

NATURAL RESOURCES BOARD AGENDA ITEM

SUBJECT: Clarification of Board Decision about Registration Required For NBOA Access on Properties Purchased with Stewardship Program Grant Funds

FOR: JANUARY 2012 BOARD MEETING

TO BE PRESENTED BY / TITLE: Tim Andryk, Chief Legal Counsel; Pam Foster Felt, NCO Grant Manager

SUMMARY:

Department staff seek Board clarification regarding the Board's decisions for item 3.B.5. at the August 2011 Board meeting and the possible statewide ramifications of that Board decision.

In August, the Board voted 6-1 that should The Nature Conservancy (TNC) be awarded Stewardship grants to acquire three parcels in Door County, TNC would have to provide an on-site registration to accommodate any required visitor registration system. The Board's determination followed discussion that the required Internet registration system TNC proposed for hunters and trappers was so onerous that the registration system itself rose to the level of a prohibition, ie., it would prevent a major or significant amount of hunting and trapping from occurring on these three parcels.

To ensure efficient and consistent administration of Stewardship Program grants, Department staff need to know if the Board's August 2011 decision applies only to the three Nature Conservancy (TNC) projects brought before the Board at that time, or if the Board intended to establish policy for all future parcels to be purchased in part with Stewardship Program funds.

If the Board's action was intended to set policy for all future Stewardship properties on which landowners propose some user registration, Department staff will need additional guidance from the Board to fairly implement this policy. Following direction from the Board and about factors to consider when evaluating a user-registration requirement under ch. NR 52, staff can draft guidance or policy for consideration by the Board at a future meeting.

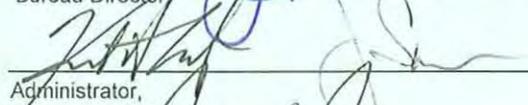
RECOMMENDATION: Clarify the reach of the Board's August, 2011 action about on-site registration on Stewardship-purchased lands.

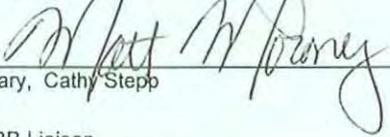
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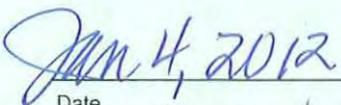
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|--|---|---|----------|
| No <input checked="" type="checkbox"/> | Fiscal Estimate Required | Yes <input type="checkbox"/> | Attached |
| No <input checked="" type="checkbox"/> | Environmental Assessment or Impact Statement Required | Yes <input type="checkbox"/>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

APPROVED:

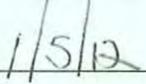

 Bureau Director

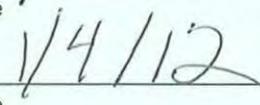

 Administrator,


 Secretary, Cathy Stepp


 Date


 Date


 Date


 Date

cc: NRB Liaison
DNR Rules Coordinator

DATE: January 4, 2012

TO: Natural Resources Board Members

FROM: Matt Moroney, Deputy Secretary

SUBJECT: Clarification of Board Decision about Registration Required For NBOA Access on Properties Purchased with Stewardship Program Grant Funds

Department staff seek Board clarification regarding the Board's decisions for item 3.B.5. at the August 2011 Board meeting and the possible statewide ramifications of that Board decision.

To ensure efficient and consistent administration of Stewardship Program grants, Department staff need to know if the Board's August 2011 decisions apply only to the three Nature Conservancy (TNC) projects brought before the Board at that time, or if the Board intended to establish policy for all future parcels to be purchased in part with Stewardship Program funds.

BACKGROUND

On August 10, 2011, Department grants staff asked the Board to ratify our preliminary determination to allow award three Stewardship grants to TNC for parcels on which TNC would prohibit water trapping to protect Hines emerald dragonflies. Following much discussion, the Board decided, by a vote of 6-1, that prohibition of water trapping was not necessary to protect Hines emerald dragonfly larvae on these three parcels. Therefore, in order for TNC to receive a Stewardship grant for each of these parcels, the Board decided that TNC would have to allow water trapping on the three parcels.

In response to citizen testimony, the Board went on to discuss TNC's proposed internet user registration requirement that TNC had proposed for those using these three sites. Following that discussion, the Board decided, by a separate vote of 6-1, that TNC's required Internet registration system for hunters and trappers was so onerous that the registration system itself arose to the level of a prohibition, ie., it would prevent a major or significant amount of hunting and trapping from occurring on these three parcels. In order for TNC to receive a Stewardship grant for each of these parcels, when requiring registration for the public to use these parcels, TNC would have to provide an on-site registration system for the three parcels.

CLARIFICATION REQUESTED

The Board's August, 2011 decision was a result of much discussion about the particular circumstances of TNC's management of public use and their website-based registration system. Future project sponsors and Department staff need clarification about the ramifications of that action.

If the Board's action was intended to set policy for all future Stewardship properties on which landowners propose some user registration, Department staff will need additional guidance from the Board to fairly implement this policy. Following direction from the Board and about factors to consider when evaluating a user-registration requirement under ch. NR 52, staff can draft guidance or policy for consideration by the Board at a future meeting.

RELEVANT STATUTES AND CODE

The following statutes and administrative code citations guide Department evaluation of proposed public

uses on parcels purchased in whole or in part with Stewardship funds:

Sec. 23.0916(2)(b), Wis. Stats., requires that hunting, trapping, fishing, hiking, and cross-country skiing are required on most properties purchased in whole or in part with Stewardship Program funds unless the Natural Resources Board first determines that the prohibition of any of these is necessary to protect public safety or a unique plant or animal community. Exceptions to this requirement are identified in the statutes.

Chapter 23, Stats., authorizes the DNR to develop an administrative rule related to this feature of the program. The Board adopted ch. NR 52, Wis. Adm. Code, effective on August 1, 2010. Chapter NR 52 defines criteria by which the Department may determine if an NBOA prohibition is necessary and a process by which the Board decides whether or not to ratify that staff determination at a public-noticed meeting of the Board.

Section NR 52.02(10), Wis. Adm. Code, defines "Prohibit access for an NBOA" as "... not to allow the activity in its entirety, or to restrict the activity so that a major or significant amount of the activity is not allowed."

Section NR 52.01(1), Wis. Adm. Code, also states that "... a restriction of a nature based outdoor activity may be considered a prohibition if the restriction prevents a major or a significant amount of the nature based activity from occurring."

Chapter NR 52

STEWARDSHIP LAND ACCESS

NR 52.01 Purpose and applicability.
NR 52.02 Definitions.
NR 52.03 General provisions.

NR 52.04 Public notice.
NR 52.05 Natural resources board determinations.

NR 52.01 Purpose and applicability. (1) Pursuant to s. 23.0916, Stats., lands acquired in whole or in part with funding from the stewardship program are open for public hunting, trapping, hiking, fishing and cross country skiing unless public access is prohibited pursuant to this chapter. Decisions to prohibit public access for these activities will be reviewed by the department using professional judgment and will be based on sound science, legitimate safety issues, factual data and relevant information. A restriction of a nature based outdoor activity may be considered a prohibition if the restriction prevents a major or a significant amount of the nature based activity from occurring.

(2) The purpose of this chapter is to implement s. 23.0916, Stats., which directs the department to establish standards and criteria for prohibiting public access for hunting, fishing, trapping, hiking and cross-country skiing, defined as nature based outdoor activities under s. 23.0916 (1) (b), Stats. This chapter applies to land acquired in whole or in part with funding from the stewardship program under ss. 23.0915 and 23.0917, Stats. The rules in this chapter are intended to maximize the number of compatible users and uses, to the extent practical, on lands subject to s. 23.0916, Stats.

(3) Pursuant to s. 23.0916 (5) (a), Stats., the natural resources board has determined that ss. NR 1.61 and 51.07 (3) (e) govern public access on all other lands funded in whole or in part with funding from the stewardship program under ss. 23.0915 and 23.0917, Stats., that are not referred to in sub. (1) or (2).

History: CR 09-077; cr. Register July 2010 No. 655, eff. 8-1-10.

NR 52.02 Definitions. In this chapter

(1) "Accommodate usership patterns" means to consider the factors found in s. NR 52.05 (1) (c) when making a determination to prohibit an NBOA.

(2) "Department" means the Wisconsin department of natural resources

(3) "Department land" means land acquired by the department in fee title, or with an easement on former managed forest land on or after October 27, 2007, with stewardship program funds under s. 23.0917, Stats.

(4) "Former managed forest land" has the meaning given in s. 23.0916 (1) (a), Stats.

(5) "Hunting" means shooting, shooting at, taking, catching or killing any wild animal, other than by trapping, or pursuing for the purpose of shooting, shooting at, taking, catching or killing any wild animal.

(6) "Natural values" has the meaning given in s. 23.27 (1) (f), Stats.

(7) "NBOA" means the nature based public outdoor activity of hunting, fishing, trapping, hiking or cross-country skiing as described in s. 23.0916 (1) (b), Stats.

(8) "Non-department land" means land acquired in fee title, or with an easement on former managed forest land on or after October 27, 2007, by a non-profit conservation organization or local unit of government with the assistance of a stewardship program grant under s. 23.0917, Stats.

(9) "Primary purpose" means the recreational or conservation purpose for which the property is being acquired as guided by ss. 23.09 (2), (20) (am), 23.0915, and 23.0917, Stats., by s. NR 51.05, and by state, regional or local plans that support the project.

(10) "Prohibit access for an NBOA" means not to allow the activity in its entirety, or to restrict the activity so that a major or significant amount of the activity is not allowed.

Note: A temporary restriction of an NBOA for department approved land management practices is not considered a prohibition of an NBOA.

(11) "Stewardship program" means the Knowles-Nelson Stewardship Program authorized under ss. 23.0915 and 23.0917, Stats.

(12) "Unique animal or plant community" means a natural community composed of different plant and animal species, along with their associated geological and archaeological features, that exist together in a specific area, time and habitat. A unique animal or plant community is one identified as endangered, threatened, rare or ecologically sensitive. A unique plant or animal community may also be critical species habitat or an ecological reference area. The sources for identifying unique animal and plant communities include reports or databases, such as the natural heritage inventory, wildlife action plan, regional planning commission reports or other publications routinely referenced by conservation biologists. Individual game species shall not be considered as unique animal species for purposes of this chapter.

Note: References for, or copies of such databases, publications and reports may be viewed or obtained at the Department of Natural Resources, Bureau of Endangered Resources, 101 S. Webster Street, PO Box 7921, Madison, WI 53707-7921.

History: CR 09-077; cr. Register July 2010 No. 655, eff. 8-1-10.

NR 52.03 General provisions. (1) DEPARTMENT LAND.

(a) All department land transactions are subject to s. NR 1.41.

(b) The department shall incorporate an evaluation of the requirements of s. 23.0916 (3), Stats., in master plans under ch. NR 44, feasibility studies and other planning documents that include land acquisition as an implementation strategy. This paragraph applies to new plans as well as any plan updates that may be undertaken for existing department projects that are subject to s. 23.0916 (3), Stats.

(2) NON-DEPARTMENT LAND. In addition to the requirements of ch. NR 51, stewardship program grant applications to acquire non-department lands subject to s. 23.0916 (2), Stats., shall include all of the following:

(a) A description of the public uses proposed for the property being acquired and a checklist indicating which of the specific NBOAs shall be permitted on the property. The checklist shall be in a format determined by the department and shall include at a minimum:

1. An indication as to whether a specific NBOA shall be allowed on the property.

2. For hunting, the checklist shall include information for allowing waterfowl, small game, turkey and big game hunting and shall include gun and archery hunting.

3. For trapping, the checklist shall include information for allowing water trapping and upland trapping.

4. For fishing, the checklist shall include information for permitting shore fishing and boat fishing.

5. For hiking, the checklist shall include information for allowing trail hiking and hiking off-trail.

6. For cross-country skiing, the checklist shall include information for allowing groomed trail skiing and off-trail skiing.

(b) An explanation of the primary purpose for the acquisition. The primary purpose for the acquisition shall be based on s. 23.09 (2), (20) (am), 23.0915, or 23.0917, Stats., and s. NR 51.05 and on state, regional or local plans that support the acquisition. The application shall include the name of the plan being used and a description of the formal or informal public input received.

(c) A description of the NBOAs to be prohibited on the property and the reason for the prohibition. The reason for the prohibition shall be consistent with s. NR 52.05 and the applicant shall address in the application the specific factors in s. NR 52.05 that apply.

(3) DETERMINATIONS MADE IN ACCORDANCE WITH S. 23.0916, STATS., AND S. NR 52.05. (a) When a determination has been made in accordance with s. 23.0916, Stats., and s. NR 52.05 to prohibit one or more NBOAs on department land the feasibility study and master plan for the project where the NBOA will be prohibited shall be amended to describe the prohibited activity and a rule change may be initiated to enforce it.

(b) The stewardship grant contracts executed between the department and sponsor under s. NR 51.07 that are subject to s. 23.0916, Stats., and this chapter, shall describe any determination to prohibit one or more NBOAs and require the sponsor to contact the department if any of the factors identified in s. NR 52.05 changes such that a prohibition may be necessary, or is no longer necessary. The department shall evaluate those changes to determine the applicability to this chapter.

(4) Public use of lands purchased in whole or in part with funding from the stewardship program under s. 23.0917, Stats., shall be subject to all applicable federal, state and local laws; including but not limited to the public trust doctrine.

(5) Contributions of separate property used as sponsor match under subch. I of ch. NR 51, are not subject to this chapter.

(6) An organization with an identified policy prohibiting or restricting one or more NBOAs must comply with the provisions of this chapter regardless of the organization's policies.

History: CR 09-077; cr. Register July 2010 No. 655, eff. 8-1-10.

NR 52.04 Public notice. (1) In addition to the public notice requirements of ch. NR 150, the department shall provide individual notification over the internet to any person requesting to receive a notice of any proposal to prohibit an NBOA on department or non-department land subject to s. 23.0916 (2) or (3), Stats. Any public notice regarding a proposal to prohibit an NBOA shall include all of the following:

(a) The name, address and phone number of the department's contact person for the project.

(b) The checklist described in s. NR 52.03 (2) (a).

(c) A summary of the NBOAs to be prohibited and the factors that were considered under s. NR 52.05.

(d) The department's initial assessment of the proposal to prohibit the NBOA pursuant to s. 23.0916 (2) (b) or (3) (b), Stats. The department's assessment shall include an evaluation of s. NR 52.05 (1) (a) to (c) and shall involve the department's resource management professionals at the local, regional and statewide level.

(2) (a) Public comments concerning the proposal to prohibit an NBOA shall be submitted in writing to the department. The comment period shall be 15 business days beginning on the day immediately following the day the department sends out the notice electronically.

(b) Objections must show the proposed prohibition of an NBOA to be inconsistent with s. 23.0916 (2) (b) or (3) (b), Stats., and s. NR 52.05.

(c) If an objection is received during the 15 business day comment period the department shall have up to 15 additional business days following the close of the comment period to evaluate the public comment, including any objections. The department shall contact anyone that submitted an objection under par. (a) and the person that requested the stewardship program funding to notify them that the objection was received and to gain more information about the proposal to prohibit an NBOA.

(d) The department shall create a written summary of its determination on the proposal to prohibit one or more NBOAs at the conclusion of the public comment and evaluation periods in pars. (c) and (d). The department's written determination shall be based on s. 23.0916 (2) (b) or (3) (b), Stats., and s. NR 52.05 and the department shall provide the written summary to anyone that submitted an objection in accordance with par. (a), and to the person that requested the stewardship program funding.

(e) The department shall submit to the natural resources board for each regularly scheduled meeting a report that summarizes determinations made under par. (d). The report shall contain the information made available to the public under s. NR 52.04 (1), public comments, including any objections, gathered under s. NR 52.04 (2), and the department's written determination made under par. (d). The department shall deliver the report to the natural resources board and make the information available to the public over the internet at least five working days preceding the next regularly scheduled meeting of the board. The natural resources board shall allow public participation to receive public testimony regarding the department's determinations and vote whether to ratify prohibitions on non-department land that appear on the monthly report.

History: CR 09-077; cr. Register July 2010 No. 655, eff. 8-1-10.

NR 52.05 Natural resources board determinations.

(1) In accordance with s. 23.0916, Stats., the natural resources board has determined that it is necessary to prohibit one or more NBOAs on department or non-department land for one or more of the following reasons listed below. In accordance with s. 15.05 (1) (b), Stats., the department shall make administrative determinations for each individual proposal to prohibit an NBOA, under the direction of the board, utilizing the process established in ss. NR 52.03 and 52.04, and based on the following reasons and factors.

(a) To protect public safety. One or more of the factors to consider when evaluating a proposal to prohibit an NBOA to protect public safety include:

1. The primary purpose for the project.

2. Laws and ordinances that may impact one or more NBOAs on the property.

Note: NBOAs may be affected by local laws or ordinances and may change as local laws or ordinances change.

3. User conflicts that may create public safety issues and impact one or more NBOAs on the property.

4. The physical characteristics of the property including size, shape, groundcover, topography or proximity to inhabited buildings that create public safety issues and influence NBOAs on the property.

5. A proposal to prohibit one or more NBOAs on a parcel 5 acres or smaller, located within the boundaries of cities and villages, shall be determined to be necessary in order to protect public safety and shall not be subject to s. NR 52.04 unless:

a. The parcel is adjacent to a parcel where the NBOAs to be prohibited already exist or;

b. The parcel is adjacent to a public waterway.

(b) To protect a unique animal or plant community. One or more of the factors to consider when evaluating a proposal to pro-

hibit an NBOA to protect a unique animal or plant community include:

1. The primary purpose for the project.
2. The necessity to prohibit an NBOA to protect and enhance the biological diversity, composition and ecological functions of natural communities exhibiting relatively little human disturbance or that have the capacity to be easily restored to such conditions.
3. The potential for an NBOA to impact the natural values of the site, according to s. 23.28 (3), Stats.
4. The potential for an NBOA to accelerate or increase over time and cause damage to the natural values of a site.
5. The potential for an NBOA to increase the risk of poaching rare plant or animal species, or the removal or destruction of rare geological or archeological features.

(c) To accommodate usership patterns. One or more of the factors to consider when evaluating the necessity to prohibit an NBOA to accommodate usership patterns include:

1. The primary purpose for the project.
2. User incompatibility and how this incompatibility may lead to the primary purpose of the project being significantly altered or curtailed.
3. The complexity, feasibility, practicality and cost effectiveness of separating activities by time and space or any other manner that might mitigate user incompatibility and or reduce the need for enforcement.
4. The size, shape and location of the property as well as surrounding land uses, including the use of public lands immediately adjacent to the property which may or may not have been funded with stewardship funds. The use of adjacent lands shall not be used as the sole factor in making a determination to prohibit an NBOA to accommodate usership patterns.
5. The mix of NBOAs at the location of the property that, to the extent practicable, will provide a quality experience for all compatible users and uses.

History: CR 09-077; cr. Register July 2010 No. 655, eff. 8-1-10.