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October 30, 2009

Wisconsin Natural Resources Board
PO Box 7921
Madison, WI 53707

RE: Comments on Proposed Stewardship Public Access Administrative Rule – NR 52

Dear Wisconsin Natural Resources Board:

Thank you for the opportunity to comment on the draft of NR 52. Gathering Waters Conservancy is the statewide service center for Wisconsin's land trusts. Our mission is to help people protect the places that make Wisconsin special, and we do this by making land trusts stronger. Land trusts have been tremendous partners with the Wisconsin Department of Natural Resources and have played a significant role in making the Knowles-Nelson Stewardship Fund a national model for land protection. To date, land trusts and local governments have raised nearly \$200 million in federal, local, and private funds to match state grants received through the Stewardship program and have protected more than 60,000 acres of land in communities across the state. Virtually all of this land is open to the public, and this investment represents an enduring legacy that everyone in Wisconsin should be proud of.

From the beginning of this rulemaking process, Gathering Waters has argued that NR 52 should provide adequate flexibility and predictability for land trusts and local governments to continue protecting the places important to their communities. We believe that this rule, as it is written, provides this flexibility and predictability and provides a good framework within which natural resource professionals at the DNR can make decisions on public access. We also believe that the draft of NR 52 effectively captures the input from the Administrative Rule Citizen Advisory Committee. Therefore, we are in support of the rule and are advocating that NR 52 not be revised further.

The flexibility built into the Stewardship grants program has allowed Wisconsin communities to protect some very unique, valuable lands. The current draft of NR 52 maintains a reasonable amount of flexibility for land trusts and local governments, and will hopefully allow them to continue protecting the places that make their communities special. In particular, the series of factors listed in section 52.05 of the rule, which are to be used to determine when properties can be closed to protect public safety, protect unique plant and animal communities, or accommodate usership patterns should be left intact because they direct the natural resource professionals at the DNR to examine all of the most relevant issues. In addition, nearly all of the factors in 52.05 were pulled directly from the recommendations of the diverse Citizen Advisory Committee.

Another great strength of the Stewardship program has been its predictability. Land trusts and local governments have come to rely on clear criteria and objective, science-based decision making when applying for Stewardship grants. The current draft of NR 52 would help to maintain a predictable process by vesting the final decision-making about individual grants with the Department of Natural Resources, rather than with the members of the Natural Resources Board. Some individuals and organizations have requested that the rules allow for a direct appeal from the DNR to NRB; however, we believe that an appeal right to the NRB would only serve to further politicize the Stewardship Fund and would likely delay an already complicated and rigorous grant application process. In addition, it is important to point out that there is no requirement in the state statute for the NRB to oversee an appeals process. Instead, the statute (in section 23.0916(5)) simply states that the NRB shall develop *a process* for the review of determinations made about public access, and does not specify who must administer this process. Please see below for the direct quote from the statute.

In addition to our more general comments, here are several specific comments about sections of the rule that we believe are particularly important:

- (1) The statutory language (Wis. Stat. s. 23.0916(5)(b)) does not require that decisions by the DNR be appealable to the NRB. The specific language reads as follows: “The natural resources board, by rule, shall develop, all of the following:...(b) A process for the review of determinations made under subs.

(2)(b) and (3)(b)” [emphasis added]. The statutory language clearly states that the NRB is merely directed to develop a review process, and not necessarily one that the NRB must implement. In addition, it is important to note that the Wisconsin Legislative Council memo prepared by Mark Patronsky, dated October 28, 2008, does not address Wis. Stat. 23.0916(5)(b), but rather 23.0916(2)(b) and 23.0916(3)(b). As we described above, we believe that there should be no appeals process to the Wisconsin Natural Resource Board.

- (2) All of the factors listed in NR 52.05(1)(c) should be left intact; however, two of them are particularly important. NR 52.05(1)(c)4. and 5. are crucial components of the rule and should not be modified further. Without these two factors, the effectiveness of the rule would be significantly diminished. These two factors would allow the DNR staff to examine the unique circumstances and usership patterns of each particular property and would give them a reasonable amount of flexibility to make determinations about public use. An example of how these factors might be applied could be the addition of new acreage to an existing project—for instance 20 acres added on to an existing 500-acre complex of protected land. In this example, it would be entirely unreasonable to expect a land manager to manage the new addition for different recreational activities without taking the complexity, feasibility, practicality and cost effectiveness into account. In addition, the size, shape and location of the property, as well as surrounding land uses would clearly be relevant factors that should also be considered.
- (3) The primary purpose of Stewardship projects should remain in the rule as one of the factors considered in determining the prohibition of nature based outdoor activities. The addition of Wis. Stat. s. 23.0916 to the Stewardship statute did not change the primary purposes of the Stewardship Program. For example, the primary purpose of the State Natural Areas program is defined in law (Wis. Stat. s. 23.27) as:
 - (i) Areas that serve as reservoirs of genetic or biological diversity and native biotic communities
 - (ii) Areas that provide habitat for endangered, threatened or critical species or for species of special concern of plants and/or animals
 - (iii) Areas that may contain significant archaeological or geological features
 - (iv) Sites for education and research and to serve as benchmarks to measure impacts (e.g. climate change) on ecosystems.

Clearly there is some correlation between the “unique plant and animal community” exception in the public access section of the Stewardship statute and the State Nature Areas section of the Stewardship statute, and thus the primary purpose for protecting State Natural Area should be considered as a factor in NR 52.

- (4) Natural resource professionals within the DNR should be given the discretion to use their best professional judgment when implementing NR 52. Therefore, the phrase, “[d]ecisions 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 issue, factual data and relevant information,” (NR 52.01(1)) should be left intact in the final rule and should be followed closely by the DNR in implementing the rule. In addition to this language, the language in NR 52.05(b)3. and 4. should not be modified. DNR staff should be allowed to use their professional judgment in determining “the potential for an NBOA to impact the natural values of [a] site, according to s. 23.28(3)”, and in determining “the potential for an NBOA to accelerate or increase over time and cause damage to the natural values of a site.”

As natural resource professionals will tell you, there is often little conclusive research on either the positive or negative impacts of recreational uses on unique plant and animal communities. Therefore, the Department should be given the discretion to use a precautionary approach to allowing such uses, particularly on State Natural Areas.

Again, we would like to thank you for the opportunity to comment on this important issue, and we at Gathering Waters Conservancy look forward to working with the DNR and all interested parties to continue making the Knowles-Nelson Stewardship Fund a relevant and effective program for many years to come.

Sincerely,

A handwritten signature in black ink, appearing to read 'MS', is positioned above the typed name.

Mike Strigel
Executive Director