

(e) The permit does not authorize any work other than what is specifically described in the application and plans, and as modified by the conditions of the permit. A permittee shall obtain prior written approval of modifications from the department before modifying a project or amending permit conditions.

(f) The department may modify or revoke the permit if the project is not completed according to the terms of the permit or if the department subsequently determines the activity is detrimental to the public interest.

(g) The permittee shall post a copy of this permit at a conspicuous location on the project site visible from the waterway, beginning at least 5 days prior to construction and remaining at least 5 days after construction. The permittee shall also have a copy of the permit and approved plan available at the project site at all times until the project is complete.

(h) The permittee shall submit a series of photographs to the department within one week of completion of work on the site. The photographs shall be taken from different vantage points and depict all work authorized by the permit.

(2) Acceptance of a general permit and efforts to begin work on the activity authorized by the general permit signifies that the permittee has read, understood and agreed to follow all conditions of the general permit.

(3) The department shall retain continuing jurisdiction over any project permitted under this chapter and s. 30.206, Stats.

(4) The department shall monitor activities permitted under the general permit program and shall evaluate the need to repeal or amend this chapter or other chapters authorizing general permits for specific activities.

SUBCHAPTER IV INDIVIDUAL PERMITS, NOTICES, HEARINGS AND ADMINISTRATIVE REVIEW

NR 310.13 Eligibility for individual permits. To be eligible under subchs. I and II of ch. 30, Stats., for authorization under an individual permit, an activity shall meet all standards for the individual permit in the statute that authorized issuance of the individual permit, the rules in this chapter and the rules promulgated under the statute that authorized issuance of the individual permit.

Note: The rules specifying standards for regulated activities for which individual permits are available are the NR 300 series of Wisconsin Administrative Code.

NR 310.14 Individual permit applications. (1) GENERAL PROVISIONS. (a) Any person may apply for an individual permit from the department under subch. II, ch. 30, Stats.

(b) A person who seeks an individual permit from the department under this section shall submit an application on a form provided by the department and shall provide all the information requested on the form and accompanying instructions.

Note: Individual permit application forms are available at department service centers and on the department's website at www.dnr.wi.gov under the topic "Waterway and Wetland Permits."

Note: Federal permits may also be required. Applications for general permits are joint applications for both state and federal permits. The applicant shall mail a duplicate copy of the completed general permit application forms to the St. Paul district, U.S. army corps of engineers to seek federal authorization. Applicants are responsible for obtaining all necessary federal permits or approvals for their activity.

Note: Local land use or building permits may also be required. Applicants are responsible for obtaining all necessary local permits or approvals for their activity.

(c) An individual permit application is received by or submitted to the department on the date the application or additional information is received at the department office specified on the permit application form or accompanying instructions.

(d) Any additional information filed by an applicant to complete an individual permit application is received by or submitted to the department on the date the additional information is received at the department office where the additional information was requested to be submitted.

(e) The department has provided notice under this subchapter when it mails an applicant the initial determination of completeness, notice of complete application or notice of public hearing.

(2) INTERESTED AND POTENTIALLY INTERESTED MEMBERS OF THE PUBLIC (a) The following are determined to be interested and potentially interested members of the public under s. 30.208(3), Stats.:

1. The designated contact for all state, regional, and local watershed and waterway organizations for the waterway or waterways affected by the activity.

2. The clerk of the county and the town, village or city in which the activity is located.

3. Any person who submits to the department a written request for notification regarding a specific application or any general type of application. If the department receives requests for notification from persons who identify themselves as members of a specific organization, notice to an officer of the organization shall constitute notice to all organization members.

4. The adjacent riparian on each side of the property on which the activity is located.

(b) The department may identify additional interested members of the public for a specific individual permit application.

(c) The department shall provide to the applicant with the notice of complete application a list of the names and addresses of the persons it has identified under pars. (a) and (b).

(3) COMPLETENESS DETERMINATIONS. (a) In determining completeness under this subchapter, the department shall determine if an applicant submitted all required items of information necessary to evaluate the application. A determination that an application is complete does not determine whether the submitted information is accurate or sufficient to prove that the activity meets the standards to obtain an individual permit.

(b) The department may dismiss an individual permit application without prejudice if the information needed to complete the application is not received within 45 days after the department notifies an applicant that its application is incomplete.

(c) The department may dismiss an individual permit application without prejudice if the proof of publication required in sub. (9) is not received within 45 days after the department notifies an applicant that its application is complete.

(4) INITIAL DETERMINATION OF COMPLETENESS (APPLICATION DATE + 30 DAYS OR LESS). (a) Within 30 days after an individual permit application is submitted, the department shall initially determine whether the application is complete and notify the applicant as follows:

1. If the application is complete, the department shall notify the applicant in writing that the application is complete.

2. If the application is incomplete, the department shall notify the applicant in writing that the application is incomplete, identify all specific items of information needed to complete the application, and

advise the applicant that the department may dismiss the application if the information needed to complete the application is not received within 45 days after the department provides notice that the application is incomplete.

(b) The department may not determine an application is complete unless the department determines that the applicant has provided all information necessary any environmental assessment or environmental impact statement required under s. 1.11, Stats., and ch. NR 150.

NR 310.15 Notices and public comment. (1) NOTICE OF COMPLETE APPLICATION (INITIAL DETERMINATION OF COMPLETENESS DATE + 15 DAYS). (a) Within 15 days after the department provides an initial determination of completeness under s. NR 310.14(4)(a)1., the department shall send the applicant a notice of complete application. The notice shall contain all the information required under s. 30.208(5)(b), Stats.

(b) If the applicant requests a public hearing in its individual permit application, the department shall include a notice of public hearing with the notice provided in par. (a).

(c) The applicant shall publish the notice in par. (a) or (b) in the newspaper identified by the department in the notice.

(d) The applicant shall provide a copy of the notice to any person or group who requests a copy.

(e) If the notice contains a list of names and addresses identified under s. NR 310.14(2), the applicant shall provide a copy of the notice to each person on the list. The notice shall be provided to each person via US mail with return receipt requested or delivered in person.

(f) The applicant shall provide proof of notice publication to the department within 45 days after the department provides to the applicant the notice of complete application. The proof of publication shall be an affidavit from the newspaper certifying publication and documenting the date of publication.

(g) If the applicant is required to notify a list of persons in par. (e), the applicant shall provide proof of notification to the department within 45 days after the department provides to the applicant the notice of complete application. The proof of notification shall be copies of signed return receipts or other signed document verifying that the person received the notice in person.

(2) PUBLIC COMMENT PERIOD (NOTICE OF COMPLETE APPLICATION DATE + 30 DAYS, OR PUBLIC HEARING DATE + 10 DAYS). (a) Any person may submit written comments on an application to the address specified in the notice of complete application or notice of public hearing.

(b) Comments shall address facts relevant to whether an activity in an application will comply with the legal standards listed in the notice of complete application.

(c) The department shall consider all written public comments in evaluating an individual permit application.

(d) Comments are submitted on the date they are postmarked using U.S. mail or on the date they are hand-delivered to the address specified in the notice of complete application or notice of public hearing.

(3) NOTICE OF PUBLIC HEARING. (a) The department shall provide a notice of public hearing:

1. If an applicant requests a public hearing in their individual permit application.

2. If a person submits a written request for public hearing within 30 days after the date the department provided notice of complete application under sub. (1).

3. If the department determines within 30 days after the date the department provided notice of complete application under sub. (1) that there is a significant public interest in holding a public hearing.

(b) The notice of public hearing shall contain all the information required under s. 30.208(5)(b), Stats.

(c) The department shall provide the notice of public hearing required in par. (a)1. with the notice of complete application provided under sub. (1).

(d) The applicant shall publish the notice of public hearing in the newspaper identified by the department in the notice.

(e) The applicant shall provide a copy of the notice of public hearing to any person or group that requests a copy of the notice prior to the public hearing date.

(f) If the notice contains a list of names and addresses identified under s. NR 310.14(2), the applicant shall provide a copy of the notice to each person on the list. The notice shall be provided to each person via US mail with return receipt requested or delivered in person.

(g) The applicant shall provide proof of notice publication to the department within 45 days after the department provides to the applicant a notice of public hearing. The proof of publication shall be an affidavit from the newspaper certifying publication and documenting the date of publication.

(h) If the applicant is required to notify a list of persons in par. (f), the applicant shall provide proof of notification to the department within 45 days after the department provides to the applicant a notice of public hearing. The proof of notification shall be copies of signed return receipts, or other signed document verifying that the person received the notice in person.

NR 310.16 Public informational hearings. (1) FORM AND TIMELINESS OF REQUEST FOR PUBLIC HEARING. Any request for a public informational hearing shall comply with all the following requirements:

(a) A request shall be in writing and dated.

(b) A request shall be submitted to the address in the notice of complete application and postmarked no later than 30 days following the date the department provided notice of complete application.

(c) A request shall include the docket number or applicant name and specify the issues that the party desires to be addressed at the public informational hearing.

(d) The issues specified in the hearing request shall relate to the legal standards listed in the notice of complete application.

(2) LOCATION OF PUBLIC INFORMATIONAL HEARING. The department shall schedule the public informational hearing. The hearing shall be located in the vicinity of the property that is the subject of the individual permit application wherever possible and practicable.

(3) PARTICIPATION AT PUBLIC INFORMATIONAL HEARINGS. Any interested members of the public or representatives of government agencies may participate in a public informational hearing with respect to the issuance of the proposed permit subject to the procedures in sub. (5). Persons and government agencies participating need not be represented by legal counsel.

(4) CHANGES OR ADJOURNMENTS IN TIME OR PLACE OF HEARING. (a) Requests for changes in the time and place of a scheduled hearing will be granted only for good cause shown prior to any required newspaper publication of legal notice for the hearing.

(b) The hearing examiner may adjourn a hearing for good cause shown, to be reconvened at the discretion of the department on 10 days' notice or at a time certain on agreement of all persons present.

(5) CONDUCT OF PUBLIC INFORMATIONAL HEARINGS. (a) *Informational hearings.* Public informational hearings held pursuant to this subsection are not contested cases as defined in s. 227.01(3), Stats.

(b) *Hearing examiner.* Public informational hearings held pursuant to this subsection shall be conducted by a hearing examiner designated by the secretary or secretary's designee.

(c) *Procedure.* 1. The hearing examiner shall open the hearing by concisely stating the scope and purpose of the hearing and explaining the procedures to be used in the hearing. The hearing examiner shall explain how and to whom notice of the final decision granting or denying a permit will be provided and how a person may seek administrative or judicial review of the final decision.

2. Appearance slips shall be distributed to all persons attending the hearing and the hearing examiner shall ask all persons present to indicate on their appearance slips whether they intend to present an oral or written statement at the hearing.

3. Any person may direct informational or clarifying questions through the hearing examiner to a person making oral statements, but cross-examination may not be allowed at the hearing.

4. The hearing examiner may place time limits on individual oral statements to prevent undue repetition or insure that all persons wanting to make statements can do so in a reasonable period of time.

5. The hearing examiner, in the hearing examiner's discretion, may limit the number of representatives that may make oral statements on behalf of any individual or organized group.

6. When necessary to ensure maximum participation and adequately allot time for oral statements at hearing, the hearing examiner may schedule at set times for persons to make oral statements. Even if oral statements are scheduled, unscheduled oral or written statements also shall be allowed at hearing.

7. Any person submitting a written statement at hearing shall submit at least one legible copy to the hearing examiner.

8. Regardless of specific requirements of this paragraph, the hearing examiner may, in the hearing examiner's discretion, use any procedures necessary to insure that the hearing will be conducted in an orderly and expeditious manner, provided the measures are consistent with broad public participation in the hearing.

(d) *Contempt.* Loud, noisy, disruptive or contemptuous conduct at a hearing shall be grounds for exclusion from the hearing, at the discretion of the hearing examiner.

(6) RECORD OF PUBLIC PARTICIPATION. The department shall record public informational hearings electronically. The department may prepare a written report of public participation in the hearing.

NR 310.17 Individual permit decision. (1) DECISION DATE (PUBLIC HEARING DATE OR PUBLIC COMMENT PERIOD END DATE + 30 DAYS OR LESS). The department shall render a decision issuing, denying or modifying a permit or approving a contract within 30 days after the public hearing is held, or if no public hearing is held, within 30 days after the end of the public comment period.

(2) STANDARDS AND INFORMATION. The department shall consider all the following information in deciding whether to approve, modify or deny an individual permit application:

(a) Applicable standards in statutes, rules and common law.

(b) Plans and information provided by an applicant.

- (c) Information gathered during site investigations.
- (d) Written or oral provided during a public comment period or public hearing.
- (e) Statements or information provided by local, state and national government agencies.
- (f) Data or information found in natural resource inventories and plans, or maps collected by the department or others using commonly accepted methods.
- (g) Published scientific research.
- (h) Section 1.11, Stats., Wisconsin environmental policy act, and ch. NR 150.
- (i) Any other pertinent information.

(3) NOTICE OF DECISION. The department shall mail copies of its decision on an individual permit application to all of the following:

- (a) The applicant.
- (b) The city, town or village where the activity is located.
- (c) The county where the activity is located.
- (d) The United States army corps of engineers.
- (e) Any person who asks the department in writing for a copy of the final decision.

(4) EFFECTIVE DATE. (a) *Delayed effective date.* All individual permits issued under this subchapter shall take effect 30 days after the date the department mails its decision to all the parties listed in sub. (3), unless the department receives a petition for administrative hearing under s. 30.209, Stats., and s. NR 310.18 that contains a request for a stay as provided in s. 30.209(1m)(c), Stats.

(b) *Effect of request for stay on permit effective date.* 1. If a petition for administrative review contains a request for a stay, the individual permit for which a stay is requested shall take effect the day after the date the department denies the petition as provided under s. 30.209(f) and (fm), Stats.

2. If the department grants a petition for administrative review, the individual permit for which the petition has been granted shall take effect the day after any of the following occurs:

a. The hearing examiner assigned the case by the division of hearings and appeals lifts the stay because the hearing examiner has determined as provided in s. 30.209(2)(b), Stats., that continuation of the stay is not necessary to prevent significant adverse impacts or irreversible harm to the environment pending completion of the hearing.

b. The hearing examiner renders a decision approving, modifying or denying the individual permit.

(c) *Dates of decisions regarding permits, petitions for administrative review, and stays.* For purposes of this subsection, the department or hearing examiner has rendered a decision; granted or denied a petition for administrative review, or lifted a stay on the date that the department or examiner mails the applicant and the petitioner copies of the decision.

NR 310.18 Administrative review. (1) PETITION FOR ADMINISTRATIVE REVIEW AND REQUEST FOR STAY (PERMIT DECISION DATE + 30 DAYS). (a) Within 30 days after the department renders a decision under s. NR 310.17, any interested person may file with the department, and at the same time provide a copy to the

applicant of, a petition seeking administrative review of the decision. The petition also may request a stay of the activity pending an administrative hearing.

(b) The petition shall be in writing, shall be dated and shall be signed by the petitioner.

(c) The petition shall be submitted to the secretary of the department at the address provided in ch. NR 2.

(d) The petition shall include as an attachment a copy of the decision for which administrative review is sought.

(e) A petition for administrative review and any request for stay therein shall comply with the format and be filed in the manner provided by s. 30.209(1m), Stats., and ch. NR 2.

(f) A petition is filed on the date it is received by the secretary of the department at the address specified in ch. NR 2.

(g) A stay requested in a petition shall take effect upon filing of the petition and remain in effect until the department denies the petition under sub. (3) or a hearing examiner lifts the stay as provided by s. 30.209(2)(b), Stats.

(2) APPLICANT RESPONSE TO PETITION (PETITION RECEIPT DATE + 15 DAYS OR LESS) (a) Within 15 days after a petition is filed with the department, an applicant may file with the department, and at the same time shall provide to the petitioner seeking review, a response to the petition.

(b) A response to a petition shall comply with s. 30.209(1m)(e), Stats.

(c) A response to a petition is filed on the date it is received by the secretary of the department at the address specified in ch. NR 2.

(3) GRANT OR DENIAL OF ADMINISTRATIVE REVIEW PETITION (PETITION RECEIPT DATE + 30 DAYS OR LESS)

(a) Within 30 days after the date that a petition is filed, the department shall grant or deny the petition in writing and, if the petition is denied, state the reasons for denial as provided in s. 30.209(1m)(f), Stats. Failure to dispose of the petition within 30 days is a denial.

(b) The department has granted or denied a petition under par. (a) when it mails a grant or denial to a petitioner.

(4) REFERRAL TO DIVISION OF HEARINGS AND APPEALS (PETITION GRANT DATE + 15 DAYS OR LESS) (a)

Unless both the petitioner and applicant agree to an extension, the department shall refer the matter to the division of hearings and appeals within 15 days after granting the petition.

(b) The department has referred the matter under par. (a) when it mails to the division of hearings and appeals a hearing request form and copies of the permit application, the notice of completeness, the permit decision, the petition for administrative review, any petitioner's response to the petition, and the department letter granting the petition.

(5) NOTICE OF ADMINISTRATIVE HEARING. (a) At least 30 days before the date of the administrative hearing, the division of hearings and appeals shall notify the applicant as provided in par. (b).

(b) The division of hearings and appeals shall provide an applicant all the following:

1. A notice of administrative hearing that shall contain all the information required under s. 30.208(5)(b), Stats. The division of hearings and appeals may include any additional information that it deems necessary to provide adequate notice of an administrative hearing.

2. A letter accompanying the notice or notices that contains all the following:

a. A statement that an administrative hearing will be held and whether the applicant or an interested person requested the hearing.

b. A statement that the applicant must mail a copy of the notice to any person or group who asks for a copy and mail a copy via U.S. mail with return receipt requested to an enclosed list of persons that the department has determined are interested and potentially interested members of the public pursuant to s. 30.208(3), Stats., and s. NR 310.14(2).

c. A list of persons and groups that asked that a notice of hearing be mailed to them, a list of interested and potentially interested members of the public determined by the department under s. 30.208(3), Stats., and s. NR 310.14(2) and a statement that the applicant is required to mail a notice of hearing to any person or group that asks for the notice between now and the hearing date.

d. A statement that the applicant is required to publish the notice as a Class I notice under ch. 985, Stats., and provide the division an affidavit of publication to prove the notice was published. The name of the newspaper in which the notice must be published shall also be provided to the applicant.

e. A statement that the applicant is required to furnish the division return receipts of mailing to or signed affidavits of receipt of notice from all persons under subd. par. c.

f. A statement that the applicant or an authorized representative must appear at the hearing to present testimony or the hearing will be rescheduled or the application dismissed.

g. A statement that the hearing may be rescheduled or the application dismissed if the hearing examiner does not receive the information specified under subd. pars. d. and e. by the date requested by the hearing examiner.

h. A statement that if the application is dismissed, the applicant may resubmit an application for the individual permit.

(c) The division has provided the information in par. (b) when it mails an applicant the information.

(d) An applicant shall publish a notice provided under par. (b) as a class I notice under ch. 985, Stats., mail the notice or notices to all listed persons in par. (b)2.c., and provide to the division a copy of the notice, an affidavit of publication, and return receipts of mailing to or signed affidavits of receipt of notice from all persons under par. (b)2.c.

(e) The department has provided notice of an administrative hearing on the later of the date notice of hearing was published or mailed to all listed persons as required by par. (d).

(f) The division may reschedule a hearing or dismiss an application without hearing if the hearing examiner does not receive the information specified in par. (b)2. d. and e. by the date requested by the hearing examiner.

(g) If the application is dismissed, the applicant may resubmit an application for the individual permit.

(5) CONDUCT OF ADMINISTRATIVE HEARING. An administrative hearing shall be conducted in compliance with the requirements of ss. 30.209(2) and 227.42, Stats., and chs. NR 2 and HA 1.

(6) CONFLICTS OR OMISSIONS. In the event of conflicts between or omissions in the statutes and rules that govern requests for and conduct of administrative hearings, the applicable statutes and rules shall be applied in the following sequence:

(a) Section 30.209, Stats., shall apply notwithstanding any conflicting statutes or rules.

(b) Section 227.42, Stats., shall apply notwithstanding any conflicting statutes or rules except for s. 30.209, Stats., and shall apply to any issues not addressed by s. 30.209, Stats.

(c) Section NR 310.18 shall apply notwithstanding any conflicting statutes or rules except for ss. 30.209 and 227.42, Stats., and shall apply to any issues not addressed by s. 30.209 or 227.42, Stats.

(d) Chapter NR 2 shall apply notwithstanding any conflicting statutes or rules except for ss. 30.209 and 227.42, Stats., and s. NR 310.18, and shall apply to any issues not addressed by s. 30.209 or 227.42, Stats., and s. NR 310.18.

(e) Chapter HA 1 shall apply to any issues not addressed by s. 30.209 or 227.42, Stats., or s. NR 310.18 or ch. NR 2.

SECTION 7. Chapter NR 322 is repealed.

SECTION 8. FINDING. The emergency rule procedure, pursuant to s. 227.24, Stats., is necessary and justified in establishing rules to protect the public health, safety and welfare. The Wisconsin Legislature recently enacted 2003 Wisconsin Act 118, to streamline the regulatory process for activities in public trust waters. The state has an affirmative duty to administer the new law in a manner consistent with the public trust responsibilities of the State of Wisconsin under Article IX, Section I of the Wisconsin Constitution.

2003 Act 118 identifies certain activities that may be undertaken in public trust waters exempt from a permit, or under a general permit. Certain activities may not be undertaken in waters that are defined as "areas of special natural resource interest" or at other locations where the activity would cause detrimental impacts on public rights and interests in navigable waters. Without emergency rules to aid in administering the new law, the following severe problems will occur:

- Until general permits are created by rule, any activity which is not exempt requires an individual permit with an automatic 30-day public notice. The required 30-day comment period will unnecessarily delay hundreds of construction projects that otherwise could go ahead with specified conditions for protecting lakes and streams (for example, all new riprap and culvert applications currently require public notices).
- Unclear wording of exemptions currently puts property owners, contractors and consultants at risk of violation. Without clear procedures and standards established by emergency rule, many more people may request exemption determinations, slowing the decisions on individual permit applications.
- Wording of exemptions and temporary grading jurisdiction puts lakes and streams at risk. Without standards as intended and described in the new law, exempted activities and grading along shorelines will cause inadvertent but permanent destruction of fish and wildlife habitat, loss of natural scenic beauty and reduced water quality. Rights of neighboring property owners may also be harmed. Cumulatively over one or two construction seasons, these impacts will have immediate and permanent effects on Wisconsin's water-based recreation and tourism industry.

To carry out the intention of the Legislature that 2003 Act 118 to speed decision-making but not diminish the public trust in state waters, these emergency rules are required to establish definitions, procedures and substantive standards for exemptions, general permits and jurisdiction under the new law.

SECTION 4. EFFECTIVE DATE. This rule shall take effect the day of publication in the official state newspaper.

SECTION 5. BOARD ADOPTION. This rule was approved and adopted by the State of Wisconsin Natural Resources Board on April 6, 2004.

Dated at Madison, Wisconsin 4/7/09

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By Scott Hassett
Scott Hassett, Secretary

(SEAL)

Natural Resources – Affects Chs. NR 300, 310, 322

SECTION 1. NR 300.01 is amended to read:

NR 300.01 Purpose. This chapter is developed pursuant to ss. 30.28, 31.39, 281.22, 281.36 and 281.37, Stats., to establish procedures for charging basic and supplemental fees for permits, approvals, determinations and hearings for projects in navigable waters and wetlands and to establish time limits for permits, approvals and determinations for projects in navigable waters and wetlands.

SECTION 2. NR 300.04(2), (3) and (4)(a) and (b) are amended to read:

NR 300.04(2) For any permit, approval or determination made pursuant to ss. 30.10 to 30.27, ~~281.36 or 281.37~~, Stats., the department shall initially determine whether a complete application has been submitted and, no later than ~~60~~ 30 calendar days after the application is submitted, notify the applicant in writing about the initial determination of completeness. For any permit, approval or determination made pursuant to s. 281.37, Stats., the department shall initially determine whether a complete application has been submitted and, no later than 30 calendar days after the application is submitted, notify the applicant in writing about the initial determination of completeness. If the department determines that the application is incomplete, the notice shall state the reason for the determination and the specific items of information necessary to make the application complete. For any permit, approval or determination made pursuant to ss. 30.10 to 30.27 and ~~281.37~~ 281.36, Stats., the department may not demand items of information that are not specified in the notice as a condition for determining whether the application is complete unless both the department and the applicant agree or unless the applicant makes material additions or alterations to the project for which the application has been submitted. An application may not be considered complete until the requirements of the Wisconsin environmental policy act, s. 1.11, Stats., have been met and until all information necessary for associated permits, such as Wisconsin pollution discharge elimination permits under ch. 283, Stats., have been submitted to the department.

(3) For any permit, approval or determination made pursuant to ss. 31.02 to 31.38, 281.22 and ~~281.36~~ 281.37, Stats., the applicant shall submit as requested, at any time during the review process, additional information the department finds to be reasonably necessary for review of the application.

(4)(a) The department shall initially determine whether a complete application has been submitted and, no later than 30 calendar days after the application is submitted, notify the applicant in writing about the initial determination of completeness. For individual permits, the department shall provide to the applicant a notice of complete application within 15 calendar days after the department determines that the application is complete.

(b) For determinations made pursuant to ss. ~~30.10 to 30.27~~, 31.02 to 31.28, 281.22, 281.36 and 281.37, Stats., 120 calendar days.

SECTION 3. NR 300.04(4)(d) to (g) are created to read:

NR 300.04(4)(d) A person wishing to proceed with an activity that may be authorized by a general permit promulgated under s. 30.206, Stats., shall apply to the department, with written notification of the person's wish to proceed, not less than 30 calendar days before commencing the activity. If within 30 calendar days after a notification is received, the department does not inform the applicant that an individual permit is required, the activity will be considered to be authorized and the applicant may proceed without further notice.

(e) For determinations made for individual permits without a request for hearing pursuant to ss. 30.10 to 30.27, Stats., 105 calendar days.

(f) For determinations made for individual permits with a request for public hearing pursuant to ss. 30.10 to 30.27, Stats., 150 calendar days.

(g) For exemption determinations made pursuant to ss. 30.10 to 30.27, Stats., 15 calendar days.

SECTION 4. NR 300.05(3)(e) is created to read:

NR 300.05(3)(e) If an exemption determination request is not made according to the procedures in s. NR 310.05 or the exemption determination request does not give consent to inspect, the 15 calendar day time limit does not apply.

SECTION 5. NR 300.06(1) is amended to read:

NR 300.06 Fee processing. (1) FEE REQUIRED. The department shall charge a fee for permits or approvals. The permit or approval fee shall accompany the permit application or request for approval. Projects funded in whole or in part by any federal agency or state agency ~~or any permits issued under s. 30.12 (3) (a) 2., 2m. or 3., Stats.,~~ are exempt from fees. Except for federal or state agency dam projects, any construction, alteration, change in operation, transfer or abandonment of a dam requires a fee pursuant to s. 31.39 (3), Stats.

Note: Fees for general permits will be set at \$50.

SECTION 6. Chapter NR 310 is created to read:

NR 310

PROCEDURES FOR EXEMPTIONS, GENERAL PERMITS, INDIVIDUAL PERMITS, NOTICES, HEARINGS, AND ADMINISTRATIVE REVIEW

SUBCHAPTER I GENERAL PROVISIONS

NR 310.01 Purpose. This chapter establishes procedures for processing exemption determinations, general permits and individual permits for activities in navigable waterways, in order to provide consistent and efficient administration of the exemption and permit programs while assuring that the public trust in Wisconsin waterways is maintained.

NR 310.02 Applicability. This chapter applies to exemptions, general permits and individual permits regulated under subchs. I and II, ch. 30, Stats.

NR 310.03 Definitions. In this chapter:

(1) "Days" under this chapter means calendar days unless otherwise specified.

Note: See s. 990.001(4), Stats., for statutory standards on computing time.

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

(3) "General permit" means a permit issued by the department that categorically authorizes certain activities regulated under ss. 30.206 and 30.12(3), 30.12(7), 30.19(3r) and 30.20(1t), Stats.

(4) "Individual permit" means a permit issued by the department for a single project under specific applicable provisions of ch. 30, Stats., excluding s. 30.206, Stats. For purposes of this chapter, "individual permit" includes a contract issued under s. 30.20, Stats.

(5) "Navigable waterway" means any body of water with a defined bed and bank that is navigable under Wisconsin law. In Wisconsin a body of water is navigable if it is capable of floating on a regularly recurring basis the lightest boat or skiff used for recreation or any other purpose.

(6) "Riparian" means an owner of land abutting a navigable waterway.

(7) "Surface waters" means all natural and artificial lakes and streams, except for artificial cooling lakes, agricultural or irrigation ponds, and facilities constructed for the treatment of wastewaters.

SUBCHAPTER II EXEMPTIONS

NR 310.04 Eligibility for exemptions. (1) To be exempt under s. 30.12(1g), 30.123(6)(d) or (e), or 30.20(1g), Stats., from the requirement to obtain a general or individual permit under ch. 30, Stats., an activity shall meet all standards for installation, construction and location in the statute authorizing the exemption and the rules promulgated under s. 30.12(1p), 30.123(6s) or 30.20(1k), Stats.

Note: Some locations are not eligible for exemptions or general permits, see ch. NR 1.

Note: The rules specifying standards for exempted activities are chs. NR 1, 320, 323, 326, 328, 329 and 345.

(2) For those activities which may not be located where there are public rights features as defined in s. NR 1.06, a person may only undertake an exempt activity after they have evaluated the site and determined that no public rights features described in s. NR 1.06(4) may be affected by their activity.

(3) Pursuant to ss. 30.12(2m), 30.123(6m), and 30.20(1m), Stats., the department may require a person engaged in or proposing an activity for which an exemption is available to obtain a general or individual permit.

NR 310.05 Exemption determination requests. (1) Any person may request a determination from the department under s. 30.12(2r), 30.123(6r) or 30.20(1r), Stats., as to whether an activity or location is exempt under s. 30.12(1g), 30.123(6)(d) or (e) or 30.20(1g), Stats.

(2) A person who seeks a department determination as to whether an activity or location is eligible for an exemption under sub. (1) shall submit a written request to the department. The request shall be submitted on a form provided by the department, by delivery methods specified by the department, and shall provide all the information requested on the form.

(3) If the person who requests the determination is the person proposing the activity, the request shall be submitted not less than 20 days before commencing the activity to allow time for mailing between the applicant and department.

Note: Federal or local permits may be required. Applicants are responsible for obtaining all necessary federal or local permits or approvals for their activity.

NR 310.06 Department procedures for processing exemption determination requests. (1) The department shall develop and maintain a form for requesting an exemption determination under s. NR 310.05, and provide a copy of the form to any person on request.

Note: Form 3500-107, "Chapter 30 Exemption Determination Request" is available at department service centers and on the department's website at www.dnr.wi.gov under the topic "Waterway and Wetland Permits."

(2) Upon receipt of an exemption determination request under s. NR 310.05, the department shall determine whether an activity or location qualifies for an exemption under s. 30.12(1g), 30.123(6)(d) or (e) or 30.20(1g), Stats., and the rules promulgated under the applicable statute.

(3) The date of receipt of an exemption determination request shall be the date the form is received at the department office specified on the form.

(4) If the exemption determination request does not meet all the requirements of s. NR 310.05(2), it shall be deemed incomplete. The department shall notify the requester that the activity is not exempt and shall describe the information that a new exemption determination request must include in order for the information to be complete.

(5) Where an exemption determination request is filed for an activity for which an exemption is not available under s. 30.12(1g), 30.123(6)(d) or (e) or 30.20(1g), Stats., the department shall notify the requester within 15 days of receipt that the activity is not eligible for an exemption, and of any provisions of ch. 30, Stats., that apply to the activity.

NR 310.07 Exemption determinations. (1) The department shall determine whether an activity is exempt under s. 30.12(1g), 30.123(6)(d) or (e) or 30.20(1g), Stats., based on whether it complies with this chapter, all standards in the statute that create the specific exemption and all standards in any rules promulgated under that statute.

(2) The department may inspect activity sites as necessary to determine whether the activity qualifies for an exemption, or whether a general or individual permit is required.

(3) In determining whether an activity is eligible for an exemption, the department may rely on information and data gathered by the department in a prior inspection of the activity site or the waterbody adjacent to the activity site. The department is not required to make a new site inspection in response to receipt of an exemption determination request form.

(4) Where a person who owns the property where an activity is or will be located files an exemption determination request, the department shall determine if the activity is exempt under sub. (1), notify the requester in writing within 15 days if it determines that an activity is not exempt, and inform the requester that a general or individual permit is required for the activity. The department also may notify a requester if it determines that an activity is exempt.

(5) Where a person who does not own the property where an activity is or will be located files an exemption determination request, the department shall determine if the activity is exempt under sub. (1) and notify the requester in writing of its determination. If the activity is not exempt, the department shall inform the requester that a general or individual permit is required for the activity. If the department seeks permission from the landowner to access the property, the department shall notify the landowner of both the exemption determination request and its exemption determination. If the department is not able to obtain permission to access the property to inspect the site, and therefore unable to make a determination as to whether the activity is exempt, the department shall inform the requester of this fact. The department also may notify a requester if it determines that an activity is exempt.

(6) The department has provided notice of its exemption determination on the date the department mails the written determination to the person who requested the determination.

NR 310.08 Permits in lieu of exemptions. In making a determination under s. 30.12(2m), 30.123(6m) or 30.20(1m), Stats., that a general permit or individual permit is required in lieu of an exemption, the department may rely on information and data gathered by the department in a prior inspection of the activity site or waterbody adjacent to the activity site. The department is not required to make a new site inspection in response to receipt of an exemption determination request form.

SUBCHAPTER III

GENERAL PERMITS

NR 310.09 Eligibility for general permits. (1) To be eligible for authorization under a general permit pursuant to ss. 30.206 and 30.12(3), 30.123(7), 30.19(3r), or 30.20(1t), Stats., an activity shall meet all standards for the general permit in the statute that authorized issuance of the general permit, the rules in this subchapter and the rules promulgated under the statute that authorized issuance of the general permit and s. 30.206, Stats.

Note: The rules specifying standards for regulated activities for which general permits are available are chs. NR 320, 323, 326, 328, 329, 341, 343 and 345.

(2) Pursuant to ss. 30.12(2m), 30.123(6m), 30.20(1m) and 30.206(3r), Stats., the department may require a person engaged in or proposing an activity for which general permit authorization is available to obtain an individual permit.

NR 310.10 General permit applications. (1) Any person may apply for a general permit from the department under ss. 30.206 and 30.12(3), 30.123(7), 30.19(3r) or 30.20(1t), Stats.

(2) A person who seeks a general permit from the department under sub. (1) shall submit an application on a form provided by the department and shall provide all the information requested on the form and accompanying instructions.

Note: General permit application forms are available at department service centers and on the department's website at www.dnr.wi.gov under the topic "Waterway and Wetland Permits."

(3) A person filing an application under subs. (1) and (2) shall submit the application to the department not less than 35 days before commencing the activity to allow time for mailing between the applicant and department.

Note: Federal permits may also be required. Applications for general permits are joint applications for both state and federal permits. The applicant shall mail a duplicate copy of the completed general permit application form to the St. Paul district, U.S. army corps of engineers to seek federal authorization. Applicants are responsible for obtaining all necessary federal permits or approvals for their activity.

Note: Local land use or building permits may also be required. Applicants are responsible for obtaining all necessary local permits or approvals for their activity.

NR 310.11 Department procedures for processing general permits. (1) The department shall develop and maintain application forms for requesting authorization under a general permit under s. NR 310.10 and shall provide a copy of a form to any person upon request.

(2) Upon receipt of a general permit application under s. NR 310.10, the department shall determine whether the activity qualifies for a general permit under s. 30.12(3), 30.123(7) or 30.20(1t), Stats.

(3) The date of receipt of a general permit application shall be the date the application is received at the department office specified on the form or accompanying instructions.

(4) The department may investigate or visit a site to determine whether an activity meets the standards for a general permit or requires an individual permit under s. 30.206(3r), Stats.

(5) If the general permit application does not meet all the requirements of s. NR 310.10(2) it shall be deemed incomplete. Within 30 days of receipt, the department shall notify the applicant that the application is incomplete and shall describe the information that shall be submitted in order for the application to be complete.

(6) Where a general permit application is filed for an activity for which a general permit is not available under s. 30.12(3), 30.123(7), 30.19(3r) or 30.20(1t), Stats., the department shall notify the requester that the activity is not eligible for general permit, and of any provisions of ch. 30, Stats., that apply to the activity.

(7) The department may dismiss a general permit application without prejudice if the information needed to complete the application is not received within 30 days after the department notifies an applicant that its application is incomplete.

(8) If the department determines that an activity is not eligible for a general permit, the department shall notify the applicant in writing that the applicant may withdraw their application, revise the project so that the activity is eligible for a general permit, or apply for an individual permit.

(9) If the department determines that an activity is eligible for a general permit, the department shall notify the applicant in writing.

(10) The department has provided notice of its determination under sub. (5), (7) or (8) on the date the department mails the written determination to the applicant.

NR 310.12 General permit decisions. (1) All activities proceeding under a general permit issued under s. 30.206, Stats., shall be subject to any requirements in ss. 30.12(3), 30.123(7), 30.19(3r), 30.20(1t), and 30.206, Stats., rules promulgated under those statutes, and all of the following conditions.

(a) The permittee shall maintain the project in good condition and in compliance with the terms and conditions of the permit, this chapter and s. 30.206, Stats.

(b) Upon reasonable notice, the permittee shall allow access to the project site during reasonable hours to any department employee who is investigating the project's construction, operation, maintenance or permit compliance.

(c) The permittee shall notify the department before starting construction and again not more than 5 days after the project is complete.

(d) The permittee shall complete the project on or before the expiration date established in the permit. If the project is not completed by the expiration date, the permittee shall submit to the department a written request for an extension prior to the expiration date of the permit. The request shall identify the requested extension date and the reason for the extension. The department may grant a permit extension for good cause shown. The permittee may not begin or continue construction after the original permit expiration date unless the department grants a new permit or permit extension in writing.

(e) The permit does not authorize any work other than what is specifically described in the application and plans, and as modified by the conditions of the permit. A permittee shall obtain prior written approval of modifications from the department before modifying a project or amending permit conditions.

(f) The department may modify or revoke the permit if the project is not completed according to the terms of the permit or if the department subsequently determines the activity is detrimental to the public interest.

(g) The permittee shall post a copy of this permit at a conspicuous location on the project site visible from the waterway, beginning at least 5 days prior to construction and remaining at least 5 days after construction. The permittee shall also have a copy of the permit and approved plan available at the project site at all times until the project is complete.

(h) The permittee shall submit a series of photographs to the department within one week of completion of work on the site. The photographs shall be taken from different vantage points and depict all work authorized by the permit.

(2) Acceptance of a general permit and efforts to begin work on the activity authorized by the general permit signifies that the permittee has read, understood and agreed to follow all conditions of the general permit.

(3) The department shall retain continuing jurisdiction over any project permitted under this chapter and s. 30.206, Stats.

(4) The department shall monitor activities permitted under the general permit program and shall evaluate the need to repeal or amend this chapter or other chapters authorizing general permits for specific activities.

SUBCHAPTER IV

INDIVIDUAL PERMITS, NOTICES, HEARINGS AND ADMINISTRATIVE REVIEW

NR 310.13 Eligibility for individual permits. To be eligible under subchs. I and II of ch. 30, Stats., for authorization under an individual permit, an activity shall meet all standards for the individual permit in the statute that authorized issuance of the individual permit, the rules in this chapter and the rules promulgated under the statute that authorized issuance of the individual permit.

Note: The rules specifying standards for regulated activities for which individual permits are available are the NR 300 series of Wisconsin Administrative Code.

NR 310.14 Individual permit applications. (1) GENERAL PROVISIONS. (a) Any person may apply for an individual permit from the department under subch. II, ch. 30, Stats.

(b) A person who seeks an individual permit from the department under this section shall submit an application on a form provided by the department and shall provide all the information requested on the form and accompanying instructions.

Note: Individual permit application forms are available at department service centers and on the department's website at www.dnr.wi.gov under the topic "Waterway and Wetland Permits."

Note: Federal permits may also be required. Applications for general permits are joint applications for both state and federal permits. The applicant shall mail a duplicate copy of the completed general permit application forms to the St. Paul district, U.S. army corps of engineers to seek federal authorization. Applicants are responsible for obtaining all necessary federal permits or approvals for their activity.

Note: Local land use or building permits may also be required. Applicants are responsible for obtaining all necessary local permits or approvals for their activity.

(c) An individual permit application is received by or submitted to the department on the date the application or additional information is received at the department office specified on the permit application form or accompanying instructions.

(d) Any additional information filed by an applicant to complete an individual permit application is received by or submitted to the department on the date the additional information is received at the department office where the additional information was requested to be submitted.

(e) The department has provided notice under this subchapter when it mails an applicant the initial determination of completeness, notice of complete application or notice of public hearing.

(2) INTERESTED AND POTENTIALLY INTERESTED MEMBERS OF THE PUBLIC. (a) The following are determined to be interested and potentially interested members of the public under s. 30.208(3), Stats.:

1. The designated contact for all state, regional, and local watershed and waterway organizations for the waterway or waterways affected by the activity.

2. The clerk of the county and the town, village or city in which the activity is located.

3. Any person who submits to the department a written request for notification regarding a specific application or any general type of application. If the department receives requests for notification from persons who identify themselves as members of a specific organization, notice to an officer of the organization shall constitute notice to all organization members.

4. The adjacent riparian on each side of the property on which the activity is located.

(b) The department may identify additional interested members of the public for a specific individual permit application.

(c) The department shall provide to the applicant with the notice of complete application a list of the names and addresses of the persons it has identified under pars. (a) and (b).

(3) COMPLETENESS DETERMINATIONS. (a) In determining completeness under this subchapter, the department shall determine if an applicant submitted all required items of information necessary to evaluate the application. A determination that an application is complete does not determine whether the submitted information is accurate or sufficient to prove that the activity meets the standards to obtain an individual permit.

(b) The department may dismiss an individual permit application without prejudice if the information needed to complete the application is not received within 45 days after the department notifies an applicant that its application is incomplete.

(c) The department may dismiss an individual permit application without prejudice if the proof of publication required in sub. (9) is not received within 45 days after the department notifies an applicant that its application is complete.

(4) INITIAL DETERMINATION OF COMPLETENESS (APPLICATION DATE + 30 DAYS OR LESS). (a) Within 30 days after an individual permit application is submitted, the department shall initially determine whether the application is complete and notify the applicant as follows:

1. If the application is complete, the department shall notify the applicant in writing that the application is complete.

2. If the application is incomplete, the department shall notify the applicant in writing that the application is incomplete, identify all specific items of information needed to complete the application, and advise the applicant that the department may dismiss the application if the information needed to complete the application is not received within 45 days after the department provides notice that the application is incomplete.

(b) The department may not determine an application is complete unless the department determines that the applicant has provided all information necessary any environmental assessment or environmental impact statement required under s. 1.11, Stats., and ch. NR 150.

NR 310.15 Notices and public comment. (1) NOTICE OF COMPLETE APPLICATION (INITIAL DETERMINATION OF COMPLETENESS DATE + 15 DAYS). (a) Within 15 days after the department provides an initial determination of completeness under s. NR 310.14(4)(a)1., the department shall send the applicant a notice of complete application. The notice shall contain all the information required under s. 30.208(5)(b), Stats.

(b) If the applicant requests a public hearing in its individual permit application, the department shall include a notice of public hearing with the notice provided in par. (a).

(c) The applicant shall publish the notice in par. (a) or (b) in the newspaper identified by the department in the notice.

(d) The applicant shall provide a copy of the notice to any person or group who requests a copy.

(e) If the notice contains a list of names and addresses identified under s. NR 310.14(2), the applicant shall provide a copy of the notice to each person on the list. The notice shall be provided to each person via US mail with return receipt requested or delivered in person.

(f) The applicant shall provide proof of notice publication to the department within 45 days after the department provides to the applicant the notice of complete application. The proof of publication shall be an affidavit from the newspaper certifying publication and documenting the date of publication.

(g) If the applicant is required to notify a list of persons in par. (e), the applicant shall provide proof of notification to the department within 45 days after the department provides to the applicant the notice of complete application. The proof of notification shall be copies of signed return receipts or other signed document verifying that the person received the notice in person.

(2) PUBLIC COMMENT PERIOD (NOTICE OF COMPLETE APPLICATION DATE + 30 DAYS, OR PUBLIC HEARING DATE + 10 DAYS).

(a) Any person may submit written comments on an application to the address specified in the notice of complete application or notice of public hearing.

(b) Comments shall address facts relevant to whether an activity in an application will comply with the legal standards listed in the notice of complete application.

(c) The department shall consider all written public comments in evaluating an individual permit application.

(d) Comments are submitted on the date they are postmarked using U.S. mail or on the date they are hand-delivered to the address specified in the notice of complete application or notice of public hearing.

(3) NOTICE OF PUBLIC HEARING. (a) The department shall provide a notice of public hearing:

1. If an applicant requests a public hearing in their individual permit application.

2. If a person submits a written request for public hearing within 30 days after the date the department provided notice of complete application under sub. (1).

3. If the department determines within 30 days after the date the department provided notice of complete application under sub. (1) that there is a significant public interest in holding a public hearing.

(b) The notice of public hearing shall contain all the information required under s. 30.208(5)(b), Stats.

(c) The department shall provide the notice of public hearing required in par. (a)1. with the notice of complete application provided under sub. (1).

(d) The applicant shall publish the notice of public hearing in the newspaper identified by the department in the notice.

(e) The applicant shall provide a copy of the notice of public hearing to any person or group that requests a copy of the notice prior to the public hearing date.

(f) If the notice contains a list of names and addresses identified under s. NR 310.14(2), the applicant shall provide a copy of the notice to each person on the list. The notice shall be provided to each person via US mail with return receipt requested or delivered in person.

(g) The applicant shall provide proof of notice publication to the department within 45 days after the department provides to the applicant a notice of public hearing. The proof of publication shall be an affidavit from the newspaper certifying publication and documenting the date of publication.

(h) If the applicant is required to notify a list of persons in par. (f), the applicant shall provide proof of notification to the department within 45 days after the department provides to the applicant a notice of public hearing. The proof of notification shall be copies of signed return receipts, or other signed document verifying that the person received the notice in person.

NR 310.16 Public informational hearings. (1) FORM AND TIMELINESS OF REQUEST FOR PUBLIC HEARING. Any request for a public informational hearing shall comply with all the following requirements:

(a) A request shall be in writing and dated.

(b) A request shall be submitted to the address in the notice of complete application and postmarked no later than 30 days following the date the department provided notice of complete application.

(c) A request shall include the docket number or applicant name and specify the issues that the party desires to be addressed at the public informational hearing.

(d) The issues specified in the hearing request shall relate to the legal standards listed in the notice of complete application.

(2) LOCATION OF PUBLIC INFORMATIONAL HEARING. The department shall schedule the public informational hearing. The hearing shall be located in the vicinity of the property that is the subject of the individual permit application wherever possible and practicable.

(3) PARTICIPATION AT PUBLIC INFORMATIONAL HEARINGS. Any interested members of the public or representatives of government agencies may participate in a public informational hearing with respect to the issuance of the proposed permit subject to the procedures in sub. (5). Persons and government agencies participating need not be represented by legal counsel.

(4) CHANGES OR ADJOURNMENTS IN TIME OR PLACE OF HEARING. (a) Requests for changes in the time and place of a scheduled hearing will be granted only for good cause shown prior to any required newspaper publication of legal notice for the hearing.

(b) The hearing examiner may adjourn a hearing for good cause shown, to be reconvened at the discretion of the department on 10 days' notice or at a time certain on agreement of all persons present.

(5) CONDUCT OF PUBLIC INFORMATIONAL HEARINGS. (a) *Informational hearings.* Public informational hearings held pursuant to this subsection are not contested cases as defined in s. 227.01(3), Stats.

(b) *Hearing examiner.* Public informational hearings held pursuant to this subsection shall be conducted by a hearing examiner designated by the secretary or secretary's designee.

(c) *Procedure.* 1. The hearing examiner shall open the hearing by concisely stating the scope and purpose of the hearing and explaining the procedures to be used in the hearing. The hearing examiner shall explain how and to whom notice of the final decision granting or denying a permit will be provided and how a person may seek administrative or judicial review of the final decision.

2. Appearance slips shall be distributed to all persons attending the hearing and the hearing examiner shall ask all persons present to indicate on their appearance slips whether they intend to present an oral or written statement at the hearing.

3. Any person may direct informational or clarifying questions through the hearing examiner to a person making oral statements, but cross-examination may not be allowed at the hearing.

4. The hearing examiner may place time limits on individual oral statements to prevent undue repetition or insure that all persons wanting to make statements can do so in a reasonable period of time.

5. The hearing examiner, in the hearing examiner's discretion, may limit the number of representatives that may make oral statements on behalf of any individual or organized group.

6. When necessary to ensure maximum participation and adequately allot time for oral statements at hearing, the hearing examiner may schedule at set times for persons to make oral statements. Even if oral statements are scheduled, unscheduled oral or written statements also shall be allowed at hearing.

7. Any person submitting a written statement at hearing shall submit at least one legible copy to the hearing examiner.

8. Regardless of specific requirements of this paragraph, the hearing examiner may, in the hearing examiner's discretion, use any procedures necessary to insure that the hearing will be conducted in an orderly and expeditious manner, provided the measures are consistent with broad public participation in the hearing.

(d) *Contempt.* Loud, noisy, disruptive or contemptuous conduct at a hearing shall be grounds for exclusion from the hearing, at the discretion of the hearing examiner.

(6) RECORD OF PUBLIC PARTICIPATION. The department shall record public informational hearings electronically. The department may prepare a written report of public participation in the hearing.

NR 310.17 Individual permit decision. (1) DECISION DATE (PUBLIC HEARING DATE OR PUBLIC COMMENT PERIOD END DATE + 30 DAYS OR LESS). The department shall render a decision issuing, denying or modifying a permit or approving a contract within 30 days after the public hearing is held, or if no public hearing is held, within 30 days after the end of the public comment period.

(2) STANDARDS AND INFORMATION. The department shall consider all the following information in deciding whether to approve, modify or deny an individual permit application:

(a) Applicable standards in statutes, rules and common law.

(b) Plans and information provided by an applicant.

(c) Information gathered during site investigations.

(d) Written or oral provided during a public comment period or public hearing.

(e) Statements or information provided by local, state and national government agencies.

(f) Data or information found in natural resource inventories and plans, or maps collected by the department or others using commonly accepted methods.

(g) Published scientific research.

(h) Section 1.11, Stats., Wisconsin environmental policy act, and ch. NR 150.

(i) Any other pertinent information.

(3) NOTICE OF DECISION. The department shall mail copies of its decision on an individual permit application to all of the following:

- (a) The applicant.
- (b) The city, town or village where the activity is located.
- (c) The county where the activity is located.
- (d) The United States army corps of engineers.
- (e) Any person who asks the department in writing for a copy of the final decision.

(4) EFFECTIVE DATE. (a) *Delayed effective date.* All individual permits issued under this subchapter shall take effect 30 days after the date the department mails its decision to all the parties listed in sub. (3), unless the department receives a petition for administrative hearing under s. 30.209, Stats., and s. NR 310.18 that contains a request for a stay as provided in s. 30.209(1m)(c), Stats.

(b) *Effect of request for stay on permit effective date.* 1. If a petition for administrative review contains a request for a stay, the individual permit for which a stay is requested shall take effect the day after the date the department denies the petition as provided under s. 30.209(f) and (fm), Stats.

2. If the department grants a petition for administrative review, the individual permit for which the petition has been granted shall take effect the day after any of the following occurs:

a. The hearing examiner assigned the case by the division of hearings and appeals lifts the stay because the hearing examiner has determined as provided in s. 30.209(2)(b), Stats., that continuation of the stay is not necessary to prevent significant adverse impacts or irreversible harm to the environment pending completion of the hearing.

b. The hearing examiner renders a decision approving, modifying or denying the individual permit.

(c) *Dates of decisions regarding permits, petitions for administrative review, and stays.* For purposes of this subsection, the department or hearing examiner has rendered a decision, granted or denied a petition for administrative review, or lifted a stay on the date that the department or examiner mails the applicant and the petitioner copies of the decision.

NR 310.18 Administrative review. (1) PETITION FOR ADMINISTRATIVE REVIEW AND REQUEST FOR STAY (PERMIT DECISION DATE + 30 DAYS). (a) Within 30 days after the department renders a decision under s. NR 310.17, any interested person may file with the department, and at the same time provide a copy to the applicant of, a petition seeking administrative review of the decision. The petition also may request a stay of the activity pending an administrative hearing.

(b) The petition shall be in writing, shall be dated and shall be signed by the petitioner.

(c) The petition shall be submitted to the secretary of the department at the address provided in ch. NR 2.

(d) The petition shall include as an attachment a copy of the decision for which administrative review is sought.

(e) A petition for administrative review and any request for stay therein shall comply with the format and be filed in the manner provided by s. 30.209(1m), Stats., and ch. NR 2.

(f) A petition is filed on the date it is received by the secretary of the department at the address specified in ch. NR 2.

(g) A stay requested in a petition shall take effect upon filing of the petition and remain in effect until the department denies the petition under sub. (3) or a hearing examiner lifts the stay as provided by s. 30.209(2)(b), Stats.

(2) APPLICANT RESPONSE TO PETITION (PETITION RECEIPT DATE + 15 DAYS OR LESS) (a) Within 15 days after a petition is filed with the department, an applicant may file with the department, and at the same time shall provide to the petitioner seeking review, a response to the petition.

(b) A response to a petition shall comply with s. 30.209(1m)(e), Stats.

(c) A response to a petition is filed on the date it is received by the secretary of the department at the address specified in ch. NR 2.

(3) GRANT OR DENIAL OF ADMINISTRATIVE REVIEW PETITION (PETITION RECEIPT DATE + 30 DAYS OR LESS). (a) Within 30 days after the date that a petition is filed, the department shall grant or deny the petition in writing and, if the petition is denied, state the reasons for denial as provided in s. 30.209(1m)(f), Stats. Failure to dispose of the petition within 30 days is a denial.

(b) The department has granted or denied a petition under par. (a) when it mails a grant or denial to a petitioner.

(4) REFERRAL TO DIVISION OF HEARINGS AND APPEALS (PETITION GRANT DATE + 15 DAYS OR LESS). (a) Unless both the petitioner and applicant agree to an extension, the department shall refer the matter to the division of hearings and appeals within 15 days after granting the petition.

(b) The department has referred the matter under par. (a) when it mails to the division of hearings and appeals a hearing request form and copies of the permit application, the notice of completeness, the permit decision, the petition for administrative review, any petitioner's response to the petition, and the department letter granting the petition.

(5) NOTICE OF ADMINISTRATIVE HEARING. (a) At least 30 days before the date of the administrative hearing, the division of hearings and appeals shall notify the applicant as provided in par. (b).

(b) The division of hearings and appeals shall provide an applicant all the following:

1. A notice of administrative hearing that shall contain all the information required under s. 30.208(5)(b), Stats. The division of hearings and appeals may include any additional information that it deems necessary to provide adequate notice of an administrative hearing.

2. A letter accompanying the notice or notices that contains all the following:

a. A statement that an administrative hearing will be held and whether the applicant or an interested person requested the hearing.

b. A statement that the applicant must mail a copy of the notice to any person or group who asks for a copy and mail a copy via U.S. mail with return receipt requested to an enclosed list of persons that the department has determined are interested and potentially interested members of the public pursuant to s. 30.208(3), Stats., and s. NR 310.14(2).

c. A list of persons and groups that asked that a notice of hearing be mailed to them, a list of interested and potentially interested members of the public determined by the department under s. 30.208(3), Stats., and s. NR 310.14(2) and a statement that the applicant is required to mail a notice of hearing to any person or group that asks for the notice between now and the hearing date.

d. A statement that the applicant is required to publish the notice as a Class I notice under ch. 985, Stats., and provide the division an affidavit of publication to prove the notice was published. The name of the newspaper in which the notice must be published shall also be provided to the applicant.

e. A statement that the applicant is required to furnish the division return receipts of mailing to or signed affidavits of receipt of notice from all persons under subd. par. c.

f. A statement that the applicant or an authorized representative must appear at the hearing to present testimony or the hearing will be rescheduled or the application dismissed.

g. A statement that the hearing may be rescheduled or the application dismissed if the hearing examiner does not receive the information specified under subd. pars. d. and e. by the date requested by the hearing examiner.

h. A statement that if the application is dismissed, the applicant may resubmit an application for the individual permit.

(c) The division has provided the information in par. (b) when it mails an applicant the information.

(d) An applicant shall publish a notice provided under par. (b) as a class I notice under ch. 985, Stats., mail the notice or notices to all listed persons in par. (b)2.c., and provide to the division a copy of the notice, an affidavit of publication, and return receipts of mailing to or signed affidavits of receipt of notice from all persons under par. (b)2.c.

(e) The department has provided notice of an administrative hearing on the later of the date notice of hearing was published or mailed to all listed persons as required by par. (d).

(f) The division may reschedule a hearing or dismiss an application without hearing if the hearing examiner does not receive the information specified in par. (b)2. d. and e. by the date requested by the hearing examiner.

(g) If the application is dismissed, the applicant may resubmit an application for the individual permit.

(5) CONDUCT OF ADMINISTRATIVE HEARING. An administrative hearing shall be conducted in compliance with the requirements of ss. 30.209(2) and 227.42, Stats., and chs. NR 2 and HA 1.

(6) CONFLICTS OR OMISSIONS. In the event of conflicts between or omissions in the statutes and rules that govern requests for and conduct of administrative hearings, the applicable statutes and rules shall be applied in the following sequence:

(a) Section 30.209, Stats., shall apply notwithstanding any conflicting statutes or rules.

(b) Section 227.42, Stats., shall apply notwithstanding any conflicting statutes or rules except for s. 30.209, Stats., and shall apply to any issues not addressed by s. 30.209, Stats.

(c) Section NR 310.18 shall apply notwithstanding any conflicting statutes or rules except for ss. 30.209 and 227.42, Stats., and shall apply to any issues not addressed by s. 30.209 or 227.42, Stats.

(d) Chapter NR 2 shall apply notwithstanding any conflicting statutes or rules except for ss. 30.209 and 227.42, Stats., and s. NR 310.18, and shall apply to any issues not addressed by s. 30.209 or 227.42, Stats., and s. NR 310.18.

(e) Chapter HA 1 shall apply to any issues not addressed by s. 30.209 or 227.42, Stats., or s. NR 310.18 or ch. NR 2.

SECTION 7. Chapter NR 322 is repealed.

ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD
REPEALING, RENUMBERING, RENUMBERING AND AMENDING, AMENDING, REPEALING AND
RECREATING, AND CREATING RULES

The Wisconsin Natural Resources Board proposes an order to repeal Natural Resources Board Emergency Order FH-15-04(E), renumber NR 320.03(1), (3), (5), (6) and (8); to renumber and amend NR 320.03(2), (4) and (7); to amend ch. NR 320(title), 320.04(title), 320.05(title), 320.06(title), (1)(b)2. and (2)(b) and 320.07(title); to repeal and recreate NR 320.01 and 320.02(1); and to create NR 320.03(1), (7), (11), (13) and (14), 320.08 and 320.09 relating to the regulation of bridges and culverts in or over navigable waterways.

FH-61-04(E)

Analysis Prepared by Department of Natural Resources

Statutory authority: ss. 30.12, 30.123, 227.11(2) and 227.24, Stats.

Statutes interpreted: ss. 30.12 and 30.123, Stats.

Explanation of Agency Authority:

The Department has authority under s. 30.123, Stats., to promulgate rules that establish installation practices, construction and design requirements and limitations on the location of culverts placed under statutory exemptions. The Department has authority under ss. 30.123 and 30.206, Stats., to promulgate rules to establish general permits.

Related statute or rule:

These rules relate directly to regulation of activities in navigable waters under ch. 30, Stats., waters designations in ch. NR 1, and the NR 300 series of rules.

Plain Language Analysis:

The purpose of this rule revision is to modify the existing rule to reflect the exemption, general permit and individual permit options provided by statute. This rule revision establishes construction, design, placement and location standards for projects to be eligible for statutory exemptions, establishes general permits for clear span bridges and culverts crossing navigable waterways less than 35 feet wide, and establish standards for projects that may be authorized under an individual permit.

Federal Regulatory Analysis

Any activity that results in a discharge (including deposits and structures) into "waters of the United States" is regulated by the U.S. Army Corps of Engineers (Corps) under section 404 of the Clean Water Act. An Individual Permit from the Corps is required, unless Wisconsin regulates the project in its entirety under chapter 30, Stats., in which case the project is authorized by the Corps under general permits GP-01-WI or GP-LOP-WI. Dredging or discharge into waters declared navigable under Section 10, Rivers and Harbors Act, 1899 is also regulated, and requires an Individual Permit from the Corps

Comparison with Adjacent States

The construction, replacement and maintenance of bridges and culverts is regulated to varying degrees among the adjacent states of Minnesota, Iowa, Illinois and Michigan.

Minnesota. The Minnesota Department of Natural Resources authorizes the construction and replacement of bridges and culverts through the administration of the Public Waters Work Permit program. Permits are granted only when less detrimental alternatives are unavailable or unreasonable and where such facilities adequately protect public health, safety, and welfare. Bridge or culvert construction or replacement is prohibited when the project 1) will obstruct navigation or create a water safety hazard, 2) will cause or contribute to significant increases in flood elevations and flood damages either upstream or downstream, 3) involves extensive channelization above and beyond minor stream

channel realignments, 4) will be detrimental to water quality or significant fish and wildlife habitat, 5) will take threatened or endangered species, or 6) will provide private access to an island .

A permit is not required to construct or reconstruct a bridge or culvert on a public waterway with a total drainage area, at its mouth, of five square miles or less (This exemption is not allowed on trout streams). Permits are required for other water bodies, along with the general criteria of 1) the project must not exceed more than a minimum encroachment, change, or damage to the environment, particularly the ecology of the waters, 2) adverse effects on the physical or biological character of the waters are subject to feasible and practical measures to mitigate the effects. Specific permit conditions include 1) the hydraulic capacity of the structure is established by a competent technical study, 2) the department has performed a hydraulic study base upon available information and reasonable assumptions, and 3) the project will not cause flood-related damages or problems for upstream or downstream interests.

Minnesota offers general permits for bridge and culvert projects on a statewide and/or county level. An individual permit is required if the proposed work does not meet the requirements of a specific general permit.

Iowa. The Iowa Department of Natural Resources, in cooperation with the Iowa Environmental Protection Agency and the Army Corps of Engineers, authorizes the construction and replacement of bridges and culverts through administration of the Sovereign Lands Construction Permit program. Permits are required in some cases so the wise use and the protection and maintenance of the existing state's water resources can be ensured.

Illinois. The Illinois Department of Natural Resources, in cooperation with the Army Corps of Engineers authorizes the construction and replacement of bridges and culverts through the administration of the Water Resource Management Permit. Permits are distributed to prevent 1) obstruction to, or interference with, the navigability of any public body of water, 2) encroachment on any public body of water, and 3) impairment of the rights, interests, or uses of the public in any public body of water. Activities will not be permitted if the action will result in an obstruction to, or interference with the navigability of any public body of water or the activity would result in bank and shoreline instability on other properties.

Illinois offers statewide, regional and general permits only after notice and opportunity for public review and comment.

Michigan. The Michigan Department of Environmental Quality authorizes the installation of a new or replacement bridge or culvert through the administration of the Geologic and Land Management Permit program. All permit applications are reviewed to ensure the project will not adversely affect the public trust or riparian rights and to ensure it does not structurally interfere with the natural flow of the stream. Permits are not granted if the project unlawfully impairs or destroys any of the waters or other natural resources of the state.

Summary: The permitting process is traditionally administered by one regulatory agency, usually the Department of Natural Resources. Although, in some cases, (i.e., IA and IL) joint applications are filed with cooperators. Generally, Individual permits are granted, but Minnesota and Illinois also authorize culvert construction and replacement by general or statewide/regional permits. General permits from Minnesota and Illinois are not awarded without some kind of public review or comment.

When compared to Wisconsin, all states advocate comparable protection goals (e.g., permits are granted to: prevent significant adverse impacts to the public rights and interests, prevent material injury to the riparian rights or any riparian owner, prevent detrimental impacts to water quality or significant fish and wildlife habitat). The regulated activities are roughly similar among all states with Iowa and Michigan slightly less protective. However, all states are much more subjective than Wisconsin in Administrative Code language.

Summary of Factual Data and Analytical Methodologies:

Standard hydrologic and hydraulic methods for analyzing stream flows, combined with findings from the substantial scientific literature on fish response to water flow and quality conditions are the basis for the numerical standards for culvert placement. Published documents establishing science-based designs for wing deflectors are used as the standards for wing deflectors.

Analysis and Documents supporting determination of Small Business Effect: Any person placing a structure or making similar physical modifications to public navigable waters either qualifies for an exemption or must obtain a general or individual permit under state statute. To comply, small businesses follow the same requirements as other waterfront property owners: (1) make a self-determination of exemption using web-based tools provided by the department or describe their activity on an exemption determination request form; (2) complete a general permit application; or (3) complete an individual permit application. Schedules, application steps and compliance/reporting requirements are very basic for all applicants, and most projects can be planned and conducted by individuals with no specific professional background.

Anticipated Private Sector Costs: No significant fiscal effect on the private sector is anticipated.

Effect on Small Business: Small businesses who wish to conduct regulated activities on or near navigable waterways will be affected by the rule. Specific standards will provide clarity and consistency in the permitting process.

Agency Contact Person: Karl Scheidegger, Karl.Scheidegger@dnr.state.wi.us, (608) 267-9426

SECTION 1. Natural Resources Board Emergency Order FH-15-04(E) is repealed.

SECTION 2. Chapter NR 320 (title) is amended to read:

BRIDGES AND CULVERTS IN OR OVER NAVIGABLE WATERWAYS

SECTION 3. NR 320.01 is repealed and recreated to read:

NR 320.01 Purpose. The purpose of this chapter is to establish reasonable procedures and limitations for exempt activities, general permits and individual permits for placement of bridges and culverts in or over navigable waterways as regulated under s. 30.123, Stats., in order to protect the public rights and interest in the navigable, public waters of the state as defined in s. 30.10, Stats.

SECTION 4. NR 320.02(1) is repealed and recreated to read:

NR 320.02 (1) BRIDGES AND CULVERTS PLACEMENT. This chapter applies to construction, placement and maintenance of bridges and culverts in or over navigable waterways as regulated under s. 30.123, Stats. Any person that intends to construct, place or maintain a bridge or culvert in or over any navigable waterway shall comply with all applicable provisions of this chapter and any permit issued under this chapter.

SECTION 5. NR 320.03 (1) to (8) are renumbered NR 320.03 (6), (9), (5), (10), (3), (8), (12) and (2), respectively, and NR 320.03 (9), (10) and (12), as renumbered, are amended to read:

NR 320.03(9) "Waterway Navigable waterway" means any body of water declared navigable pursuant to s. 30.10, Stats. with a defined bed and bank, which is navigable under the laws of the state. In Wisconsin, a navigable body of water is capable of floating the lightest boat or skiff used for recreation or any other purpose on a regularly recurring basis.

(10) "Ordinary high water mark" means the point on the banks or shore up to which the presence and action of water is so continuous as to ~~have~~ leave a distinct mark either by erosion, destruction of terrestrial vegetation or other easily recognizable characteristics.

(12) "Regional flood" means a flood ~~determined by the department to be~~ representative of large floods known to have generally occurred in Wisconsin ~~and which may be expected to occur on a particular stream because of like physical requirements. The regional flood generally has an average frequency of the 100-year recurrence interval flood or which may be expected to occur on a particular lake, river or stream once in every 100 years.~~

SECTION 6. NR 320.03 (1), (4), (7), (11), (13) and (14) are created to read:

NR 320.03 (1) "Area of special natural resource interest" has the meaning in s. 30.01(1am), Stats., and as identified by the department in s. NR 1.05.

Note: "Area of special natural resource interest" means any of the following:

- (a) A state natural area designated or dedicated under ss. 23.27 to 23.29.
- (b) A surface water identified as a trout stream by the department under NR 1.02(7).
- (bm) A surface water identified as an outstanding or exceptional resource water under s. 281.15.
- (c) An area that possesses significant scientific value, as identified by the department in NR 1.05.

Information and lists can be obtained by contacting the department, or found on the department's website at www.dnr.wi.gov, under the topic "Waterway and Wetland Permits".

(4) "Channel" means a natural or artificial water course with defined bed and banks to confine and conduct the normal flow of water.

(7) "Highway" or "public highway" has the meaning in s. 340.01(22), Stats.

(11) "Perched culvert" means a culvert where the bottom outlet elevation is greater than the water level elevation, thereby effectively eliminating fish migration and fish passage.

(13) "Replacement" means a degree of structural changes to a bridge or culvert by which some or all of the bridge or culvert is being removed or recreated.

(14) "Riprap" means a layer or layers of rock, including filter material, placed on the bed and bank of a navigable waterway to prevent erosion, scour or sloughing of the existing bank.

SECTION 7. NR 320.04 (title) is amended to read:

NR 320.04 ~~Required~~ Bridge clearance over navigable waterway.

SECTION 8. NR 320.05 (title) is amended to read:

NR 320.05 ~~Flood~~ Bridge flood flow requirements.

SECTION 9. NR 320.06(title), (1)(b)2. and (2)(b) are amended to read:

NR 320.06 ~~Plan~~ Bridge plan and information requirements.

(1)(b)2. Cross-sectional profiles of the flood plain, as necessary, ~~for the department to~~ determine the natural regional flood elevation. The cross-sectional profiles shall indicate existing natural ground elevations and water surface elevations.

(2)(b) The bridge will completely span the stream from ~~bank to bank~~ top of channel to top of channel;

SECTION 10. NR 320.07(title) is amended to read:

NR 320.07 ~~Enforcement~~ Bridge enforcement.

SECTION 11. NR 320.08 is created to read:

NR 320.08 Bridges and culverts. (1) EXEMPTIONS. (a) *Procedures.* Exemptions shall be processed according to the procedures in ch. NR 310.

(b) *Applicable activities.* A replacement of a culvert that meets all the standards in par. (c) shall be exempt under s. 30.123(6)(e), Stats. A replacement of a previously permitted culvert that meets all the standards in par. (d) shall be exempt under s. 30.12(6)(d), Stats.

(c) *Standards to replace a culvert that does not exceed 24-inches in diameter.* 1. The culvert may not be located in an area of special natural resource interest as defined in s. 30.01(1am), Stats., and identified by the department in s. NR 1.05, or where there are public rights features as defined in s. NR 1.06, or in perennial tributaries to surface waters identified as trout streams by the department in s. NR 1.02(7).

2. The replacement culvert shall be an in-kind replacement of a single culvert of the same type, of equal or smaller diameter, and of equal or shorter length of culvert that is being replaced.

3. The stream may not have a base flow of more than 4 cubic feet per second to ensure that a 24-inch culvert adequately passes stream flow and is not likely to create a ponded condition upstream.

Note: If the culvert or roadway is being replaced because it has washed out, overtopped or has been eroded around, then a 24 inch culvert is likely inadequate unless the damage occurred during a regional flood.

4. Culvert placement and installation shall mimic the natural stream and gradient above and below the culvert channel, not to exceed a 3% slope. Ponding upstream or perching or plunge pool conditions downstream indicate that a culvert is not in compliance with this condition.

Note: A culvert which is part of a structure that functions as a dam requires an approval or permit under ch. 31, Stats.

5. Both ends of the culvert shall be installed so 25% of the diameter of a round culvert or 25% of the height of a box culvert lies below the bed of the waterway. If the culvert is of open arch design, there may be no break in the bed substrate.

6. Culvert inlets may not be capped with screens, bars or any other means, with the exception of beaver control procedures, that prevents movement of fish or wildlife or collects debris. Culvert openings shall be inspected at least once a year for debris and any obstructions shall be removed.

7. Culverts shall be long enough so road fill does not extend beyond the ends of the culvert. The culvert shall extend at least one foot beyond the fill. Culvert ends shall be protected with 3- to 12-inch diameter riprap extending horizontally at least 2 times the culvert diameter from the end of the culvert.

8. Fill material shall be firmly compacted around the culvert. To prevent crushing, the top of the culvert shall be covered with fill to a depth of at least 12 inches. Fill material used shall be free of fines, sediment, soil, pollutants, contaminants and other waste materials.

9. Dredging under 30.20 (1g)(b)1., Stats., and deposition of sand, gravel or stone on the stream bed under s. 30.12(1g)(a), Stats., may be associated with the replacement of a culvert provided dredging is limited to the volume necessary to bury the culvert as required in subd. 5 and the deposit is limited to the area immediately underneath or within 2 feet of the culvert.

10. Culvert replacement is prohibited from March 15 to June 1 annually to minimize adverse impacts on fish movement, fish spawning, egg incubation periods and high stream flows.

11. Erosion control measures shall meet or exceed the standards in the most current version of the Wisconsin Construction Site Best Management Practices Handbook.

Note: Information on how to obtain this publication can be found by contacting the department or found on the department's website at www.dnr.wi.gov, under the "Runoff Management" program.

Note: The replacement culvert may not impair drainage or cause backwater on the property of an upstream property owner without written consent or appropriate legal arrangements.

Note: Equipment shall be operated from the streambank only (see s. 30.29, Wis. Stats.).

Note: A permit is required under s. 30.19, Wis. Stats. and NR341 if land disturbance or excavation exceeds 10,000 square feet on the bank of the navigable waterway.

(d) *Standards to replace a previously permitted culvert.* 1. A culvert that is authorized by a permit issued under s. 30.12 or 30.123, Stats., may be replaced provided the construction, placement and maintenance will comply with the same conditions of the original permit.

2. Both ends of the culvert shall be installed so 25% of the diameter of a round culvert or 25% of the height of a box culvert lies below the bed of the waterway.

3. Erosion control measures shall meet or exceed the standards in the most current version of the Wisconsin Construction Site Best Management Practices Handbook.

Note: Information on how to obtain this publication can be found by contacting the department or found on the department's website at www.dnr.wi.gov, under the "Runoff Management" program.

4. A deposit of sand, gravel or stone under s. 30.12(1g)(a), Stats., may be associated with the replacement of a culvert provided the deposit is limited to the area immediately underneath or within 2 feet of the culvert, and is less than 2 cubic yards.

5. Dredging under s. 30.20(1g)(b)1., Stats., is allowed for the replacement of a culvert provided it is limited to the volume necessary to bury the culvert as required in subd. 2.

6. Culvert replacement under this paragraph may not occur more than once every 5 years.

(e) Activities that do not meet the standards in par. (c) or (d) or are determined ineligible for an exemption by the department require a general permit or individual permit.

(2) GENERAL PERMITS. (a) *Procedures.* General permits shall be processed according to the procedures in ch. NR 310.

(b) *Applicable activities.* A clear span bridge that meets all the standards in s. NR 320.04 and par. (c) shall be eligible for a general permit under ss. 30.123(7)(a)1. and (b) and 30.206, Stats. A culvert

placement that meets all the standards in par. (d) shall be eligible for a general permit under ss. 30.123(7)(a)1. and (b) and 30.206, Stats.

(c) *Clear span bridge standards.* 1. To minimize adverse impacts on fish movement, fish spawning, egg incubation periods and high stream flows, clear span bridge placement may not occur during the following time periods:

a. For trout streams identified under s. NR 1.02(7) and perennial tributaries to those trout streams, September 15 through May 15.

b. For all waters not identified in this subd. 1.a. and located south of state highway 29, March 15 through May 15.

c. For all waters not identified in this subd. 1.a. and located north of state highway 29, April 1 through June 1.

d. The applicant may request that the requirement in this subd. 1.a., b. or c. be waived by the department on a case-by-case basis, by submitting a written statement signed by the local department fisheries biologist, documenting consultation about the proposed dredging project, and that the local department fisheries biologist has determined that the requirements of this paragraph are not necessary to protect fish spawning for the proposed project.

2. The bridge may only span a portion of a navigable waterway that is less than 35 feet wide, measured from ordinary high water mark to ordinary high water mark.

3. The bridge may not be located on a wild river designated under ch. NR 302, or where similar federal, state or local regulations prohibit the construction.

4. If the department determines that a proposal submitted under this section has the potential to impact an endangered or threatened species in accordance with s. 29.604, Stats., the application shall be deemed incomplete. The department may not consider the application complete or issue a general permit until the applicant submits documentation to demonstrate one of the following:

a. The project avoids impacts to the endangered or threatened species in accordance with s. 29.604, Stats.

b. The project has received an incidental take authorization under s. 29.604, Stats.

c. If the applicant modifies their project plans to meet the requirements of subd. 1.b., the modified plans shall be submitted before the department can consider the application complete or issue a general permit.

5. Any grading, excavation and land disturbance shall be confined to the minimum area necessary for the construction and may not exceed 10,000 square feet.

6. Erosion control measures shall meet or exceed the standards in the most current version of the Wisconsin Construction Site Best Management Practices Handbook.

Note: Information on how to obtain this publication can be found by contacting the department or found on the department's website at www.dnr.wi.gov, under the "Runoff Management" program.

7. All equipment used for the project shall be designed and properly sized to minimize the amount of sediment that can escape into the water.

8. Any area where topsoil is exposed during construction shall be immediately seeded and mulched or ripped to stabilize disturbed areas and prevent soil from being eroded and washed into the waterway.

9. When the project is completed and the disturbed areas are adequately stabilized, the silt fencing or similar erosion control measures shall be removed so that the erosion control measures are not a barrier to the movement of wildlife.

10. Construction or placement of the clear span bridge shall minimize the removal of trees, shrubs and other shoreline vegetation above the ordinary high water mark.

Note: Local zoning ordinances may place restrictions on cutting trees in the shoreland zone. The riparian is responsible for ensuring that their project is in compliance with any local zoning requirements.

11. No approach fill shall be placed in any wetland, floodway or below the ordinary high water mark of any navigable waterway. If an approach must be located in a wetland or floodway, it shall be open ramp style construction only.

12. The permittee shall assume all responsibility and liability for any direct or indirect damage caused or resulting from the presence of the bridge and hold the state of Wisconsin, or its employees, harmless.

13. Accumulated brush or debris shall be regularly removed from the bridge.

14. At least one end of the bridge structure shall be firmly anchored in a manner that the bridge will not be transported downstream during flood conditions.

15. The bridge shall completely span the waterway from top of channel to top of channel with no support pilings in the waterway.

16. The bridge shall be of a natural earth tone color so that it minimizes the impact on natural scenic beauty.

17. The permittee shall submit a photograph of the completed project to the department within 10 days of project completion.

(d) *Standards for culvert placement on streams less than 35' wide.* 1. To minimize adverse impacts on fish movement, fish spawning, egg incubation periods and high stream flows, culvert placement may not occur during the following time periods:

a. For trout streams identified under s. NR 1.02(7) and perennial tributaries to those trout streams, September 15 through May 15.

b. For all waters not identified in this subd. 1.a. and located south of state highway 29, March 15 through May 15.

c. For all waters not identified in this subd. 1.a. and located north of state highway 29, April 1 through June 1.

d. The applicant may request that the requirement in this subd. 1.a., b. or c. be waived by the department on a case-by-case basis, by submitting a written statement signed by the local department fisheries biologist, documenting consultation about the proposed dredging project, and that the local department fisheries biologist has determined that the requirements of this paragraph are not necessary to protect fish spawning for the proposed project.

2. If the department determines that a proposal submitted under this section has the potential to impact an endangered or threatened species in accordance with s. 29.604, Stats., the application shall be deemed incomplete. The department may not consider the application complete or issue a general permit until the applicant submits documentation to demonstrate one of the following:

a. The project avoids impacts to the endangered or threatened species in accordance with s. 29.604, Stats.

b. The project has received an incidental take authorization under s. 29.604, Stats.

c. If the applicant modifies their project plans to meet the requirements of this subd. 2.b., the modified plans shall be submitted before the department can consider the application complete or issue a general permit.

3. Culvert placement and installation shall mimic the natural stream and gradient above and below the culvert channel, not to exceed a 3% slope. Ponding upstream or perching conditions downstream indicate that a culvert is not in compliance with this condition.

4. If flow conditions require the use of a multiple culvert arrangement, culverts shall be placed at varying elevations (one in the bed and the other slightly higher) to facilitate base and low flows as well as excessive rain or snowmelt events.

5. Both ends of the culvert shall be installed so 25% of the diameter of a round culvert or 25% of the height of a box culvert lies below the bed of the waterway. If a bottomless arch design is used, there may be no break in the bed substrate.

6. Culvert inlets may not be capped with screens, bars or any other means, with the exception of beaver control procedures, which prevent movement of fish or wildlife or collects debris. Culvert openings shall be inspected at least once a year for debris and any obstructions shall be removed.

7. Culverts shall be long enough so road fill does not extend beyond the ends of the culvert. The culvert shall extend at least one foot beyond the fill. Culvert ends shall be protected with 3- to 12-inch diameter riprap extending horizontally at least 2 times the culvert diameter from the end of the culvert.

8. Fill material shall be firmly compacted around the culvert. To prevent crushing, the top of the culvert shall be covered with fill to a depth of at least 12 inches. Fill material used shall be free of fines, sediment, soil, pollutants, contaminants and other waste materials.

9. Dredging and deposition of sand, gravel or stone on the streambed may be associated with the placement of a culvert provided dredging is limited to the volume necessary to bury the culvert as required in this section and the deposit is limited to the area immediately underneath or within 2 feet of the culvert.

10. Erosion control measures shall meet or exceed the standards in the most current version of the Wisconsin Construction Site Best Management Practices Handbook.

Note: Information on how to obtain this publication can be found by contacting the department or found on the department's website at www.dnr.wi.gov, under the "Runoff Management" program.

Note: The culvert may not impair drainage or cause backwater on the property of an upstream property owner without written consent or appropriate legal arrangements.

Note: Equipment shall be operated from the streambank only (see s. 30.29, Stats).

Note: A permit is required under s. 30.19, Wis. Stats. and ch. NR 341 if land disturbance or excavation exceeds 10,000 square feet on the bank of the navigable waterway.

(e) Activities that do not meet the standards in par. (c) or (d) or a general permit issued by the department shall require an individual permit.

(3) **INDIVIDUAL PERMITS.** (a) *Procedures.* Individual permits shall be processed according to the procedures in ch. NR 310.

(b) *Applicable activities.* Any bridge or culvert which is not exempt under s. NR 320.08(1), is not authorized by a general permit under s. NR 320.08(2), or is located in an area of special natural resource interest requires authorization by an individual permit under s. 30.123 (8), Stats.

(c) *Standards.* Construction, placement or maintenance of a bridge or culvert which meets the standards in s. 30.123(2), Stats., may be authorized under an individual permit.

SECTION 12. NR 320.09 is created to read:

NR 320.09 (1) Noncompliance with the provisions of ss. 30.12, 30.123, 30.20 and 30.206, Stats., this chapter, or any conditions of an exemption, general permit or individual permit issued by the department, constitutes a violation and may result in a forfeiture. If the activity is a general permit under s. 30.206, Stats., the failure to follow procedural requirements may not, by itself, result in abatement of the activity. Unless there is good cause shown, the department may seek abatement of any activity in violation of ss. 30.12, 30.123, 30.20 and 30.206, Stats.

(2) General permits may not be issued for after-the-fact permit applications. When an after-the-fact permit application has been filed with the department, the department shall follow the procedures in ch. NR 301 for violations.

(3) Any reference in ss. 30.15, 30.292, 30.294 and 30.298, Stats., to any provision of ch. 30, Stats., shall include any rules promulgated under that provision.

(4) No person may place a bridge or culvert in or over a navigable waterway if the activity is not eligible for an exemption, authorized by a general permit or individual permit issued under this chapter, or otherwise authorized under this chapter.

SECTION 13. **FINDING.** The emergency rule procedure, pursuant to s. 227.24, Stats., is necessary and justified in establishing rules to protect the public health, safety and welfare. The Wisconsin Legislature recently enacted 2003 Wisconsin Act 118, to streamline the regulatory process for activities in public trust waters. The state has an affirmative duty to administer the new law in a manner consistent with the public trust responsibilities of the State of Wisconsin under Article IX, Section I of the Wisconsin Constitution.

2003 Act 118 identifies certain activities that may be undertaken in public trust waters exempt from a permit, or under a general permit. Certain activities may not be undertaken in waters that are defined as "areas of special natural resource interest" or at other locations where the activity would cause detrimental impacts on public rights and interests in navigable waters. Without emergency rules to aid in administering the new law, the following severe problems will occur:

- Until general permits are created by rule, any activity which is not exempt requires an individual permit with an automatic 30-day public notice. The required 30-day comment period will unnecessarily delay hundreds of construction projects that otherwise could go ahead with specified conditions for protecting lakes and streams (for example, all new riprap and culvert applications currently require public notices).

- Unclear wording of exemptions currently puts property owners, contractors and consultants at risk of violation. Without clear procedures and standards established by emergency rule, many more people may request exemption determinations, slowing the decisions on individual permit applications.
- Wording of exemptions and temporary grading jurisdiction puts lakes and streams at risk. Without standards as intended and described in the new law, exempted activities and grading along shorelines will cause inadvertent but permanent destruction of fish and wildlife habitat, loss of natural scenic beauty and reduced water quality. Rights of neighboring property owners may also be harmed. Cumulatively over one or two construction seasons, these impacts will have immediate and permanent effects on Wisconsin's water-based recreation and tourism industry.

To carry out the intention of the Legislature that 2003 Act 118 to speed decision-making but not diminish the public trust in state waters, these emergency rules are required to establish definitions, procedures and substantive standards for exemptions, general permits and jurisdiction under the new law.

SECTION 13. EFFECTIVE DATE. This rule shall take effect the day of publication in the official state newspaper.

SECTION 14. BOARD ADOPTION. This rule was approved and adopted by the State of Wisconsin Natural Resources Board on August 16, 2004.

Dated at Madison, Wisconsin

8/17/09

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By

Scott Hassett

Scott Hassett, Secretary

(SEAL)

**ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD
REPEALING AND RECREATING RULES**

The Wisconsin Natural Resources Board proposes an order to repeal and recreate NR 323 related to fish and wildlife habitat structures in navigable waterways.

FH-16-04(E)

Analysis Prepared by the Department of Natural Resources

Statutory Authority: ss. 30.12(1), 30.12(1p), 30.12(3)(br), 227.11(2) and 227.24, Stats.

Statutes interpreted: ss. 30.12(1), 30.12(1g)(a), (c) and (d), 30.12(1p), 30.12(2m), 30.12(2r), 30.12(3), 30.12(3m) and 30.20(1g)(b)2., Stats.

Rule Analysis

The purpose of this rule is to establish construction, design and placement standards for projects to be eligible for statutory exemptions, and to establish standards for projects that may be authorized under an individual permit.

NR 323 defines and describes design standards for half a dozen commonly used fish habitat structures that would qualify for exemptions in all waters other than ASNRIs. These include:

- Fish cribs
- Fish spawning reefs
- Wing deflectors
- Tree drops
- Half log structures
- Wildlife nesting structures

Federal Regulatory Analysis

Any activity that results in a discharge (including deposits and structures) into "waters of the United States" is regulated by the U.S. Army Corps of Engineers (Corps) under section 404 of the Clean Water Act. An Individual Permit from the Corps is required, unless Wisconsin regulates the project in its entirety under chapter 30, Stats., in which case the project is authorized by the Corps under general permits GP-01-WI or GP-LOP-WI. Dredging or discharge into waters declared navigable under Section 10, Rivers and Harbors Act, 1899 is also regulated, and requires an Individual Permit from the Corps.

Analysis of Adjacent States

Activity	Wisconsin	Illinois	Iowa	Michigan	Minnesota
Fish Habitat Structures	Exempt if not located in "area of special natural resource interest or will not cause adverse impacts to public trust values	Requires a permit if located in Lake Michigan or if the structure will obstruct flood flows or navigation	Exempt	Requires either a general permit or individual permit	Exempt if not located in a trout stream
Wildlife Habitat Structures	Exempt if not located in "area of special natural resource interest or will not cause adverse impacts to public trust values	Requires a permit if located in Lake Michigan or if the structure will obstruct flood flows or navigation	Exempt	Requires either a general permit or individual permit	Exempt if not located in a trout stream

SECTION 1. Chapter NR 323 is repealed and recreated to read:

Chapter NR 323
FISH AND WILDLIFE HABITAT STRUCTURES IN NAVIGABLE WATERWAYS

NR 323.01 Purpose. The purpose of this chapter is to establish reasonable procedures and limitations for exempt activities, general permits and individual permits for placement of fish and wildlife habitat structures in navigable waterways as regulated under s. 30.12, Stats., in order to protect the public rights and interest in the navigable, public waters of the state as defined in s. 30.10, Stats.

NR 323.02 Applicability. This chapter applies to construction, placement and maintenance of fish and wildlife habitat structures regulated under ss. 30.12(1), (1g)(a), (c) and (d), (2m) and (3m) and 30.20(1g)(b)2., Stats. Any person that intends to construct, place or maintain a fish or wildlife habitat structure in any navigable waterway shall comply with all applicable provisions of this chapter and any permit issued under this chapter.

NR 323.03 Definitions. The following definitions apply to this chapter:

(1) "Areas of special natural resource interest" has the meaning in s. 30.01(1am), Stats., and as identified by the department in s. NR 1.05.

Note: "Area of special natural resource interest" means any of the following:

- (a) A state natural area designated or dedicated under ss. 23.27 to 23.29.
- (b) A surface water identified as a trout stream by the department in NR 1.02(7).
- (bm) A surface water identified as an outstanding or exceptional resource water under s. 281.15, Stats.
- (c) An area that possesses significant scientific value, as identified by the department in NR 1.05.

Information and lists can be obtained by contacting the department, or found on the department's website at www.dnr.wi.gov, under the topic "Waterway and Wetland Permits".

(2) "Bank cover" means a man-made structure composed of biological and inert materials designed to provide overhanging cover habitat for fish in streams.

(3) "Biological materials" means living or organic materials that are biodegradable such as native grasses, sedges, forbs, shrubs and trees; live stakes and posts; non-treated wood; jute netting; fiber rolls and mats; logs; and branches.

(4) "Department" means the department of natural resources.

(5) "Fish crib" means a man-made 3-dimensional habitat structure composed of biological or inert materials designed specifically to attract and concentrate fish.

(6) "Half log" means a man-made structure composed of a log sawed lengthwise and anchored flat side down to the bottom of a lake or stream using steel rods for the purpose of providing habitat for fish.

(7) "Inert materials" means those materials that slowly degrade, such as chemically treated wood, stone, stainless and galvanized steel, plastics and synthetic polymers.

(8) "Navigable waterway" means any body of water with a defined bed and bank, which is navigable under the laws of the state. In Wisconsin, a navigable body of water is capable of floating the lightest boat or skiff used for recreation or any other purpose on a regularly recurring basis.

(9) "Nesting structure" means any structure or device constructed for the purpose of improving nesting habitat for wildlife, including birds, mammals, amphibians and reptiles. Nesting structures include but are not limited to wood duck houses and nesting platforms.

(10) "Ordinary high water mark" means the point on the banks or shore up to which the presence and action of water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation or other easily recognizable characteristics.

(11) "Riparian" means an owner of land abutting a navigable waterway.

(12) "Similar device" under s. 30.12(1g)(c), Stats., means a man-made structure composed of biological or inert materials designed specifically for the purpose of providing habitat for fish, including tree drops, half-logs, stake beds, bank covers, brush bundles and low barriers.

(13) "Spawning reef" means an expanse of rock below the surface of the water used by fish for spawning.

(14) "Tree drop" means a man-made structure created by a tree cut and allowed to fall into the water for the purpose of providing habitat for fish.

(15) "Wing deflector" means a man-made structure composed of biological or inert materials placed in streams to deflect stream flow and modify stream channels for the purpose of providing habitat for fish.

NR 323.04 Fish habitat structures. (1) EXEMPTIONS. (a) Procedures. Exemptions shall be processed according to the procedures in ch. NR 310.

(b) Applicable activities. A fish habitat structure that meets the standards in pars. (c) to (h) shall be exempt under s. 30.12(1g)(c), Stats.

(c) General standards. 1. The fish habitat structure may not be located in an area of special natural resource interest as defined in s. 30.01(1am), Stats., and identified by the department in s. NR 1.05.

2. The fish habitat structure may be placed and maintained only by a riparian.

3. The fish habitat structure shall be placed entirely within the riparian's zone of interest, as determined by one of the methods outlined in s. NR 326.04.

4. The fish habitat structure must be placed solely for the purpose of improving fish habitat.

5. The riparian shall report the placement of the structure to the local department fisheries biologist within 30 days after placement. The report shall contain a description of the project and its purpose, the name of the waterway and a map showing where the structure was placed.

6. A deposit of sand, gravel or stone under s. 30.12(1g)(a), Stats., may be associated with the placement of a fish habitat structure provided the deposit is limited to the area immediately underneath or within one foot of the structure and is less than 2 cubic yards.

7. Dredging under s. 30.20(1g)(b)1., Stats., is not allowed for the placement of a fish habitat structure.

(d) Fish crib standards. In addition to the standards in par. (c), fish cribs shall meet the following requirements.

1. Fish cribs shall be placed in at least 10 feet of water and have a minimum of 6 feet of water over the top of the structure. The depth and clearance of the fish cribs shall be based on summer water level or normal low water level conditions.

2. Fish cribs shall be constructed of biological materials, with the exception of fastening and anchoring devices.

3. The dimensions of a fish crib shall be no larger than 8 feet tall by 8 feet long by 8 feet wide.

4. Fish cribs may not be placed within 100 feet of swimming beaches or swim rafts.

5. Fish cribs may not be located in soft sediment or muck that is greater than 3 inches in depth.

6. Fish cribs may not be placed where the bottom contour of the waterway exceeds a slope of 4-foot horizontal to one-foot vertical.

(e) *Spawning reef standards.* In addition to the standards in par. (c), spawning reefs shall meet the following requirements.

1. Spawning reefs shall be constructed of an aggregate of clean, uncrushed gravel and rock from 2 to 8 inches in diameter, in a ratio of approximately 30% ranging from 2 to 4 inches in diameter and approximately 70% ranging from 4.1 to 8 inches in diameter.

2. Spawning reefs shall be placed in a linear form parallel to the shore.

3. Spawning reefs shall be no longer than 100 feet along the shoreline and no wider than 30 feet perpendicular to shore.

4. Spawning reefs shall be placed where water depths range from 0 to 5 feet.

5. Spawning reefs may not be placed where bottom contour of the waterway exceeds a slope of 10-foot horizontal to one-foot vertical.

6. Spawning reefs may not be placed greater than 100 feet from shore.

7. Spawning reefs may not be placed where the bottom substrate composition consists of less than 90% clean sand.

Note: Natural walleye spawning reefs generally consist of substrates 2-8 inches in diameter with rounded edges. Natural walleye spawning reefs are located adjacent to gently sloping shorelines in shallow water. Walleye spawning reefs require a moderate amount of wave action to keep the substrate clean of algae and provide adequate water circulation for incubating eggs. The requirement of 90% clean sand indicates a lack of spawning habitat, the appropriate wave action, and substrate capable of supporting the reef. If the water depth remains less than 5 feet and the bottom contour remains less than 10:1, a maximum location of 100 feet from shore is required to reduce navigation concerns.

(f) *Wing deflector standards.* In addition to the standards in par. (c), wing deflectors shall meet the following requirements.

1. Design and placement of wing deflectors shall follow the prescriptions in *Trout Stream Therapy* by Robert L. Hunt or in *Guidelines for Management of Trout Stream Habitat in Wisconsin* by Ray J. White and Oscar M. Brynildson.

Note: Copies of these publications may be inspected by contacting your local department fisheries biologist, and are available at many public libraries.

2. Wing deflectors may only be placed in navigable streams which are less than 5 feet wide, measured from ordinary high water mark to ordinary high water mark.

3. Wing deflectors may not extend more than 25% across the stream width.

(g) *Tree drops*. In addition to the standards in par. (c), tree drops shall meet the following requirements.

1. Tree drops may only be placed in lakes or flowages.

2. Tree drops shall use live trees having a minimum diameter of 12 inches at the base.

3. Tree drops shall be securely anchored to the shore.

Note: Local zoning ordinances may place restrictions on cutting trees in the shoreland zone. The riparian is responsible for ensuring that their tree drop project is in compliance with any local zoning requirements.

(h) *Half log structures*. In addition to the standards in par. (c), half log structures shall meet the following requirements.

1. Half logs shall be constructed from green logs with a minimum diameter of 10 inches.

2. Half logs shall be placed where the bottom substrate composition consists of sand and/or gravel.

3. Half logs may not be placed in water deeper than 5 feet.

4. Half logs may not be placed greater than 100 feet from shore.

(i) Activities which do not meet the standards in pars. (c) to (h) or are determined ineligible for an exemption by the department shall require a general permit or individual permit.

(2) **INDIVIDUAL PERMITS.** (a) *Procedures*. Individual permits shall be processed according to the procedures in ch. NR 310.

(b) *Applicable activities*. Any fish habitat structure which is not exempt under sub. (1), is not authorized by a general permit, or is located in an area of special natural resource interest requires authorization by an individual permit pursuant to s. 30.12(1), Stats.

(c) *Standards*. A fish habitat structure meeting the standards in s. 30.12(3m), Stats., may be authorized under an individual permit.

Note: Fish habitat projects where the department is the applicant are reviewed under the same standards and following a comparable procedure.

(3) **EXISTING PERMITS.** A fish habitat structure which is authorized by an existing department permit shall continue to be authorized, provided the structure is maintained in compliance with all the conditions of the original permit. Any modifications to the structure that do not comply with the original permit conditions shall require a new individual permit and shall comply with all standards in this section.

NR 323.05 Wildlife habitat structures. (1) EXEMPTIONS. (a) *Procedures*. Exemptions shall be processed according to the procedures in ch. NR 310.

(b) *Applicable activities*. A nesting structure that meets all the standards in par. (c) shall be exempt under s. 30.12(1g)(d), Stats.

(c) *General standards.* 1. The nesting structure may not be located in an area of special natural resource interest as defined in s. 30.01(1am), Stats., and identified by the department in s. NR 1.05.

2. The nesting structure may be placed and maintained only by a riparian.

3. The nesting structure shall be placed entirely within the riparian's zone of interest, as determined by one of the methods outlined in s. NR 326.04.

4. The nesting structure must be placed solely for the purpose of improving wildlife habitat.

5. A deposit of sand, gravel or stone under s. 30.12(1g)(a), Stats., may be associated with the placement of a nesting structure provided the deposit is limited to the area underneath or within one foot of the structure and is less than 2 cubic yards.

6. Dredging under s. 30.20(1g)(b)1., Stats., is allowed for the placement of a nesting structure provided the dredging does not exceed one cubic yard.

7. The surface area of a nesting structure may not exceed 25 square feet.

8. Nesting structures shall be designed and constructed of unpainted wood or of materials that are non-gloss earthtone colors that blend into a natural shoreline setting during leaf-on conditions.

(d) Activities which do not meet the standards in par. (c) or are determined ineligible for an exemption by the department shall require a general permit or individual permit.

(e) *Exceptions.* 1. Wood duck houses and nesting platforms attached to or supported by existing trees in their natural condition are not regulated under ch. 30, Stats., or this chapter.

2. Wildlife habitat projects authorized under ch. NR 353 relating to wetland conservation activities are not subject to the requirements of this chapter.

(2) **INDIVIDUAL PERMITS.** (a) *Procedures.* Individual permits shall be processed according to the procedures in ch. NR 310.

(b) *Applicable activities.* Any wildlife habitat structure which is not exempt under sub. (1), is not authorized by a general permit, or is located in an area of special natural resource interest requires authorization by an individual permit pursuant to s. 30.12(1), Stats.

(c) *Standards.* A wildlife habitat structure meeting the standards in s. 30.12(3m), Stats., may be authorized under an individual permit.

Note: Wildlife habitat projects where the department is the applicant are reviewed under the same standards and following a comparable procedure.

(3) **EXISTING PERMITS.** A wildlife habitat structure which is authorized by an existing department permit shall continue to be authorized, provided the structure is maintained in compliance with all the conditions of the original permit. Any modifications to the structure that do not comply with the original permit conditions shall require a new individual permit and shall comply with all standards in this section.

NR 323.06 Enforcement. (1) Noncompliance with the provisions of ss. 30.12, 30.20 and 30.206, Stats., this chapter, or any conditions of an exemption, general permit or individual permit issued by the department, constitutes a violation and may result in a forfeiture. If the activity is a general permit under s. 30.206, Stats., the failure to follow procedural requirements may not, by itself, result in abatement of the

activity. Unless there is good cause shown, the department shall seek abatement of any activity in violation of ss. 30.12, 30.20 and 30.206, Stats.

(2) General permits may not be issued for after-the-fact permit applications. When an after-the-fact permit application has been filed with the department, the department shall follow the procedures in ch. NR 301 for violations.

(3) Any reference in ss. 30.15, 30.292, 30.294 and 30.298, Stats., to any provision of ch. 30, Stats., shall include any rules promulgated under that provision.

(4) No person may place a fish or wildlife habitat structure in a navigable waterway if the activity is not eligible for an exemption, authorized by a general permit or individual permit issued under this chapter, or otherwise authorized under this chapter.

SECTION 2. FINDING. The emergency rule procedure, pursuant to s. 227.24, Stats., is necessary and justified in establishing rules to protect the public health, safety and welfare. The Wisconsin Legislature recently enacted 2003 Wisconsin Act 118, to streamline the regulatory process for activities in public trust waters. The state has an affirmative duty to administer the new law in a manner consistent with the public trust responsibilities of the State of Wisconsin under Article IX, Section I of the Wisconsin Constitution.

2003 Act 118 identifies certain activities that may be undertaken in public trust waters exempt from a permit, or under a general permit. Certain activities may not be undertaken in waters that are defined as "areas of special natural resource interest" or at other locations where the activity would cause detrimental impacts on public rights and interests in navigable waters. Without emergency rules to aid in administering the new law, the following severe problems will occur:

- Until general permits are created by rule, any activity which is not exempt requires an individual permit with an automatic 30-day public notice. The required 30-day comment period will unnecessarily delay hundreds of construction projects that otherwise could go ahead with specified conditions for protecting lakes and streams (for example, all new riprap and culvert applications currently require public notices).
- Unclear wording of exemptions currently puts property owners, contractors and consultants at risk of violation. Without clear procedures and standards established by emergency rule, many more people may request exemption determinations, slowing the decisions on individual permit applications.
- Wording of exemptions and temporary grading jurisdiction puts lakes and streams at risk. Without standards as intended and described in the new law, exempted activities and grading along shorelines will cause inadvertent but permanent destruction of fish and wildlife habitat, loss of natural scenic beauty and reduced water quality. Rights of neighboring property owners may also be harmed. Cumulatively over one or two construction seasons, these impacts will have immediate and permanent effects on Wisconsin's water-based recreation and tourism industry.

To carry out the intention of the Legislature that 2003 Act 118 to speed decision-making but not diminish the public trust in state waters, these emergency rules are required to establish definitions, procedures and substantive standards for exemptions, general permits and jurisdiction under the new law.

SECTION 3. EFFECTIVE DATE. This rule shall take effect the day of publication in the official state newspaper.

SECTION 4. BOARD ADOPTION. This rule was approved and adopted by the State of Wisconsin Natural Resources Board on April 6, 2004.

Dated at Madison, Wisconsin 4/7/09

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By Scott Hassett
Scott Hassett, Secretary

(SEAL)

ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD
REPEALING, RENUMBERING, AMENDING AND CREATING RULES

The Wisconsin Natural Resources Board proposes an order to repeal NR 325.065 and 325.13; renumber NR 325.07(5), 325.10 and 325.11; renumber and amend NR 325.08 and 325.12; amend NR 325.01, 325.06(1) and 325.07 (title) and (1); repeal and recreate NR 325.09; and create NR 325.03(7k) and (9), 325.07(5) and 325.08 relating to boathouses and fixed houseboats in navigable waterways.

FH-17-04(E)

Analysis Prepared by the Department of Natural Resources

Statutory Authority: ss. 30.121, 227.11(2) and 227.24, Stats.

Statutes interpreted: s. 30.121, Stats.

Rule Analysis

The purpose of this rule revision is to modify the existing rule to reflect the exceptions. This rule revision establishes standards and clarifies procedures for obtaining certification of boathouse repair or eligibility for a statutory exception.

This order makes some minor changes to existing NR325 to bring into accordance with the provisions of Act 118 allowing an exception to the limits on over-water boathouses for some commercial boat houses.

Federal Regulatory Analysis

Any activity that results in a discharge (including deposits and structures) into "waters of the United States" is regulated by the U.S. Army Corps of Engineers (Corps) under section 404 of the Clean Water Act. An Individual Permit from the Corps is required, unless Wisconsin regulates the project in its entirety under chapter 30, Stats., in which case the project is authorized by the Corps under general permits GP-01-WI or GP-LOP-WI. Dredging or discharge into waters declared navigable under Section 10, Rivers and Harbors Act, 1899 is also regulated, and requires an Individual Permit from the Corps.

Analysis of Adjacent States

Minnesota is generally more restrictive and their decision-making criteria are specific. Minnesota requires a permit for construction, reconstruction, relocation, removal, or repair of a boathouse. Permits are only granted if the boathouse is in an area of historic boathouse use, is approved by a resolution of the local government, and was located on public waters prior to January 1, 1997.

Michigan is generally less restrictive and their decision-making criteria are more subjective. A general permit is required for construction of a new boathouse, and the applicant is required to minimize the size, use and environmental impacts of the structure.

Illinois is generally less restrictive and their decision-making criteria are more subjective. A permit is required to place a structure over any state-owned land or water. Construction in the floodway of rivers, lakes and streams is also regulated.

Iowa is generally more restrictive, though their decision-making criteria are subjective. A Sovereign Lands Construction Permit from the Iowa Department of Natural Resources is required. The applicant must analyze the availability of alternatives and measures proposed to prevent, minimize or mitigate adverse impacts to natural resources or public use of the affected area.

SECTION 1. NR 325.01 is amended to read:

NR 325.01 Purpose. These rules are promulgated pursuant to ss. 30.121 and 227.11(2)(a) and (b), Stats., in order to establish a valuation program for boathouses and fixed houseboats, to define terms used in s. 30.121, Stats., and other terms necessary to the administration of s. 30.121, Stats., and these rules, and to establish standards and procedures for certification of maintenance and repair costs, certification of eligibility for exceptions, and procedures for the department to use in obtaining removal of abandoned boathouses and fixed houseboats or boathouses which materially obstruct navigation.

SECTION 2. NR 325.03 (7k) and (9) are created to read:

NR 325.03 (7k) "Navigable waterway" means any body of water with defined bed and banks, which is navigable under the laws of the state. In Wisconsin, a navigable body of water is capable of floating the lightest boat or skiff used for recreation or any other purpose on a regularly recurring basis.

(9) "Ordinary high water mark" means the point on the banks or shore up to which the presence and action of water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation or other easily recognizable characteristics.

SECTION 3. NR 325.06(1) is amended to read:

NR 325.06 Repair and maintenance cost. (1) Owners of boathouses or fixed houseboats shall obtain a certification from the department that all needed repair and maintenance costs total less than 50% of the current ~~valuation~~ value of the structure prior to performance of the maintenance of repairs.

SECTION 4. NR 325.065 is repealed.

SECTION 5. NR 325.07 (title) and (1) is amended to read:

NR 325.07 (title) Certification procedure for repair and maintenance. (1) Except as provided for in s. NR 325.06 (2), owners of boathouses or fixed houseboats wishing to perform maintenance or repairs shall request certification that all required maintenance and repairs do not exceed 50% of the current value. The request for certification shall be made to the department ~~district director of the district within which the boathouse or fixed houseboat is located~~ and shall contain the information set forth in ss. NR 325.05 and ~~325.08~~ 325.09(1) and (2).

SECTION 6. NR 325.07 (5) is renumbered to (6).

SECTION 7. NR 325.07 (5) is created to read:

NR 325.07(5) The department certification shall contain a requirement that the boathouse owner record the certification with the register of deeds for the municipality where the boathouse is located, and that the boathouse owner submit an affidavit showing proof of recording prior to commencing repairs.

SECTION 8. NR 325.08 is renumbered to NR 325.10, and as renumbered is amended to read:

NR 325.10 (title) ~~Maintenance and repair cost certification~~ Certification information. (1) REQUIRED INFORMATION. Plans or photographs with a locational sketch shall be prepared by the applicant submitted to the department showing the following information for use by the department. For certification requests filed pursuant to s. NR 325.07, an application form including plans, photographs and a location sketch shall be prepared by the applicant submitted to the department showing the following information for use by the department.

(a) *Location*. The waterway upon which the boathouse or fixed houseboat is located, the legal description of the adjacent property and directions to the site ~~shall be provided~~.

(b) (title) *Owner or lessee*. The ~~owner or lessee's~~ owner's name, address, fire number (if available) and telephone number ~~shall be provided~~.

(c) *Features*. Information about the following features and their state of repair ~~shall be provided as a part of the required certification information~~:

1. Boathouses.
 - a. Foundations.
 - b. Structural framework.
 - c. Siding.
 - d. Roofing.
 - e. Presence and description of living quarters, if any.
2. Fixed houseboats.
 - a. Devices used to secure the fixed houseboat to the bank or bed.
 - b. Floatation devices.
 - c. Superstructure framework.
 - d. Siding.
 - e. Roof.
 - f. Presence and description of living quarters, if any.

(2) STATEMENT OF MAINTENANCE OR REPAIRS. ~~The~~ For certification requests filed pursuant to s. NR 325.07, the applicant shall provide a statement of all needed maintenance or repair items regardless of whether the maintenance or repair will be done within one year of the statement. An estimate of labor and material cost associated with those items shall be submitted. Estimates may be prepared by the applicant or by a contractor or contractors representing the applicant. Volunteer labor shall be valued at the prevailing minimum wage rate.

(3) CERTIFICATION OF EXCEPTION. For certification requests filed to seek an exception pursuant to s. NR 325.08, an application form including plans, photographs and a location sketch shall be submitted showing the following information:

(a) Location. The waterway upon which the boathouse or fixed houseboat is located, the legal description of the adjacent property and directions to the site.

(b) Owner. The owner's name, address, fire number (if available) and telephone number.

(c) Historic or cultural value. For applications to request an exception under s. 30.121(3g), Stats., documentation to demonstrate that the boathouse or fixed boathouse has been designated as a national, state or local historical landmark.

(d) Single-story boathouse. For applications to request an exception under s. 30.121(3m), Stats., documentation to demonstrate that the waterway enlargement has been authorized by the department, and that the project meets the standards in s. 30.121(3m), Stats.

(e) Damaged boathouse. For applications to request an exception under s. 30.121(3r), Stats., documentation to demonstrate that the project meets the standards in s. 30.121(3w), Stats., and s. NR 325.09.

(f) Commercial boathouse. For applications to request an exception under s. 30.121(3w), Stats., documentation to demonstrate that the project meets the standards in s. 30.121(3w), Stats., and s. NR 325.09.

SECTION 9. NR 325.08 is created to read:

NR 325.08 Certification procedure for exceptions. (1) Owners wishing to repair or maintain a boathouse or fixed houseboat pursuant to s. 30.121(3g), Stats., construct, repair or maintain a single-story boathouse pursuant to s. 30.121(3m), Stats., repair or reconstruct a boathouse pursuant to s. 30.121(3r), Stats., or construct, repair or maintain a boathouse pursuant to s. 30.121(3w), Stats., shall request certification that the proposed activity is eligible for an exception. The request for certification shall be made to the department and contain the information in ss. NR 325.09 and 325.10.

(2) The department shall review the information submitted by the applicant for certification, and shall inspect the boathouse or fixed houseboat or the site of the proposed boathouse.

(3) The department shall within 60 days issue a certification as requested, if the department agrees that the proposed activity is eligible for a statutory exception.

(4) The department shall within 60 days deny certification if the department determines that the proposed activity does not meet the requirements of s. 30.121, Stats., and this chapter to be eligible for an exception. Any owner denied certification may review the denial pursuant to s. 227.42, Stats.

SECTION 10. NR 325.09 is repealed and recreated to read:

NR 325.09 Standards. (1) MAINTENANCE. In addition to the requirements of s. 30.121(3), Stats., repair and maintenance of existing boathouses and fixed houseboats must meet the following conditions:

(a) Repair and maintenance is limited to the 3-dimensional envelope of the existing boathouse or fixed houseboat. No expansion of the boathouse or fixed houseboat in any direction is allowed.

(b) Repair and maintenance may not include any change in roof pitch or addition of decks, walkways, railings or other architectural features.

(c) Decks, walkways, railings or piers that are attached or adjacent to the boathouse or fixed boathouse shall be considered part of the boathouse or fixed houseboat, and shall be subject to the repair limitations of s. 30.121(3), Stats.

(2) DAMAGED BOATHOUSE. In addition to the requirements of s. 30.121(3r), Stats., repair or reconstruction of a damaged boathouse must meet the following conditions to be eligible for an exception:

(a) The boathouse owner shall demonstrate that the boathouse was damaged by violent wind, vandalism or fire. Documentation shall include photographs that depict the boathouse before and after the damage.

(b) The boathouse owner shall demonstrate that the damage occurred after January 1, 1984.

(c) Repair and reconstruction is limited to the specific portions of the boathouse that were damaged. Any other proposed work on the boathouse that is not related to specific damage caused under pars. (a) and (b) is subject to the limitations of s. 30.121(3), Stats., the procedures of s. NR 325.07 and the standards in sub. (1).

(3) COMMERCIAL BOATHOUSE. In addition to the requirements of s. 30.121(3w), Stats., a commercial boathouse shall meet the following conditions to be eligible for an exception.

(a) The boathouse may not be located over natural navigable waters, and may only be located over an artificial waterway enlargement authorized under s. 30.19, Stats.

(b) The boathouse may only be located on a Great Lakes waterbody or on a riverfront property that is within 2 miles of and tributary to a Great Lakes waterbody.

(c) The boathouse may only be located landward of an existing bulkhead line.

(d) The bulkhead line shall have been established prior to January 1, 1970.

SECTION 12. NR 325.10 and 325.11 are renumbered to NR 325.11 and 325.12, respectively.

SECTION 13. NR 325.13 is repealed.

SECTION 14. NR 325.12 is renumbered to NR 325.13, and as renumbered is amended to read:

NR 325.13 (title) ~~Removal procedure for disrepaired or obstructing boathouses or fixed houseboats~~ Enforcement. Upon complaint or upon its own motion the department shall order the removal of boathouses or fixed houseboats which materially obstruct navigation or are in a major state of disrepair pursuant to the provisions of s. 30.03(4)(a), Stats. Forfeitures and abatement for violations of s. 30.121, Stats., and this chapter may also be prosecuted by the department pursuant to the provisions of ss. 23.50, 23.79 and 30.03 (2), Stats.

SECTION 15. FINDING. The emergency rule procedure, pursuant to s. 227.24, Stats., is necessary and justified in establishing rules to protect the public health, safety and welfare. The Wisconsin Legislature recently enacted 2003 Wisconsin Act 118, to streamline the regulatory process for activities in public trust waters. The state has an affirmative duty to administer the new law in a manner consistent with the public trust responsibilities of the State of Wisconsin under Article IX, Section I of the Wisconsin Constitution.

2003 Act 118 identifies certain activities that may be undertaken in public trust waters exempt from a permit, or under a general permit. Certain activities may not be undertaken in waters that are defined as "areas of special natural resource interest" or at other locations where the activity would cause detrimental impacts on public rights and interests in navigable waters. Without emergency rules to aid in administering the new law, the following severe problems will occur:

- Until general permits are created by rule, any activity which is not exempt requires an individual permit with an automatic 30-day public notice. The required 30-day comment period will unnecessarily delay hundreds of construction projects that otherwise could go ahead with specified conditions for protecting lakes and streams (for example, all new riprap and culvert applications currently require public notices).
- Unclear wording of exemptions currently puts property owners, contractors and consultants at risk of violation. Without clear procedures and standards established by emergency rule, many more people may request exemption determinations, slowing the decisions on individual permit applications.
- Wording of exemptions and temporary grading jurisdiction puts lakes and streams at risk. Without standards as intended and described in the new law, exempted activities and grading along shorelines will cause inadvertent but permanent destruction of fish and wildlife habitat, loss of natural scenic beauty and reduced water quality. Rights of neighboring property owners may also be harmed. Cumulatively over one or two construction seasons, these impacts will have immediate and permanent effects on Wisconsin's water-based recreation and tourism industry.

To carry out the intention of the Legislature that 2003 Act 118 to speed decision-making but not diminish the public trust in state waters, these emergency rules are required to establish definitions, procedures and substantive standards for exemptions, general permits and jurisdiction under the new law.

SECTION 16. EFFECTIVE DATE. This rule shall take effect the day of publication in the official state newspaper.

SECTION 17. BOARD ADOPTION. This rule was approved and adopted by the State of Wisconsin Natural Resources Board on April 6, 2004.

Dated at Madison, Wisconsin 9/7/09

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By Scott Hassett
Scott Hassett, Secretary

(SEAL)

Natural Resources – Affects Ch. NR 325

SECTION 1. NR 325.01 is amended to read:

NR 325.01 Purpose. These rules are promulgated pursuant to ss. 30.121 and 227.11(2)(a) and (b), Stats., in order to establish a valuation program for boathouses and fixed houseboats, to define terms used in s. 30.121, Stats., and other terms necessary to the administration of s. 30.121, Stats., and these rules, and to establish standards and procedures for certification of maintenance and repair costs, certification of eligibility for exceptions, and procedures for the department to use in obtaining removal of abandoned boathouses and fixed houseboats or boathouses which materially obstruct navigation.

SECTION 2. NR 325.03 (7k) and (9) are created to read:

NR 325.03 (7k) “Navigable waterway” means any body of water with defined bed and banks, which is navigable under the laws of the state. In Wisconsin, a navigable body of water is capable of floating the lightest boat or skiff used for recreation or any other purpose on a regularly recurring basis.

(9) “Ordinary high water mark” means the point on the banks or shore up to which the presence and action of water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation or other easily recognizable characteristics.

SECTION 3. NR 325.06(1) is amended to read:

NR 325.06 Repair and maintenance cost. (1) Owners of boathouses or fixed houseboats shall obtain a certification from the department that all needed repair and maintenance costs total less than 50% of the current ~~valuation~~ value of the structure prior to performance of the maintenance of repairs.

SECTION 4. NR 325.065 is repealed.

SECTION 5. NR 325.07 (title) and (1) is amended to read:

NR 325.07 (title) Certification procedure for repair and maintenance. (1) Except as provided for in s. NR 325.06 (2), owners of boathouses or fixed houseboats wishing to perform maintenance or repairs shall request certification that all required maintenance and repairs do not exceed 50% of the current value. The request for certification shall be made to the department ~~district director of the district within which the boathouse or fixed houseboat is located~~ and shall contain the information set forth in ss. NR 325.05 and ~~325.08~~ 325.09(1) and (2).

SECTION 6. NR 325.07 (5) is renumbered to (6).

SECTION 7. NR 325.07 (5) is created to read:

NR 325.07(5) The department certification shall contain a requirement that the boathouse owner record the certification with the register of deeds for the municipality where the boathouse is located, and that the boathouse owner submit an affidavit showing proof of recording prior to commencing repairs.

SECTION 8. NR 325.08 is renumbered to NR 325.10, and as renumbered is amended to read:

NR 325.10 (title) ~~Maintenance and repair cost certification~~ Certification information. (1) REQUIRED INFORMATION. Plans or photographs with a locational sketch shall be prepared by the applicant submitted to the department showing the following information for use by the department.

(a) *Location.* The waterway upon which the boathouse or fixed houseboat is located, the legal description of the adjacent property and directions to the site ~~shall be provided.~~

(b) (title) *Owner or lessee.* The ~~owner or lessee's~~ owner's name, address, fire number (if available) and telephone number ~~shall be provided.~~

(c) *Features.* Information about the following features and their state of repair ~~shall be provided as a part of the required certification information:~~

1. Boathouses.
 - a. Foundations.
 - b. Structural framework.
 - c. Siding.
 - d. Roofing.
 - e. Presence and description of living quarters, if any.
2. Fixed houseboats.
 - a. Devices used to secure the fixed houseboat to the bank or bed.
 - b. Floatation devices.
 - c. Superstructure framework.
 - d. Siding.
 - e. Roof.
 - f. Presence and description of living quarters, if any.

(2) STATEMENT OF MAINTENANCE OR REPAIRS. The For certification requests filed pursuant to s. NR 325.07, the applicant shall provide a statement of all needed maintenance or repair items regardless of whether the maintenance or repair will be done within one year of the statement. An estimate of labor and material cost associated with those items shall be submitted. Estimates may be prepared by the applicant or by a contractor or contractors representing the applicant. Volunteer labor shall be valued at the prevailing minimum wage rate.

(3) CERTIFICATION OF EXCEPTION. For certification requests filed to seek an exception pursuant to s. NR 325.08, an application form including plans, photographs and a location sketch shall be submitted showing the following information:

(a) Location. The waterway upon which the boathouse or fixed houseboat is located, the legal description of the adjacent property and directions to the site.

(b) Owner. The owner's name, address, fire number (if available) and telephone number.

(c) Historic or cultural value. For applications to request an exception under s. 30.121(3g), Stats., documentation to demonstrate that the boathouse or fixed boathouse has been designated as a national, state or local historical landmark.

(d) Single-story boathouse. For applications to request an exception under s. 30.121(3m), Stats., documentation to demonstrate that the waterway enlargement has been authorized by the department, and that the project meets the standards in s. 30.121(3m), Stats.

(e) Damaged boathouse. For applications to request an exception under s. 30.121(3r), Stats., documentation to demonstrate that the project meets the standards in s. 30.121(3w), Stats., and s. NR 325.09.

(f) Commercial boathouse. For applications to request an exception under s. 30.121(3w), Stats., documentation to demonstrate that the project meets the standards in s. 30.121(3w), Stats., and s. NR 325.09.

SECTION 9. NR 325.08 is created to read:

NR 325.08 Certification procedure for exceptions. (1) Owners wishing to repair or maintain a boathouse or fixed houseboat pursuant to s. 30.121(3g), Stats., construct, repair or maintain a single-story boathouse pursuant to s. 30.121(3m), Stats., repair or reconstruct a boathouse pursuant to s. 30.121(3r), Stats., or construct, repair or maintain a boathouse pursuant to s. 30.121(3w), Stats., shall request certification that the proposed activity is eligible for an exception. The request for certification shall be made to the department and contain the information in ss. NR 325.09 and 325.10.

(2) The department shall review the information submitted by the applicant for certification, and shall inspect the boathouse or fixed houseboat or the site of the proposed boathouse.

(3) The department shall within 60 days issue a certification as requested, if the department agrees that the proposed activity is eligible for a statutory exception.

(4) The department shall within 60 days deny certification if the department determines that the proposed activity does not meet the requirements of s. 30.121, Stats., and this chapter to be eligible for an exception. Any owner denied certification may review the denial pursuant to s. 227.42, Stats.

SECTION 10. NR 325.09 is repealed and recreated to read:

NR 325.09 Standards. (1) MAINTENANCE. In addition to the requirements of s. 30.121(3), Stats., repair and maintenance of existing boathouses and fixed houseboats must meet the following conditions:

(a) Repair and maintenance is limited to the 3-dimensional envelope of the existing boathouse or fixed houseboat. No expansion of the boathouse or fixed houseboat in any direction is allowed.

(b) Repair and maintenance may not include any change in roof pitch or addition of decks, walkways, railings or other architectural features.

(c) Decks, walkways, railings or piers that are attached or adjacent to the boathouse or fixed boathouse shall be considered part of the boathouse or fixed houseboat, and shall be subject to the repair limitations of s. 30.121(3), Stats.

(2) DAMAGED BOATHOUSE. In addition to the requirements of s. 30.121(3r), Stats., repair or reconstruction of a damaged boathouse must meet the following conditions to be eligible for an exception:

(a) The boathouse owner shall demonstrate that the boathouse was damaged by violent wind, vandalism or fire. Documentation shall include photographs that depict the boathouse before and after the damage.

(b) The boathouse owner shall demonstrate that the damage occurred after January 1, 1984.

(c) Repair and reconstruction is limited to the specific portions of the boathouse that were damaged. Any other proposed work on the boathouse that is not related to specific damage caused under pars. (a) and (b) is subject to the limitations of s. 30.121(3), Stats., the procedures of s. NR 325.07 and the standards in sub. (1).

(3) COMMERCIAL BOATHOUSE. In addition to the requirements of s. 30.121(3w), Stats., a commercial boathouse shall meet the following conditions to be eligible for an exception.

(a) The boathouse may not be located over natural navigable waters, and may only be located over an artificial waterway enlargement authorized under s. 30.19, Stats.

(b) The boathouse may only be located on a Great Lakes waterbody or on a riverfront property that is within 2 miles of and tributary to a Great Lakes waterbody.

(c) The boathouse may only be located landward of an existing bulkhead line.

(d) The bulkhead line shall have been established prior to January 1, 1970.

SECTION 12. NR 325.10 and 325.11 are renumbered to NR 325.11 and 325.12, respectively.

SECTION 13. NR 325.13 is repealed.

SECTION 14. NR 325.12 is renumbered to NR 325.13, and as renumbered is amended to read:

NR 325.13 (title) ~~Removal procedure for disrepaired or obstructing boathouses or fixed houseboats~~ Enforcement.

Upon complaint or upon its own motion the department shall order the removal of boathouses or fixed houseboats which materially obstruct navigation or are in a major state of disrepair pursuant to the provisions of s. 30.03(4)(a), Stats.

Forfeitures and abatement for violations of s. 30.121, Stats., and this chapter may also be prosecuted by the department pursuant to the provisions of ss. 23.50, 23.79 and 30.03 (2), Stats.

Natural Resources – Affects Ch. NR 326

SECTION 1. Chapter NR 326 (title) is amended to read:

PIERS, WHARVES, BOAT SHELTERS, BOAT HOISTS, BOAT LIFTS, AND SWIM RAFTS IN NAVIGABLE WATERWAYS

SECTION 2. NR 326, subch. I (title) is created to read:

**SUBCHAPTER I
GENERAL PROVISIONS**

[Drafter's Note: This title shall be inserted at the beginning of the chapter, and contain ss. NR 326.01 through 326.04.]

SECTION 3. NR 326.01 is repealed and recreated to read:

NR 326.01 Purpose. The purpose of this chapter is to establish reasonable procedures and limitations for exempt activities, general permits and individual permits for placement of piers, wharves, boat shelters, boat hoists, boat lifts and swim rafts in navigable waterways as regulated under s. 30.12, Stats., in order to protect the public rights and interest in the navigable, public waters of the state as defined in s. 30.10, Stats.

SECTION 4. NR 326.02 is repealed and recreated to read:

NR 326.02 Applicability. This chapter applies to construction, placement and maintenance of piers, wharves, boat shelters, boat hoists, boat lifts and swim rafts regulated under ss. 30.12(1), (1g)(a), (b), (e) and (f), (3) and (3m), 30.13(1) and (1m) and 30.20(1g)(b)2., Stats. Any person that intends to construct, place or maintain a pier, wharf, boat shelter, boat hoist, boat lift or swim raft in any navigable waterway shall comply with all applicable provisions of this chapter and any permit issued under this chapter.

SECTION 5. NR 326.03(1) is renumbered 326.03(1f), and as renumbered is amended to read:

NR 326.03(1f) "Boat shelter" as defined has the meaning given in s. 30.01(1c), Stats., means a structure in navigable waters designed and constructed for the purpose of providing cover for a berth place for watercraft, which may have a roof but may not have walls or sides. Such a structure may include a boat hoist.

SECTION 6. NR 326.03 (6), (8) and (10) are amended to read:

NR 326.03(6) "Ordinary high water mark" ~~has the definition contained in s. NR 320.03 (4).~~ means the point on the banks or shore up to which the presence and action of water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation or other easily recognizable characteristics.

(8) "Pier" as defined has the meaning given in s. 30.01 (5), Stats., means any structure extending channelward from the shore with water on both sides, built or maintained for the purpose of providing a berthing or mooring place for watercraft or for loading or unloading cargo or passengers onto or from watercraft. Such a structure may include a boat shelter which is removed seasonally.

(10) "Riparian" means an owner of land adjacent to abutting a navigable waters waterway.

SECTION 7. NR 326.03 (1b), (1c), (1d), (1g), (1k), (1p), (1t), (5g), (5m), (5r), (9g), (9m), (10m) and (14) are created to read:

NR 326.03(1b) "Area of special natural resource interest" has the meaning in s. 30.01(1am), Stats., and as identified by the department in s. NR 1.05.

Note: "Area of special natural resource interest" means any of the following:

- (a) A state natural area designated or dedicated under ss. 23.27 to 23.29, Stats.
- (b) A surface water identified as a trout stream by the department under NR 1.02(7).
- (bm) A surface water identified as an outstanding or exceptional resource water under s. 281.15, Stats.
- (c) An area that possesses significant scientific value, as identified by the department in NR 1.05.

Information and lists can be obtained by contacting the department, or found on the department's website at www.dnr.wi.gov, under the topic "Waterway and Wetland Permits".

(1c) "Boat hoist" means a structure attached to a pier or wharf or shoreline that is designed and placed for the purpose of lifting a docked boat out of the water.

(1d) "Boat lift" means a structure placed adjacent to a pier or wharf or shoreline, that is designed and placed for the purpose of lifting a docked boat out of the water.

(1g) "Boat slip" means any place along or adjacent to a pier or wharf where a boat is docked, including a space outlined by catwalks or created by placement of a boat shelter, boat lift or boat hoist. A boat slip does not include a space occupied for less than 24 hours by a guest at a private pier.

(1k) "Change in ownership" for the purposes of this chapter means transfer or conveyance of some or all of the riparian property, except conveyances to a spouse, sibling, child or grandchild, conveyances to a trust created for the benefit of a spouse, sibling, child or grandchild, or a conveyance to a partnership, limited liability company or corporation controlled by the original riparian owner.

(1p) "Commercial marina" means a facility containing piers, wharves and other mooring spaces, where the riparian property is not owned by a municipality, is open to the general public, and the primary purpose of the facility is to provide boats or boat slips either for rental or for free.

(1t) "Deck" means any portion of a pier that exceeds 6-feet in width. Width shall be measured across the shortest horizontal distance of any given portion of the pier surface.

(5g) "Municipal marina" means a facility containing piers, wharves and other mooring spaces, where the riparian property is owned by a municipality and the primary purpose of the facility is to provide boats or boat slips for rental or for free.

(5m) "Navigable waterway" means any body of water with defined bed and banks, which is navigable under the laws of the state. In Wisconsin, a navigable body of water is capable of floating the lightest boat or skiff used for recreation or any other purpose on a regularly recurring basis.

(5r) "Open to the general public" means available to any person conditioned only upon the payment of a reasonable fee. "Open to the general public" does not include conditions that require purchase of a boat, boat slip, parcel of property, condominium unit or membership in a club or organization.

(9g) "Private pier or wharf" means a pier or wharf which is not part of a commercial marina or a municipal marina.

(9m) "Reasonable fee" means a fee comparable to those charged the general public for similar facilities on the waterway or a similar waterway in the vicinity.

(10m) "Seasonal" for the purposes of this chapter means a pier, wharf, boat shelter, boat lift, boat hoist or swim raft which is removed from the water between November 1 and April 1 annually.

(14) "Wharf" has the meaning given in s. 30.10(8), Stats.

SECTION 8. NR 326.04, 326.05 and 326.055 are repealed.

SECTION 9. NR 326.06 to 326.09 are renumbered NR 326.05, 326.04, 326.10 and 326.06, respectively.

SECTION 10. NR 326.07 is created to read:

NR 326.07 Enforcement. (1) Noncompliance with the provisions of ss. 30.12, 30.20 and 30.206, Stats., this chapter, or any conditions of an exemption, general permit or individual permit issued by the department, constitutes a violation and may result in a forfeiture. If the activity is a general permit under s. 30.206, Stats., the failure to follow procedural requirements may not, by itself, result in abatement of the activity. Unless there is good cause shown, the department shall seek abatement of any activity in violation of ss. 30.12, 30.20 and 30.206, Stats.

(2) General permits may not be issued for after-the-fact permit applications. When an after-the-fact permit application has been filed with the department, the department shall follow the procedures in ch. NR 301 for violations.

(3) Any reference in ss. 30.15, 30.292, 30.294 and 30.298, Stats., to any provision of ch. 30, Stats., shall include any rules promulgated under that provision.

(4) No person may place a pier, wharf, boat shelter, boat hoist, boat lift or swim raft in a navigable waterway if the activity is not eligible for an exemption, authorized by a general permit or individual permit issued under this chapter, or otherwise authorized under this chapter.

SECTION 11. NR 326, subch. II (title) is created to read:

SUBCHAPTER II PIERS AND WHARVES

[Drafter's Note: This title shall be inserted after s. NR 326.07 and contain s. NR 326.08 as created.]

SECTION 12. NR 326.08 is created to read:

NR 326.08 Pier and wharf standards. (1) **EXEMPTIONS.** (a) *Procedures.* Exemptions shall be processed according to the procedures in ch. NR 310.

(b) *Applicable activities.* A pier or wharf that meets all the standards in par. (c) shall be exempt under s. 30.12(1g)(f), Stats.

(c) *Standards.* 1. The pier or wharf may not be located in an area of special natural resource interest as defined in s. 30.01(1am), Stats., and identified by the department in s. NR 1.05.

2. The pier or wharf may not be located where there are public rights features as defined in s. NR 1.06.

3. The pier or wharf may be placed and maintained only by a riparian owner.

4. The pier or wharf may not extend into the water from the shoreline beyond the line of navigation or the length of the boat using the pier unless a need can be demonstrated by the riparian that boats using the pier require a greater depth of water. The depth of water necessary for nonfixed keel sailboats shall be measured with the centerboard or dagger boards raised.

5. The pier or wharf may not exceed 6 feet in width and may not include a deck.

6. The pier or wharf may not have more than 2 boat slips for the first 50 feet of riparian owner's shoreline footage and no more than one additional boat slip for each additional full 50 feet of shoreline footage.

7. The pier or wharf may not be a solid structure, or constructed on rock-filled cribs or similar size and type devices serving as a foundation.

8. The pier or wharf may not totally enclose any portion of a navigable waterway.
 9. The pier or wharf may not interrupt the free movement of water nor cause the formation of land by deposition of littoral drift upon the bed of the waterway.
 10. The pier or wharf may not be constructed or maintained with a screen or similar structure underneath or in any other manner which would trap or accumulate aquatic plants or other debris.
 11. The pier or wharf and any boats, boat shelters, hoists or lifts associated with it shall be located entirely within the riparian's zone of interest, as determined by one of the methods outlined in s. NR 326.04.
 12. The pier or wharf shall be set back a minimum of 10 feet from the riparian zone line on each side, unless an applicable municipal ordinance requires a side setback which is more restrictive. If the riparian property contains less than 35 feet of shoreline footage, the pier owner shall place the pier or wharf following the technique outlined in s. NR 326.04(3) in order to fairly apportion riparian rights.
 13. The pier or wharf may not have any structures placed on it or attached to it, with the exception of the following temporary structures which shall be removed between November 1 and April 1 annually: a ladder, a bench not to exceed 2-feet wide by 8-feet long, chairs, a table, flower pots and a flagpole.
 14. Subject to the boat slip limitations in subd. 6., the pier or wharf may have an associated seasonal boat shelter, boat hoist or boat lift that meets the requirements of s. NR 326.09.
 15. The pier or wharf shall be exclusively for the private use of the riparian and their guests only, and is not associated with any commercial activity, commercial marina or municipal marina.
 16. The pier or wharf shall comply with all local ordinance requirements.
 17. If the pier or wharf is not seasonal, it shall be marked with reflective material that is 3 feet above the winter water level on the lakeward end between November 1 and April 1 annually for safety and visibility.
 18. A pier or wharf on a river, stream or channel may not extend out more than 25% of the width across the river, stream or channel.
 19. A deposit of sand, gravel or stone under s. 30.12(1g)(a), Stats., may be associated with the placement of any pier or wharf provided the deposit is limited to the area underneath or within one foot of the posts or pilings and is less than 2 cubic yards.
 20. Dredging under s. 30.20(1g)(b)1., Stats., is allowed for the placement of a pier or wharf, provided it is limited to incidental dredging not to exceed one cubic yard associated with jet-installation of permanent posts or pilings.
- Note: Removal of aquatic vegetation is limited to the amount necessary for placement of the pier or wharf under ch. NR 109.
- (d) *Permit not required.* 1. A pier or wharf may be placed under s. 30.13(1), Stats., without a permit under s. 30.12(1), Stats., if the structure complies with all the requirements in par. (c) with the following exceptions or limitations:
- a. The pier or wharf may extend out to the approved local pierhead line on the waterway.
 - b. The pier or wharf may contain one additional boat slip beyond the number allowed in par. (c)6.
 - c. The pier or wharf may be located on the Lower St. Croix River as defined in s. 30.27, Stats., provided it does not exceed 50-feet in length.
 - d. The pier or wharf including boat slips may be located in an area of special natural resource interest as defined in s. 30.01(1am), Stats., and identified by the department in s. NR 1.05.
2. A pier or wharf may be placed under s. 30.13(1), Stats., without a permit under s. 30.12(1), Stats., if it was authorized by a consent order entered into with the department prior to the effective date of this subchapter ... [revisor insert date].
- (e) Activities which do not meet the standards in par. (c) or are determined ineligible for an exemption by the department shall require a general permit or individual permit. Activities which do not meet the standards in par. (d) or s. 30.13(1), Stats., shall require a general permit or individual permit.
- (2) **GENERAL PERMITS.** (a) *Procedures.* General permits shall be processed according to the procedures in ch. NR 310.
- (b) *Applicable activities.* An existing pier or wharf that meets all the criteria in par. (c) shall be eligible for general permit coverage under ss. 30.12(3)(br) and 30.206, Stats.
- (c) *General permit standards for existing private pier or wharf.* An existing private pier or wharf which was in place on August 1, 2003 may be authorized under this general permit if it meets all of the requirements of sub. (1)(c) with the following exceptions or additional limitations:
1. The pier may contain a single deck at the lakeward end of the pier only, provided the owner can demonstrate that the deck was placed in 5 of the 6 years beginning with 1998 and ending with 2003, and provided that the total surface area of the deck and pier at the lakeward end does not exceed 80 square feet.
 2. The owner may have 2 boat slips at the riparian property in addition to the number allowed by sub. (1)(c)6., provided the owner can demonstrate that the higher number of boat slips was in use in 5 of the 6 years beginning with 1998 and ending with 2003.