

**SPECIES AND HABITAT
CONSERVATION AGREEMENT RELATING
TO THE INCIDENTAL TAKE OF THE
KARNER BLUE BUTTERFLY**

THIS SPECIES AND HABITAT CONSERVATION AGREEMENT (“Agreement”) is entered into by and between the State of Wisconsin Department of Natural Resources (DNR) and State of Wisconsin, Department of Transportation (DOT), state agencies, for the purpose of authorizing the incidental take of the Karner blue butterfly (KBB) in the State of Wisconsin consistent with and during the period of a statewide Incidental Take Permit issued by the United States Department of Interior, Fish and Wildlife Service (FWS).

WHEREAS, the DNR intends to apply for and request that a Permit authorizing the incidental take of the KBB (“Permit”) be issued by the FWS based upon this Agreement with DOT, similar species and habitat conservation agreements with other public and private entities, and an implementation agreement to be included with the permit application;

WHEREAS, the statewide KBB conservation program contemplates the use and inter-relationship of species and habitat conservation agreements, a statewide Habitat Conservation Plan (HCP) and an Incidental Take Permit to form and direct the KBB conservation plan, as well as clarify commitments and obligations of landowners and land users in this effort;

WHEREAS, the Permit requested from the FWS would authorize the incidental take of the KBB in the State of Wisconsin subject to implementation of conservation measures and compliance with procedures, terms and conditions of this Agreement, the HCP and the Permit, by other private and public entities entering into species and habitat conservation agreements with the DNR; and

WHEREAS, DOT plans to engage in activities that may result in the incidental take of the KBB and is willing to implement conservation measures consistent with the Permit, and this Agreement on lands under and to the extent of the DOT’s control to avoid, minimize or mitigate the take of such species as further provided herein.

IT IS HEREBY AGREED by the parties, based upon the mutual terms and conditions herein, that this Species and Habitat Conservation Agreement (SHCA) shall constitute the DOT’s commitment and agreement to undertake conservation measures for the KBB upon issuance of a Permit (which constitutes the Certificate of Inclusion) by the FWS. The parties further agree this Certificate of Inclusion is conditioned on the premise that the SHCA shall be consistent with the HCP and the conditions of the Permit.

1. **DEFINITIONS.** For purposes of this Agreement, the following definitions apply:

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- A. "Certificate of Inclusion" is a document issued by the FWS which, thereby, includes the person or entity it is issued to under the provisions of the Permit and authorizes incidental take consistent with the HCP, the Permit and this Agreement.
- B. "Implementation Agreement" is a legal contract entered into between the DNR and the FWS that: (1) identifies the responsibilities of all public and private entities included the HCP; (2) legally binds the DNR to their obligations; and (3) is signed by the DNR.
- C. "Incidental take" is the take of a species incidental to, and not for the purpose of, the carrying out of an otherwise lawful activity.
- D. "Incidental Take Permit" is a permit issued by the FWS under the authority of Section 10(a)(1)(B) of the Endangered Species Act to authorize the incidental take of a species listed as endangered or threatened under that Act.
- E. "Intentional Take" means the purposeful take of a species not incidental to an otherwise lawful activity, e.g., collecting.
- F. "Partner", consistent with the HCP Articles of Partnership (AOP) and determined as a Partner by the HCP Implementation Oversight Committee (IOC) assigned this task, is a person, agency or organization that:
1. Enters into and agrees to the HCP and AOP; and
 2. Has an ownership interest, i.e., fee title or easement in land with existing or potential KBB habitat; or
 3. Has economic assets at risk as a result of the listing of the KBB as endangered; or
 4. Has a role in implementing the HCP.

2. PERIOD OF AGREEMENT.

The period of this Agreement shall be 10 years from its execution and issuance of a Permit authorizing incidental take consistent with this Agreement, during the period of the Permit, unless terminated in accordance with paragraph 10 or amended in accordance with paragraph 11.

3. LANDS SUBJECT TO AGREEMENT.

The lands subject to this Agreement include approximately 8,052 acres and are more particularly described in Appendix B and accompanying map which is attached to and made part of this Agreement and all future ownership within the high potential range of the KBB, subject to the notification and reporting process, and implementation of conservation practices consistent with this Agreement, the HCP and the Permit.

4. ACTIVITIES/INCIDENTAL TAKE AUTHORIZED/PUBLIC OUTREACH AND EDUCATION/CONSERVATION EFFORTS/MODIFICATION.

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A. ACTIVITIES. The following specified land management or land use activities may be engaged in on the lands owned or managed by DOT and described in Appendix B in accordance with this Agreement, and the incidental take of KBB is authorized, if the specified activities or any activities not listed are conducted consistent with the HCP, HCP guidelines and protocols, the Permit, this Agreement and any changes and improvements made with the HCP participation processed and consistent with the AOP, which amend these documents; and other protocols or management directions attached to and made part of this Agreement as Appendix A; specifically construction, operation and maintenance of highways and airports, and associated transportation structures or facilities.

B. INTENTIONAL TAKE. The DOT agrees not to engage in the intentional take of the KBB, (as defined in Paragraph 1. E.) and agrees that entering into this Agreement does not authorize the intentional take of such species.

C. PUBLIC OUTREACH AND EDUCATION. The DOT agrees to engage in public outreach and education activities where it is feasible for the purpose of conserving the KBB.

D. CONSERVATION EFFORTS FOR THE KBB. The DOT intends to engage in conservation efforts and practices to manage in consideration of Karner Blue butterflies in dispersal corridors along designated state highways described in Appendix A and B.

5. SURVEYS.

The DOT agrees to conduct surveys of the KBB and its habitat on selected highway corridors listed in Appendix B. Written records of all surveys, including identification and qualifications of the person conducting the survey, the results of the survey as to habitat and occurrences observed, and the conservation strategy to be applied to respond to the findings of the survey, shall be maintained by the DOT during the period of, and retained for five years following termination of the Agreement, at Hill Farms State Office Building, 4802 Sheboygan Avenue, P.O. Box 7965, Madison, Wisconsin 53707-7965

6. MONITORING

The DOT agrees to monitor and maintain written records regarding the effects of land management and activities on the lands subject to this Agreement, and retain them for five years following termination of the Agreement, at Hill Farms State Office Building, 4802 Sheboygan Avenue, P.O. Box 7965, Madison, Wisconsin 53707-7965

7. DNR AND FWS INGRESS AND EGRESS.

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a.(1). **AUDITING AND MONITORING.** During the period of this Agreement, the DNR may audit and monitor the activities and records of the DOT. Except as provided in a.(2), auditing and monitoring shall be preceded by reasonable notice, not to be less than 24 hours, and shall be conducted in the presence of a representative of the DOT, if the representative is available at the noticed time and date, or other time agreed upon by the DOT and auditing personnel. Reasonable advance notice must also be given DOT when inspecting the Interstate system to obtain vehicle safety equipment and DOT escort before inspection begins. Access to the property involved, to the extent of the DOT's authority, is authorized; it being expressly understood and agreed that such access shall be at the sole risk of FWS, DNR, and DNR shall notify in writing all parties entering such property of this risk prior to such access. Access to the lands subject to this Agreement and records required by it, or the HCP, shall be for the purpose of assuring compliance with this Agreement and the HCP, and be unlimited. Documents of title or interest in the property shall be provided to the DNR upon its request. A copy of any final report, map or other record prepared by the DNR on the results of its going upon the land or reviewing the records shall be provided to the DOT within thirty (30) days of the DNR access and review.

Notification under this paragraph shall be in writing, facsimile, or telephone to:

Wisconsin Department of Transportation, Bureau of Equity and Environmental Services, (608) 266-1017, Hill Farms State Office Building, 4802 Sheboygan Avenue, P.O. Box 7965, Madison, Wisconsin 53707-7965. Representatives of the Implementation and Oversight Committee agree to and shall protect, indemnify and save harmless the State and all of its officers, agents and employees from and against any and all suits, actions, demands, or claims of any character whatsoever brought for or on account of any injuries or damages received by any persons or property from, directly or indirectly, the operations or activities of the representatives of the Implementation and Oversight Committee, in performing the audits and inspections related to this Agreement. Between the DOT and the DNR, any loss or expense (including costs and attorney fees) by reason of liability imposed by law, will be charged to the agency responsible for the officer, employee or agent whose activity caused the loss or expense.

(2) The notice provision in subparagraph a. (1), shall not apply when the DNR considers that pending or ongoing activities of the DOT, or person authorized by the DOT, based on written concerns or complaints made known to them, may adversely affect KBB occupied sites in a manner inconsistent with the Agreement, or result in damage to or destruction of KBB occupied habitat that may jeopardize the Permit.

b. Any refusal of access authorized in Subparagraphs (1) or (2), shall be considered a breach of this Agreement and subject the DOT to all remedies available to the DNR under this Agreement or at law.

c. The FWS may accompany the DNR when auditing or monitoring under this Agreement or the HCP.

d. In addition to authority granted elsewhere in this Agreement, the FWS may, at its sole risk, enter lands subject to this Agreement, which are owned by the DOT and, during regular business hours, access records of the DOT required for the purpose of overseeing the Permit and activities under it or required by this Agreement.

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e. Nothing in this agreement, including this section, shall abrogate the authority of the Secretary of the Interior through the FWS to fulfill his (her) responsibility in the administration and enforcement of the Endangered Species Act (ESA), 16 USC 1531 et seq., and all implementing regulations including, but not limited to 50 CFR 13 and 17.

8. ANNUAL REPORT.

A. The DOT shall submit an annual report no later than March 1 following the calendar year, which is the subject of the report. Each report shall include the following information as to the KBB:

- (1). The acreage of land subject to disturbance, land use or management activities;
- (2). The type of activity, including equipment or techniques used, and location of the disturbance;
- (3). Surveys conducted for the lands subject to the activities and the person(s) conducting the activities consistent with this Agreement and the HCP;
- (4). Results of absence/presence surveys for the KBB
- (5). Monitoring activities conducted during the calendar year;
- (6) Transfers or purchases, conveyance of, or anticipated transfers or purchases, or conveyance of Lands Included or management rights subject to this Agreement in the high potential range of the KBB, or other transactions involving the DOT regarding lands or management rights of land in the high potential range, including identification of the purchaser or transferee, or other person with interest in the property, and address, location, and occurrence of KBB (if known) except as regarding other notification involving land in Biological Recovery Zones (BRZ);
- (7). Other information requested by the DNR prior to the report date which is identified in the HCP or is reasonably necessary for implementation of or compliance with the Permit or otherwise offered by the DOT.
- (8). Public outreach and education activities conducted by the DOT adequately describing the outreach and education effort e.g. publication, cooperation with other landowners, etc.

B. Within thirty (30) days after receipt of the annual report from DOT under Paragraph 8. A., the DNR shall provide written notification to DOT as to the DOT's compliance with this Agreement. This notification shall constitute certification that DOT is and has been in full compliance with this Agreement, the HCP and the Permit as of the date of the report, or list areas where compliance is not achieved.

9. REMEDIES.

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a. The DOT agrees that this Agreement and authorization under the Permit does not apply to conduct resulting in the take of a KBB that does not substantially conform to the requirements of this Agreement or the HCP, and in such a situation the DOT will be acting without a Permit or authority to take a KBB and shall be subject to all provisions, remedies and penalties of the Endangered Species Act (ESA), 16 USC 1531 et seq.

b. (1) Upon a breach or violation of this Agreement, as determined by the DNR, and in addition to any remedies provided or pursued under paragraphs 9a., the DNR may revoke this Agreement and the authorization under it after considering recommendations of the Implementation and Oversight Committee. The DOT and the FWS shall be notified in writing of an alleged breach or violation by the DOT.

(2) The DOT shall be provided an opportunity to present information to the DNR and the Implementation and Oversight Committee on an alleged violation and what an appropriate remedy, if any, should be prior to the DNR's determination on whether a breach or violation occurred and the appropriate remedy. Information shall be presented to the DNR and the Implementation and Oversight Committee by the DOT within thirty (30) days of notice of an alleged violation of this Agreement to the DOT.

(3) If the DNR, after its determination that there was a breach or violation of this Agreement by the DOT, and its consideration of recommendations of the Oversight and Implementation Committee, determines that action by the DOT may be taken that is reasonable and consistent with ensuring the conservation of the KBB and its habitat without the application of other remedies in this paragraph, it shall not seek additional remedies on the condition that the DOT completes the remedial action within a time considered reasonable by the DNR.

c. The DNR retains all further remedies in law or equity which it may apply to a breach or violation of this Agreement. Enforcement or other remedies available to the FWS under the ESA shall not be abridged or affected by any decision of the DNR under this paragraph.

d. It is understood that unintentional violations of this Agreement may occur, and that the DOT may be required to act in emergency situations that do not allow them to follow all commitments in this Agreement. Should such a situation arise, it is expected that the DOT will report such activity, detailing the damage, if any, to KBB habitat and such action the DOT intends to take to cure or mitigate any damage to KBB or its habitat. The DNR agrees to consider the circumstances and the DOT's offer to cure or mitigate in any decision it may make regarding appropriate remedial or enforcement action necessary under this Agreement.

10. TERMINATION.

This Agreement or its applicability to any land under it may be terminated by the DOT upon sixty (60) days notice to the DNR and upon the occurrence of one of the following:

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- a. The land or management right over it is transferred to another by land contract, fee title, easement, or otherwise;
- b. The KBB is no longer protected by the ESA, (i.e. is delisted) or the KBB is downlisted to threatened and take activities of the DOT is allowed per a 4.d. rule.
- c. Other reasons for termination by the DOT with advice of the DNR and Implementation Oversight Committee provided that appropriate conservation and/or compensation has occurred for the take of occupied KBB habitat. It is the responsibility of DOT to demonstrate to DNR that reasonable conservation has occurred to termination.

11. AMENDMENT.

This Agreement shall constitute the entire Agreement between DNR and DOT concerning the KBB. No modifications of this Agreement or waiver of its terms and conditions shall be effective unless made specifically in writing and mutually agreed upon and signed by both parties.

12. CONTRACTING PARTIES.

In this Agreement, the DNR and the DOT include their respective officers, employees, agents and successors.

13. STATUS OF PARTIES.

The DOT shall not be considered as an agent, contractor or an employee of the DNR for any purpose, including workers compensation. The DNR agrees that the DOT has sole control of the activities and work conducted on the lands of or under the control of the DOT. The DNR only reserves the right of ingress and egress to the lands and facilities, consistent with paragraph 7, to inspect the lands and records of the DOT, as provided herein, to assure compliance with this Agreement.

14. TRANSFER.

In the event that the DOT sells, transfers or otherwise divests itself of some portion of the Lands Included or management rights, but still has a portion of the Lands Included, management rights or assets at risk due to the listings of the KBB, and the DOT chooses to remain a signatory partner, assignment of any incidental take authorization under this Agreement and the permit may be transferred to a subsequent owner of the Lands Included or management rights (Transferee) if the Transferee enters into, agrees to and files with the DNR a SHCA, which is acceptable to the DNR. Following review and recommendation by the IOC, the SHCA may be signed. The FWS will be notified of the transfer and approved SHCA and shall issue a Certificate covering the Transferee. Unlike the complete transfer and assignment of an SHCA to an Assignee, incidental take authorization is not offered to the Transferee until a SHCA unique to the Transferee is approved by the IOC and DNR and a Certificate is issued by the FWS. The

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DOT agrees to notify the DNR of any transaction involving Lands Included, management rights, or assets related to land within a Biological Recovery Zone (BRZ), designated on the map which is attached and made part of this Agreement, within 45 days of the transaction. For any transaction involving Lands Included or management rights on property not located within a BRZ, but still located within the high potential range, notification of transfers can be made at any time, but must be included prior to any activity which would result in incidental take of KBB in order for the incidental take authority to be valid. Incidental take is not authorized on newly acquired land until the transfer is reported to the DNR and added to the DOT's Lands Included.

15. MODIFICATION/ADAPTIVE MANAGEMENT. The DOT agrees to modify, to the extent that is necessary and practicable, responsibilities and duties under this Agreement consistent with the review and adaptive management process established in the HCP. The DOT further agrees to reasonably modify or adapt its management or activities upon a clear showing through DOT's monitoring that management or activities are not producing the conservation benefits anticipated, consistent with DNR advice; or modify or adapt its management or activities consistent with the HCP monitoring and adaptive management protocol.

16. FUNDING COMMITMENTS.

The DOT commits to completing its conservation strategies and other obligations as provided in this Agreement, whether accomplished by the employees, agents, contractors or cooperators. Nothing in this Agreement shall be construed as obligating the DOT to the expenditure of funds or for the future payment of money in excess of appropriations authorized by law.

17. DATA SHARING

- A. Data provided by the DNR and which constitutes Natural Heritage Inventory data (NHI) may not be used for any purpose other than development of the SHCA or conducting of activities under the Permit. It may not be released or made available to any person, agency or organization for any purpose unless agreed to in writing by the DNR. Documents or data containing NHI information is included in this restriction.
- B. Data provided to the DNR is subject to Wisconsin's Public Record Law, Ch. 19, Wis. Stats., and subject to that law regarding requests for it. Under s. 23.27 (3), Wis. Stats., NHI information is considered confidential and release or use of it is controlled by the DNR and administrative rules to administer the NHI Program.

18. NOTICE TO AGENTS, ETC. It is recognized that the DOT often conducts its land management or use activities through an agent, lessee, licensee, contractor, permittee, right-of-way grantee, or purchaser. The DOT has and accepts the obligation to require, normally through written agreement or communication, that activities be conducted in a manner consistent with this Agreement, the HCP and the Permit. Take incidental to otherwise lawful activities of these persons or entities is authorized by the Permit so long as such activity and incidental take resulting from it is authorized by the DOT consistent with this Agreement, the HCP and the Permit. A violation of any authorization which includes procedures and activities for KBB conservation the DOT is required to follow or conduct, consistent with this Agreement, the HCP and the Permit, by an agent, lessee, licensee, contractor, permittee, right-of-way grantee, or purchaser, shall not result in the suspension, revocation, or termination of the Permit or the authorization to the DOT under this Agreement, the HCP and the Permit; nor shall it affect other

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benefits, rights, or privileges under this Agreement, the HCP or the Permit, except as to that agent, lessee, licensee, contractor, permittee, right-of-way grantee, or purchaser, who is and will be subject to the provisions of the ESA, including remedies for its violation when acting inconsistent with the authorization from the DOT, this Agreement, the HCP and the Permit. The obligation to demonstrate that the DOT adequately communicated procedures and requirements of this Agreement, the HCP and the Permit to the agent, lessee, licensee, contractor, permittee, right-of-way grantee, or purchaser is on the DOT.

19. ARTICLES OF PARTNERSHIP. The DOT agrees to enter into and comply with the Articles of Partnership (AOP), which are attached to and part of this Agreement.

**STATE OF WISCONSIN
DEPARTMENT OF TRANSPORTATION**

DATE _____

BY _____

**Kevin Chesnik
Division Administrator
Transportation System Development**

**STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES**

DATE _____

BY _____

**Paul DeLong
Division Administrator of
Forestry, Wisconsin DNR**

AND

DATE _____

BY _____

**Laurie Osterndorf
Division Administrator of
Land, Wisconsin DNR**

Appendix A

DOT Roadside Management with Consideration for the Karner Blue butterfly

In November 1995, the Wisconsin Department of Transportation (DOT) became involved with other public and private organizations to develop a Habitat Conservation Plan (HCP) for the Karner Blue butterfly. DOT demonstrates its commitment toward the successful implementation of the HCP through its active participation in the HCP's development process and participation in several committees. DOT further agrees to modifications of its roadside management along selected corridors in central and northwestern Wisconsin in consideration of KBB habitat. WisDOT's main approach to consideration of KBB will be the Dispersal Corridor Strategy.

Dispersal Corridor Strategy

It is documented that KBB use right-of-way (r-o-w) corridors for population dispersal. This strategy will manage selected r-o-w to provide for corridors of dispersal between KBB habitat along r-o-w corridors controlled by DOT. Habitat corridors can function as connections between KBB population centers and serve to disperse KBB genetic material and guard against extreme population shifts. They also help assure that catastrophic events do not isolate or eliminate individual KBB populations. This strategy includes:

1. Selective mowing that avoids the growing season except immediately adjacent to travel lanes
2. Lupine seeding after construction projects in appropriate soils and locations
3. Mitigation for permanent take or removal
4. Monitoring KBB/lupine populations when affected by WisDOT activities

Corridor Criteria. KBB management corridors meet the following criteria:

WisDOT highway corridors that are within the high potential range of KBB, and contain significant wild lupine populations, typically upland sandy soil areas in central and northwestern Wisconsin.

County crews normally do all of DOT's highway maintenance. This work is completed through guidance and direction from DOT's maintenance sections within each district. County crews will be trained in implementation of this agreement.

Mowing/Brushing - Mowing for safety will continue to occur at least once annually within 15' of outside shoulders of highways, or to the bottom of the ditch or drainage areas, whichever is less, Five feet on inside shoulders of medians and within vision areas described in the Maintenance Manual 74.10, C.

R-o-w beyond this mow zone varies from 20 to 50 feet or more and will be the main target of KBB management. Spot mowing or brush cutting in this area will only be done between July 15th and April 1 on a two to five year cutting rotation to control woody plants and encourage lupine germination and growth. Exceptions to this may be allowed for spot mowing during the growing season to favor native plants and discourage leafy spurge, Canada thistle and other invasive species.

Appendix B

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Karner Blue butterfly Corridors

This is the list of highway corridors selected for management in consideration of Karner Blue butterfly with approximate map mileage, excluding urban areas. These designated corridors have either KBB and/or significant lupine populations. Management will be implemented on these corridors. If significant new KBB habitat is discovered on other corridors, those stretches of highway rights-of-way would be included with those managed for KBB.

WisDOT Highway Corridors:

- 80 from I-90, 94 to Dexterville, 32 miles (24 miles*)
- 54 from Black River Falls to Port Edwards, 47 miles (7 miles*)
- 54 from Wisconsin Rapids east to Plover, 11 miles
- 54 from Highway 51 southeast to Waupaca, 19 miles
- 10 from Steven's Point east to Waupaca, 19 miles
- 173 from Valley Junction to STH 80, 21 miles (20 miles*)
- 173 from Babcock to Nekoosa, 9 miles
- 12 from I-94 north of Tomah to Black R. Falls, 22 miles (5 miles)*
- 12 & 16 from Camp Douglas northwest to I-90 near Tomah, 10 miles
- 12 from Augusta west to Eau Claire, 19 miles
- 12 from Black River Falls north to Hwy 10, 22 miles
- 27 from Augusta north to Co. "D", 10 miles
- 27 south of Bl. River Falls to Cataract ,12 miles (3 miles*)
- 21 from Angelo east to I-94, 14 miles (4 miles*)
- 21 from I-94 east to the Juneau County line, 9 miles
- 21 from Juneau County line east to Wautoma, 50 miles (8 miles*)
- 22 from Montello north to Wautoma, 15 miles
- 152 from Wautoma to Mt. Morris, 6 miles
- 23 from Highway 51 east to Montello, 7 miles
- 13 north from Co. Hwy E to Highway 73, 25 miles
- I-90 and 16 between Sparta exit east to Tomah/I-94, 16 miles
- I-94 from the Eau Claire County line northwest to first Eau Claire exit, 14 miles
- 58 from I-90, 94 north to 80, 10 miles
- 77 from Danbury east to the county line, 15 miles
- 35 from Danbury south to Siren, 14 miles
- 70 from Highway 35 east to the county line, 16 miles
- I-90, 94 from Mauston northwest to Black River Falls, 40 miles
- 73 from Highway 13 southeast to Wautoma, 26 miles
- 73 from Highway 13 southeast to Wautoma, 26 miles
- 12 and 16 from Mauston north to Camp Douglas, 15
- 29 from county "T" near Chippewa Falls west to I-94, 9 miles
- 12 from Eau Claire northwest to Hwy 29, 5 miles
- 66 from Stevens Point northeast to Rosholt ,9 miles
- 70 from Hwy 48 west to the St. Croix River, 5 miles
- 35 from Danbury north to Riverside, 6 miles

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- 22 from Wautoma north to Waupaca, 22 miles

- I-94 from Black River Falls northwest to Hixton, 10 miles

- 51 from Coloma north to Hwy 10, 34 miles

Total miles = 671 Approximately 12 acres per mile of right-of-way

Total acres = 8,052

Biological Recovery Zone acreage:

Black River/Fort McCoy area- 15 miles; 180 acres

Wood/Juneau Co. area- 52 miles; 624 acres

Total for Biological Recovery Zones - 67 miles; 804 acres