

3. The pier or wharf 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 or where there are public rights features as defined in s. NR 1.06 provided it meets subs. 1. and 2.

4. The general permit shall expire upon change of ownership of all or part of the riparian property on which the pier or wharf is located, and the pier or wharf shall be brought into compliance with ch. 30, Stats., and this chapter on the date of change of ownership.

(d) A pier or wharf is not eligible for a general permit if:

1. The department commenced or completed enforcement action or otherwise notified a pier or wharf owner in writing that the pier or wharf presents a potential obstruction to navigation or potentially detrimental to the public interest, prior to August 1, 2003;

2. The department received a written complaint about the pier or wharf prior to August 1, 2003; or

3. The riparian owner reconstructed or materially altered the pier or wharf after August 1, 2003.

(e) Activities which do not meet the standards in par. (c) or are ineligible for a general permit under par. (d) 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 pier or wharf which is not exempt under sub. (1), is not authorized by a general permit under sub. (2), or is located in an area of special natural resource interest except as provided under sub.(1)(d), requires authorization by an individual permit pursuant to s. 30.12(1), Stats.

(c) *Individual permit standards for solid piers.* A solid pier meeting the standards in s. 30.12(3m), Stats., may be authorized under an individual permit subject to the following limitations.

1. Solid piers may be permitted only on the following waters:

a. Outlying waters.

b. Harbors connected to outlying waters.

c. Fox river from the DePere dam to Lake Winnebago.

d. Lake Winnebago.

e. Mississippi river.

2. Solid piers shall be provided with a sufficient opening to provide for the passage of littoral drift. The opening size shall be adequate to prevent the deposition of littoral drift considering wave energy, littoral drift supply and near-shore water depths.

(d) *Individual permit standards for a pier on rock-filled cribs.* A pier on rock-filled cribs or similar structures used to provide a pier foundation or support, meeting the standards in s. 30.12(3m), Stats., and located on a Great Lakes water body or on Lake Geneva in Walworth county, may be authorized under an individual permit, provided the pier or wharf does 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.

(e) *Individual permit standards for a commercial or municipal marina.* Piers or wharves for a commercial marina meeting the standards in s. 30.12(3m), Stats., may be authorized under an individual permit.

(f) *Individual permit standards for private pier or wharf to accommodate a disability.* A single private pier or wharf meeting the standards in s. 30.12(3m), Stats., and all the conditions in s. NR 326.08(1) except for size and design, may be authorized under an individual permit provided the riparian can demonstrate that a different pier or wharf size or design is necessary to accommodate a disability of a resident of the riparian property. The permit shall expire when the person with a disability is no longer a resident of the property.

Note: Department designs for piers at public facilities, which meet federal ADA accessibility guidelines, are recommended. Information is available from the department on request.

(g) *Individual permit standards for existing pier or wharf with historic use.* A private pier or wharf meeting the standards in s. 30.12(3m), Stats., and all the conditions in s. NR 326.08(1) with the exception of pier length, number of boat slips, being constructed on rock-filled cribs or being located in an area of special natural resource interest may be authorized under an individual permit provided the riparian can demonstrate that the length, higher number of boat slips and cribs were historically placed permanently or seasonally at the same waterfront property in the same approximate location and in the same approximate configuration in 5 of the 6 years beginning with 1998 and ending with 2003. In no case may the individual permit authorize a length or number of boat slips that exceeds the historic length or number of boat slips.

(4) **EXISTING PERMITS.** A pier or wharf which is authorized by an existing department permit shall continue to be authorized, provided the structures are maintained in compliance with all the conditions of the original permit. Any modifications to the pier or wharf that do not comply with the original permit conditions shall require a new individual permit and shall comply with all standards in sub. (3).

(5) A pier or wharf which is not eligible for an exemption, general permit or individual permit or otherwise authorized under this subchapter may not be permitted.

SECTION 13. NR 326, subch. III (title) is created to read:

**SUBCHAPTER III
BOAT SHELTERS, BOAT HOISTS AND BOAT LIFTS**

[Drafter's Note: This title shall be inserted after s. NR 326.08, and contains s. NR 326.09 as created.]

SECTION 14. NR 326.09 is created to read:

NR 326.09 Boat shelter, boat hoist and boat lift standards. (1) EXEMPTIONS. (a) *Procedures.* Exemptions shall be processed according to the procedures in ch. NR 310.

(b) *Applicable activities.* A seasonal boat shelter, boat hoist or boat lift that meets all the criteria in par. (c) shall be exempt under s. 30.12(1g)(e), Stats.

(c) *Standards.* 1. The boat shelter, boat hoist or boat lift 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 boat shelter, boat hoist or boat lift may not be located where there are public rights features as defined in s. NR 1.06.

4. The boat shelter, boat hoist or boat lift may be placed and maintained only by a riparian.

5. The boat shelter, boat hoist or boat lift shall allow the free movement of water underneath and may not cause formation of land on the bed of the waterway.

6. The boat shelter, boat hoist or boat lift shall comply with applicable provisions of any municipal ordinances adopted under s. 30.12(3)(a)6. and (c), Stats.

7. Except for designations under s. 30.275, Stats., the structure may not be placed in any waterway designated by federal, state or local government as having outstanding scenic values.

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

9. All boat shelters shall be designed and used exclusively for the berthing of a single watercraft. Any boat shelter originally placed or permitted after September 1, 1991 may not exceed an outside dimension of 12 feet wide by 24 feet long on waters under 1000 acres in size and may not exceed an outside dimension of 14 feet wide by 24 feet long on waters 1000 acres and larger in size. The burden of proving that a boat shelter was placed prior to September 1, 1991 shall be on the owner. A seasonal boat shelter originally placed prior to September 1, 1991 and which does not comply with this subsection may not be expanded in size.

10. A boat shelter shall be connected to adjacent uplands by a pier.

11. A structure may include a roof but may not include walls, sides or equivalent construction such as canvas side drops. A boat shelter roof shall be pitched not less than one foot nor more than 2.5 feet from the roof peak to the bottom of the eaves. Only the size and number of vertical components required to support the watercraft and any roof are permitted.

12. Storage facilities may only be included above the eaves of a boat shelter.

13. A boat shelter may include only a single sign necessary to identify the property and may only include lighting essential for safety and mooring.

14. A riparian owner may place no more than one boat shelter, boat lift or boat hoist for each boat slip that is authorized under subch. II.

15. Permanent and seasonal boat shelters shall be placed as close together as practicable at a single location adjacent to each property. Adjacent lots in common ownership shall be considered a single property for the purpose of this subsection.

16. A deposit of sand, gravel or stone under s. 30.12(1g)(a), Stats., may be associated with the placement of any boat shelter, boat hoist or boat lift provided the deposit is limited to the area underneath or within one foot of the posts or supports and is less than 2 cubic yards.

17. Dredging under s. 30.20(1g)(b)1., Stats., is not allowed for the placement or maintenance of any boat shelter, boat hoist or boat lift.

18. The structure may not extend beyond the line of navigation or the approved local pierhead line on the waterway.

(d) A boat shelter, boat lift or boat hoist 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, provided it complies with par. (c)2. through 18., and to the extent authorized under s. NR 326.08(1)(d)1.d.

(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.

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

(b) *Applicable activities.* Any boat shelter, boat hoist or boat lift which is not exempt under sub. (1), is not authorized by a general permit under s. 30.206, Stats., 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) *Individual permit standards for permanent boat shelters.* A boat shelter which is not seasonal may be authorized by the department as a permanent boat shelter if the project complies with sub. (1)(c) and the following requirements.

1. No permit may be granted for a permanent boat shelter constructed after May 3, 1988 if the owner's riparian property also contains a boathouse over navigable waters or within 75 feet of the ordinary high water mark. Each permit issued for a permanent boat shelter shall contain a condition which provides that the permit becomes void if there is any subsequent construction of a boathouse over navigable waters adjacent to the owner's property or within 75 feet of the ordinary high water mark on the owner's property.

2. A permit may not be granted for a permanent boat shelter to be placed on lakes or flowages of less than 500 acres or on rivers except the Mississippi river, the Wolf river from Lake Butte des Morts to the upstream limits of the village of Fremont, and the Fox river from the DePere dam to Lake Winnebago. For the purpose of this subsection, a series of lakes or flowages which have a connection which is commonly navigated by motorized craft and which have a common water level shall be considered a single lake or flowage. Artificial mooring basins and navigation channels and reaches of rivers where water levels are controlled by a dam are considered part of the lake or flowage to which they are connected for the purpose of this subsection.

3. No more than one permanent boat shelter may be permitted for each riparian property. Contiguous lots in common ownership shall be considered one property for the purpose of this subsection.

4. A permanent boat shelter may not extend more than 30 feet from the shoreline or to the line of navigation, whichever is less, on rivers named in subd. 2. and on waters between 500 and 1000 acres in size and may not extend more than 50 feet from the shoreline or to the line of navigation, whichever is less, on waters 1000 acres and larger in size. For the purpose of this subsection the shoreline shall be established at normal summer low water levels.

5. Permits for permanent boat shelters may only be granted for locations adjacent to developed shorelines. Developed shorelines are those where there are at least 5 principal structures including at least one on the applicant's property which are located within 500 feet of the proposed shelter site and which are visually intrusive as viewed from a location on the water.

(3) **EXISTING PERMITS.** A permanent boat shelter 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 permanent boat shelter that do not comply with the original permit conditions shall require a new individual permit and shall comply with all standards in sub. (2).

(4) A boat shelter, boat hoist or boat lift which is not eligible for an exemption, general permit or individual permit or otherwise authorized under this subchapter may not be permitted.

SECTION 15. NR 326, subch. IV (title) is created to read:

SUBCHAPTER IV SWIM RAFTS

[Drafter's Note: This subchapter shall be inserted after s. NR 326.09, and contain s. NR 326.10 as renumbered and amended.]

SECTION 16. NR 326.10(title), as renumbered, is amended to read:

NR 326.10 Swim rafts raft standards.

SECTION 17. NR 326.10(2), as renumbered, is amended to read:

NR 326.10 (2) EXEMPTIONS. (a) Swim Procedures. Exemptions shall be processed according to the procedures in ch. NR 310.

(b) *Applicable activities.* A seasonal swim raft that meets all the criteria in par. (c) shall be exempt under ss. 30.12(1g)(b) and 30.13(1), Stats.

(c) *Standards.* 1. The swim raft may be placed and maintained only by a riparian.

2. The swim raft may not exceed 200 square feet in surface area or 38 inches in height above the water level.

3. A deposit of sand, gravel or stone under s. 30.12(1g)(a), Stats., may not be associated with the placement of any swim raft.

4. Dredging under s. 30.20(1g)(b)1., Stats., is not allowed for the placement or maintenance of any swim raft.

5. The size and height limitations of sub. (1) do not apply to swim rafts which are pulled onto shore and completely removed from the water on a daily basis or that are placed in swim areas marked and approved pursuant to s. NR 5.09 are exempt from sub. (1).

(b) 6. The height limitation of sub. (1) does not apply to protective covers, diving boards, ladders and slides.

(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.

SECTION 18. NR 326.10(4), (5) and (6) are created to read:

NR 326.10 (4) INDIVIDUAL PERMITS. (a) *Procedures.* Individual permits shall be processed according to the procedures in ch. NR 310.

(b) *Applicable activities.* Any swim raft which is not exempt under s. NR 326.10(2), is not authorized by a general permit under s. 30.206, Stats., or is located in an area of special natural resource interest, requires authorization by an individual permit pursuant to s. 30.12(1), Stats.

(5) EXISTING PERMITS. A swim raft 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 swim raft that do not comply with the original permit conditions shall require a new individual permit and shall comply with all standards in sub. (4).

(6) A swim raft which is not eligible for an exemption, general permit or individual permit or otherwise authorized under this subchapter may not be permitted.

NR 326 Emergency Rules

Talking Points

BACKGROUND

Prior to the enactment of 2003 Wisconsin Act 118 (a.k.a. "The Job Creation Act"), section 30.13 of the statutes provided that piers did not require a permit provided the pier did not interfere with public rights or those of neighboring riparians and that the pier was consistent with local pierhead lines or ordinances. In implementing this statute the DNR used a guidance document known as the "Pier Planner". New piers which met the requirements found in the DNR's pier planner -generally were not required to obtain a permit. For existing piers that did not meet the pier planner standards, the DNR did not require a permit unless the pier interfered with public rights or those of neighboring riparians. Furthermore, the DNR could not require existing piers to be removed or brought into conformity simply because they did not comply with the dimensional requirements in the pier planner guidance.

CHANGES MADE IN ACT 118

Act 118 attempted to accomplish two objectives with respect to piers and seasonal structures. First, it attempted to codify the DNR's practice for exempting piers that met the dimensional requirements found in the pier planner guidance. Second, the Act exempted certain seasonal structures which the DNR had previously exempted under NR 326. The legislation did not make any other changes with respect to piers and seasonal structures, nor did the legislation change or otherwise limit the general exemption language in section 30.13.

EMERGENCY RULES – NR 326

The emergency rules made significant changes to the regulations pertaining to piers that impacts the fundamental rights of property owners.

Emergency Rules Are Inconsistent with the Statutes and Legislative Intent – The emergency rules are inconsistent with the underlying intent and statutory changes agreed to by Governor Doyle and the Wisconsin Legislature as part of Act 118. One of the primary goals of Act 118 was to streamline the permitting process and make the process easier to understand for the regulated public. However, NR 326, for example, creates a number of additional permitting requirements for both new and existing piers, places unnecessary restrictions on general permits (general permits expire upon the sale of the property), and is overly complex which will likely result cause a number of unsuspecting property owners to be in noncompliance.

For example, under the new NR 326, in order to obtain the Pier Planner exemption, the pier cannot be located in an areas of special natural resource interest. The definition of "area of special natural resource interest" in NR 1.05 is inconsistent with the statutory changes agreed to in Act 118. Act 118 defined "area of special natural resource interests"

to encompass approximately 7% of the waters in the state. However, NR 1 significantly expanded the list of these waters (added 9 entirely new categories or waters such as "sturgeon waters") and, as a result, at least 50% - 75% of the waters in Wisconsin are now ineligible for exemptions such as the pier planner exemption.

Almost Every Pier (New and Existing) Will Be Required to Obtain A Permit -- First, the rules require all piers (new and existing) to obtain permits, unless they meet one of two very narrow exemptions. (See NR 326.07(4)) NR 326 does not grandfather existing piers from the new permitting requirements.

To qualify for the Pier Planner exemption, a property owner must comply with 20 different conditions. (See NR 326.08(1)(c)) Some of those requirements can be found in the original pier planner, many others cannot. Among the most significant changes is that the exemption does not apply to piers located in waters designated under either NR 1.05 ("areas of special natural resource interest") or NR 1.06 ("public rights features"). (Note – this was not a consideration under prior law.) As stated above, this means that activities such as installing a pier are not exempt from permitting requirements on at least 50% - 75% of the waters in Wisconsin. Furthermore, even if the pier (new or existing) is not located in one of these special waters, the pier must meet a number of dimensional requirements in order to be exempt from a permit, including:

- The pier may not exceed 6 feet in width; may not include a deck; the pier may not have any permanent "structures" placed on it or attached to it (such as a bench, flagpole, or ladder); the pier may not have more than one additional boat slip for its amount of frontage (3 boat slips for the first 50 feet of the water frontage plus one additional boat slip for each additional 50 feet of water frontage); the pier cannot be used by anyone other than the riparian and his guests, or be used for any commercial purpose.

Although NR 326 contains an additional exemption from the permitting requirement, this exemption only applies if you meet ALL of the Pier Planner conditions, with a few exceptions. [(See NR 326.08(1)(d); piers can be located in "areas of special natural resource interests", but cannot be located in waters with "public rights features" and piers can have one additional slip, but they must still meet the same dimensional requirements)]. Given the broad list of special waters and the strict dimensional requirements, a significant number of existing and new piers will not meet the requirements for an exemption and thus will be required to obtain a general or individual permit. (See NR 326.08(1)(e))

NR 326 Has Made Thousands of Existing Piers Illegal -- Any new or existing pier that does not have a permit (or is not otherwise exempt) is not in compliance with NR 326 and is considered to be illegal. (See NR 326.02, NR 326.07(1), and NR 326.07(4)). As stated above, new and existing piers must, among other things, meet ALL of the standards outlined in NR 326.08(1)(c) or (d). While many of these criteria were part of the DNR pier planner guidance, others were not. Furthermore, the standards in the pier planner guidance have been applied to new piers only within the last 15 years or so. As a

result, most piers installed prior to 1990 do not meet the requirements in the pier planning guidance, such as the 6-foot width requirement, # of boat slip requirements, no permanent benches, ladders, and flagpoles, no large decks at the end of the pier, etc.

ALL General Permits Expire At the Time of Sale – If a pier does not meet all the requirements for an exemption (including the dimensional standards in the Pier Planner), a general permit is available. However, most of the Pier Planner dimensional standards still apply. The exceptions from the pier planner standards require that you demonstrate those conditions existed for 5 of the last 6 years. For example the general permit allows you to have decks at the end of the pier not exceeding 80 square feet if it existed in 5 or the last 6 years, but does not allow piers that are wider than 6 feet regardless of past use.

Even if you do obtain a general permit from the DNR to install your pier, the pier expires at the time of sale and the pier must be brought into compliance with all the requirements in the rule. (NR 326.08(2)(4)) This means that buyers of waterfront property, who will likely spend 100s of thousands of dollars to own property on the lake, may or may not have the ability to install the pier that they purchased with the property. What if the pier is already in the water when the property is purchased? Will the new property owner be required to take it out until he/she receives a new permit? If the pier is not in the water yet, will the property owner have to wait until he/she receives a permit before installing the pier? How long will this take? Furthermore, if that pier does not comply with the dimensional requirements of NR 326.08(1)(c), the new property owner may have to spend a few thousand dollars more to replace that pier with one that does comply. Because this information will likely be material to a transaction, sellers and their real estate agents must disclose this information to prospective buyers.

Existing Piers Are Not Grandfathered -- Any pier is illegal, unless it meets one of the very limited exceptions discussed above or has received a general or individual permit. (NR 326.07(4)) Unfortunately, the law does not exempt existing piers from these requirements. (NR 326.02 and NR 326.07(4))

NR 326 Received No Public Input or Approval By Elected Officials Prior to Enactment – NR 326 was enacted as part of an emergency rule package. Emergency rules do not have to go through the normal rulemaking process, namely public hearings and close scrutiny by elected officials before the rule is enacted. As a result, waterfront property owners were not given an opportunity to comment on NR 326 prior to enactment nor were the rules subject to approval by their elected representatives. Because these rules represent a considerable change in policy and have a significant impact upon the use and value of waterfront property, they should have been subject to an open debate so that affected property owners could have had an opportunity to review the rules and provide necessary feedback. Furthermore, because Act 118 did not make any changes to the law relating to piers (as stated above, Act 118 simply codified existing DNR practice), no “emergency” existed and thus the DNR acted improperly by not going through the normal rule-making process.

NR 326 Provides the DNR With the Authority To Require Removal of Existing Piers – If a pier does not meet the permit requirements, one of the limited exemptions, or is installed without a valid permit, the pier is deemed illegal and the DNR may require removal of the pier. (See NR 326.07(1)) Because most waterfront property owners are currently unaware that they must obtain a permit in order to place or keep their pier in the water, they likely do not have a permit and could be required to remove their pier.

NR 326 Takes Away the Fundamental Right of Riparian Property Owners to Use and Enjoy Their Property – Waterfront property owners have a fundamental right to own and maintain a pier. People purchase waterfront property to be able to use, enjoy, and have private access to the water. A pier makes the water more accessible and provides the waterfront property owner with the opportunity to engage in recreational opportunities like fishing, boating, and swimming. In addition to making the ownership of waterfront property more enjoyable, the right to install and maintain a pier adds real value to waterfront property. Without the right to install a pier, the value of waterfront property declines significantly. By making many existing piers illegal and causing pier rights to expire upon the sale of waterfront property (new waterfront property owners to obtain a permit to maintain or install an existing pier), NR 326 has taken away the fundamental right of many waterfront property owners to use and enjoy their property.

REALTOR® Call To Action

DNR Has Enacted Emergency Rules that Will Make Many Existing Piers Illegal

**Please contact your legislators at (800) 362-9472 and ask them to
suspend Emergency Rule NR 326!**

BACKGROUND -- In April, the DNR passed emergency rules that required ALL piers (new and existing) to obtain a permit unless the pier meets some very limited exceptions. Any pier that is sitting in the water today that does not have a permit or does not meet one of the limited exceptions is ILLEGAL and may be ordered to be removed. (The DNR will not be requiring every illegal pier to be removed. They are neither that foolish nor do they have the staff to pull it off. Instead, the rule provides them with very broad authority to engage in selective enforcement.) This rule will impact tens of thousand of piers and property owners. In addition, all general pier permits expire at the time of sale. This means that new property owners will have to obtain a permit from the DNR in order to use or install their new or existing pier, unless they meet one of the limited exceptions. Obviously, some disclosure obligations exist for both sellers and Realtors. Most property owners are not aware of these rules and thus have not complained . . . yet.

KEY TALKING POINTS

Emergency Rules Are Inconsistent with the Statutes and Legislative Intent – The emergency rules are inconsistent with the underlying intent and statutory changes agreed to by Governor Doyle and the Wisconsin Legislature as part of Act 118 (a.k.a. “The Job Creation Act”). One of the primary goals of Act 118 was to streamline the permitting process and make the process easier to understand for the regulated public. However, NR 326 creates a number of additional permitting requirements for both new and existing piers, places unnecessary restrictions on general permits (general permits expire upon the sale of the property), and is overly complex which will likely result cause a number of unsuspecting property owners to be in noncompliance.

Most Piers (New and Existing) Will Be Required to Obtain A Permit – NR 326 requires all piers (new and existing) to obtain permits, unless they meet a few very narrow exemptions. (See NR 326.07(4)) If a pier is located in a water body identified by the DNR as an “area of special natural resource interest” or as having “public rights features” (Note – approximately 50%-75% of the waters in Wisconsin fall into these categories) or fail to meet all of the strict dimensional requirements (see below), the pier will not be exempt and thus will be required to obtain a general or individual permit. (See NR 326.08(1)(e)) A significant number of piers will NOT be exempt. Furthermore, NR 326 does not grandfather existing piers from the new permitting requirements.

[Dimensional requirements -- The pier may not exceed 6 feet in width; may not include a deck; the pier may not have any permanent “structures” placed on it or attached to it (such as a bench, flagpole, or ladder); the pier may not have more than one additional boat slip for its amount of frontage (3 boat slips for the first 50 feet of the water frontage plus one additional boat slip for each additional 50 feet of water frontage); the pier cannot be used by anyone other than the riparian and his guests, or be used for any commercial purpose.]

NR 326 Has Made Thousands of Existing Piers Illegal -- Any new or existing pier that does not have a permit (or is not otherwise exempt) is not in compliance with NR 326 and is considered to be illegal. (See NR 326.02, NR 326.07(1), and NR 326.07(4)). As stated above, new and existing piers must, among other things, meet ALL of the standards outlined in NR 326.08(1)(c) or (d) in order to be exempt. While many of these criteria were part of the DNR pier planner guidance, others were not. Because the standards in the pier planner guidance have been applied to new piers only within the last 15 years or so, most piers installed prior to 1990 do not meet these standards, such as the 6-foot width requirement, # of boat slip requirements, no permanent benches, ladders, and flagpoles, no large decks at the end of the pier, etc.

ALL General Permits Expire At the Time of Sale -- Even if a property owner does obtain a general permit from the DNR to install/maintain a pier, the pier expires at the time of sale and the pier must be brought into compliance with all the requirements in the rule. (NR 326.08(2)(4)) This means that buyers of waterfront property, who will likely spend 100s of thousands of dollars to own property on the lake, may or may not have the ability to install the pier that they purchased with the property. What if the pier is already in the water when the property is purchased? Will the new property owner be required to take it out until he/she receives a new permit? If the pier is not in the water yet, will the property owner have to wait until he/she receives a permit before installing the pier? How long will this take? Furthermore, if that pier does not comply with the dimensional requirements of NR 326.08(1)(c), the new property owner may have to spend a few thousand dollars more to replace that pier with one that does comply. Because this information will likely be material to a transaction, sellers and their real estate agents must disclose this information to prospective buyers.

Existing Piers Are Not Grandfathered -- Any pier is illegal, unless it meets one of the very limited exceptions discussed above or has received a general or individual permit. (NR 326.07(4)) Unfortunately, the law does not exempt existing piers from these requirements. (NR 326.02 and NR 326.07(4))

NR 326 Received No Public Input or Approval By Elected Officials Prior to Enactment -- NR 326 was enacted as part of an emergency rule package. Emergency rules do not have to go through the normal rulemaking process, namely public hearings and close scrutiny by elected officials before the rule is enacted. As a result, waterfront property owners were not given an opportunity to comment on NR 326 prior to enactment nor were the rules subject to approval by their elected representatives.

NR 326 Provides the DNR With the Authority To Require Removal of Existing Piers -- If a pier does not meet the permit requirements, one of the limited exemptions, or is installed without a valid permit, the pier is deemed illegal and the DNR may require removal of the pier. (See NR 326.07(1)) Because most waterfront property owners are currently unaware that they must obtain a permit in order to place or keep their pier in the water, they likely do not have a permit and could be required to remove their pier.

NR 326 Takes Away the Fundamental Right of Riparian Property Owners to Use and Enjoy Their Property -- Without the right to install a pier, the value and enjoyment of waterfront property declines significantly. By making many existing piers illegal and causing pier rights to expire upon the sale of waterfront property (new waterfront property owners to obtain a permit to maintain or install an existing pier), NR 326 has taken away the fundamental right of many waterfront property owners to use and enjoy their property.



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JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

Motion Form

Moved by Welch, Seconded by Grothman

THAT
The Joint Committee for Review of Administrative Rules, pursuant to
cs 227.19(1)3. and 6. and 227.26(2)(d), stats,
suspends emergency rule ch. NR 326

COMMITTEE MEMBER	Aye	No	Absent
1. Senator LEIBHAM	✓		
2. Senator WELCH	✓		
3. Senator LAZICH	✓		
4. Senator ROBSON		✓	
5. Senator COGGS		✓	
6. Representative GROTHMAN	✓		
7. Representative SERATTI	✓		
8. Representative GUNDERSON	✓		
9. Representative MOLEPSKE		✓	
10. Representative HEBL		✓	
Totals	6	4	

Motion Carried

Motion Failed

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

The Wisconsin Natural Resources Board proposes an order to repeal Natural Resources Board Emergency Order FH-19-04(E) and create NR 328, subch. I relating to shore erosion control of inland lakes and impoundments.

FH-65-04(E)

Analysis Prepared by the Department of Natural Resources

Statutory Authority: ss. 30.12(1), 30.12(1p), 30.2035, 227.11(2), and 227.24, Stats

Statutes Interpreted: ss. 30.12(1), 30.12(1g) (i), (j) and (k), 30.12(3), and 30.12(3m) Stats.

Explanation of Agency Authority:

The Department has authority under s. 30.12, Stats., to promulgate rules that establish installation practices, construction and design requirements and limitations on the location of structures placed under statutory exemptions. The Department has authority under ss. 30.12 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 is to establish construction, design and placement standards for projects to be eligible for statutory exemptions, to establish general permits with appropriate conditions, and to establish standards for projects that may be authorized under an individual permit.

Standards for exemptions, general permits and individual permits in this section are based on state-of-the-art science for determining wave energy condition at a site that corresponds to the presence of habitat features (and coincidentally the potential for shore erosion at the site). Research shows that fish and wildlife habitat is maximized along in natural shorelines and minimized where hard armoring (e.g., seawalls, riprap) is installed. Riprap repair and replacement are generally allowed at moderate and high energy sites with several installation practices. Biological shore erosion control structures are generally allowed with several installation practices.

This order also establishes general permits for biological erosion control, riprap or vegetative armoring, and seawall replacement. Biological erosion control is allowed in ASNRIs under general permit if all standards for exemptions for this activity are met. Up to 100' of new riprap or vegetative armoring is allowed along shorelines in lakes of 300 acres or more under general permit if all standards for exemptions for riprap repair and replacement are met. Seawall replacement is allowed under general permit at municipal and commercial marinas, navigation channels, and locations with slopes greater than 1.5:1.

This order also establishes some limitations on individual permits.

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 :

Minnesota

The Minnesota Department of Natural Resources, Division of Waters is responsible for Administrative Rules 6115.0215 (Restoration of Public Waters) and 6115.0210 (Structures in Public Waters). Minnesota's regulations include exempted activities and general permits and the regulated activity are roughly similar to Wisconsin. Minnesota's stated resource protection goals are more protective than Wisconsin, however their Administrative rule criteria are more subjective.

Michigan

Inland lakes and streams are regulated under Part 301 and of the Natural Resources and Environmental Protection Act (NREPA), PA 451 of 1994, as amended. Under Part 301 the construction of any type of shore stabilization structure such as a sea wall, bulkhead, revetment, etc. at or below the ordinary high water mark of the lake or stream requires a permit. Michigan's stated goals and procedures (except MI has no erosion control structures exempt from permits) are similar to Wisconsin, however their specific decision criteria are more subjective.

Illinois

Illinois has no firm detailed guidelines related to specific permitting of erosion control structures. The U.S. Army Corps of Engineers often plays the lead role in permit issuance of erosion control structures in Illinois. The Army Corps consults with Illinois DNR, Illinois EPA and the U.S. Fish and Wildlife Service when reviewing projects. Project reviews typically focus on water quality and endangered resources. Illinois' regulated erosion control activities are less protective of the environment than in Wisconsin, and their decision criteria more subjective.

Iowa

Pursuant to Chapter 461A, erosion control structures placed below the ordinary high water mark requires a permit for rivers, streams and lakes under the jurisdiction of the DNR (Sovereign Lands Construction Permit). Iowa Administrative Code only identifies authority, and the Department offers limited guidance and historical precedence for conducting project reviews. Environmental reviews consist of a record of review for protected species (state listed endangered or threatened), rare natural communities, state lands and waters in the project area, including review by personnel representing state parks, preserves, recreation areas, wetlands, fisheries and wildlife. Iowa's regulated erosion control activities are less protective of the environment than in Wisconsin and their decision criteria more subjective.

Summary of Factual Data and Analytical Methodologies: Standards are based on state-of-the-art science for determining wave energy condition at a site that corresponds to the presence of habitat features, and the potential for shore erosion at the site.

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.

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SECTION 1. Natural Resources Board Order No. FH-19-04(E) is repealed.

SECTION 2. Chapter NR 328 (title) is repealed and recreated to read:

CHAPTER NR 328
SHORE EROSION CONTROL STRUCTURES IN NAVIGABLE WATERWAYS

SECTION 3. Chapter NR 328, subch. I is created to read:

SUBCHAPTER I
SHORE EROSION CONTROL STRUCTURES ON INLAND LAKES AND IMPOUNDMENTS

NR 328.01 Purpose. The purpose of this subchapter is to establish reasonable procedures and limitations for exempt activities, general permits and individual permits for placement of shore erosion control structures in inland lakes and impoundments 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 328.02 Applicability. (1) Except as provided in s. 30.2023, Stats., this subchapter applies to construction, placement and maintenance of shore erosion control structures regulated under ss. 30.12(1), (1g)(a),(i), (j) and (k), (2m), (3)(a)3c., 3g., 3r. and 13. and (3m), Stats. Any person that intends to construct, place or maintain a shore erosion control structure in any inland lake or impoundment shall comply with all applicable provisions of this chapter and any permit issued under this chapter.

Note: This subchapter does not apply to the Great Lakes or outlying waters as defined in s. 29.001(63), Stats.

Note: Shore erosion control structures for lakes and impoundments in the areas described in s. 30.203, Stats., (Seawalls; Wolf River and Fox River basins) that do not qualify for an exemption are regulated under this chapter.

(2) Shore erosion control measures such as grading to establish a stable slope, revegetation or other bioengineering methods that do not involve the placement of structures on the bed of a waterway are not regulated under s. 30.12, Stats., or this subchapter.

NR 328.03 Definitions. In this subchapter:

(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, 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".

(2) "Biological shore erosion control structure" means a structure that relies solely on biological materials.

(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.

Note: Temporary breakwaters, with non-biodegradable elements, are considered a permissible element during the plant establishment phase of a biological erosion control project.

(4) "Commercial marina" has the meaning in s. NR 326.03(1p).

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

(6) "Erosion intensity" or "EI" means the degree of erosion as estimated under s. NR 328.08(2).

(7) "Grading" means the physical disturbance of the bank by the addition, removal or redistribution of soil.

(8) "Hard armoring" means a shore erosion control structure that relies solely on inert materials, and includes but is not limited to riprap and seawalls.

(9) "High energy site" means a site where the storm-wave height calculated under s. NR 328.08(1) is greater than or equal to 2.3 feet, where the erosion intensity score calculated under s. NR 328.08(2) has a score of greater than 67, or where bank-edge recession exceeds 4 feet per year.

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

(11) "Integrated toe protection" means a structure combining 2 separate treatments: toe protection at the base of the bank and vegetation establishment on the remaining upper portion of the bank above the ordinary high water mark.

Note: The maximum toe protection structure elevation is equal to the ordinary high water mark plus one-half of the storm-wave height.

Note: The toe protection relies on materials such as stone, armor units, fiber rolls or wattles to protect the base of the bank. Above the toe protection, the remainder of the bank is revegetated by installing a shoreland buffer or with brush layering, brush mattresses, fiber rolls, live stakes, vegetated geogrid, rolled erosion control products or wattles. Plant materials may also be incorporated as part of the shore protection design below the ordinary high water mark as well.

(12) "Low energy site" means a site where the storm-wave height calculated under s. NR 328.08(1) is less than 1.0 foot, or where the erosion intensity score calculated under s. NR 328.08(2) has a score of 47 or less.

(13) "Municipal marina" has the meaning in s. NR 326.03 (5g).

(14) "Maximum toe elevation" means the elevation of the bank toe mark plus the storm-wave height estimated under s. NR 328.08(1).

(15) "Moderate energy site" means a site where the storm-wave height calculated under s. NR 328.08(1) is greater than or equal to 1.0 foot but less than 2.3 feet, where the erosion intensity score calculated under s. NR 328.08(2) has a score of 48 to 67, or where bank-edge recession is between 2-4 feet per year.

Note: Common law doctrine of avulsion secures to waterfront property owner the ability to reclaim land suddenly lost to erosion (*AG ex rel Becker v. Bay Boom Wild Rive and Fur Company*, 172 Wis. 363 1920.)

(16) "Offshore" means located a minimum of 10 horizontal feet waterward from the ordinary high water mark.

(17) "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.

(18) "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.

(19) "Permanent breakwater" means a structure constructed of stone, rock, concrete or other non-degradable materials and located offshore for the purpose of diminishing the force of the waves and protecting the shoreline.

Note: These structures can be designed to provide fish and wildlife habitat in addition to erosion control by incorporating vegetation on the breakwater and in the nearshore zone. Examples of permanent breakwaters include stone dikes, barrier islands, stone islands and submerged offshore shoals.

(20) "Replacement" means a degree of structural changes to the shore erosion control structure by which some or all of the structure is being removed and recreated.

Note: For seawalls, any replacement of a portion of the seawall down to or at the footing of the structure is considered replacement. For riprap, replacement of filter fabric or replacement of the base substrate is considered replacement.

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

(22) "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.

(23) "Seawall" means an upright structure that is steeper than 1.5 feet vertical to one foot horizontal and that is installed parallel to the shore to prevent the sliding or slumping of the land and to protect the adjacent upland from wave action.

Note: Seawalls are commonly constructed of timber, rock (including gabions), concrete, steel or aluminum sheet piling, and may incorporate biological components.

(24) "Shore erosion control structure" means a structure with defined shape, size, form and utility constructed and maintained for the purpose of protecting a shoreline from erosion. Shore erosion control structures include vegetated armoring and hard armoring.

(25) "Similar material" in s. 30.12(3)(a)3., Stats., means material, such as concrete, masonry, steel or wood, which is designed and constructed for the purpose of protecting the bank and adjacent upland from erosion.

(26) "Storm-wave height" means the wave height estimated under s. NR 328.08(1).

(27) "Temporary breakwater" means an offshore structure consisting of biological components, such as jute, fiber rolls, willow stakes, branchbox breakwater or a structure consisting of inert components that will be removed after a set period of time.

Note: Temporary breakwaters are placed for the purpose of providing an area of quiescent water, when new erosion protection designs and shoreland plant installations are becoming established. Biological temporary breakwater designs degrade naturally and examples include branchbox breakwaters and fiber rolls.

(28) "Toe" means the most waterward edge of a shore erosion control structure.

(29) "Vegetated armoring" means a shore erosion control structure that combines biological and inert materials, and includes 3 types: integrated toe protection, vegetated-riprap and vegetated-geogrids.

(30) "Wave height" means the vertical distance between the wave crest and wave trough.

(31) "Wetland" means an area where water is at, near or above the land surface long enough to be capable of supporting aquatic or hydrophytic vegetation and which has soils indicative of wet conditions.

NR 328.04 Exemptions. (1) PROCEDURES. Exemptions shall be processed according to the procedures in ch. NR 310.

(2) **APPLICABLE ACTIVITIES.** A biological shore erosion control structure that meets all the standards in subs (3) and (4) shall be exempt under s. 30.12(1g)(k), Stats. Riprap repair that meets all the standards in subs. (3) and (5) shall be exempt under s. 30.12(1g)(j), Stats. Riprap replacement that meets all the standards in subs. (3) and (6) shall be exempt under s. 30.12(1g)(i), Stats.

(3) **STANDARDS.** (a) The 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.

(b) The structure may be placed and maintained only by a riparian.

(c) The project will not result in removal of greater than 20% of the aerial coverage of natural bank vegetation, emergent vegetation or floating vegetation, not including the area covered by the footprint of the riprap, or any access corridors necessary for the placement of the riprap.

(d) 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.

(e) 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.

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

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

(h) 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.

(i) No waterward extension of the property is permitted other than what is reasonably necessary to conduct the project and protect the existing bank. No soil or similar fill material may be placed in a wetland or below the ordinary high water mark of any navigable waterway.

(j) Dredging under s. 30.20(1g)(b)1., Stats., is not allowed for the placement or maintenance of any shore erosion control structure under this section.

(4) **BIOLOGICAL SHORE EROSION CONTROL.** Biological shore erosion control structures, including but not limited to native vegetation, fiber rolls, fiber mats, live stakes, brush mattresses, branchbox breakwaters, temporary breakwaters, may be placed subject to the requirements and limitations of sub. (3) and this subsection:

(a) Any wave breaks or wave barriers shall be completely removed within 2 years of the installation date. If wave barriers are used they shall be located within the 3-foot water depth contour or less, marked with reflectors, and may not create an obstruction to navigation.

(b) Willow wattles, willow posts, brush mattresses, brush layering, fiber roll breakwaters, plant carpets, root wads, and other natural materials shall be installed by hand.

(c) Vegetation shall be plant species which are native to the area of Wisconsin where the project is located.

(d) Fiber rolls shall be secured using can and duckbill anchors or hardwood stakes. Spacing between the duckbill anchors shall be 6 feet or less. Spacing between the hardwood stakes shall be 4 feet or less.

(e) A deposit of sand, gravel or stone under s. 30.12(1g)(a), Stats., may not be associated with the biological erosion control structure.

(5) RIPRAP REPAIR. Existing riprap may be repaired subject to the requirements and limitations of sub. (3) and this subsection:

(a) Riprap repair may not exceed 300 continuous linear feet of shoreline located on an inland lake or flowage.

(b) Riprap repair may only involve placement of additional rock or redistribution of existing rock within the footprint of the existing riprap.

(c) Addition of rock may only occur no more than once every 5 years.

(d) A deposit of sand, gravel or stone under s. 30.12(1g)(a), Stats., other than the riprap itself, may be not associated with the riprap repair.

(e) Except as provided in pars. (a), (b), (c) and (d), the riprap repair shall meet the conditions of the original permit.

(f) Where riprap was not previously permitted, the riprap repair shall meet the following conditions in addition to the requirements of pars. (a) to (d):

1. Repair shall be outside of sensitive areas identified in ch. NR 107.

2. Repair shall be located along moderate or high energy shorelines, based on the calculation of storm wave height calculated in s. NR 328.08(1).

3. Riprap may not be placed at an elevation higher than the ordinary high water mark plus the storm-wave height as calculated in s. NR 328.08.

4. The toe of the riprap may not extend more than 6 feet waterward of the ordinary high water mark.

5. Riprap shall be clean fieldstone or quarry stone 6 to 24 inches in diameter.

(6) RIPRAP REPLACEMENT. Existing riprap may be replaced subject to the requirements and limitations of sub. (3) and this subsection:

(a) Riprap replacement may not exceed 100 continuous linear feet of shoreline located on an inland lake or flowage.

(b) Riprap replacement may occur no more than once every 5 years.

(c) A deposit of sand, gravel or stone under s. 30.12(1g)(a), Stats., may be associated with the riprap replacement provided the deposit is limited to the area immediately underneath the riprap and is less than 2 cubic yards, not including the riprap itself or clean washed gravel provided under sub. (e)6.

(d) Except as provided in pars. (a), (b), and (c), the riprap repair shall meet the conditions of the original permit.

(e) Where riprap was not previously permitted, the riprap repair shall meet the following conditions in addition to the requirements of pars. (a) to (c):

1. Repair shall be outside of sensitive areas identified in ch. NR 107.
2. Repair shall be located along moderate or high energy shorelines, based on the calculation of storm wave height calculated in s. NR 328.08(1).
3. Riprap may not be placed at an elevation higher than the ordinary high water mark plus the storm-wave height as calculated in s. NR 328.08.
4. The toe of the riprap may not extend more than 6 feet waterward of the ordinary high water mark.
5. Riprap shall be clean fieldstone or quarry stone 6 to 24 inches in diameter.
6. Filter cloth or clean-washed gravel shall be used as a filter layer under the riprap to extend the life of the structure, improve effectiveness and prevent soil erosion behind the riprap.
7. Riprap or other vegetated armoring along moderate energy sites shall be re-vegetated above the ordinary high water mark by using native plantings which may include native non-woody plants, native shrub plantings, native live stakes or native jointed plantings.

(7) Activities which do not meet the standards in subs. (3) and either (4), (5) or (6) or are determined ineligible for an exemption by the department shall require a general permit or individual permit.

NR 328.05 General permits. (1) PROCEDURES. General permits shall be processed according to the procedures in ch. NR 310.

(2) **APPLICABLE ACTIVITIES.** Biological shore erosion control that meets all the criteria in sub. (3) shall be eligible for general permit coverage under ss. 30.12(3)(br) and 30.206, Stats. Riprap that meets all the criteria in subs. (4) and (5) shall be eligible for general permit coverage under ss. 30.12(3)(a)3g., (br) and 30.206, Stats. Seawall replacement that meets all the criteria in sub. (6) shall be eligible for general permit coverage under ss. 30.12(3)(a)13. and 30.206, Stats.

(3) **BIOLOGICAL SHORE EROSION CONTROL.** Biological shore erosion control structures may be authorized under this general permit if it meets all of the requirements of s. NR 328.04(3) and (4) with the exception that it 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.

(4) **RIPRAP REPLACEMENT ALONG LOW ENERGY SHORELINES.** Replacement of riprap on the bed or bank of a navigable water may be authorized under this general permit if it meets all of the requirements of s. NR 328.04(3) with the exception that it may be located in an area of special natural resource interest as defined in s. 30.101(1am), Stats., and identified by the department in s. NR 1.05 and with additional limitations as follows:

(a) Riprap replacement may not exceed 100 continuous linear feet of shoreline located on an inland lake or flowage.

(b) Riprap replacement may occur no more than once every 5 years.

(c) A deposit of sand, gravel or stone under s. 30.12(1g)(a), Stats., may be associated with the riprap replacement provided the deposit is limited to the area immediately underneath the riprap and is less than 2 cubic yards, not including the riprap itself or clean washed gravel provide under par. (L)

(d) The replacement will not disturb sensitive areas identified in ch. NR 107.

(e) The application can document, using historical information and photos, the previous placement of riprap or a seawall.

(f) The application can demonstrate that replacement structure is within the footprint of the previous structures.

(g) Riprap may not be placed at an elevation higher than the ordinary high water mark plus the storm-wave height as calculated in s. NR 328.08(1).

(h) The toe of the riprap may not extend more than 6 feet waterward of the ordinary high water mark.

(i) Riprap shall be clean fieldstone or quarry stone 6 to 24 inches in diameter.

(j) Filter cloth or clean-washed gravel shall be used as a filter layer under the riprap to extend the life of the structure, improve effectiveness and prevent soil erosion behind the riprap.

(k) Riprap or other vegetated armoring shall be re-vegetated above the ordinary high water mark by using native plantings which may include native non-woody plants, native shrub plantings, native live stakes or native jointed plantings.

(L) 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:

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

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

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

(5) RIPRAP OR VEGETATED ARMORING. Riprap or vegetated armoring on the bed or bank of a navigable water may be authorized under this general permit if it meets all of the requirements of s. NR 328.04(3) with the exception that it may be located in an area of special natural resource interest as defined in s. 30.101(1am), Stats., and identified by the department in s. NR 1.05 and with additional limitations as follows:

(a) Riprap placement may not exceed 500 continuous linear feet of shoreline located on an inland lake or flowage of 300 acres or more.

(b) The project site is a moderate or high energy site.

- (c) Riprap shall be clean fieldstone or quarry stone 6 to 24 inches in diameter.
- (d) The toe of the riprap may not extend more than 6 feet waterward of the ordinary high water mark.
- (e) The final riprap slope may not exceed (be steeper than) 2 feet horizontal to one foot vertical.
- (f) Riprap may not be placed at an elevation higher than the ordinary high water mark plus the storm-wave height as calculated in s. NR 328.08(1).
- (g) No fill material or soil may be placed in a wetland or below the ordinary high water mark of any navigable waterway.
- (h) The riprap shall follow the natural contour of the shoreline.
- (i) Filter cloth or clean-washed gravel shall be used as a filter layer under the riprap to extend the life of the structure, improve effectiveness and prevent soil erosion behind the riprap.
- (j) Riprap or other vegetated armoring along moderate energy sites shall be re-vegetated above the ordinary high water mark by using native shrub plantings, native live stakes or native jointed plantings.

Note: Erosion control treatments may include a 10-foot shoreline segment where plant establishment is not required for the purpose of ingress/egress associated with the placement of a pier or access to the waterway, or associated with public park activities.

(k) 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:

1. The project avoids impacts to the endangered or threatened species in accordance with s. 29.604, Stats.
2. The project has received an incidental take authorization under s. 29.604, Stats.
3. If the applicant modifies their project plans to meet the requirements of par. (b), the modified plans shall be submitted before the department can consider the application complete or issue a general permit.

(6) SEAWALL REPLACEMENT. Replacement of an existing seawall on the bed or bank of a navigable water adjacent to a riparian property may be authorized under this general permit if it meets all of the requirements and limitations:

(a) The replacement may not exceed 100 continuous feet of shoreline located on an inland lake or flowage of 300 acres or more.

(b) Seawall replacement may be permitted only at the following locations:

1. Municipal or commercial marinas where vertical docking facilities are a practical alternative after considering the public interest.
2. Navigational channels actively used as thoroughfares or for access, where slopes are greater (steeper) than 1.5 feet vertical to one foot horizontal, showing evidence of erosion, where alternative methods of erosion control would impede navigation.

3. Locations where slopes are greater (steeper) than 1.5 feet vertical to one foot horizontal, and where the applicant demonstrates that alternative measures are not practicable taking into consideration bank height and the location of other permanent structures on the property.

(c) The seawall replacement shall incorporate an adequate footing to prevent settlement, tipping or undermining.

(d) The seawall shall be attached, where appropriate, to tieback anchors placed on the upland to prevent or minimize tipping of the wall.

(e) The seawall shall include weep holes where necessary to relieve hydrostatic pressure in upland soils. A filter fabric or gravel filter layer backing at weep holes shall be installed to facilitate drainage and prevent the loss of soil from behind the wall.

(f) For locations identified in par. (b)3., rock riprap shall be placed in front of the seawall to dissipate wave energy, minimize scour at the base of the wall and provide aquatic habitat. Rock shall be placed to the top of the wall. Riprap shall be clean fieldstone or quarry stone 6 to 24 inches in diameter, placed at a slope not to exceed (be steeper than) 2 feet horizontal to one foot vertical, and may not extend more than 6 feet waterward of the face of the seawall.

(g) Each end of the seawall shall be buried or keyed into the bank to prevent flanking.

(h) The seawall may be built only high enough to prevent the over-topping by storm waves.

(i) If the department determines that a seawall 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:

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

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

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

(7) Activities which do not meet the standards in sub. (3), (4), (5) or (6) are otherwise ineligible for a general permit shall require an individual permit.

NR 328.06 Individual permits. (1) PROCEDURES. Individual permits shall be processed according to the procedures in ch. NR 310.

(2) **APPLICABLE ACTIVITIES.** Any shore erosion control structure which is not exempt under s. NR 328.04, is not authorized by a general permit under s. NR 328.05, or is located in an area of special natural resource interest except as provided under s. NR 328.05(3), requires authorization by an individual permit pursuant to s. 30.12(1), Stats.

(3) **RIPRAP.** Notwithstanding s. NR 328.07, riprap meeting the standards in s. 30.12(3m), Stats., may be authorized under an individual permit.

(4) **SEAWALLS.** Seawalls meeting the standards in s. 30.12(3m), Stats., may be authorized under an individual permit, except that seawalls at low energy sites may only be permitted in the following locations:

(a) Municipal or commercial marinas where vertical docking facilities are a practical alternative after considering the public interest.

(b) Navigational channels actively used as thoroughfares or for access, where slopes are greater (steeper) than 1.5 feet vertical to one foot horizontal, showing evidence of erosion, where alternative methods of erosion control would impede navigation.

(c) Locations where slopes are greater (steeper) than 1.5 feet vertical to one foot horizontal, and where the applicant demonstrates that alternative measures are not practicable taking into consideration bank height and the location of other permanent structures on the property.

(5) **EXISTING PERMITS.** A shore protection 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 328.07 Prohibited erosion control methods. (1) PERMANENT BREAKWATERS. Except as provided in subch. II, construction of permanent breakwaters is prohibited.

(2) **NEW SEAWALLS.** Except as provided in s. NR 328.06(4) or s. 30.203, Stats., construction of new seawalls is prohibited.

NR 328.08 Data requirements and site assessment methods. Applicants and department staff shall adhere to the following data requirements and site assessment methods:

(1) **CALCULATION OF STORM-WAVE HEIGHT.** The department shall provide applicants with worksheets and internet-based computer software for the purpose of estimating storm wave height. Computer software shall be mathematically designed based on Young and Verhagen (1996) and Young (1998). Storm-wave heights shall be estimated according to Young and Verhagen (1996) and Young (1997) by applying a storm wind speed of 35 miles per hour (51.45 ft/sec), fetch at the applicant's shore protection site, and the average depth along that fetch. To record fetch, applicants shall measure the longest unobstructed straight-line distance originating from the shore protection site across the water surface to the opposite intersect with the shore. To estimate average depth applicants shall examine a lake map, sum the reported depths along the fetch, and divide by the number of recorded values. At least 5 equally placed intervals along the fetch shall be used.

Note: The citation for Young (1997) is as follows: Young, I.R. 1997. The growth rate of finite depth wind-generated waves. Coastal Engineering, Vol. 32, pp. 181-195. The citation for Young and Verhagen (1996) is as follows: Young, I.R. and L.A. Verhagen. 1996. The growth of fetch limited waves in finite water depth. Coastal Engineering, Vol. 29, pp. 47-78.

Note: Statewide storm wind speeds are estimated from Naber Knox, P. 1996. Wind Atlas of Wisconsin. Wisconsin Geological and Natural History Survey, Bulletin No. 94.

(2) **CALCULATION OF EROSION INTENSITY.** Where an applicant or the department believes that, as a result of site conditions, storm-wave height as calculated in sub. (1) may inaccurately predict the degree of erosion, the erosion intensity score may be calculated to determine erosion. The department shall provide applicants with worksheets and internet-based computer software for the purpose of calculating erosion intensity. When the department or applicants assess erosion at the shore protection site they shall apply methods outlined in Table 1 to calculate an erosion intensity score. Wherever EI and storm-wave height result in different energy categories, the site shall be placed in the category as determined by EI.

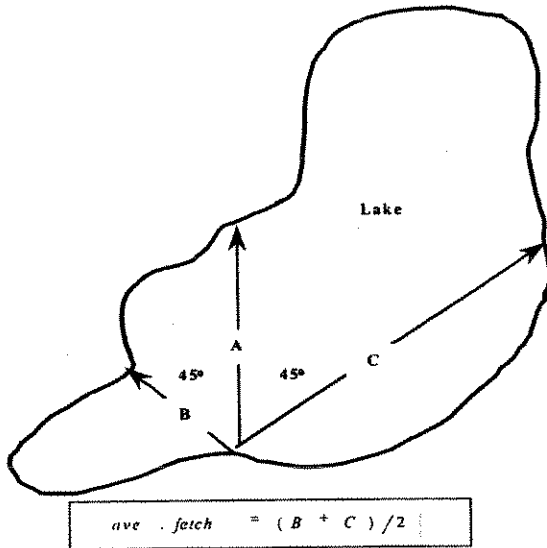
(3) **BANK EDGE RECESSION MEASUREMENTS.** Methods of measuring bank edge recession shall include all of the following: establishment of a physical measurement reference line between at least 2 headstakes; date-imbedded photographs showing the initial installation of the reference line and headstakes; reference distance measures to the bank edge shall be reported on department supplied forms; and time between separate measurements shall equal or exceed 3 months during the open-water season.

Table 1. Erosion Intensity (EI) Score Worksheet. Applicants and department staff shall use this worksheet to calculate erosion intensity pursuant to s. NR 328.08(2).

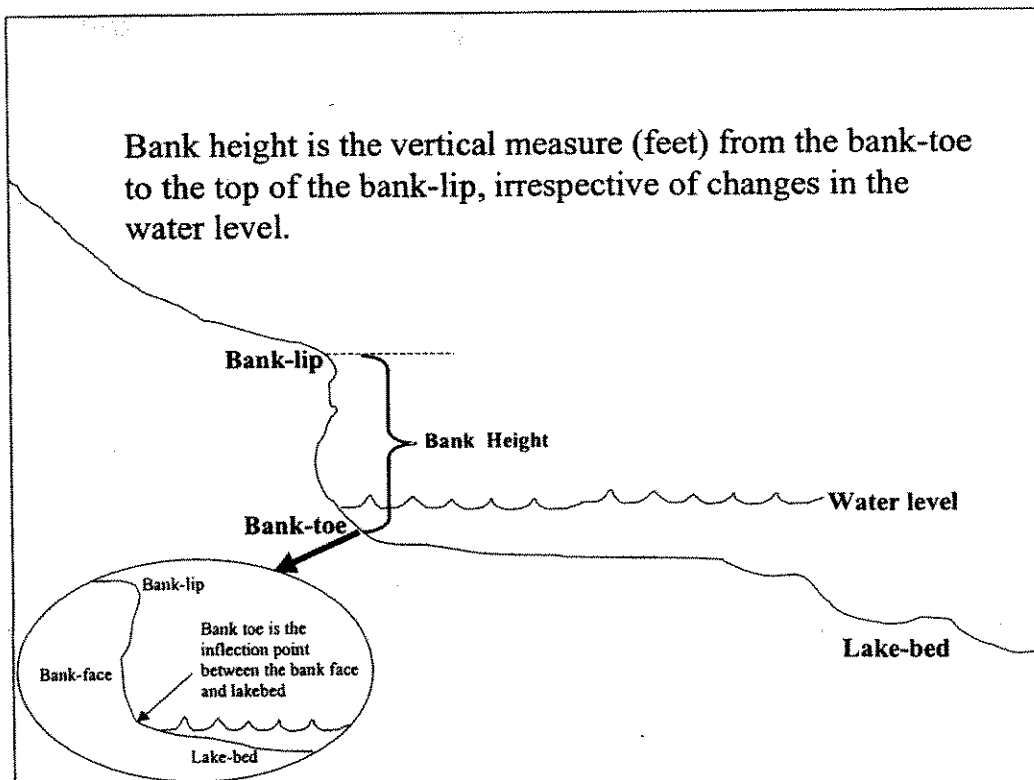
SHORELINE VARIABLES	DESCRIPTIVE CATEGORIES						ASSIGNED EI	
	EROSION INTENSITY VALUE IS LOCATED IN PARENTHESIS ON LEFT SIDE OF EACH CATEGORY BOX							
AVERAGE FETCH ¹ - average distance (miles), across the open water to the opposite shore measure 45° other side of the perpendicular to the shoreline.	(0) <1/10	(2) 1/10 - 1/3	(4) 1/3-1	(7) 1 -3	(10) 3-10	(13) 10-30	(16) >30	
DEPTH AT 20 FEET, Depth of water (feet) 20 feet from shoreline	(1) <1	(2) 1-3	(3) 3-6	(4) 6-12	(5) >12			
DEPTH AT 100 FEET, depth of water (feet) 100 feet from shoreline	(1) <1	(2) 1-3	(3) 3-6	(4) 6-12	(5) >12			
BANK HEIGHT ² , height of bank (feet), measure from toe of the bank to top of the bank-lip.	(1) <1	(2) 1-5	(3) 5-10	(4) 10-20	(5) >20			
BANK COMPOSITION composition and degree of cementation of the sediments	(0) rock, marl, tight clay, well cemented sand (dig with a pick)		(7) soft clay, clayey sand, moderately cemented (easily dug with a knife)		(15) uncemented sands or peat (easily dug with your hand)			
INFLUENCE OF ADJACENT STRUCTURES, likelihood that adjacent structures are causing bank erosion at the site	(0) no hard armoring on either adjacent property	(1) hard armoring on one adjacent property	(2) hard armoring on both adjacent properties	(3) hard armoring on one adjacent property with measurable recession	(4) hard armoring on both adjacent properties with measurable recession adjacent to both structures			
AQUATIC VEGETATION ³ type and abundance of vegetation occurring in the water off the shoreline	(0) rocky substrates unable to support vegetation.		(1) dense or abundant emergent, floating or submerged vegetation	(4) scattered or patchy emergent, floating or submerged vegetation		(7) lack of emergent, floating or submerged vegetation		
BANK VEGETATION, type and abundance of the vegetation occurring on the bank and immediately on top of the bank lip	(0) bank compose of rocky outcropping unable to support vegetation		(1) dense vegetation, upland trees, shrubs and grasses, including lawns	(4) clumps of vegetation alternating with areas lacking vegetation		(7) lack of vegetation (cleared), crop or agricultural land		
BANK STABILITY, The degree to which bank and adjacent area (within 10 feet of the bank-lip) is stabilized by natural ground, shrub, and canopy vegetation (outside a 10' pier access corridor). Human disturbance is typified by tree removal, brushing, mowing, and lawn establishment.	(0) established lawn with few canopy trees	(1) established lawn with moderate to dense canopy trees	(4) moderate to dense natural ground vegetation and canopy trees with shrub layer substantially reduced; or few canopy trees with moderate to dense natural shrub layer.			(7) moderate to dense canopy trees with moderate to dense natural shrub layer; or other natural features prevents establishment of vegetation.		
SHORELINE GEOMETRY general shape of the shoreline at the point of interest plus 200 yards on either side.	(1) coves or bays			(4) irregular shoreline or straight shoreline		(8) headland, point, or island		
SHORE ORIENTATION ⁴ geographic direction the shoreline faces	(0) < 1/3 mile fetch	(1) north to east to south-southeast (349°-360°, 1°-168°)		(4) south to west-southwest (169°-258°)		(8) west to north-northwest (259°-349°)		
BOAT WAKES ⁵ proximity to and use of boat channels	(1) no channels within 100 yards, broad open water body, or constricted shallow water body; or channels within no-wake zones		(6) thoroughfare within 100 yards carrying limited traffic, or thoroughfare 100 yards to ½ mile offshore carrying intensive traffic		(12) thoroughfare within 100 yards carrying intensive traffic (unregulated boating activity)			
EROSION INTENSITY SCORE (EI)							→	

Note: Table 1 is adapted from Knutson, P. L., H. H. Allen, and J. W. Webb, 1990. "Guidelines for Vegetative Erosion Control on Wave-Impacted Coastal Dredged Material Sites," Dredging Operations Technical Support Program Technical Report D-90-13, U.S. Army Engineer Waterways Experiment Station, Vicksburg, MS 39180, 35 pp.

¹ Average fetch: The following diagram describes the calculation of average fetch.



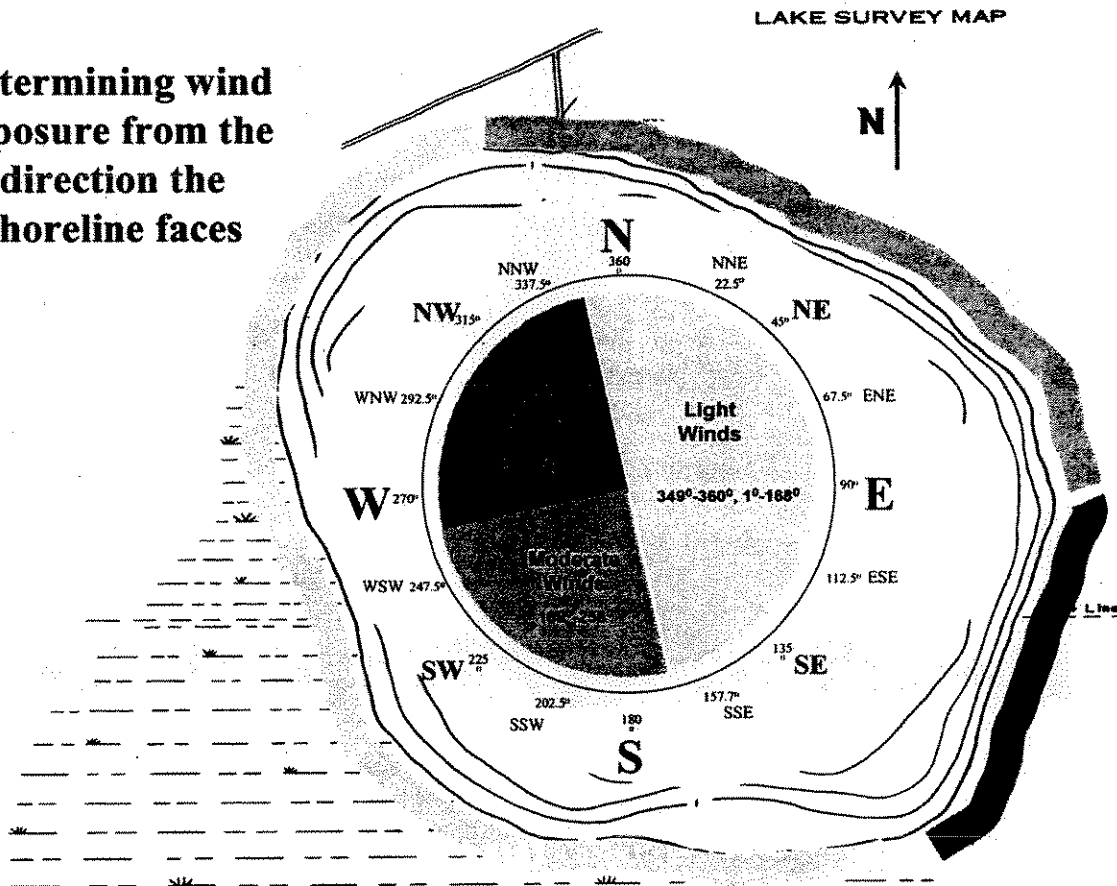
² Bank height: The following diagram describes the features of the bank for the purpose of accurately measuring bank height



³Aquatic vegetation: Dense or abundant means that on average 50-100% of the bottom is visually obstructed by plants during the growing season, defined by the dates June 1 through September 15. Scattered or patchy means that on average 1-49% of the bottom is visually obstructed by plants during the growing season, defined by the dates June 1 through September 15. Absent means that on average < 1% of the bottom is visually obstructed by plants during the growing season, defined by the dates June 1 through September 15.

⁴Shoreline Orientation: The following lake map shows an example of accurately determining shoreline orientation

Determining wind exposure from the direction the shoreline faces



⁵Boating: A thoroughfare is identified as physical narrowing of the waterbody that by its nature intensifies boating activity near the shore. Thoroughfares which are 250 yards or wider are not scored 12 points, unless the depth contours of the thoroughfare constricts boating activity in close proximity to one shore, and the traffic is intensive. Intensive traffic is defined by a location where at least 50% of the public boating access available must pass through the thoroughfare to reach the open water of the lake, provided the waterway has a total of more than 60 car-trailer units. Limited traffic is defined by a location where at least 30% of the public boating access available must pass through the thoroughfare to reach the open water of the lake, provided the waterway has a total of more than 40 car-trailer units.

NR 328.09 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 may 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 shore erosion control 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 4. 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 5. EFFECTIVE DATE. This rule shall take effect the day of publication in the official state newspaper.

SECTION 6. BOARD ADOPTION. This rule was approved and adopted by the State of Wisconsin Natural Resources Board on August 16, 2004.

Dated at Madison, Wisconsin

8/17/04

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By



Scott Hassett, Secretary

(SEAL)

Natural Resources – Affects Ch. NR 328

SECTION 1. Chapter NR 328 (title) is repealed and recreated to read:

CHAPTER NR 328

SHORE EROSION CONTROL STRUCTURES IN NAVIGABLE WATERWAYS

SECTION 2. Chapter NR 328, subch. I is created to read:

SUBCHAPTER I

SHORE EROSION CONTROL STRUCTURE ON INLAND LAKES AND IMPOUNDMENTS

NR 328.01 Purpose. The purpose of this subchapter is to establish reasonable procedures and limitations for exempt activities, general permits and individual permits for placement of shore erosion control structures in inland lakes and impoundments 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 328.02 Applicability. (1) Except as provided in s. 30.2023, Stats., this subchapter applies to construction, placement and maintenance of shore erosion control structures regulated under ss. 30.12(1), (1g)(a),(i), (j) and (k), (2m), (3)(a)3c., 3g., 3r. and 13. and (3m), Stats. Any person that intends to construct, place or maintain a shore erosion control structure in any inland lake or impoundment shall comply with all applicable provisions of this chapter and any permit issued under this chapter.

Note: This subchapter does not apply to the Great Lakes or outlying waters as defined in s. 29.001(63), Stats.

Note: Shore erosion control structures for lakes and impoundments in the areas described in s. 30.203, Stats., (Seawalls; Wolf River and Fox River basins) that do not qualify for an exemption are regulated under this chapter.

(2) Shore erosion control measures such as grading to establish a stable slope, revegetation or other bioengineering methods that do not involve the placement of structures on the bed of a waterway are not regulated under s. 30.12, Stats., or this subchapter.

NR 328.03 Definitions. In this subchapter:

(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, 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".

(2) "Biological shore erosion control structure" means a structure that relies solely on biological materials.

(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.

Note: Temporary breakwaters, with non-biodegradable elements, are considered a permissible element during the plant establishment phase of a biological erosion control project.

(4) "Commercial marina" has the meaning in s. NR 326.03(1p).

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

(6) "Erosion intensity" or "EI" means the degree of erosion as estimated under s. NR 328.08(2).

(7) "Grading" means the physical disturbance of the bank by the addition, removal or redistribution of soil.

(8) "Hard armoring" means a shore erosion control structure that relies solely on inert materials, and includes but is not limited to riprap and seawalls.

(9) "High energy site" means a site where the storm-wave height calculated under s. NR 328.08(1) is greater than or equal to 2.3 feet, where the erosion intensity score calculated under s. NR 328.08(2) has a score of greater than 67, or where bank-edge recession exceeds 4 feet per year.

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

(11) "Integrated toe protection" means a structure combining 2 separate treatments: toe protection at the base of the bank and vegetation establishment on the remaining upper portion of the bank above the ordinary high water mark.

Note: The maximum toe protection structure elevation is equal to the ordinary high water mark plus one-half of the storm-wave height.

Note: The toe protection relies on materials such as stone, armor units, fiber rolls or wattles to protect the base of the bank. Above the toe protection, the remainder of the bank is revegetated by installing a shoreland buffer or with brush layering, brush mattresses, fiber rolls, live stakes, vegetated geogrid, rolled erosion control products or wattles. Plant materials may also be incorporated as part of the shore protection design below the ordinary high water mark as well.

(12) "Low energy site" means a site where the storm-wave height calculated under s. NR 328.08(1) is less than 1.0 foot, or where the erosion intensity score calculated under s. NR 328.08(2) has a score of 47 or less.

(13) "Municipal marina" has the meaning in s. NR 326.03 (5g).

(14) "Maximum toe elevation" means the elevation of the bank toe mark plus the storm-wave height estimated under s. NR 328.08(1).

(15) "Moderate energy site" means a site where the storm-wave height calculated under s. NR 328.08(1) is greater than or equal to 1.0 foot but less than 2.3 feet, where the erosion intensity score calculated under s. NR 328.08(2) has a score of 48 to 67, or where bank-edge recession is between 2-4 feet per year.

Note: Common law doctrine of avulsion secures to waterfront property owner the ability to reclaim land suddenly lost to erosion (*AG ex rel Becker v. Bay Boom Wild Rive and Fur Company, 172 Wis. 363 1920.*)

(16) "Offshore" means located a minimum of 10 horizontal feet waterward from the ordinary high water mark.

(17) "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.

(18) "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.

(19) "Permanent breakwater" means a structure constructed of stone, rock, concrete or other non-degradable materials and located offshore for the purpose of diminishing the force of the waves and protecting the shoreline.

Note: These structures can be designed to provide fish and wildlife habitat in addition to erosion control by incorporating vegetation on the breakwater and in the nearshore zone. Examples of permanent breakwaters include stone dikes, barrier islands, stone islands and submerged offshore shoals.

(20) "Replacement" means a degree of structural changes to the shore erosion control structure by which some or all of the structure is being removed and recreated.

Note: For seawalls, any replacement of a portion of the seawall down to or at the footing of the structure is considered replacement. For riprap, replacement of filter fabric or replacement of the base substrate is considered replacement.

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

(22) "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.

(23) "Seawall" means an upright structure that is steeper than 1.5 feet vertical to one foot horizontal and that is installed parallel to the shore to prevent the sliding or slumping of the land and to protect the adjacent upland from wave action.

Note: Seawalls are commonly constructed of timber, rock (including gabions), concrete, steel or aluminum sheet piling, and may incorporate biological components.

(24) "Shore erosion control structure" means a structure with defined shape, size, form and utility constructed and maintained for the purpose of protecting a shoreline from erosion. Shore erosion control structures include vegetated armoring and hard armoring.

(25) "Similar material" in s. 30.12(3)(a)3., Stats., means material, such as concrete, masonry, steel or wood, which is designed and constructed for the purpose of protecting the bank and adjacent upland from erosion.

(26) "Storm-wave height" means the wave height estimated under s. NR 328.08(1).

(27) "Temporary breakwater" means an offshore structure consisting of biological components, such as jute, fiber rolls, willow stakes, branchbox breakwater or a structure consisting of inert components that will be removed after a set period of time.

Note: Temporary breakwaters are placed for the purpose of providing an area of quiescent water, when new erosion protection designs and shoreland plant installations are becoming established. Biological temporary breakwater designs degrade naturally and examples include branchbox breakwaters and fiber rolls.

(28) "Toe" means the most waterward edge of a shore erosion control structure.

(29) "Vegetated armoring" means a shore erosion control structure that combines biological and inert materials, and includes 3 types: integrated toe protection, vegetated-riprap and vegetated-geogrids.

(30) "Wave height" means the vertical distance between the wave crest and wave trough.

(31) "Wetland" means an area where water is at, near or above the land surface long enough to be capable of supporting aquatic or hydrophytic vegetation and which has soils indicative of wet conditions.

NR 328.04 Exemptions. (1) PROCEDURES. Exemptions shall be processed according to the procedures in ch. NR 310.

(2) APPLICABLE ACTIVITIES. A biological shore erosion control structure that meets all the standards in subs (3) and (4) shall be exempt under s. 30.12(1g)(k), Stats. Riprap repair that meets all the standards in subs. (3) and (5) shall be exempt under s. 30.12(1g)(j), Stats. Riprap replacement that meets all the standards in subs. (3) and (6) shall be exempt under s. 30.12(1g)(i), Stats.

(3) STANDARDS. (a) The 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.

(b) The structure may be placed and maintained only by a riparian.

(c) The project will not result in removal of greater than 20% of the aerial coverage of natural bank vegetation, emergent vegetation or floating vegetation.

(d) 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.

(e) 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.

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

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

(h) 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.

(i) No waterward extension of the property is permitted other than what is reasonably necessary to conduct the project and protect the existing bank. No soil or similar fill material may be placed in a wetland or below the ordinary high water mark of any navigable waterway.

(j) Dredging under s. 30.20(1g)(b)1., Stats., is not allowed for the placement or maintenance of any shore erosion control structure under this section.

(4) BIOLOGICAL SHORE EROSION CONTROL. Biological shore erosion control structures, including but not limited to native vegetation, fiber rolls, fiber mats, live stakes, brush mattresses, branchbox breakwaters, temporary breakwaters, may be placed subject to the requirements and limitations of sub. (3) and this subsection:

(a) Any wave breaks or wave barriers shall be completely removed within 2 years of the installation date. If wave barriers are used they shall be located within the 3-foot water depth contour or less, marked with reflectors, and may not create an obstruction to navigation.

(b) Willow wattles, willow posts, brush mattresses, brush layering, fiber roll breakwaters, plant carpets, root wads, and other natural materials shall be installed by hand.

(c) Vegetation shall be plant species which are native to the area of Wisconsin where the project is located.

(d) Fiber rolls shall be secured using can and duckbill anchors or hardwood stakes. Spacing between the duckbill anchors shall be 6 feet or less. Spacing between the hardwood stakes shall be 4 feet or less.

(e) A deposit of sand, gravel or stone under s. 30.12(1g)(a), Stats., may not be associated with the biological erosion control structure.

(5) RIPRAP REPAIR. Existing riprap may be repaired subject to the requirements and limitations of sub. (3) and this subsection:

(a) Riprap repair may not exceed 300 continuous linear feet of shoreline located on an inland lake or flowage.

(b) Riprap repair may only involve placement of additional rock or redistribution of existing rock within the footprint of the existing riprap.

(c) The riprap was previously permitted by the department.

(d) Except as provided in pars. (a) and (b), the riprap repair shall meet the conditions of the original permit.

(e) Addition of rock may only occur no more than once every 5 years.

(f) A deposit of sand, gravel or stone under s. 30.12(1g)(a), Stats., may be not associated with the riprap repair.

(6) RIPRAP REPLACEMENT. Existing riprap may be replaced subject to the requirements and limitations of sub. (3) and this subsection:

(a) Riprap replacement may not exceed 100 continuous linear feet of shoreline located on an inland lake or flowage.

(b) The riprap was previously permitted by the department.

(c) Except as provided in par. (a), the riprap replacement shall meet the conditions of the original permit.

(d) Riprap replacement may occur no more than once every 5 years.

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

(7) Activities which do not meet the standards in subs. (3) and (4), (5) or (6) or are determined ineligible for an exemption by the department shall require a general permit or individual permit.

NR 328.05 General permits. (1) PROCEDURES. General permits shall be processed according to the procedures in ch. NR 310.

(2) APPLICABLE ACTIVITIES. Biological shore erosion control that meets all the criteria in sub. (3) shall be eligible for general permit coverage under ss. 30.12(3)(br) and 30.206, Stats. Riprap that meets all the criteria in sub. (4) shall be eligible for general permit coverage under ss. 30.12(3)(a)3g., (br) and 30.206, Stats. Seawall replacement that meets all the criteria in sub. (5) shall be eligible for general permit coverage under ss. 30.12(3)(a)13. and 30.206, Stats.

(3) BIOLOGICAL SHORE EROSION CONTROL. Biological shore erosion control structures may be authorized under this general permit if it meets all of the requirements of s. NR 328.04(3) and (4) with the exception that it 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.

(4) RIPRAP OR VEGETATED ARMORING. Riprap or vegetated armoring on the bed or bank of a navigable water may be authorized under this general permit if it meets all of the requirements of s. NR 328.04(3) with the exception that it may be located in an area of special natural resource interest as defined in s. 30.101(1am), Stats., and identified by the department in s. NR 1.05 and with additional limitations as follows:

(a) Riprap placement may not exceed 500 continuous linear feet of shoreline located on an inland lake or flowage of 300 acres or more.

(b) The project site is a moderate or high energy site.

(c) Riprap shall be clean fieldstone or quarry stone 6 to 24 inches in diameter.

(d) The toe of the riprap may not extend more than 6 feet waterward of the ordinary high water mark.

(e) The final riprap slope may not exceed (be steeper than) 2 feet horizontal to one foot vertical.

(f) Riprap may not be placed at an elevation higher than the ordinary high water mark plus the storm-wave height as calculated in s. NR 328.08(1).

(g) No fill material or soil may be placed in a wetland or below the ordinary high water mark of any navigable waterway.

(h) The riprap shall follow the natural contour of the shoreline.

(i) Filter cloth or clean-washed gravel shall be used as a filter layer under the riprap to extend the life of the structure, improve effectiveness and prevent soil erosion behind the riprap.

(j) Riprap or other vegetated armoring along moderate energy sites shall be re-vegetated above the ordinary high water mark by using native shrub plantings, native live stakes or native jointed plantings.

Note: Erosion control treatments may include a 10-foot shoreline segment where plant establishment is not required for the purpose of ingress/egress associated with the placement of a pier or access to the waterway, or associated with public park activities.

(5) SEAWALL REPLACEMENT. Replacement of an existing seawall on the bed or bank of a navigable water adjacent to a riparian property may be authorized under this general permit if it meets all of the requirements and limitations:

(a) The replacement may not exceed 100 continuous feet of shoreline located on an inland lake or flowage of 300 acres or more.

(b) Seawall replacement may be permitted only at the following locations:

1. Municipal or commercial marinas where vertical docking facilities are a practical alternative after considering the public interest.

2. Navigational channels actively used as thoroughfares or for access, where slopes are greater (steeper) than 1.5 feet vertical to one foot horizontal, showing evidence of erosion, where alternative methods of erosion control would impede navigation.

3. Locations where slopes are greater (steeper) than 1.5 feet vertical to one foot horizontal, and where the applicant demonstrates that alternative measures are not practicable taking into consideration bank height and the location of other permanent structures on the property.

(c) The seawall replacement shall incorporate an adequate footing to prevent settlement, tipping or undermining.

(d) The seawall shall be attached, where appropriate, to tieback anchors placed on the upland to prevent or minimize tipping of the wall.

(e) The seawall shall include weep holes where necessary to relieve hydrostatic pressure in upland soils. A filter fabric or gravel filter layer backing at weep holes shall be installed to facilitate drainage and prevent the loss of soil from behind the wall.

(f) For locations identified in par. (b)3., rock riprap shall be placed in front of the seawall to dissipate wave energy, minimize scour at the base of the wall and provide aquatic habitat. Rock shall be placed to the top of the wall. Riprap shall be clean fieldstone or quarry stone 6 to 24 inches in diameter, placed at a slope not to exceed (be steeper than) 2 feet horizontal to one foot vertical, and may not extend more than 6 feet waterward of the face of the seawall.

(g) Each end of the seawall shall be buried or keyed into the bank to prevent flanking.

(h) The seawall may be built only high enough to prevent the over-topping by storm waves.

(6) Activities which do not meet the standards in sub. (3), (4) or (5) or are otherwise ineligible for a general permit shall require an individual permit.

NR 328.06 Individual permits. (1) PROCEDURES. Individual permits shall be processed according to the procedures in ch. NR 310.

(2) APPLICABLE ACTIVITIES. Any shore erosion control structure which is not exempt under s. NR 328.04, is not authorized by a general permit under s. NR 328.05, or is located in an area of special natural resource interest except as provided under s. NR 328.05(3), requires authorization by an individual permit pursuant to s. 30.12(1), Stats.

(3) RIPRAP. Notwithstanding s. NR 328.07, riprap meeting the standards in s. 30.12(3m), Stats., may be authorized under an individual permit.

(4) SEAWALLS. Seawalls meeting the standards in s. 30.12(3m), Stats., may be authorized under an individual permit, except that seawalls at low or moderate energy sites may only be permitted in the following locations:

(a) Municipal or commercial marinas where vertical docking facilities are a practical alternative after considering the public interest.

(b) Navigational channels actively used as thoroughfares or for access, where slopes are greater (steeper) than 1.5 feet vertical to one foot horizontal, showing evidence of erosion, where alternative methods of erosion control would impede navigation.

(c) Locations where slopes are greater (steeper) than 1.5 feet vertical to one foot horizontal, and where the applicant demonstrates that alternative measures are not practicable taking into consideration bank height and the location of other permanent structures on the property.

(5) EXISTING PERMITS. A shore protection 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 328.07 Prohibited erosion control methods. (1) PERMANENT BREAKWATERS. Except as provided in subch. II, construction of permanent breakwaters is prohibited.

(2) NEW SEAWALLS. Except as provided in s. NR 328.06(4) or s. 30.203, Stats., construction of new seawalls is prohibited.

(3) NEW RIPRAP. Construction of new riprap is prohibited at low energy sites.

NR 328.08 Data requirements and site assessment methods. Applicants and department staff shall adhere to the following data requirements and site assessment methods:

(1) CALCULATION OF STORM-WAVE HEIGHT. The department shall provide applicants with worksheets and internet-based computer software for the purpose of estimating storm wave height. Computer software shall be mathematically designed based on Young and Verhagen (1996) and Young (1998). Storm-wave heights shall be estimated according to Young and Verhagen (1996) and Young (1997) by applying a storm wind speed of 35 miles per hour (51.45 ft/sec), fetch at the applicant's shore protection site, and the average depth along that fetch. To record fetch, applicants shall measure the longest unobstructed straight-line distance originating from the shore protection site across the water surface to the opposite intersect with the shore. To estimate average depth applicants shall examine a lake map, sum the reported depths along the fetch, and divide by the number of recorded values. At least 5 equally placed intervals along the fetch shall be used.

Note: The citation for Young (1997) is as follows: Young, I.R. 1997. The growth rate of finite depth wind-generated waves. Coastal Engineering, Vol. 32, pp. 181-195. The citation for Young and Verhagen (1996) is as follows: Young, I.R. and L.A. Verhagen. 1996. The growth of fetch limited waves in finite water depth. Coastal Engineering, Vol. 29, pp. 47-78.

Note: Statewide storm wind speeds are estimated from Naber Knox, P. 1996. Wind Atlas of Wisconsin. Wisconsin Geological and Natural History Survey, Bulletin No. 94.

(2) CALCULATION OF EROSION INTENSITY. Where an applicant or the department believes that, as a result of site conditions, storm-wave height as calculated in sub. (1) may inaccurately predict the degree of erosion, the erosion intensity score may be calculated to determine erosion. The department shall provide applicants with worksheets and internet-based computer software for the purpose of calculating erosion intensity. When the department or applicants assess erosion at the shore protection site they shall apply methods outlined in Table 1 to calculate an erosion intensity score. Wherever EI and storm-wave height result in different energy categories, the site shall be placed in the category as determined by EI.

(3) BANK EDGE RECESSION MEASUREMENTS. Methods of measuring bank edge recession shall include all of the following: establishment of a physical measurement reference line between at least 2 headstakes; date-imbedded photographs showing the initial installation of the reference line and headstakes; reference distance measures to the bank edge shall be reported on department supplied forms; and time between separate measurements shall equal or exceed 3 months during the open-water season.

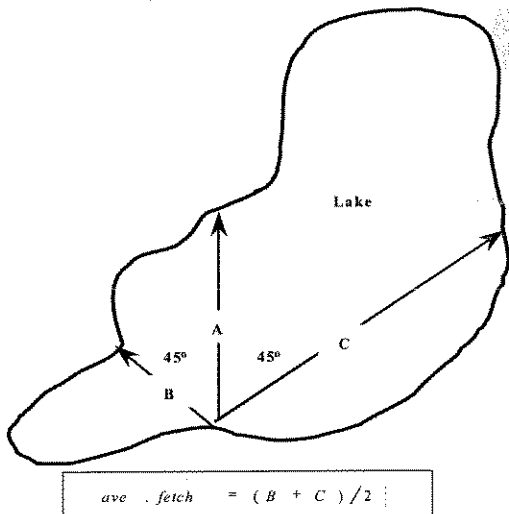
Table 1. Erosion Intensity (EI) Score Worksheet. Applicants and department staff shall use this worksheet to calculate erosion intensity pursuant to s. NR 328.08(2).

SHORELINE VARIABLES	DESCRIPTIVE CATEGORIES						ASSIGNED EI
	EROSION INTENSITY VALUE IS LOCATED IN PARENTHESIS ON LEFT SIDE OF EACH CATEGORY BOX						
AVERAGE FETCH ¹ , average distance (miles), across the open water to the opposite shore measure 45° other side of the perpendicular to the shoreline.	(0) <1/10	(2) 1/10 – 1/3	(4) 1/3-1	(7) 1 –3	(10) 3-10	(13) 10-30	(16) >30
DEPTH AT 20 FEET, Depth of water (feet) 20 feet from shoreline	(1) <1	(2) 1-3	(3) 3-6	(4) 6-12	(5) >12		
DEPTH AT 100 FEET, depth of water (feet) 100 feet from shoreline	(1) <1	(2) 1-3	(3) 3-6	(4) 6-12	(5) >12		
BANK HEIGHT ² , height of bank (feet), measure from toe of the bank to top of the bank-lip.	(1) <1	(2) 1-5	(3) 5-10	(4) 10-20	(5) >20		
BANK COMPOSITION composition and degree of cementation of the sediments	(0) rock, marl, tight clay, well cemented sand (dig with a pick)		(7) soft clay, clayey sand, moderately cemented (easily dug with a knife)		(15) uncemented sands or peat (easily dug with your hand)		
INFLUENCE OF ADJACENT STRUCTURES, likelihood that adjacent structures are causing flank erosion at the site	(0) no hard armoring on either adjacent property	(1) hard armoring on one adjacent property	(2) hard armoring on both adjacent properties	(3) hard armoring on one adjacent property with measurable recession	(4) hard armoring on both adjacent properties with measurable recession adjacent to both structures		
AQUATIC VEGETATION ³ type and abundance of vegetation occurring in the water off the shoreline	(0) rocky substrates unable to support vegetation.	(1) dense or abundant emergent, floating or submerged vegetation	(4) scattered or patchy emergent, floating or submergent vegetation		(7) lack of emergent, floating or submergent vegetation		
BANK VEGETATION, type and abundance of the vegetation occurring on the bank and immediately on top of the bank lip	(0) bank compose of rocky outcropping unable to support vegetation	(1) dense vegetation, upland trees, shrubs and grasses, including lawns	(4) clumps of vegetation alternating with areas lacking vegetation		(7) lack of vegetation (cleared), crop or agricultural land		
BANK STABILITY, The degree to which bank and adjacent area (within 10 feet of the bank-lip) is stabilized by natural ground, shrub, and canopy vegetation (outside a 10' pier access corridor). Human disturbance is typified by tree removal, brushing, mowing, and lawn establishment.	(0) established lawn with few canopy trees	(1) established lawn with moderate to dense canopy trees	(4) moderate to dense natural ground vegetation and canopy trees with shrub layer substantially reduced; or few canopy trees with moderate to dense natural shrub layer.		(7) moderate to dense canopy trees with moderate to dense natural shrub layer; or other natural features prevents establishment of vegetation.		
SHORELINE GEOMETRY general shape of the shoreline at the point of interest plus 200 yards on either side.	(1) coves or bays		(4) irregular shoreline or straight shoreline		(8) headland, point, or island		
SHORE ORIENTATION ⁴ geographic direction the shoreline faces	(0) < 1/3 mile fetch	(1) north to east to south-southeast (349°-360°, 1°-168°)	(4) south to west-southwest (169°-258°)		(8) west to north-northwest (259°-349°)		

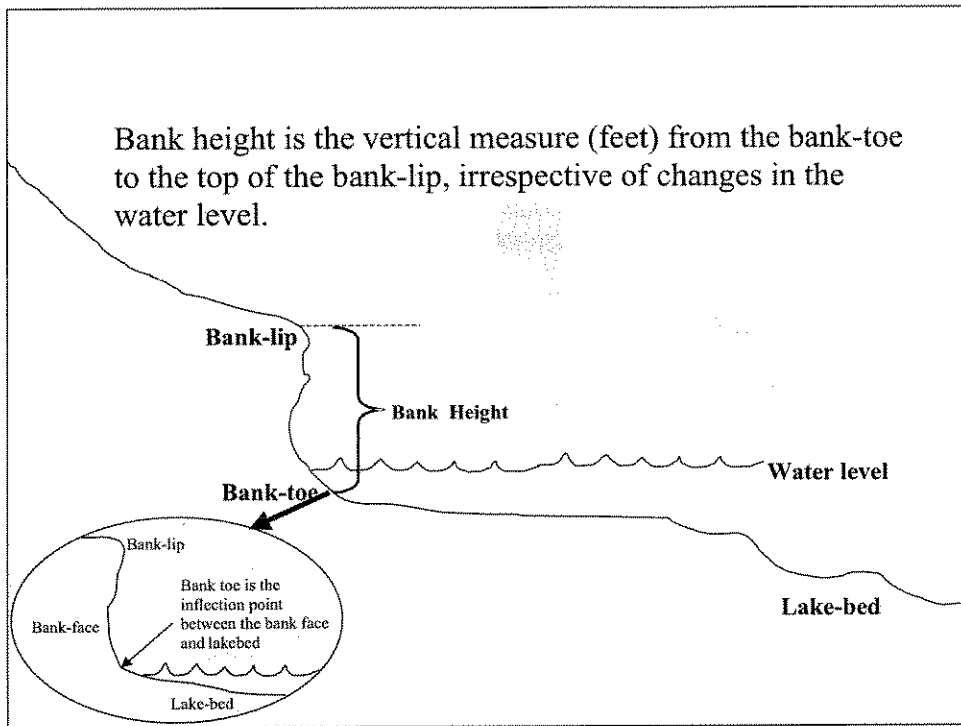
BOAT WAKES ⁵ proximity to and use of boat channels	(1) no channels within 100 yards, broad open water body, or constricted shallow water body; or channels within no-wake zones	(6) thoroughfare within 100 yards carrying limited traffic, or thoroughfare 100 yards to ½ mile offshore carrying intensive traffic	(12) thoroughfare within 100 yards carrying intensive traffic (unregulated boating activity)	
EROSION INTENSITY SCORE (EI) →				<input type="text"/>

Note: Table 1 is adapted from Knutson, P. L., H. H. Allen, and J. W. Webb, 1990. "Guidelines for Vegetative Erosion Control on Wave-Impacted Coastal Dredged Material Sites," "Dredging Operations Technical Support Program Technical Report D-90-13, U.S. Army Engineer Waterways Experiment Station, Vicksburg, MS 39180, 35 pp.

¹ Average fetch: The following diagram describes the calculation of average fetch.



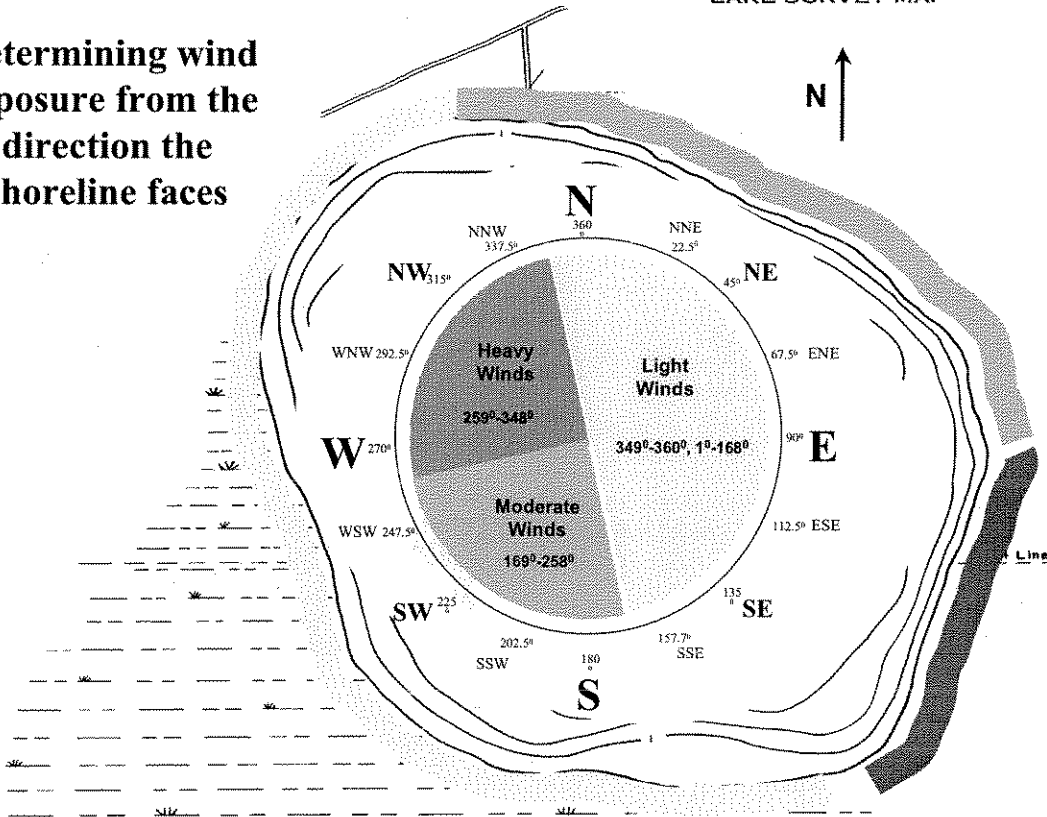
² Bank height: The following diagram describes the features of the bank for the purpose of accurately measuring bank height



³Aquatic vegetation: Dense or abundant means that on average 50-100% of the bottom is visually obstructed by plants during the growing season, defined by the dates June 1 through September 15. Scattered or patchy means that on average 1-49% of the bottom is visually obstructed by plants during the growing season, defined by the dates June 1 through September 15. Absent means that on average < 1% of the bottom is visually obstructed by plants during the growing season, defined by the dates June 1 through September 15.

⁴Shoreline Orientation: The following lake map shows an example of accurately determining shoreline orientation

Determining wind exposure from the direction the shoreline faces



⁵Boating: A thoroughfare is identified as physical narrowing of the waterbody that by its nature intensifies boating activity near the shore. Thoroughfares which are 250 yards or wider are not scored 12 points, unless the depth contours of the thoroughfare constricts boating activity in close proximity to one shore, and the traffic is intensive. Intensive traffic is defined by a location where at least 50% of the public boating access available must pass through the thoroughfare to reach the open water of the lake, provided the waterway has a total of more than 60 car-trailer units. Limited traffic is defined by a location where at least 30% of the public boating access available must pass through the thoroughfare to reach the open water of the lake, provided the waterway has a total of more than 40 car-trailer units.

NR 328.09 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 shore erosion control 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.

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

The Wisconsin Natural Resources Board proposes an order to repeal Natural Resources Board Emergency Order FH-20-04(E) and create NR 329 relating to miscellaneous structures in navigable waterways.

FH-62-04(E)

Analysis Prepared by the Department of Natural Resources

Statutory Authority: ss. 30.12(1), (1p) and (3)(br), 30.206, 227.11(2) and 227.24, Stats.

Statutes Interpreted: ss. 30.12(1g)(a), (g), (h) and (km), (2m), (2r), (3) and (3m) and 30.20(1g)(b)2., Stats.

Explanation of Agency Authority:

The Department has authority under s. 30.12, Stats., to promulgate rules that establish installation practices, construction and design requirements and limitations on the location of structures placed under statutory exemptions. The Department has authority under ss. 30.12 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 is to establish construction, design and placement standards for projects to be eligible for statutory exemptions, to establish general permits with appropriate conditions, and to establish standards for projects that may be authorized under an individual permit.

NR329 establishes standards for exemptions for dry fire hydrants, intake and outfall structures, and pilings. Exemptions are not allowed in areas of special natural resource interest (ASNRIs) and must follow technical standards similar to those previously used for short form permits.

This order also establishes general permits for fords across navigable waterways and boat ramps open to the public or on lakes greater than 50 acres and which do not already have a public boat ramp. These general permits are not allowed in ASNRIs and must follow technical standards similar to those previously used for short form permits.

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

Activity	Wisconsin	Illinois	Iowa	Michigan	Minnesota
Boat Ramp	General permit-for projects not located in an "area of special natural resource interest", boat ramps in ASNRI authorized under IP only	General permit, except if located in Cook, DuPage, Kane, Lake, McHenry and Will Counties (regulated by Co.)	Exempt on non-state owned lands, general permit on state owned lands. Must match natural contours	General permit, must match existing contours	Exempt. Private boat ramps also exempt if < 12' wide and < 10' waterward
Dry fire hydrants	Exempt for projects not located in an "area of special natural resource interest" and perennial tributaries to trout streams, authorized under GP in ASNRI and perennial tributaries to trout streams.	General permit	General permit provided does not obstruct flood flows.	General permit	General permit
Fords	General permit for projects not located in an "area of special natural resource interest" and perennial tributaries to trout streams, then authorized under IP	General permit	General permit	General permit	General permit but top of bank cannot exceed 4'
Intake and outfall structures	Exempt for projects not located in "area of special natural resource interest" and perennial tributaries to trout streams, if adversely affects public trust values, or extends more than 25 % stream width, GP for structures in ASNRI and perennial tributaries to trout streams.	General permit. Cannot extend waterward beyond the natural bank.	General permit in state owned waters only. Can not impact flood flows	General permit if not located on a trout stream, otherwise individual permit.	General permit, must be screened with natural plants, energy dissipation at outfall
Piling	Exempt for projects not located in an "area of special natural resource interest" and perennial tributaries to trout streams, then authorized under GP	General permit, cannot obstruct navigation.	General permit provided does not obstruct navigation	General permit, may not obstruct navigation	Exempt provided not an obstruction to navigation

Summary of Factual Data and Analytical Methodologies: Not applicable.

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: Dale Simon, Dale.Simon@dnr.state.wi.us, (608) 267-9868

SECTION 1. Natural Resources Board Emergency Order FH-20-04(E) is repealed.

SECTION 2. Chapter NR 329 is created to read:

Chapter NR 329
MISCELLANEOUS STRUCTURES IN NAVIGABLE WATERWAYS

NR 329.01 Purpose. The purpose of this chapter is to establish reasonable procedures and limitations for exempt activities, general permits and individual permits for placement of boat ramps, dry fire hydrants, fords, intake and outfall structures and pilings 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 329.02 Applicability. This chapter applies to construction, placement and maintenance of boat ramps, dry fire hydrants, fords, intake and outfall structures and pilings regulated under ss. 30.12(1), (1g)(a), (g), (h) and (km), (3) and (3m) and 30.20(1g)(b)2., Stats. Any person that intends to construct, place or maintain a boat ramp, dry fire hydrant, ford, intake or outfall structure or pilings in any navigable waterway shall comply with all applicable provisions of this chapter and any permit issued under this chapter.

NR 329.03 Definitions. In this chapter:

(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, 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".

(2) "Boat ramp" means a structure installed on the bed and bank of a navigable waterway for the purpose of launching and landing watercraft.

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

(4) "Dry fire hydrant" means a structure or device, that a fire hose can be connected, which is constructed in and adjacent to a navigable waterway for the purpose of providing water for fighting fires.

(5) "Ford" means a structure consisting of rock or gravel, placed on the bed of a navigable waterway to facilitate crossing the waterway.

(6) "Intake or outfall structure" means a structure located on the bank or bed of a navigable waterway below the horizontal plane of the ordinary high water mark, that is used to divert water from the waterway for purposes other than irrigation or to discharge water to the waterway. An intake or outfall structure shall include rock riprap toe protection not to exceed 2 cubic yards.

(7) "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.

(8) "Piling" means a long, heavy timber, or section of concrete or metal driven or jetted into the earth or waterway bed adjacent to the riparian owner's property for the purpose of deflecting ice, protecting an existing or proposed structure, or providing a pivot point for turning watercraft.

(9) "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.

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

(11) "Wetland" means an area where water is at, near or above the land surface long enough to be capable of supporting aquatic or hydrophytic vegetation and which has soils indicative of wet conditions.

NR 329.04 Miscellaneous structures. (1) EXEMPTIONS. (a) Procedures. Exemptions shall be processed according to the procedures in ch. NR 310.

(b) Applicable activities. A dry fire hydrant that meets the standards in par. (c) shall be exempt under s. 30.12(1g)(g), Stats. An intake or outfall structure that meets the standards in par. (d) shall be exempt under s. 30.12(1g)(km), Stats. Pilings that meet the standards in par. (e) shall be exempt under s. 30.12(1g)(h), Stats.

(c) Dry fire hydrant standards. 1. The dry fire hydrant 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 dry fire hydrant may be placed and maintained only by a riparian, or by a municipality with the permission of the riparian.

3. The dry fire hydrant 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 dry fire hydrant may not be placed in a wetland or in a manner that adversely impedes surface or subsurface flow into or out of any wetland.

5. The dry fire hydrant shall have a perforated inlet screen with cap on the inlet end.

6. The dry fire hydrant shall be installed with the riser landward of the ordinary high water mark.

7. The dry fire hydrant shall be installed so that the inlet pipe is at least 3 feet below the surface water level during normal low water level conditions.

8. The dry fire hydrant may not result in the permanent or temporary deposition of fill in any floodplain or wetland.

9. The dry fire hydrant may not result in the waterward extension of the upland.

10. 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.

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.

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

13. 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.

14. 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.

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

16. Dredging under s. 30.20(1g)(b)1., Stats., may be associated with the placement of a dry fire hydrant provided the dredging does not exceed one cubic yard.

(d) *Intake or outfall structure standards.* 1. The intake or outfall 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, 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 intake or outfall structure may be placed and maintained only by a riparian, or by a municipality with the permission of the riparian.

3. The intake or outfall 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 intake or outfall structure, including any wingwalls and rock riprap, shall be less than 6 feet from the water side of the ordinary high water mark and less than 25% of the width of the channel in which it is placed.

5. The intake or outfall structure may not be placed in a manner that adversely impedes surface or subsurface flow into or out of any wetland.

6. The intake or outfall structure may not result in the permanent or temporary deposition of fill in any floodplain or wetland.

7. The intake or outfall structure may not result in the waterward extension of the upland.
8. 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.
9. 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.

10. All equipment used for the project shall be designed and properly sized to minimize the amount of sediment that can escape into the water.
11. 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.
12. 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.
13. A deposit of sand, gravel or stone under s. 30.12(1g)(a), Stats., may be associated with the placement of an intake or outfall structure provided the deposit is limited to the area underneath or within 4 feet of the structure and is less than 2 cubic yards.
14. Dredging under s. 30.20(1g)(b)1., Stats., may be associated with the placement of an intake or outfall structure provided the dredging does not exceed one cubic yard.
15. Outfall structures may not exceed 24 inches in diameter, and in streams may not result in a discharge of more than 50% of the streams base flow (80% exceedance flow) at any given time.
16. Intake structures may not exceed 12 inches in diameter and the invert of the culvert shall be located above the public rights stage elevation as determined by the department pursuant to s. 31.02, Stats.
 - (e) *Pilings standards.* 1. Pilings 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. Pilings may be placed and maintained only by a riparian.
 3. Pilings 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. Pilings may not be placed in a manner that adversely impedes surface or subsurface flow into or out of any wetland.
 5. Pilings may not result in the permanent or temporary deposition of fill in any floodplain or wetland.
 6. Pilings shall be placed only for the purposes of deflecting ice, protecting an existing or proposed structure or providing a pivot point for turning watercraft.
 7. Pilings may not be placed or used for mooring a boat, except in Lake Michigan, Lake Superior or on the Mississippi River.

8. Pilings may consist of a group of not more than 3 individual piles placed adjacent to each other and firmly bound together.

9. 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.

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.

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

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

13. 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.

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

15. Dredging under s. 30.20(1g)(b)1., Stats., may be associated with the placement of pilings provided the dredging does not exceed one cubic yard.

(f) Activities that do not meet the standards in par. (c), (d) or (e) or are determined ineligible for an exemption by the department 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.* A ford that meets the standards in par. (c) shall be eligible for a general permit under ss. 30.12(3)(a)4. and 30.206, Stats. A boat ramp that meets the standards in par. (d) shall be eligible for a general permit under ss. 30.12(3)(a)5. and 30.206, Stats. A dry fire hydrant that meets the standards in par. (e), an intake or outfall structure that meets the standards in par. (f), or pilings that meet the standards in par. (g) shall be eligible for a general permit under ss. 30.12(3)(br) and 30.206, Stats.

(c) *Ford standards.* 1. The ford 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 ford may be placed and maintained only by a riparian.

3. The ford 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 ford shall be designed and constructed to prevent structural failure caused by wave, wind or ice action and shall be maintained in good condition at all times.

5. The ford shall only be located in a stream.

6. The ford shall only be constructed where the stream width is less than 100 feet, the normal stream depth is less than 2 feet, and where the streambed does not contain more than 6 inches of soft sediment.

7. The ford shall consist of a 6 to 24-inch thick layer of 2 to 4-inch diameter rock or pre-cast reinforced concrete planks over a base of crushed rock with a total thickness not exceeding 24 inches.

8. The ford shall be no more than 16 feet wide in a direction parallel to the flow of the stream.

9. The ford shall have its top surface at the same level as the natural streambed immediately upstream and downstream from the ford. The placement of the ford cannot result in the creation of an impoundment or dam upstream or a waterfall or riffle area downstream.

10. The approach road to the ford may not have bank slopes steeper than 5-foot horizontal to one-foot vertical (5H:1V) toward the stream, or side slopes exceeding 2-foot horizontal to one-foot vertical (2H:1V).

11. The approach road to the ford may not be constructed in or across a wetland.

12. The approach road to the ford may not be raised above the elevation of the surrounding natural ground elevation within a mapped floodplain.

13. 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.

14. 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.

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

16. 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.

17. 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.

18. Material excavated from the streambed or banks may not be placed in any surface water body or wetland and may not be placed in a floodplain.

19. Construction of the ford may not occur during periods of high stream flow.

(d) *Boat ramp standards.* 1. The boat ramp 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 boat ramp may be placed and maintained only by a riparian.

3. The boat ramp 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 boat ramp shall be designed and constructed to prevent structural failure caused by wave, wind or ice action and shall be maintained in good condition at all times.

5. Construction of the boat ramp may not involve grading on the banks of the stream exceeding 10,000 square feet.

6. Material removed or excavated to construct the boat ramp may not be placed in a wetland, floodplain or below the ordinary high water mark of any navigable waterway.

7. The boat ramp shall consist of a 6 to 24-inch layer of crushed rock, 4-inch minimum thickness pre-cast reinforced concrete planks or a cast-in-place reinforced concrete slab, each with a 6 to 18-inch crushed rock base. Pre-cast planks shall be connected to prevent displacement.

8. The boat ramp shall have a slope no steeper than 7-foot horizontal to one-foot vertical (7H:1V).

9. The boat ramp may not be located in or across a wetland.

10. The boat ramp shall have rock riprap toe protection at the lakeward end of the ramp which may not extend above the natural level of the bottom of the waterway.

11. The side slopes of the excavated banks on either side of the boat ramp may not exceed 2 feet horizontal to one foot vertical (2H :1V).

12. Cofferdams used for site de-watering shall consist only of clean recoverable materials such as sandbags or plywood sheeting, etc., and all materials shall be removed immediately following project completion.

13. 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.

14. 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.

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

16. 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.

17. 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.

18. Construction of the boat ramp 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.

19. The boat ramp shall be open to the general public, or shall be located on a lake greater than 50 acres in size which has no boat ramp that is open to the general public.

(e) *Dry fire hydrant standards.* A dry fire hydrant may be authorized under a general permit if the activity meets all of the requirements of sub. (1)(c) with the exception that it is located in an area of special natural resource interest.

(f) *Intake or outfall structure standards.* 1. An intake or outfall structure may be authorized under a general permit if the activity meets all the requirements of sub.(1)(d) with the exception that it is located in an area of special natural resource interest.

2. To protect fish habitat during spawning seasons, the intake or outfall structure may not be constructed during the following time periods:

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

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

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

d. The applicant may request that the requirements in this subd. 2.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 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.

3. 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 the project plans to meet the requirements of this subd. 3.b, the modified plans shall be submitted before the department can consider the application complete or issue a general permit.

(g) *Pilings standards.* Pilings may be authorized under a general permit if the activity meets all the requirements of sub. (1)(e) with the exception that it is located in an area of special natural resource interest.

(h) Activities which do not meet the standards in par. (c), (d), (e), (f) or (g) 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 miscellaneous structure which is not exempt under s. NR 329.04(1), is not authorized by a general permit under s. NR 329.04(2), 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 miscellaneous structure meeting the standards in s. 30.12(3m), Stats., may be authorized under an individual permit.

(4) **EXISTING PERMITS.** A structure regulated under this chapter 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 329.05 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 may 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 boat ramp, dry fire hydrants, ford, intake or outfall structure or pilings 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 3. 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 1 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 August 16, 2004.

Dated at Madison, Wisconsin

8/17/04

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By


Scott Hassett, Secretary

(SEAL)

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

The Wisconsin Natural Resources Board proposes an order to repeal NR 340.02(2), (8) and (19) and to create ch. NR 341 related to regulation of grading on the bank of a navigable waterway.

FH-21-04(E)

Analysis Prepared by the Department of Natural Resources

Statutory Authority: ss. 30.19(1g)(c), (1d), (1m), (3r)(a)(2) and (4), 227.11(2) and 227.24, Stats.
Statutes Interpreted: ss. 30.19(1g)(c), (1d), (1m), (3r)(a)(2) and (4), 227.11(2) and 227.24, Stats.

Rule Analysis: The rule determines what constitutes a bank for priority navigable waterways and navigable waterways; establishes criteria defining those activities needing a grading permit for grading sites located on the bank of a navigable waterway; and specifies conditions under which individual permit coverage is required. This rule recognizes the similarity between the requirements of a grading permit and the requirements of a ch. NR 216 stormwater construction site discharge permit. This rule specifies permit requirements necessary to protect public health, safety, welfare, rights and interest and to protect riparian landowner rights and property.

Three definitions from NR 340 are repealed to reflect statutory changes.

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 – The Minnesota DNR regulates grading from the ordinary high water mark down to the stream. For Minnesota, the ordinary high water mark is equivalent to the top of the bank. There is additional authority if the area above the ordinary high water mark is a wetland. Then the Board of Water and Soil Resources has jurisdiction. The MPCA or the county zoning department issues permits for land disturbing construction activity of one or more acres. Because of the jurisdictional difference in the definition of bank, Minnesota is less protective than Wisconsin.

Michigan – The Michigan jurisdiction covers any earth change (removal of vegetation) greater than 225 square feet within 500 feet landward of a lake or stream. The water level at the time of construction is the point from which the 500 feet is measured. The county issues an individual permit for this activity and if a project receives this individual soil erosion permit then the land disturbing construction site permit of one or more acres is automatic. This rule has been in place since the 1970s. Michigan has a broader jurisdiction for control of grading sites near navigable streams and is therefore more protective than Wisconsin.

Iowa – The Iowa DNR regulates from the ordinary high water mark downward to the navigable stream with an individual permit. They use a sovereign lands construction permit for "meandered streams" defined by the federal government for public ownership and navigation rights. This is a separate permit process from the stormwater permit process for land disturbing construction activity, which Iowa also administers. Because of their limited jurisdiction above the ordinary high water mark, Iowa is less protective than Wisconsin.

Illinois – The Illinois DNR regulates construction within public bodies of water and within the floodway of streams draining 10 square miles or more in rural areas and one square mile or more in urban areas.