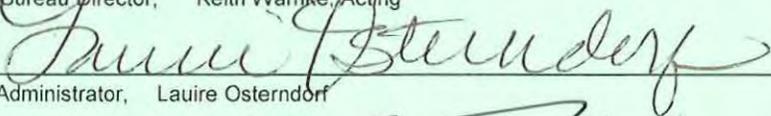
RECOMMENDATION: Adopt revisions to NR 29, relating to Endangered Resources information fees

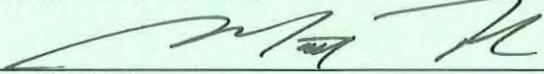
LIST OF ATTACHED MATERIALS:

- | | | | | | |
|----|-------------------------------------|---|-----|-------------------------------------|----------|
| No | <input type="checkbox"/> | Fiscal Estimate Required | Yes | <input checked="" type="checkbox"/> | Attached |
| No | <input checked="" type="checkbox"/> | Environmental Assessment or Impact Statement Required | Yes | <input type="checkbox"/> | Attached |
| No | <input type="checkbox"/> | Background Memo | Yes | <input checked="" type="checkbox"/> | Attached |

APPROVED:


 Bureau Director, Keith Warnke, Acting


 Administrator, Laurie Osterndorf


 Secretary, Matt Frank

7/19/10
 Date

7/20/10
 Date

7-29-10
 Date

cc: Laurie J. Ross - AD/8
Tim Andryk - LS/8, Linda Haddix - LS/8

DATE: July 19, 2010 FILE REF: NR29BackgroundMemo19July2010.doc

TO: NR Board

FROM: Matthew J. Frank
Secretary, Department of Natural Resources

SUBJECT: Background Memo on NR 29 relating to Endangered Resources information fees,
Request for adoption

Background

The Department is required by s. 23.27(3)(b), Wis. Stats., to share Natural Heritage Inventory (NHI) information with those who request it for research, educational, environmental, land management or similar authorized purposes. The Endangered Resources (ER) Review Program (Program) meets this requirement, sharing NHI information and data on rare species and high-quality natural communities with the public in several ways. The Program evaluates specific proposed projects for potential impacts to rare species and habitats (called ER Reviews), and shares generalized NHI data (for general information and planning purposes) with the public free of charge on our website. The Program also shares detailed NHI data with Department staff and external users who request access to these data via formal NHI Data Licenses; access is provided via a specially developed online mapping application called the NHI Portal. In addition, the Program provides training and support for Department staff and external partners and customers using these data. Ch. NR 29, Wis. Admin. Code was created in 1990 and has not been modified since.

These proposed changes to Ch. NR 29, Wis. Admin. Code, were developed in response to two issues. First, a group of stakeholders met several times between Fall 2008 and Spring 2009 to consider and recommend changes to the ER Review Program that would better serve its partners and customers. Changes proposed here represent several changes recommended by program stakeholders, including establishment of a new service (Expedited ER Reviews), and development of a pilot certification program to facilitate broader sharing of detailed NHI data by ensuring that users are qualified and knowledgeable in how to interpret, apply, and protect the data. The stakeholder group was diverse, representing the broad array of customers who use services provided by the program. Stakeholders included other state and federal agencies, local units of government, developers, private and county forests, utilities, non-profit conservation organizations, private consultants, and others. Specific organizations represented included Alliant Energy, American Transmission Company, Madison Audubon Society, Metropolitan Builders Association, Natural Resources Consulting, Inc., The Nature Conservancy, US Department of Agriculture Natural Resources Conservation Service, We Energies, Wisconsin Department of Agriculture, Trade, and Consumer Protection, Wisconsin Towns Association, and others. Internal stakeholders were also consulted regarding ways to facilitate coordination across programs and shorten permit turnaround time related to the endangered resources review required for all actions that the Department conducts, funds, or approves. The Division of Forestry, Office of Energy, and Bureaus of Science Services and Watershed were represented on the internal stakeholder group.

Second, fees in Ch NR 29, Wis. Adm. Code, no longer cover Department costs of collecting, storing, managing, compiling, and providing NHI information and data as required by s. 23.27(3)(b), Wis. Stats.

Fees in Ch. NR 29, Wis. Admin. Code, have not been updated in 20 years. Current fees for providing NHI information are \$20 per hour. Staff costs for provision alone far exceed this value. Similarly, current fees for providing access to all or a portion of the detailed NHI database range from \$500-\$1000, but actual costs of 1) collection, mapping, quality control, management and packaging of these data for customers, 2) the processing time necessary to complete NHI Data License agreements safeguarding the data, and 3) providing the training and technical support necessary for customers and partners to correctly use, understand and interpret the data regularly exceed this fee. With decreasing funds available to the ER Program as a whole, and to the ER Review Program in particular, the Program needs to update the fee structure in order to provide the services identified by stakeholders in a financially sound manner, ensuring the quality and consistency of services on a long-term basis.

The proposed revision to Ch. NR 29, Wis. Adm. Code, pertains to rules for providing NHI information to those who request it. Requesters are diverse, including private landowners, public agencies, utilities, local units of government, non-governmental organizations, educational institutions and many others. Fees in the rule are entirely voluntary; no person or organization is required to use the services or pay the fees described in the proposed rule. NHI information is provided as a tool to help these individuals and organizations comply with state and federal endangered species laws and to promote more effective on-the-ground conservation of endangered resources through informed project, local, and regional planning. Customers will now have the option to request information in an expedited manner, helping them to meet short deadlines. In addition, individuals with a documented biological background may choose to apply for certification. Certification will allow them to conduct Proposed ER Reviews for their organization or other customers, thus providing an additional service to their customers.

Rule Summary

Ch. NR 29, Wis. Admin. Code, outlines mechanisms and fees for sharing NHI information and data with requesters. The proposed changes to Ch. NR 29, Wis. Admin. Code address two primary issues: updating fees to cover Department costs, and implementing several changes requested by stakeholders during a recent, comprehensive program review. The proposed rule updates fees for one-time NHI information requests (commonly referred to as ER Reviews) to \$75/hour, and reduces the minimum charge from three hours of staff time to one hour of staff time. Fees for providing access to detailed NHI data (provided via a formal NHI Data License) are updated to a minimum of \$850 and a maximum of \$1500. The rule also creates a new expedited service (Expedited ER Reviews) to meet the needs of customers faced with very short deadlines for commencing project activities. The product is provided in a guaranteed, short timeframe (7 working days) for a higher fee: \$140/hour with a minimum charge of three hours (\$420). The proposed rule clarifies that users with access to detailed NHI data may be required to take training and/or an exam to ensure that they have the knowledge and skills to correctly access, interpret, apply and ensure the security of these sensitive data, and establishes that the Department may charge fees for training and exams to cover Department costs. Finally, the rule directs the Department to establish a pilot certification program to allow external individuals with a documented biological background who demonstrate specific skills and knowledge be authorized to conduct preliminary evaluations of potential impacts of proposed projects on endangered resources.

This proposal represents a continuation of existing policy regarding sharing of NHI information with customers, and providing customers with training and information that will facilitate better compliance with endangered species laws and more effective on-the-ground conservation of endangered resources. The ER Program has been working in recent years to share NHI information more broadly so that the regulated community will have better information about where endangered resources are located, thus helping to conserve those same resources in the course of project activities. Creation of a certification

program will go hand in hand with this effort, sharing detailed NHI data with additional customers while at the same time ensuring that those customers have the training and knowledge they need to correctly interpret, apply, and ensure the security of the data. The certification program also represents a move toward providing the regulated community with more access to training, information and tools to help them comply with regulatory requirements – in this case state endangered species laws. Certified individuals would be authorized to conduct preliminary endangered resources reviews (called Proposed ER Reviews). The Department will review each Proposed ER Review and provide final Department concurrence as required by s. 29.604, Wis. Stats. This is the first time that the Department has provided comprehensive training to qualified external customers on how to formally evaluate proposed projects for potential impacts to endangered resources. While language in s. 23.27(3)(b), Wis. Stats., encompasses this use of the NHI data, this is the first time that the Department has considered preliminary endangered resources review to be an authorized use of the NHI data.

Public Input

The Department held three public hearings on the proposed changes to Ch. NR 29, Wis. Adm. Code:

Date	Location	Attendees	No. in Support	No. Opposed	Not indicated
7/13/10	Fitchburg	0			
7/14/10	Waukesha	1		0	1
7/16/10	Wausau	4	4	0	
Written comments		3	1	0	2

Comments and Responses

Perry Lindquist of Waukesha County asked that the Department consider ways (including lower fees) to help local units of government which are issuing permits on behalf of the Department conduct the necessary screening for endangered resources. The Department offers three options to address this concern. 1) The Program believes the existing waiver language in Ch. NR 29.04(2)(a) applies to this circumstance, and thus the Department could waive or reduce the annual fee for an NHI Data License. 2) Alternately, Waukesha County could simply require permit applicants to submit an ER Review with their permit application. The applicant could request an ER Review from the Department or a Certified ER Reviewer. In this way, Waukesha is assured that the required endangered resources review has been conducted, and there is no cost in dollars or staff to the county. 3) County staff could also become certified and conduct their own Proposed ER Reviews. It was clarified that the Department will not control what fee others can charge for providing this service. The Department also will consider the needs, roles, and circumstances of local units of government when setting fees for the pilot certification program.

Three attendees from Mid-State Consultants or its subsidiary RW Communication Services supported the proposed changes and believe they will make the endangered resources review process faster and more efficient. However, they pointed out an important need for better outreach to raise awareness of and compliance with the endangered species law. They noted that many projects in their industry currently proceed without being reviewed for endangered resources issues, and that businesses which comply with the law like their own are not operating on a level playing field with those who do not. They asked the Department to conduct a broad outreach and education initiative targeting businesses who are working on the Wisconsin landscape, including energy and utility customers. The Department agrees strongly that such an effort is needed, and is planning a comprehensive outreach initiative in association with implementation of the pilot certification program. There will be three primary aims. 1) Raise awareness of the endangered species law and what it means for landowners and project proponents that uses examples, venues and approaches tailored to the target audience. 2) Publicize the pilot certification program so that

those who may wish to participate are made aware of it and of how it can benefit them and their customers. 3) Talk with local units of government across the state to raise awareness of the endangered species law and tell them about practical, low to no-cost ways in which they can help improve compliance with the law and promote conservation of Wisconsin's endangered resources.

One private forester provided written comments on the proposed changes. The individual is a Cooperating Forester, a Certified Managed Forest Law (MFL) Plan Writer, and represents Wisconsin Consulting Foresters. The individual requested that the Department provide training in an online format. The Department agrees. Basic training will be provided online; optional, field-based training may be provided in person as requested or needed at a later date. The individual also requested that costs for training be kept to a minimum and that the Division of Forestry continue to financially support provision of data to Certified MFL Plan Writers. The ER Review Program is working with the Division of Forestry to address the needs of Certified Plan Writers related to NHI data and training, and keeping costs low for small private forestry companies is an important part of this ongoing discussion.

Two utility customers (Wisconsin Public Service Corporation and We Energies) registered support for the proposed changes. Utility and energy customers work with both the Office of Energy and the ER Review Program and have participated in this effort from the start. They continue to support steps to help improve consistency in and shorten turnaround times for endangered resources reviews. We Energies commended the Program for working so closely with stakeholders throughout the program review in an open, action-oriented process. They support the fee increases, and see them as reasonable and necessary. They also support the pilot certification program, and see this as a way for the Department to leverage additional expertise and expand their resources for accomplishing program objectives. There was a question about how utilities would pay for Department review of Proposed ER Reviews written by certified individuals. The Program anticipates that utility and energy customers will continue to pay for endangered resources review services in the same way that they do now. For most utilities, these services are funded through the existing agreement between the Public Service Commission, the Office of Energy, and regulated utilities to provide customized services to utilities through the Office of Energy. The ER Review Program will continue to work with the Office of Energy to ensure that energy and utility customers receive the services they need in a manner that is as seamless and efficient as possible.

No substantive modifications were made to the rule as a result of the public input.

Small Business and Initial Regulatory Flexibility Analysis

Individuals from small businesses (e.g., private consulting firms) may choose to use the services provided in the rule. In the case of a pilot certification program, small businesses with certified employees may benefit from the rule by being able to provide additional services to their clients. These rules impose no compliance or reporting requirements for small businesses and thus are not expected to have a significant economic impact on a substantial number of small businesses. Therefore, under s. 227.19(3m), Stats., a final regulatory flexibility analysis is not required.

Environmental Analysis

This is considered a Type IV Action, as defined in NR Ch. 150.03 (4), and no environmental analysis is required.

Legislative Council Rules and Clearinghouse Report

The clearinghouse report is attached. The Department made all of the recommended changes.

Fiscal Estimate — 2009 Session

<input checked="" type="checkbox"/> Original	<input type="checkbox"/> Updated	LRB Number	Amendment Number if Applicable
<input type="checkbox"/> Corrected	<input type="checkbox"/> Supplemental	Bill Number	Administrative Rule Number ER-10-10

Subject
 Revisions to the Endangered Resources (ER) information fees.

Fiscal Effect

State: No State Fiscal Effect
 Indeterminate

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.

- | | |
|--|--|
| <input type="checkbox"/> Increase Existing Appropriation | <input checked="" type="checkbox"/> Increase Existing Revenues |
| <input type="checkbox"/> Decrease Existing Appropriation | <input type="checkbox"/> Decrease Existing Revenues |
| <input type="checkbox"/> Create New Appropriation | |

Increase Costs — May be possible to absorb within agency's budget.

Yes No

Decrease Costs

Local: No Local Government Costs
 Indeterminate

1. Increase Costs
 Permissive Mandatory
2. Decrease Costs
 Permissive Mandatory

3. Increase Revenues
 Permissive Mandatory
4. Decrease Revenues
 Permissive Mandatory

5. Types of Local Governmental Units Affected:

Towns Villages Cities

Counties Others

School Districts WTCS Districts

Fund Sources Affected

GPR FED PRO PRS SEG SEG-S

Affected Chapter 20 Appropriations

20.370 I(fs)

Assumptions Used in Arriving at Fiscal Estimate

Rule Summary:

The proposed rule package amends Ch. NR 29, Wis. Adm. Code to update Natural Heritage Inventory (NHI) fees, establishes a new expedited Endangered Resources (ER) review service, specifies that users with access to NHI data may be required to take training or an exam and allows the Department to charge fees for training and exams and establishes a pilot certification program.

State Fiscal Estimate:

A. Staffing & Costs

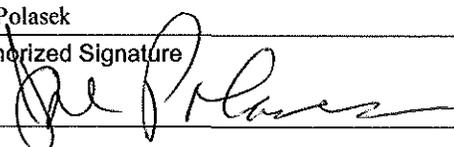
1. Current Staffing & Costs

Section 23.27(3)(b), Wis. Stats., requires the Department to share NHI information with those who request it for research, educational, environmental, land management or similar authorized purposes. The statute also provides that the Department may establish a fee to be collected to recover the actual cost of collecting, storing, managing, compiling and providing this NHI information and data to requesters. Staff in the Bureau of Endangered Resources that currently provide the suite of services related to NHI data and information on private lands are comprised of 0.6 FTE, 1.5 LTEs, and 2 contract FTE, which cost approximately \$239,600 in salary and fringe, in addition to \$9,500 for travel and supplies, \$23,300 of salary and fringe of species experts and data collectors, \$48,700 for maintenance, management and fees associated with the NHI database, for a grand total of \$321,100.

2. Staffing & Costs Under Proposed Rule

Through working with stakeholders, the ER Review Program has determined that the following resources are needed to provide improved services requested by stakeholders: 2.6 FTE, 2.25 LTE, 1 contract FTE, and the continued support. It is assumed the new 2.0 FTE will come from converting unfunded vacant ER SEG FTE.

Long-Range Fiscal Implications

Prepared By: Joe Polasek	Telephone No. 266-2794	Agency Department of Natural Resources
Authorized Signature 	Telephone No. 266-2794	Date (mm/dd/ccyy) 07-13-10

Fiscal Estimate — 2009 Session

**Page 2 Assumptions Narrative
 Continued**

LRB Number	Amendment Number if Applicable
Bill Number	Administrative Rule Number ER-10-10

Assumptions Used in Arriving at Fiscal Estimate – Continued

The contract currently funded from the Department-wide chargeback will be modified, resulting in an annual cost reduction of \$71,600. Total staffing costs will be \$229,500 annually (salary and fringe), an increase of \$177,600 to coincide with hiring the 2.0 new FTE. A new 0.75 LTE is expected to increase LTE costs to \$59,800 annually, an increase of \$20,000. Increases to the current DOT contract position and existing species experts are expected to increase contract costs to \$101,700 annually, an increase of \$2,000. Travel expenditures are expected to increase to \$17,500 annually, an increase of \$8,000. Costs for management and maintenance of the NHI database are expected to increase to \$50,600 annually, an increase of \$2,000. Therefore, it is expected that a fully-operational program for providing NHI information on private lands will cost \$459,100 in FY11, which represents a \$138,000 increase over current costs.

B. Revenues

Ch. NR 29, Wis, Adm. Code includes fees for providing two types of NHI information: ER reviews and consultation, and direct access to detailed NHI data. The Department estimates that the NHI fees included in the proposed rule would generate \$196,000 in fee revenue annually, which is summarized in the table below:

NHI Fees	Current Fee	Current Revenue	Proposed Fee	Fee basis	Number of hours	Number	Predicted Revenue
<u>Revenue from Providing NHI Information</u>							
ER Reviews	\$20/hr (60 min)	\$30,000	\$ 75	hourly	2	350	\$52,500
ER Consultation			\$ 75		10	5	3,750
Expedited ER Reviews	\$100/hr (\$360 min)		\$ 420	\$140/hr (\$420/min)	1	25	10,500
<u>Revenue from Providing Access to Detailed NHI Data</u>							
Access the entire state	1000	8,000	\$ 1,500	per requester		55	82,500
Access 4 counties or less	500	2,000	\$ 850	per requester		55	46,750
		Total	\$40,000			Total	\$196,000

In FY10, it is expected that the current fee structure will generate \$40,000 in revenue. With the new program improvements based on this rule development, the Department assumes that there will be significant increases in the number of standard ER reviews and expedited ER reviews, and that there will be a significant increase in individuals/entities that seek to gain access to NHI data based on the perceived number of users to be certified. Therefore, based on these assumptions, the Department estimates that the revised NHI fee structure will generate \$156,000 in new revenues (\$196,000, less FY10 expected revenues of \$40,000). In addition, it is assumed that the Bureau's current revenue that is generated from a Department-wide chargeback will initially need to be reduced and will eventually be eliminated altogether when the full effect of the revised fee structure is realized. Initially, the Department estimates that chargeback revenue will be reduced by \$18,000, from \$105,000 to \$87,000. Therefore, it is assumed that the proposed rule will result in a net increase in ER revenue of \$138,000 (\$156,000 in new revenues, less an \$18,000 reduction in chargeback revenues).

The proposed rule will also require training and an exam for the users of the detailed NHI data, and it establishes a pilot certification program. Fees for training, exams, and certification are to be based on the Department's costs to develop, provide, and administer the pilot program and will be sufficient to cover the operational costs of the pilot certification program. It is estimated that these certification revenues will generate up to \$87,000 annually when the program is fully operational and that these revenues would completely replace the need for the aforementioned \$87,000 Department-wide chargeback.

Local Government Fiscal Estimate: Various local governments have paid fees, and may choose to pay in the future, for the NHI information and data. Since the proposed fees are higher, it is assumed that the cost to local governments will increase. Since it is not possible to say exactly what the cost increases will be for local government, the local fiscal effect is categorized as indeterminate.

Fiscal Estimate Worksheet — 2009 Session
 Detailed Estimate of Annual Fiscal Effect

Original Updated
 Corrected Supplemental

LRB Number	Amendment Number if Applicable
Bill Number	Administrative Rule Number ER-10-10

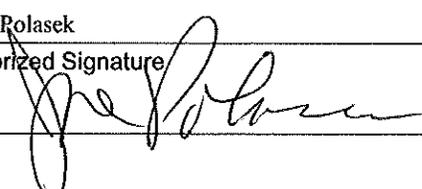
Subject
 Revisions to the Endangered Resources (ER) information fees.

One-time Costs or Revenue Impacts for State and/or Local Government (do not include in annualized fiscal effect):

Annualized Costs:		Annualized Fiscal Impact on State Funds from:	
		Increased Costs	Decreased Costs
A. State Costs by Category			
State Operations — Salaries and Fringes		\$ 177,600	\$ -
(FTE Position Changes)		(2.00 FTE)	(- FTE)
State Operations — Other Costs		32,000	- 71,600
Local Assistance			-
Aids to Individuals or Organizations			-
Total State Costs by Category		\$ 209,600	\$ - 71,600
B. State Costs by Source of Funds			
GPR		\$	\$ -
FED			-
PRO/PRS			-
SEG/SEG-S		209,600	- 71,600
State Revenues	Complete this only when proposal will increase or decrease state revenues (e.g., tax increase, decrease in license fee, etc.)	Increased Revenue	Decreased Revenue
GPR Taxes		\$	\$ -
GPR Earned			-
FED			-
PRO/PRS			-
SEG/SEG-S		156,000	- 18,000
Total State Revenues		\$ 156,000	\$ - 18,000

Net Annualized Fiscal Impact

	<u>State</u>	<u>Local</u>
Net Change in Costs	\$ 138,000	\$
Net Change in Revenues	\$ 138,000	\$

Prepared By: Joe Rolasek	Telephone No. 266-2794	Agency Department of Natural Resources
Authorized Signature 	Telephone No. 266-2794	Date (mm/dd/ccyy) 07-13-10



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

Ronald Sklansky
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Terry C. Anderson
Legislative Council Director

Laura D. Rose
Legislative Council Deputy Director

CLEARINGHOUSE RULE 10-069

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Reference Bureau and the Legislative Council Staff, dated September 2008.]

2. Form, Style and Placement in Administrative Code

a. The introductory clause lists the creation of s. NR 29.05 (title), but the proposed rule does not create s. NR 29.05 (title). [s. 1.02 (1), Manual.]

b. In the rule summary, the “plain language analysis,” “analysis and supporting documents used to determine effect on small business or in preparation of economic impact report,” and “effect on small business” headings are missing. [s. 1.02 (2) (a), Manual.]

c. The rule preface either specifically should indicate where comments about the rule are to be submitted and the deadline for their submission or indicate where the public will be able to obtain this information.

4. Adequacy of References to Related Statutes, Rules and Forms

a. In the “statutory authority” section of the rule summary, “ss. 23.27 (3) (b) and 227.11, Stats.” should replace “Section 23.27 (3) (b), Stats., and Section 227.11, Stats.” [s. 1.07, Manual.]

b. In the second paragraph of the “related statute or rules and plain language analysis” section of the rule summary, “ch. NR 29” should replace “Ch. NR 29.” [s. 1.07, Manual.]

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. In the rule summary, the first reference to “natural heritage inventory” should be “natural heritage inventory (NHI).” All subsequent references should be to “NHI.” [s. 1.01 (8), Manual.]

b. In the rule summary, the first reference to “endangered resources” should be “endangered resources (ER).” All subsequent references should be to “ER.” [s. 1.01 (8), Manual.]

c. In s. NR 29.04 (1) (a), the fee is described as including “the associated administrative costs in compiling, interpreting and providing appropriate natural heritage inventory information and the cost of collecting, storing, managing, compiling, interpreting, and providing the natural heritage inventory data.” The agency might consider using identical language in pars. (am) and (b) to describe what the fee includes.

d. In s. NR 29.04 (1) (am), “3” should replace “three.” [s. 1.01 (5), Manual.]

e. In s. NR 29.04 (1) (b), should “shall” replace “may” in the first sentence? [s. 1.01 (2), Manual.]

f. In s. NR 29.04 (1) (c) and (d), the word “will” should be replaced by the word “shall.”

**ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD
AMENDING AND CREATING RULES**

The Wisconsin Natural Resources Board proposes an order to **amend** NR 29.04(1)(a) and (b), and to **create** 29.04(1)(am), (c) and (d) relating to Endangered Resources Information Fees.

ER-10-10

Analysis Prepared by Department of Natural Resources

Statutes Interpreted: In promulgating this rule, s. 227.11(2)(a), Stats., has been interpreted as allowing the department the authority to develop rules to implement a program to provide natural heritage inventory (NHI) information to the public. Section 23.27(3)(b), Stats., has been interpreted as directing the department to share NHI information and data with those who request it for specific authorized purposes.

Statutory Authority: The state statutes that authorize the promulgation of this rule include ss. 23.27(3)(b) and 227.11, Stats.

Explanation of Agency Authority: These sections grant rule-making authority and fee establishment to the department and direct the department to make NHI information and data available to those who request it.

Related Statute or Rules: Section 23.27(3)(b), Wis. Stats., requires the Department to share NHI information with those who request it for research, educational, environmental, land management or similar authorized purposes. Ch. NR 29, Wis. Admin. Code, outlines mechanisms and fees for sharing this information.

Plain Language Analysis: The proposed changes to ch. NR 29, Wis. Admin. Code, will update fees for providing NHI information to customers to reflect the actual cost of collecting, storing, managing, compiling and providing this information and data as required by s. 23.27(3)(b), Stats. The rule will also create a new expedited endangered resources (ER) review service and establish a pilot certification program.

Fees in Ch. NR 29, Wis. Adm. Code, have not been updated in 20 years. The proposed rule updates fees for one-time NHI information requests (commonly referred to as ER Reviews) from \$20/hour to \$75/hour, and reduces the minimum charge from three hours of staff time (currently \$60) to one hour of staff time (\$75).

It should be noted that generalized NHI information is available for free to the public on our website at <http://dnr.wi.gov/org/land/er/review/> under 'Free, Online Resources'. These data are used frequently by consultants, students, land use planners, landowners, non-profit organizations, local units of government, educators, and others for a variety of purposes including research, pre-screening projects for regulatory purposes, gathering information for community/land use planning initiatives, and informing conservation and restoration efforts.

Summary of, and Comparison with, Existing or Proposed Federal Regulations: The proposed rules are related to provision of information on rare species (including those classified as endangered and threatened at the state and federal levels) and high-quality natural communities. These rules do not relieve individuals from any restrictions, requirements or conditions of federal statutes or regulations related to endangered species. In fact, providing this information to the public facilitates compliance by the regulated community with existing state and federal endangered species laws.

All projects that the Department conducts, funds or approves must also be in compliance with federal and state endangered species laws. Examples include land acquisition, land and water planning and development projects, sustainable forestry certification, Managed Forest Law plan development, National Environmental Policy Act (NEPA) compliance for receipt of federal aid, and Department permit review. Because federal compliance is required for receipt of federal grants (federal Sport Fish Restoration and Pittman-Robertson funds granted to the Department totaled nearly \$23 million last year), the ER Review Program has worked with the U.S. Fish and Wildlife Service to develop procedures for screening proposed projects for potential impacts to endangered resources. The foundation of the screening procedure is the NHI database. The provision of timely and accurate NHI data through the NHI Portal along with the technical support and services provided by the ER Review Program help ensure that federal grants are not held up by the US Fish and Wildlife Service for noncompliance, that all Department programs comply with state and federal endangered species laws, and that Department permits are issued in a timely manner.

We are not aware of a federal law requiring provision of information on federally protected rare species and habitats to the public. Generalized locational information for federally protected species in Wisconsin is available for free at the US Fish and Wildlife Service website:

<http://www.fws.gov/midwest/Endangered/lists/Wisc-cty.html>. However, information is generalized much more broadly: species locations are generalized to the county level. In contrast, the Department provides locational information for rare species in Wisconsin down to the township level. It should be noted that most information US Fish and Wildlife Service provides in their table comes from NHI data that the Department shares with US Fish and Wildlife Service via an NHI Data License.

Comparison with Rules in Adjacent States: Fees for provision of NHI information vary across the nation. The majority of states use some variety of fee formula, usually based on an hourly rate for time needed to complete the request or a per quadrangle fee. Florida, Rhode Island, and West Virginia all charge \$75/hr, with a one-hour minimum. Several other states such as Delaware and New Jersey follow this formula, although the fees range from \$20 to \$100/hr. Four states plus the Navajo Nation base their fees on the number of quadrangles reviewed, with charges ranging from \$20 to \$45 per quadrangle. New Mexico, Wyoming, and Colorado utilize a tiered fee structure, charging a base fee and adding additional charges based on variables such as whether the search returned any results, project area, or number of species found. All three states have a base fee of around \$100; the maximum charge can range up to \$25,000 in Wyoming.

Fees for NHI information in the Midwest also vary. Illinois and Iowa both provide free reports upon request. Michigan charges a \$100 base fee plus \$.607/mi², while Indiana and Ohio both charge around \$50 per half hour. South Dakota charges \$30 for a computer search and \$30/hr for a manual search. Minnesota uses a tiered system similar to New Mexico's, charging a base fee of \$60 plus an additional \$30/hr or \$25 for queries by species plus \$5 per additional species. Wisconsin's \$75 minimum fee is low to average when compared to states both nationally and in the Midwest.

Summary of Factual Data and Analytical Methodologies: The proposed rules are related to provision of information on rare species (including those classified as endangered and threatened at the state and federal levels) and high-quality natural communities. The proposed rules seek to provide information to the public, facilitating compliance by the regulated community with both state and federal endangered species laws. This information is also provided to other Department staff, facilitating Department compliance with state endangered species laws (see above). These rules do not relieve individuals from any restrictions, requirements or conditions of state statutes or regulations related to endangered species.

These rules were developed with the assistance of the Bureau of Endangered Resources, Legal Services and with input from stakeholders of the ER Review Program. A group of ER Review Program stakeholders met several times between Fall 2008 and Spring 2009 to consider and recommend changes to the ER Review Program that would better serve its customers. This proposed rule represents several changes recommended by the group. Stakeholders included other state and federal agencies, local units of government, developers, private and county forests, utilities, non-profit conservation organizations, private consultants, and others. Specific organizations represented included Alliant Energy, American

Transmission Company, Madison Audubon Society, Metropolitan Builders Association, Natural Resources Consulting, Inc., The Nature Conservancy, US Department of Agriculture Natural Resources Conservation Service, We Energies, Wisconsin Department of Agriculture, Trade, and Consumer Protection, Wisconsin Towns Association, and others. Internal stakeholders were also consulted about ways to facilitate coordination across programs and shorten permit turnaround time related to the endangered resources review required for all actions that the Department conducts, funds, or approves. The Division of Forestry, Office of Energy, and Bureaus of Science Services and Watershed were represented on the internal stakeholder group.

Fees for providing access to the detailed NHI data (provided via a formal NHI Data License) are updated from a minimum of \$500 to a minimum of \$850, and from a maximum of \$1000 to a maximum of \$1500. Most other states do not provide external customers with direct access to the underlying NHI database (the same database used by the Department for regulatory and conservation purposes). The Department feels this is a critical service, providing trained and knowledgeable users with the detailed data they need to better protect endangered resources, often accomplished by better siting and planning projects which may cover large geographic areas (e.g., utility lines) to take into account endangered resources. The range in fees provided by the updated values allows the Department to provide flexibility in costs for users depending on the format and geographic extent of the data requested.

The rule also creates a new expedited service (Expedited ER Reviews) to meet the needs of customers faced with very short deadlines for commencing project activities. The product is provided in a guaranteed, short timeframe (7 working days) for a higher fee: \$140/hour with a minimum charge of three hours (\$420). Stakeholders, both internal and external, requested this service to help enable projects on very short deadlines (e.g., stimulus projects) to comply with endangered species laws. The program has been piloting this service for the last six months to provide a mechanism for quickly reviewing proposed stimulus projects. The pilot was accomplished via contract for a similar but slightly lower fee (\$100/hour, \$360 minimum), and quality products were provided on time to customers. Based on the success of the initial pilot and consistent requests from stakeholders for this service, the Department is now proposing this change to allow Department staff to provide this service as a regular function of the ER Review Program.

The proposed rule clarifies that users with access to detailed NHI data may be required to take training and/or an exam to ensure that they have the knowledge and skills to correctly access, interpret, apply and ensure the security of these sensitive data, and establishes that the Department may charge fees for training and exams to cover Department costs. The rule also directs the Department to establish a pilot certification program to allow external individuals with a documented biological background who demonstrate specific skills and knowledge be authorized to conduct preliminary evaluations of potential impacts of proposed projects on endangered resources. These changes are a response to training needs that have been identified consistently by both customers and Department staff, and were reiterated by stakeholders in the recent program review. Those requesting direct access to the NHI data are currently required to take online training (approximately four hours) and an exam before being provided access to the data. However, there is a need to create better and more comprehensive training targeting specific user groups to allow each to better understand, interpret, and apply these data to their specific projects and uses. There is also a need to continue to ensure that this information has been effectively conveyed and understood through completion of an exam. In anticipation of this proposed rule change, the ER Review Program has been working with two small groups of stakeholders since Fall 2009 to develop a list of competencies, an exam, and a training plan for providing users of these data with the skills, tools, and information that they need to best use the data. One group consists of forestry users, while the second group encompasses other types of users (utilities, agencies, non-profit organizations, private consultants, and others). These groups are expected to finish their work in Fall 2010. The exam, training, and certification program will all be guided by the recommendations of these two working groups. More information about this initiative is available online at <http://dnr.wi.gov/org/land/er/review/proposedChanges.asp>.

Analysis and supporting documents used to determine effect on small business or in preparation of economic impact report: None.

Effect on small business: Individuals from small businesses (e.g., private consulting firms) may choose to use the services provided in the rule. In the case of a pilot certification program, small businesses with certified employees may benefit from the rule by being able to provide additional services to their clients. These rules impose no compliance or reporting requirements for small businesses and thus are not expected to have a significant economic impact on a substantial number of small businesses. Therefore, under s. 227.19(3m), Stats., a final regulatory flexibility analysis is not required.

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Deadline for written comments: The deadline for submission of written comments was July 16, 2010.

Section 1. NR 29.04(1)(a) is amended to read:

The department shall charge a minimum fee of ~~\$60-75~~ per request, for which the department will provide up to ~~3 hours~~ one hour of staff time. The ~~\$60-75~~ fee includes the associated administrative costs in compiling, interpreting and providing appropriate natural heritage inventory information and the cost of collecting, storing, managing, compiling, interpreting, analyzing, and providing the natural heritage inventory data. The department shall charge an additional ~~\$20-75~~ for each hour, or any portion thereof, of staff time required in excess of ~~3 hours~~ one hour to answer the request.

Section 2. NR 29.04(1)(am) is created to read:

The department shall charge a minimum fee of \$420 per expedited request, for which the department will provide up to 3 hours of staff time. The \$420 fee includes the associated administrative costs in compiling, interpreting and providing appropriate natural heritage inventory information and the cost of collecting, storing, managing, compiling, interpreting, analyzing, and providing appropriate natural heritage inventory information within 7 working days and the cost of collecting, storing, managing, compiling and providing the natural heritage inventory data. The department shall charge an additional \$140 for each hour, or any portion thereof, of staff time required in excess of 3 hours to answer the expedited request.

Section 3. NR 29.04(1)(b) is amended to read:

~~For frequent requesters of natural heritage inventory information, the~~ The department may ~~shall~~ set and charge an annual fee for providing updated copies of all or any portion of the actual natural heritage inventory data and for providing ~~training and support in the use and interpretation of this~~ these data. This annual fee shall be no less than \$500 850 and no greater than \$1,000 1,500. The fee includes the associated administrative costs in compiling, interpreting and providing appropriate natural heritage inventory data and the cost of collecting, storing, managing, compiling, interpreting, analyzing, and providing the natural heritage inventory data.

Section 4. NR 29.04(1)(c) is created to read:

The department may require requesters of natural heritage inventory data to have formal education, training, or experience in interpreting natural heritage inventory information. The department may require requesters to take training and an exam prior to being provided access to natural heritage inventory data. The department shall charge fees for training and exams to cover the department's costs.

Section 5. NR 29.04(1)(d) is created to read:

The department shall establish a certification program for individuals using natural heritage inventory data to prepare preliminary evaluations of potential impacts of proposed projects on native plant and animal communities, including endangered, threatened, and critical species. The department shall charge fees for certification to cover the department's costs. These preliminary evaluations shall be approved by the department before becoming final.

Section 6. EFFECTIVE DATE. This rule shall take effect the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22(2)(intro.), Stats.

Section 7. BOARD ADOPTION. This rule was approved and adopted by the State of Wisconsin Natural Resources Board on _____.

Dated at Madison, Wisconsin _____.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By _____
Matthew J. Frank, Secretary

(SEAL)