

NATURAL RESOURCES BOARD
Conference Call
Minutes

A special meeting of the Natural Resources Board via telephone conference call was held Monday August 16, 2004, in Room 774B of the State Natural Resources Building (GEF 2), 101 South Webster Street, Madison, Wisconsin.

The meeting was called to order by Chairman Gerald O'Brien at 10:30 a.m.

Participating Board Members:

Gerald M. O'Brien, Chair (Stevens Point)
Howard D. Poulson, Vice-Chair (Palmyra)
Jonathan P. Ela, Secretary (Madison)
Herbert F. Behnke (Shawano)
Stephen D. Willett (Phillips)
Christine L. Thomas (Stevens Point)

1. Adoption of revised emergency public waters rules NR 1, NR 310, NR 320, NR 328, NR 329, NR 343 and NR 345.

Mike Staggs, Director, Bureau of Fisheries and Habitat, stated that if this package before the Board doesn't pass then NR 1 will be suspended by the Legislature's Joint Committee for Review of Administrative Rules (JCRAR). Stakeholders, legislators, public interest groups, and Department staff have met to discuss possible changes and came up with the package in front of you. The main changes are to the waters list. There was a concern the list was too long. Here is the list of changes:

NR 1 – Waters Designations

- Policy Statement remains suspended by Joint Committee on Review of Administrative Rules
- Deleted description of Areas of Special Natural Resources Interest
- Shortened list of Areas of Special Natural Resources Interest in favor of additional specifications for individual regulated activities (see below)
- Limits frequency of designations of Areas of Special Natural Resources Interest and public rights features to once in a two-year period
- Clarifies that endangered, threatened, special concern and unique natural communities and public rights features are only those portions of waters where species or features are found.
- Requires report on listing of special concern species to Natural Resources Committees and Joint Committee on Review of Administrative Rules
- List of Priority navigable Waters is unchanged

NR 310 – Procedures

- Clarifies that applicability is for location of public rights features, not whether an activity has an effect on public rights features
- Obligates department to identify public rights features in notifying general permit applicant of ineligibility if public rights feature is a general permit location standard

NR 320 – Bridges and Culverts

- Exemptions for clear span bridges and replacement of culverts less than 24" not allowed in perennial tributaries to trout streams.
- A new general permit is created for placement of culverts in streams less than 35' wide.
- Construction is not allowed between certain dates for clear span bridge and culvert placement to protect fish spawning in trout streams and tributaries
- Waiver potentially available for general permit spawning windows through fisheries biologist
- Endangered and threatened species impact determination process (i.e., application not complete until incidental take authorization obtained if impact cannot be avoided)

NR 328 – Shore Erosion Control Structures

- Repair and replacement exempt if previously permitted or in moderate to high energy settings
- Re-vegetation required for replacement riprap
- Overall height limits corresponding to storm wave heights
- New general permit for riprap in low energy sites
- Endangered and threatened species impact determination process (i.e., application not complete until incidental take authorization obtained if impact cannot be avoided)
- Individual permits allowed for seawalls at moderate energy sites and new riprap at low energy sites

NR 329 – Miscellaneous Structures

- Exemption for intake-outfall structure not allowed in tributaries to trout streams.
- New general permit created for intake–outfall structures. Seasonal construction restrictions trout streams and tributaries
- Overall size limit on intake outfall structure.
- Waiver potentially available for general permit spawning windows through fisheries biologist
- Endangered and threatened species impact determination process (i.e., application not complete until incidental take authorization obtained if impact cannot be avoided)

NR 343 – Ponds

- For storm water ponds, flexibility allowed to determine project impact on public rights feature (rather than requiring set distance away from such features)

NR 345 - Dredging

- Standards for dredging of farm drainage ditch exemption
- No dredging exemption in tributaries to trout streams
- Revised general permit for utility line crossing with seasonal restriction to protect fish spawning habitat
- New general permit for manual dredging with seasonal restriction to protect fish spawning habitat.
- New general permit for maintenance dredging with seasonal restriction to protect fish spawning habitat.
- Waiver potentially available for general permit spawning windows through fisheries biologist
- Endangered and threatened species impact determination process (i.e., application not complete until incidental take authorization obtained if impact cannot be avoided)

The Department recommends the Board to pass the new emergency rules as presented by repealing the previous order and then pass the new set of changes in their entirety.

Mr. Behnke asked about NR 1. The policy statement remains suspended by JCRAR. He asked Mr. Staggs to explain that scenario to the rest of the Board members.

Mr. Staggs stated that in the rule order today there isn't anything specific, but in the rule order passed in April there is a section, 1.016 titled Department responsibilities to conserve and enhance waters. There are six subsections in there that basically outline what was a statement of board policy and intent when implementing these emergency rules and the subsequent permanent rules. There was a statement of Board and Department responsibilities under the body of law we call the public trust doctrine. There was description of case law and legal standards that have led up to what is currently thought of as the public trust doctrine and that was in response to a legislative study committee studying recodification of Chapter 30. There were four other subsections that talked about how the Board was directing the Department to implement these rules. The JCRAR suspended that section of the original emergency order in its entirety and the work group decided not to put it back in though it was stated that the issue would be revisited during development of the permanent rules. Several people at the table expressed that there should be a statement of Board policy and intent with respect to implementation of these reviews.

Mr. Behnke asked if it is the interpretation of the JCRAR that the Natural Resources Board does not have authority to establish policy.

Mr. Staggs stated that statements like that have been made. He didn't know if it's the opinion of all the people involved. It's certainly not the opinion of the Department.

Ms. Thomas stated that the statute says that is specifically what we do.

Mr. Staggs stated that that was discussed.

Mr. Behnke requested that the Chairman of the Board review this further at whatever level necessary with whatever people that should be involved.

Mr. O'Brien stated he would check into it. The statute specifically states that we have the right to set policy for the Department. Perhaps we could possibly have two motions: one to pass rule, and another not to repeal the policy statement.

Ms. Thomas stated she has a second issue, which is that the Board cannot revise the listed waters for two years. The elimination of the policy statement and the inability to revisit the waters of special natural resources interest list for two years are separation of powers issues. We are giving up the power to go back and address something should it be problem. They can always come in and suspend our rules if we added something to the list at some point in the future. But we are closing the door on it if we throw up our hands and give up right now.

Mr. Behnke stated he has another question regarding NR 328. What is the difference between high and low energy sites.

Mr. Staggs stated that it is an attempt to create technical standards. It is the amount of energy by wave activity.

Mr. Willett stated that Mr. Ela and Ms. Thomas make excellent points and under normal conditions he would support them 100%. They are talking about issues of separate powers, the role of the Board, fairness to citizens. His concern is that if we don't pass this, they are going to suspend the rule. He thinks that dangerous.

Mr. Willett MOVED, seconded by Mr. Behnke to repeal the previous action on April 6, 2004 that adopted revisions to Chapters NR 1, 310, 320, 328, 329, 343 and 345 pertaining to implementation of 2003 Wisconsin Act 118 which went into effect on February 6, 2004. The motion carried unanimously by all members.

Mr. Willett MOVED, seconded by Mr. Poulson Adoption of revised emergency public waters rules NR 1, NR 310, NR 320, NR 328, NR 329, NR 343 and NR 345.

Mr. Ela stated that he has been advised that if the Board revisits an issue that has been suspended we have to change the language, we can't just readopt it. That is how the statute reads. We have to slightly modify the preface or defer the discussion until the adoption of the permanent rule. He asked Mr. Staggs to review the timetable.

Mr. Staggs stated that the Board Orders that you passed in April remain in effect until the current package is published that will probably be several weeks because this is a big package, except what was suspended by the legislature. The new package will stay in effect for 150 days with the possibility of two 60-day extensions (approximately 9 months). The rules not affected by this action today which include: NR 300, NR 323, NR 325, NR 341 expire in the next few months. The Department has already sent a letter requesting extensions. The permanent rules' timetable continues to change. The Department would like to go before the Board in October with most of the permanent rules. The goal to get it before legislature in January. Even if they act promptly, it could be as late as May or June before the permanent rules are in effect. There will be gaps in some of the rules. NR 326-piers was suspended. No emergency rules for piers are being proposed, so existing statutes and codes will continue to apply.

Mr. Welter expressed his concerns about NR 1.06(7) that states the Department will conduct the process in sub. (6) not more than once in a two year period. He believes the Board should be able to add waters as we go. He is concerned about leaving some waters that are public rights features unprotected if the Board can only identify them every two years.

Mr. Welter MOVED, seconded by Ms. Thomas, to amend the rule to delete NR 1.06(7) and renumber accordingly.

Mr. O'Brien asked what would this motion do. What is the overall affect? Can the Board add waters as we go along?

Mr. Staggs stated that if the Board deletes that section, then we would precede under 1.06(6) that has a process by which we can identify public rights features similar to what we do with trout waters. The Department is struggling to keep up with the rule-making process, so he doesn't know how much time the staff will have to identify public rights features.

Mr. O'Brien asked since it's an emergency rule, would it be abrogated when we adopt the permanent rule. Should we wait and delete it on the permanent rule?

Mr. Ela stated that there is a parallel provision in NR 105 (5) that specifically restrains Board and Department and that should be included to motion

Mr. Welter MOVED, seconded by Ms. Thomas, to amend the motion to include NR 105(5) second sentence that states “The Board shall consider recommendations for additions to the list of areas of special natural resources interest not more than once in any two-year period” to the previous motion.

Mr. Willett stated that this amendment will make no practical difference it will have difference on how it is perceived. It may cause the entire emergency rule to fall. He will vote against it since it's only an emergency rule.

Mr. O'Brien stated he would agree because it's only an emergency rule and will not be effect for two years.

Mr. Behnke stated he agrees with Mr. Willett and Mr. O'Brien.

Mr. Poulson stated that he agrees too. We need to get to the point where we stop challenging the emergency rule and get to the point where we can get to a final rule.

Mr. Ela stated he is glad the issue was raised and we had the discussion, but I agree that it can be raised again at the permanent rule adoption.

Mr. Welter stated he thinks it's important to express our concern in some way in a fashion in that those who are involved at all levels are going to be aware of. What may have a tendency to happen is what is in the emergency rule will be in the permanent rule. He doesn't think it should be in the emergency rule because it would be a long-term problem for the waters of the state. If that means that this Board decides not to pass this amendment at this time, he would understand that it must be brought up at final rule.

Mr. Ela stated the Board should authorize the Chairman to raise these issues. Then pass the emergency rules as written and it does not bind us in the permanent rule. We have a concern that the statutory authority of the Natural Resources Board is not clearly understood by certain parties.

Ms. Thomas stated that perhaps we should take vote anyway, even though it probably won't pass. It will send a message that these two points are more important than the emergency rule because they constrain our authority in ways that it hasn't been constrained in the past. We are supposed to be a much less political body than the legislative process. Our existence is political and represents the citizens. Without the constraint of having to be re-elected allows us to take the resource into consideration first and our actions lend legitimacy to how the resources are managed and if all we just do is roll over and let that responsibility go away then essentially we're sort of a fraud. We are just there legitimizing the actions of the others when in fact we might have done something else left to our own devices.

Mr. O'Brien asked Mr. Staggs to advise the Board on the immediate history of this two year restriction. Where did it come from, how important is it and what's likely to happen if we delete it?

Mr. Staggs stated that the main concern with NR 1 was the number of waters involved. Because that was one of the concerns there was a lot of discussion back and forth. The Department staff was trying to maintain a number of the lists and functions like the public rights features that we believe in the long run provide the same level of resource protection. There was a lot of concern about the list constantly changing, list growing very fast and in some ways subverting the intent of allowing general permits and exemptions on a reasonable number of waters. There was a lot of concern in the work group along those lines. We were discussing ways to address these concerns. This two-year guideline derived out of the discussions from the ground water legislation in which there is a two-year time frame about how often the trout waters could be changed. It was an important issue for some of the parties in the discussion.

Mr. Behnke stated that he shares the concerns of Ms. Thomas and Mr. Welter in regards to the Board's authority in protecting our natural resources. But I think the discussion we have just had probably is the visible part we're looking for.

Mr. Welter stated he would like to vote on the amendment.

Bruce Baker, Deputy Administrator, Division of Water stated that one of the option the Board has is to take this up as a separate motion, which would then be clear direction from the entire Board for our negotiations in the permanent rule. Disentangle it from this current action.

Mr. Behnke stated he agrees and this issue should be separated out to direct the Department to address it in the permanent rule.

Mr. Welter stated he is willing to withdraw amendment and make it separate motion.

Ms. Thomas stated it is acceptable to her if the motion is withdrawn.

The motion to adopt the revised emergency public waters rules NR 1, NR 310, NR 320, NR 328, NR 329, NR 343 and NR 345 passed unanimously.

Mr. Welter stated he would like the Board to direct the staff to discuss and formulate the permanent rule to modify NR 1.05(5) and 1.06(7) to delete the provisions that restrict the Department from coming back with recommendations for additions to areas of special natural resources interest and of public rights features no more often than every two years.

Ms. Thomas stated she would like the Board to instruct the staff to go forward on the permanent rules on the basis of maintaining the Board's independent authority in the policy making process. That would cover both issues of the policy statement issue and the two-year limitation issue.

Mr. Welter stated that his issue is fairly specific to the one particular area sited. Ms. Thomas is addressing a larger issue.

Mr. Poulson stated that these are two separate issues. Ms. Thomas is discussing how we are going to survive as a Board and authority of a Board. Mr. Welter is discussing what we need to do relative to the waters.

Mr. Welter stated that his motion is two specific examples of Ms. Thomas' issue, but he thinks it should be a separate motion.

Mr. Staggs stated as a member of review group it is helpful to them if the Board has specific concerns to have those laid out.

Mr. Welter MOVED, seconded by Mr. Behnke to direct the staff to discuss and formulate the permanent rule to modify NR 1.05(5) and 1.06(7) to delete the provisions that restrict the Department from coming back with recommendations for additions to areas of special natural resources interest and of public rights features no more often than every two years.

The vote carried 6-1 vote, with Mr. Willett voting no.

Ms. Thomas MOVED, seconded by Mr. Behnke to instruct the staff to express to the legislature that the policy provision that was in the original rule order that they asked the Board to repeal should be placed back in, in order to express the proper authority of the Board.

Mr. Staggs asked for clarification about if the Board wants the policy provision to be inserted exactly as is or just something similar.

Ms. Thomas stated it doesn't necessarily need to be inserted as is. She is just suggesting that we have a right to put a policy statement in.

Mr. Ela added that the policy statement should not imply any diminution of the statutory of the Natural Resources Board.

The motion carried unanimously.

Mr. Welter complimented the staff for all that they have done to protect the waters during spawning season. Mr. Ela complimented the staff for doing an outstanding job putting complicated material together in a hurry.

The meeting adjourned at 11:20 a.m.