

The floodway dimension is based on maps or is done in the field for unmapped areas. The purpose of the permit is to protect structures from flood damage and to maintain the flood flow conditions. They administer general, statewide and individual permits. Illinois also administers the stormwater permit program in accordance with Federal Phase II, using general permits. Illinois' jurisdiction is not as broad as Wisconsin's and therefore less protective.

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SECTION 1. NR 340.02(2), (8) and (19) are repealed.

SECTION 2. Chapter NR 341 is created to read:

**Chapter NR 341  
GRADING ON THE BANK OF NAVIGABLE WATERWAYS**

**NR 341.01 Purpose.** The purpose of this chapter is to establish criteria defining those activities needing a grading permit for grading sites as required by s. 30.19(1g)(c), Stats.; and to specify permit requirements necessary to protect public rights and interest and to protect riparian rights for grading sites regulated under this chapter.

**NR 341.02 Applicability. (1) GRADING SITES.** This chapter applies to activities regulated under s. 30.19(1g)(c), Stats. An application for grading shall be filed with the department pursuant to ch. NR 310 by any person that intends to grade or remove soil from the bank of any navigable waterway where the area exposed by the grading or removal will exceed 10,000 square feet on the surface of the bank as determined in s. NR 341.035. This includes areas that are part of a larger common plan of development or sale where multiple separate and distinct grading activities may be taking place at different times on different schedules, but under one plan, such that the total area exposed by grading or removal will exceed 10,000 square feet on the bank. An applicant for a grading permit regulated by this chapter shall comply with all applicable provisions of this chapter and the appropriate permit issued pursuant to this chapter.

**(2) NR 216 CONSTRUCTION PERMITS.** Sites in compliance with a construction site stormwater discharge permit administered under subch. III of ch. NR 216 and also meeting the conditions of s. NR 341.08 shall be deemed to be in compliance with the provisions of this chapter.

**(3) LOCAL ADMINISTRATION OF NR 216.** Sites in compliance with the terms of an authorized local program for the administration of construction site stormwater discharge permits under subch. III of ch. NR 216, and consistent with the conditions of s. NR 341.08 as well as procedural requirements agreed to in writing between the department and the municipality shall be deemed to be in compliance with the provisions of this chapter.

**(4) EXEMPTIONS.** This chapter does not apply to:

- (a) The construction or repair of any public highway.
- (b) Any agricultural use of land.
- (c) An activity that affects a navigable inland lake that is located wholly or partly in any county having a population of 750,000 or more.
- (d) Any activity that affects a portion of Lake Michigan, Lake Superior or a navigable stream that is located within a county having a population of 750,000 or more.

Note: The landowner of a site exempt under pars. (c) and (d) is still required to submit a notice of intent under subch. III of ch. NR 216 for land disturbing construction activity of one or more acres.

**NR 341.03 Definitions.** For the purposes of this chapter the following definitions apply:

(1) "Agricultural land use" means planting, growing, cultivating and harvesting of crops for human or livestock consumption, pasturing or yarding of livestock, sod farms and beekeeping. This definition does not include the construction of structures such as barns, manure storage facilities or barnyard runoff control systems.

Note: This definition is equivalent to the definition in s. 30.40(1), Stats., and differs from the definition in chs. NR 151 and 216 only in that beekeeping is included and tree nurseries are not included.

(2) "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: Section 30.01(1am), Stats., provides that "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.
- (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.

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

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

(4) "Final stabilization" means that all land disturbing construction activities at the grading site have been completed and that a uniform perennial vegetative cover has been established with a density of at least 70% of the cover for the unpaved areas and areas not covered by permanent structures or that employ equivalent permanent stabilization measures.

(5) "Grading" means the physical disturbance of the land surface by the addition, removal or redistribution of soil.

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

(7) "Land disturbing construction activity" means any man-made alteration of the land surface resulting in a change in topography or existing vegetative or non-vegetative soil cover that may result in stormwater runoff and lead to increased soil erosion and movement of sediment into waters of the state. Land disturbing construction activity includes clearing and grubbing, demolition, excavating, pit trench dewatering, filling and grading activities.

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

(9) "Ordinary high water mark" means the point on the bank 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.

(10) "Priority navigable waterway" has the meaning in s. 30.19(1b)(c), Stats., and s. NR 1.07, and means any of the following:

- (a) Areas of special natural resource interest as defined in s. NR 1.05.
- (b) Lakes less than 50 acres in size.
- (c) Locations containing public rights features as defined in s. NR 1.06.

(11) "Stabilize" means the process of making a site steadfast or firm, minimizing soil movement by the use of practices such as mulching and seeding, sodding, landscaping, paving, graveling or other appropriate measures.

(12) "Total project area" means the area of land disturbing construction activity both within and outside of the defined bank, if it is part of the same project.

**NR 341.035 Bank determination. (1) DETERMINATION OF THE BANK.** For purposes of establishing jurisdiction under s. 30.19, Stats., the bank of a navigable waterway shall be determined as follows:

(a) *Non-priority navigable waterways.* For navigable waterways that are not priority navigable waterways, the bank is a minimum distance of 75 feet landward from the ordinary high water mark. However, if at 75 feet or less from the ordinary high water mark the slope is 12% or greater, the bank shall extend further landward until the slope of the land becomes less than 12%, provided the slope is less than 12% for more than 50 feet.

(b) *Priority navigable waterways.* For priority navigable waterways, the bank is a minimum distance of 300 feet landward from the ordinary high water mark. However, if at 300 feet or less from the ordinary high water mark the slope is 10% or greater, the bank shall extend further landward until the slope of the land becomes less than 10%, provided the slope is less than 10% for more than 50 feet.

(c) *Complete interruption.* Notwithstanding pars. (a) and (b), the bank may not include any areas where the slope or drainage of the land into the navigable waterway is completely interrupted. Completely interrupted means all of the following:

1. Runoff from the area flows through a stable, undisturbed, vegetated area for at least 150 feet of land surface before reaching any waters of the state other than groundwater.

2. The condition in subd. 1. is preexisting and will remain in the post-construction condition.

(2) **MEASUREMENTS.** For purposes of establishing jurisdiction under s. 30.19, Stats., the measurement of the bank of a navigable waterway shall be determined as follows:

(a) The bank distance shall be measured on a horizontal plane.

(b) Slope shall be measured along the surface flow path.

(c) Area of bank disturbance shall be calculated on the surface of the land and shall include all the disturbed area between the ordinary high water mark and the bank as defined in sub. (1).

**NR 341.04 Grading proposal.** The following information shall be submitted for a grading proposal:

(1) **OWNERSHIP.** A copy of the deed, lease, land contract or other document showing ownership.

(2) **PHOTOS.** Photographs that clearly show the existing project area with a size reference.

(3) **PERMISSION.** Permission from landowner to enter the site.

(4) **PLANS.** Plan drawing sheet.

(5) **DESCRIPTION.** A narrative description of the grading proposal describing:

(a) The project purpose.

- (b) Methods, materials and equipment to be used.
- (c) A construction schedule and sequence of work.
- (d) Erosion control and stormwater management plans in accordance with ss. NR 341.05 and 341.06.
- (e) Site map in accordance with s. NR 341.05(2).

**NR 341.05 Erosion control plan requirements. (1) SITE-SPECIFIC PLAN.** Any person required to submit an application for grading under this chapter shall develop a site specific erosion control plan in accordance with s. NR 216.46.

**(2) SITE MAP REQUIREMENTS.** Each grading site map shall include all of the following:

- (a) Existing topography and drainage patterns, roads, waterways, wetlands and floodplain boundaries.
- (b) Two foot pre- and post-construction contours for project sites of one acre or more.
- (c) Location, description and elevation of a reference benchmark , i.e., permanent vertical reference.
- (d) Horizontal and vertical scale and north arrow.
- (e) Approximate identification of the ordinary high water mark.
- (f) Area between the grading project and the water body to be left undisturbed.
- (g) Boundaries of the construction site, i.e., lateral extent of land disturbing construction activity.
- (h) Drainage patterns and approximate slopes anticipated after major grading activities, including the existing and proposed slope of the bank and the water level of the existing waterway.
- (i) Area of soil disturbance in square feet.
- (j) Volume of earth to be added or removed in cubic yards.
- (k) Location of any disposal area for dredged or excavated materials.
- (L) Location of major structural and non-structural controls identified in the erosion control plan.
- (m) Location of areas where stabilization practices will be employed.
- (n) Areas that will be vegetated following land disturbing construction activities.
- (o) A vegetation plan that provides for a self-sustaining vegetative cover of at least 70% for all pervious areas, and is sufficient to provide for bank stability, maintenance of fish habitat and filtering of pollutants from upslope overland flow areas under sheet flow conditions.
- (p) Areas used for infiltration of post-construction stormwater runoff.
- (q) An alphanumeric or equivalent coordinate system for the entire grading site for sites of one acre or more.

(r) Cross sections of pre- and post-construction contours, sufficient to show slope variability across the site with a minimum of one for every 50 feet of shoreline frontage. If the site is uniform, only one cross section is necessary.

Note: Many of the requirements for a grading project site map are identical to the construction site map requirements of s. NR 216.46. A site map prepared to meet the requirements of s. NR 216.46 will need to add the information requested in pars. (b), (e), (h), (o) and (r).

**(3) EROSION AND SEDIMENT CONTROL BEST MANAGEMENT PRACTICES.** The erosion control plan shall include a description of appropriate erosion and sediment control best management practices that will be installed and maintained at the grading site to prevent pollutants from reaching waters of the state. The erosion control plan shall clearly describe the appropriate erosion and sediment control best management practices for each major land disturbing construction activity and the timing during the period of land disturbing construction activity that the erosion and sediment control best management practices will be implemented. The erosion and sediment control best management practices shall be designed in accordance with s. NR 216.46(6).

**NR 341.06 Stormwater management plan requirements.** Pollution caused by stormwater discharges from the grading site after construction is completed, including rooftops, parking lots, roadways and the maintenance of grassed areas, shall be addressed by a stormwater management plan for post-construction sites in accordance with s. NR 216.47. A stormwater management plan shall be developed prior to submitting an application for grading to the department and implemented upon final stabilization of the grading site.

**NR 341.07 Construction site inspections and maintenance.** Any person required to submit an application for grading under this chapter shall inspect and maintain practices in accordance with s. NR 216.48(4).

**NR 341.08 General permit for project sites of one acre or more. (1) PROCEDURES.**

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

Note: Where there is overlapping jurisdiction between chs. NR 216 and this chapter, the department will develop consolidated procedures so that only one submittal will be required.

(b) If the department determines that a grading 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 grading project avoids impacts to the endangered or threatened species in accordance with s. 29.604, Stats.

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

(c) If the applicant modifies their grading 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.

**(2) APPLICABLE ACTIVITIES.** A grading project that meets the requirements in subs. (3), (4) and (5) shall be eligible for general permit coverage under ss. 30.19(3r) and 30.206, Stats.

**(3) STANDARDS.** A grading project may be authorized under this general permit if it meets all of the following requirements:

(a) *Size.* The total project area is one acre or greater.

(b) *Performance standards.* The grading project meets the stormwater performance standards of ss. NR 151.11 and 151.12 for stormwater discharges from land disturbing construction activities for non-transportation projects and ss. NR 151.23 and 151.24 for transportation projects.

Note: The department maintains a list of technical standards that it has determined adequate and effective for designing best management practices to control erosion and sediment runoff. Contact the department storm water program in the Bureau of Watershed Management at (608) 267-7694 to obtain a copy of this list or visit the department's stormwater website at [www.dnr.wi.gov/org/water/wm/nps/stormwater.htm](http://www.dnr.wi.gov/org/water/wm/nps/stormwater.htm).

(c) *Buffers on lakes and streams.* The grading does not disturb an existing vegetated area in accordance with the distances in s. NR 151.12(5)(d)1.a. to c. for protective areas around lakes or streams. In the absence of a protective area, the vegetative cover may not be disturbed for 35 feet landward from the ordinary high water mark. Construction or land disturbance within this buffer may occur for an activity that is otherwise authorized under ch. 30 or 31, Stats., exempted under ch. 30, Stats., or is a stormwater best management practice designed to comply with ch. NR 151 or 216.

Note: For example, a grading project including placement of a road and culvert to cross a navigable waterway is not excluded from eligibility for this general permit if the culvert is authorized under ch. 30, Stats. This section does not prohibit a local ordinance from being more restrictive.

(d) *Buffers on wetlands.* The grading does not disturb an existing vegetated area in accordance with the distances in s. NR 151.12(5)(d)1.a. or d. to f. for protective areas around wetlands. Construction or land disturbance within this buffer, but not within the wetland, may occur for a stormwater best management practice designed to comply with ch. NR 151 or 216.

(e) *Spawning season.* To protect fish habitat during spawning seasons, the grading site shall be stabilized and no new grading initiated within 75 feet of the following waterways, during the time period specified:

1. For trout streams identified under s. NR 1.02(7) and perennial tributaries to those trout streams, September 15 through December 15.
2. For all waters not identified in subd. 1. and located south of State Highway 29, March 15 through May 15.
3. For all waters not identified in subd. 1. and located north of State Highway 29, April 1 through June 1.
4. The applicant may request that the requirements in subd. 1., 2. or 3. 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.

Note: If grading work occurs over the winter and vegetation has not been established to meet this requirement, other stabilization measures such as mulch or erosion control matting shall be required.

(f) *Elevation change.* The difference in elevation between pre- and post-construction contours does not exceed 5 feet within the bank area, except for areas immediately adjacent to exposed or walkout basements where the difference in elevation between pre- and post-construction contours may not exceed 10 feet within the bank area.

Note: This section does not prohibit a local ordinance from being more restrictive.

(g) *Slope.* The grading may not disturb or create a slope that exceeds 20% within the bank area.

(h) *Revegetation*. The vegetation plan required in s. NR 341.05(2)(o) shall be implemented and monitored for one year after project completion. During the monitoring period, the grading site shall be inspected regularly, and any areas requiring additional stabilization or re-vegetation shall be addressed to ensure final stabilization. One year after project completion, a report and photographs shall be submitted to the department to demonstrate that the grading site is stabilized. If after one year, final stabilization has not been achieved or maintained, the department may require the landowner to submit a revised vegetation plan to the department, and implement the revised plan.

(i) *Designated waters*. The grading site is not located in or adjacent to any of the following:

1. A state natural area designated or dedicated under ss. 23.27 to 23.29, Stats.
2. A federal wild and scenic river designated under s. 30.27, Stats., or 16 USC 1274 (a)(8).
3. A state wild river designated under s. 30.26, Stats.
4. A river, stream or creek identified as an outstanding or exceptional resource water under s. 281.15, Stats.

(j) For grading projects on lakes identified as an outstanding or exceptional resource water under s. 281.15, Stats., upon receipt of a general permit application, the department shall conduct a site inspection.

**(4) EROSION CONTROL REQUIREMENTS.** Any person required to submit an application for grading under this chapter shall develop a site specific erosion control plan and they shall implement and maintain as appropriate all best management practices specified in the erosion control plan from the start of land disturbing construction activities until final stabilization of the grading site. The erosion and sediment control best management practices shall be designed in accordance with s. NR 216.46(6).

**(5) STORMWATER MANAGEMENT REQUIREMENTS.** Any person required to submit an application for grading under this chapter shall develop a site specific stormwater management plan and they shall implement and maintain as appropriate all best management practices specified in the stormwater management plan upon final stabilization of the grading site. The stormwater management best management practices shall be designed in accordance with s. NR 216.47.

**(6) PLANS PART OF PERMIT.** The general permit shall require that the applicant comply with submitted project plans or modified project plans as a condition of the permit.

**(7) NON-COMPLIANCE WITH GENERAL PERMIT.** Activities which do not meet the requirements in subs. (3), (4) and (5) or a general permit issued by the department shall require an individual permit.

**(8) INDIVIDUAL PERMIT.** The department has authority under s. 30.206 (3r), Stats., to require an individual permit in lieu of a general permit.

**NR 341.085 General permit for project sites of less than one acre. (1) PROCEDURES. (a)** General permits shall be processed according to the procedures in ch. NR 310.

(b) If the department determines that a grading 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 grading project avoids impacts to the endangered or threatened species in accordance with s. 29.604, Stats.
2. The grading project has received an incidental take authorization under s. 29.604, Stats.

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

(d) Applicants shall submit a grading proposal in accordance with s. NR 341.04, except for the stormwater requirements of s. NR 341.06.

Note: Requirements for a stormwater management plan in s. NR 341.04(5)(d) are covered under s. NR 341.085 (5).

(2) **APPLICABLE ACTIVITIES.** A grading project that meets the requirements in subs. (3), (4) and (5) shall be eligible for general permit coverage under ss. 30.19(3r) and 30.206, Stats.

(3) **STANDARDS.** A grading project may be authorized under this general permit if it meets all of the following requirements:

(a) *Size.* The total project area is less than one acre.

(b) *Performance standards.* The grading project meets the stormwater performance standards of ss. NR 151.11 and 151.12 for stormwater discharges from land disturbing construction activities for non-transportation projects and ss. NR 151.23 and 151.24 for transportation projects.

Note: The department maintains a list of technical standards that it has determined adequate and effective for designing best management practices to control erosion and sediment runoff. Contact the department storm water program in the Bureau of Watershed Management at (608) 267-7694 to obtain a copy of this list or visit the department's stormwater website at [www.dnr.wi.gov/org/water/wm/nps/stormwater.htm](http://www.dnr.wi.gov/org/water/wm/nps/stormwater.htm).

(c) *Buffers on lakes and streams.* The grading does not disturb an existing vegetated area in accordance with the distances in s. NR 151.12(5)(d)1.a. to c. for protective areas around lakes or streams. In the absence of a protective area, the vegetative cover may not be disturbed for 35 feet landward from the ordinary high water mark. Construction or land disturbance within this buffer may occur for an activity that is otherwise authorized under ch. 30 or 31, Stats., exempted under ch. 30, Stats., or is a stormwater best management practice designed to comply with ch. NR 151 or 216.

Note: For example, a grading project including placement of a road and culvert to cross a navigable waterway is not excluded from eligibility for this general permit if the culvert is authorized under ch. 30, Stats. This section does not prohibit a local ordinance from being more restrictive.

(d) *Buffers on wetlands.* The grading does not disturb an existing vegetated area in accordance with the distances in s. NR 151.12(5)(d)1.a. or d. to f. for protective areas around wetlands. Construction or land disturbance within this buffer, but not within the wetland, may occur for a stormwater best management practice designed to comply with ch. NR 151 or 216.

(e) *Spawning season.* To protect fish habitat during spawning seasons, the grading site shall be stabilized and no new grading initiated within 75 feet of the following waterways, during the time period specified:

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

2. For all waters not identified in subd. 1. and located south of State Highway 29, March 15 through May 15.

3. For all waters not identified in subd. 1. and located north of State Highway 29, April 1 through June 1.



4. The applicant may request that the requirements in subd. 1., 2. or 3. 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.

Note: If grading work occurs over the winter and vegetation has not been established to meet this requirement, other stabilization measures such as mulch or erosion control matting shall be required.

(f) *Elevation change*. The difference in elevation between pre- and post-construction contours does not exceed 5 feet within the bank area, except for areas immediately adjacent to exposed or walkout basements where the difference in elevation between pre-and post-construction contours may not exceed 10 feet within the bank area.

Note: This section does not prohibit a local ordinance from being more restrictive.

(g) *Slope*. The grading may not disturb or create a slope that exceeds 20% within the bank area.

(h) *Revegetation*. The vegetation plan required in s. NR 341.05(2)(o) shall be implemented and monitored for one year after project completion. During the monitoring period, the grading site shall be inspected regularly, and any areas requiring additional stabilization or re-vegetation shall be addressed to ensure final stabilization. One year after project completion, a report and photographs shall be submitted to the department to demonstrate that the grading site is stabilized. If after one year, final stabilization has not been achieved or maintained, the department may require the landowner to submit a revised vegetation plan to the department, and implement the revised plan.

(i) *Designated waters*. The grading site is not located in or adjacent to any of the following:

1. A state natural area designated or dedicated under ss. 23.27 to 23.29, Stats.
2. A federal wild and scenic river designated under s. 30.27, Stats., or 16 USC 1274 (a)(8).
3. A state wild river designated under s. 30.26, Stats.
4. A river, stream or creek identified as an outstanding or exceptional resource water under s. 281.15, Stats.

(j) For grading projects on lakes identified as an outstanding or exceptional resource water under s. 281.15, Stats., upon receipt of a general permit application the department shall conduct a site inspection.

**(4) EROSION CONTROL REQUIREMENTS.** Any person required to submit an application for grading under this chapter shall develop a site specific erosion control plan and they shall implement and maintain as appropriate all best management practices specified in the erosion control plan from the start of land disturbing construction activities until final stabilization of the grading site. The erosion and sediment control best management practices shall be designed in accordance with s. NR 216.46(6).

**(5) STORMWATER MANAGEMENT REQUIREMENTS.** Pollution caused by stormwater discharges from the grading site after construction is completed, including rooftops, parking lots, roadways and the maintenance of grassed areas, shall be addressed by a stormwater management plan for post-construction sites. Any person required to submit an application for grading under this chapter shall develop a site specific stormwater management plan and they shall implement and maintain as appropriate all best management practices specified in the stormwater management plan upon final stabilization of the grading site. The stormwater management plan shall to the maximum extent practicable direct runoff from impervious surfaces onto pervious surfaces. Examples may include directing

downspouts onto lawns and away from pavement, driveways sloped onto lawns, and avoidance of piping or channelizing flow from impervious areas into waters of the state.

**(6) PLANS PART OF PERMIT.** The general permit shall require that the applicant comply with submitted project plans or modified project plans as a condition of the permit.

**(7) NON-COMPLIANCE WITH GENERAL PERMIT.** Activities which do not meet the requirements in sub. (3), (4) or (5) or a general permit issued by the department shall require an individual permit.

**(8) INDIVIDUAL PERMIT.** The department has authority under s. 30.206 (3r), Stats., to require an individual permit in lieu of a general permit.

**NR 341.09 Individual permits. (1) PROCEDURES.** Individual permits shall be processed according to the procedures in ch. NR 310.

**(2) GRADING STANDARDS. (a)** A grading project that meets the standards in s. 30.19(4), Stats., may be authorized under an individual permit.

**(b)** For grading projects requiring an individual permit under s. NR 341.08(3)(i)4. or 341.085(3)(i)4., on receipt of an individual permit application the department may evaluate whether the project can be authorized under a general permit, based on a site inspection or prior department knowledge of the project site.

**NR 341.10 Enforcement. (1)** Noncompliance with the provisions of ss. 30.19 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 authorized by 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. 30.19 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 grade on the bank of a navigable waterway where the activity is not 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 I of the Wisconsin Constitution.

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.
- 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 Act 118 will 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 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 May 10, 2004.

Dated at Madison, Wisconsin 12 May 2004

STATE OF WISCONSIN  
DEPARTMENT OF NATURAL RESOURCES

By Scott Hassett  
Scott Hassett, Secretary

(SEAL)

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

The Wisconsin Natural Resources Board proposes an order to repeal Natural Resources Board Order FH-22-04(E), repeal NR 340.02(18) and (20), and to create ch. NR 343 related to regulation of construction, dredging, and enlargement of an artificial water body.

FH-63-04(E)

**Analysis Prepared by the Department of Natural Resources**

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

Statutes Interpreted: ss. 30.19(1g)(a) and (am), (1m), (3r)(a)(1) and 227.11(2), Stats.

Explanation of Agency Authority:

The Department has authority under ss. 30.19 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 general permits with appropriate conditions, and to establish standards for projects that may be authorized under a general or an individual permit.

This rule establishes criteria defining those activities needing a permit for the construction, dredging and enlargement of an artificial water body. This rule recognizes artificial water bodies constructed for the purpose of meeting the performance standards under ch. NR 151 and allows such artificial water bodies to be eligible for a general permit under this chapter with several design standards. This rule also specifies permit requirements necessary to protect public health, safety, welfare, rights and interest and to protect riparian landowner's rights and property.

The second emergency order differs from the first in that applicants for the stormwater pond general permit have an opportunity to demonstrate in their application that the proposed project will not affect a public rights feature, rather than that the pond must be more than 500 feet from a public rights feature.

Two 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.

Comparison with Adjacent States:

Minnesota – Minnesota regulates ponds in wetlands if they are replacement ponds governed under the Wetland Conservation Act. The counties issue the permit, with involvement from the Board of Water and Soil Resources. They also administer the stormwater permit for construction sites of one or more acres, which would cover some pond construction outside of wetlands for erosion control. Because their permitting is limited to wetlands they are less protective for public trust concerns. If the site were one or more acres then they would meet the same stormwater requirements as Wisconsin for erosion control.

Michigan – The soil erosion permit that covers one or more acres and any construction within 500 feet will cover ponds within 500 feet of a navigable stream. If the pond is connected below the ordinary high-water mark or if it connects within 500 feet because of groundwater connections, then they also have jurisdiction. There are additional requirements for placement of dredge material if the pond is located in a wetland. Because of permit consolidation at the state level, the applicant can complete one form that will go to the three different agencies potentially involved in permitting. Where possible, permit coverage is combined. Michigan's permitting of ponds is fairly comparable to Wisconsin's.

Iowa – Iowa has permits for construction in a floodplain, for larger drainage areas, that they administer jointly with the Corps of Engineers. The pond must be connected. There may also be a requirement for a dam permit if the pond is built up rather than excavated. Unconnected ponds are not regulated. Pond permits are consolidated at the state level to cover construction, wetland and floodplain jurisdiction. Because unconnected ponds are not regulated, the protection is less in Iowa than in Wisconsin.

Illinois – While the state regulates activities in the floodway, there are no specific rules to govern ponds unless they require dams. Floodways are mapped or if unmapped, the field staff makes the determination. There is no specific recognition for wetland construction. Illinois does administer the Federal Phase II construction permit program and may capture ponds of one or more acres for erosion control. Illinois is less protective than Wisconsin.

Summary of Factual Data and Analytical Methodologies: Standards hydrologic and hydraulic methods are the basis for standards related to pond discharge. Substantial published scientific literature on fish and wildlife response to riparian zone conditions is the basis for the buffer and connection requirements. Substantial published scientific literature on wetland restoration is the basis for the standards in NR353 incorporated by reference.

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 Emergency Order No. FH-22-04(E) is repealed.

SECTION 2. NR 340.02(18) and (20) are repealed.

SECTION 3. Chapter NR 343 is created to read:

**Chapter NR 343  
Ponds and Artificial Waterways**

**NR 343.01 Purpose.** The purpose of this chapter is to establish criteria defining those activities needing a permit for a pond or artificial water body as required by s. 30.19(1g)(a) and (am), Stats.; and to

specify permit requirements necessary to protect public health, safety, welfare, rights and interest and to protect riparian landowner's rights and property for pond sites regulated under this chapter.

**NR 343.02 Applicability. (1) POND OR ARTIFICIAL WATER BODY SITES.** This chapter applies to activities regulated under s. 30.19(1g)(a) and (am), Stats. An application to construct, dredge or enlarge any part of a pond or artificial water body shall be filed with the department pursuant to ch. NR 310 by any person for any artificial water body that is either:

(a) Connected to a navigable waterway.

(b) Located within 500 feet of the ordinary high water mark of an existing navigable waterway including a stormwater management pond that does not discharge into a navigable waterway except as a result of storm events.

(2) COMPLIANCE. Any person responsible for the site regulated by this chapter shall comply with all applicable provisions of this chapter and the appropriate permit issued pursuant to this chapter.

(3) EXEMPTIONS. This chapter does not apply to:

(a) The construction or repair of any public highway.

(b) Any agricultural use of land.

(c) An activity that affects a navigable inland lake that is located wholly or partly in any county having a population of 750,000 or more.

(d) Any activity that affects a portion of Lake Michigan, Lake Superior or a navigable stream that is located within a county having a population of 750,000 or more.

(e) Any work required to maintain the original dimensions of an enlargement of an artificial water body done pursuant to a permit or legislative authorization under s. 30.19 (1g)(a) or (am), Stats., provided appropriate erosion control practices are implemented and maintained and dredge spoils are disposed of in an appropriate manner and location.

(f) An infiltration device designed to meet the performance standards of s. NR 151.12(5)(c) or to meet a local ordinance that requires volume reduction and not located in a wetland or existing perennial watercourse.

Note: The landowner of a site exempt under pars. (c) and (d) is still required to submit a notice of intent under subch. III of ch. NR 216 for land disturbing construction activity of one or more acres.

**NR 343.03 Definitions.** For the purposes of this chapter the following definitions are applicable:

(1) "Agricultural land use" means planting, growing, cultivating and harvesting of crops for human or livestock consumption, pasturing or yarding of livestock, sod farms and beekeeping. This definition does not include the construction of structures such as barns, manure storage facilities or barnyard runoff control systems.

Note: This definition is equivalent to the definition in s. 30.40(1), Stats., and differs from the definition in chs. NR 151 and 216 only in that beekeeping is included and tree nurseries are not included.

(2) "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: Section 30.01(1am), Stats., provides that "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.  
(bm) A surface water identified as an outstanding or exceptional resource water under s.281.15.  
(c) An area that possesses significant scientific value, as identified by the department.  
Information and lists can be obtained by contacting the department, or found on the department's website at [www.dnr.wi.gov](http://www.dnr.wi.gov), under the topic "Waterway and Wetland Permits".

(3) "Artificial water body" means a proposed or existing body of water that does not have a history of being a lake or stream or of being part of a lake or stream.

(4) "Connected to a navigable waterway" means any artificial waterbody connected by means of enlargement or by a natural or artificial channel or drainage course, or an open or closed conduit, any of which tend to confine and direct flow into the existing navigable waterway.

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

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

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

(8) "Land disturbing construction activity" means any man-made alteration of the land surface resulting in a disturbance to soil or existing vegetative or non-vegetative soil cover that may result in stormwater runoff and lead to increased soil erosion and movement of sediment into waters of the state. Land disturbing construction activity includes clearing and grubbing, demolition, excavating, pit trench dewatering, filling and grading activities.

(9) "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.

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

(11) "Stormwater" means runoff from precipitation including rain, snow, ice melt or similar water that moves on the land surface via sheet or channelized flow.

(12) "Stormwater management pond" means any artificial water body designed to specifications generally accepted to reduce the water quantity or water quality impacts of stormwater.

(13) "Storm event" means any amount of precipitation equal to or greater than 0.01 inches with a minimum interevent period of 6 hours.

**NR 343.04 Pond or artificial water body proposal.** The following information shall be submitted for a pond or artificial water body proposal:

(1) OWNERSHIP. A copy of the deed, lease, land contract or other document showing ownership.

(2) PHOTOS. Photographs that clearly show the existing project area with a size reference.

(3) PERMISSION. Permission from landowner to enter the site.

(4) PLANS. Plan drawing sheet.

(5) DESCRIPTION. A narrative description of the pond or artificial water body proposal describing:

- (a) What the project is.
- (b) Methods, materials and equipment to be used.
- (c) A construction schedule and sequence of work.
- (d) Erosion control plan in accordance with s. NR 216.46.
- (e) Site map in accordance with s. NR 343.05(2).

**NR 343.05 Erosion control plan requirements. (1) SITE-SPECIFIC PLAN.** Any person required to submit an application for a pond or artificial water body under this chapter shall develop a site specific erosion control plan in accordance with s. NR 216.46(1) to (4).

**(2) SITE MAP REQUIREMENTS.** Each pond or artificial water body site map shall include all of the following:

- (a) Existing topography and drainage patterns, roads, waterways and floodplain boundaries.
- (b) Location, description and elevation of a reference benchmark (permanent vertical reference).
- (c) Horizontal and vertical scale and north arrow.
- (d) Approximate identification of the ordinary high water mark.
- (e) Area between the project site and the water body to be left undisturbed.
- (f) Boundaries of the construction site, i.e., lateral extent of land disturbing construction activity.
- (g) Drainage patterns and approximate slopes anticipated after major grading activities, including the existing and proposed slope of the bank and the water level of the existing waterway.
- (h) Area of soil disturbance in square feet and volume of earth to be added or removed in cubic yards.
- (i) Location of any disposal area for dredged or excavated materials.
- (j) Location of major structural and non-structural controls identified in the erosion control plan.
- (k) Location of areas where stabilization practices will be employed.
- (L) Areas that will be vegetated following land disturbing construction activities.
- (m) Area and location of wetland acreage on the pond or artificial water body site and locations where stormwater is discharged to a surface water or wetland within one-quarter mile downstream of the pond or artificial water body site.
- (n) Areas used for infiltration of post-construction stormwater runoff.
- (o) An alphanumeric or equivalent coordinate system for the entire construction site.

**(3) EROSION AND SEDIMENT CONTROL BEST MANAGEMENT PRACTICES.** The erosion control plan shall include a description of appropriate erosion and sediment control best management practices that will be installed and maintained at the pond or artificial water body site to prevent pollutants from reaching waters of the state. The erosion control plan shall clearly describe the appropriate erosion and sediment control best management practices for each major land disturbing construction activity and the timing



during the period of land disturbing construction activity that the erosion and sediment control best management practices will be implemented. The erosion and sediment control best management practices shall be designed in accordance with s. NR 216.46(6).

**NR 343.06 Construction site inspections and maintenance.** Any person required to submit an application for pond or artificial water body under this chapter shall inspect and maintain practices in accordance with s. NR 216.48(4).

**NR 343.07 General permit. (1) PROCEDURES.** General permits shall be processed according to the procedures in ch. NR 310.

**(2) APPLICABLE ACTIVITIES.** A pond or artificial water body project that meets the standards in sub. (3) shall be eligible for general permit coverage under ss. 30.19(3r) and 30.206, Stats.

**(3) GENERAL PERMIT STANDARDS** The department may issue a general permit for the construction, dredging or enlargement of any part of a pond or artificial water body that meets standards in par. (a) and either par. (b), (c) or (d).

**(a) Performance standards for all pond construction under general permits.** 1. The site meets the construction site performance standards of s. NR 151.11 for land disturbing construction activities for non-transportation projects and s. NR 151.23 for transportation projects.

2. The pond or artificial water body is designed in accordance with best management practices required for stormwater discharge permits under ch. NR 216, or to meet a local ordinance for stormwater management.

**(b) Wildlife pond.** The purpose of the pond or artificial water body is wetland conservation as determined under ch. NR 353 and all standards for construction of the ponds in ch. NR 353 will be met.

**(c) Landscape pond.** The pond or artificial water body is not connected to a navigable waterway and meets the standards of subs. 1. to 6.

1. Separation distance. No portion of the berm or pond shall be any closer than 35 feet from the ordinary high water mark.

2. Plan. The pond is not part of a stormwater management plan.

3. Wetland. The pond or artificial water body is not constructed, dredged or enlarged in a wetland.

4. Excavated material. Any excavated material is not temporarily or permanently placed in a wetland, floodplain or below the ordinary high water mark of a navigable waterway and is disposed of in an upland location.

5. Mining. The pond or artificial water body is not associated with any metallic or non-metallic mining project.

6. Public rights features. The pond or artificial water body is not within 500 feet of the location of any public rights feature as defined in s. NR 1.06.

**(d) Stormwater pond.** The pond or artificial water body is a stormwater management pond that does not discharge into a navigable waterway except as a result of storm events and meets the standards in subs. 1. to 8.

1. Separation distance. The crest of the berm of the pond or artificial water body is no closer than 35 feet from the ordinary high water mark.

2. Wetlands. The pond or artificial water body is not constructed, dredged or enlarged in a wetland.

3. Thermal. The pond or artificial water body is not designed to have a permanent pool of water that discharges to a trout stream or its upstream tributaries.

4. Hydraulic connection. The pond shall not be subject to inflow from the navigable waterway up to the 10-year 24-hour rainfall event.

5. Public rights features. The pond or artificial water body will not adversely impact any public rights feature as defined in s. NR 1.06.

6. Stable outlet. The pond shall have a stable (non-erosive) connection to the navigable waterway.

7. Fish. Fish will not be reared in the stormwater pond.

8. Vegetation. The vegetation planted in areas adjacent to or disturbed during pond construction will be non-invasive, indigenous species.

(4) **INDIVIDUAL PERMIT REQUIRED.** Activities which do not meet the standards in sub. (3) or a general permit issued by the department shall require an individual permit.

**NR 343.08 Implementation of conditions of the general permit.** Any person receiving coverage under a general permit for pond or artificial water body is required to implement the conditions of ss. NR 343.04 to 343.07.

**NR 343.09 Denial or revocation of general permit.** The department may deny or revoke coverage under a general permit and require submittal of an application in accordance with ch. NR 310 for an individual permit for construction, dredging or enlargement of a pond or artificial water body, where the department has determined that the plans or site conditions do not correspond to the conditions of the general permit. The applicant of a site denied or revoked coverage under the general permit may not commence activities until an individual permit is issued.

**NR 343.10 Individual permit. (1) REQUIREMENTS.** The department may require the applicant of any pond or artificial water body site covered by a general permit issued pursuant to this chapter or ch. NR 310, to apply for and obtain an individual permit if the department has determined that conditions specific to the site require restrictions on the activity in order to prevent significant adverse impacts to public rights and interests, environmental pollution, as defined in s. 299.01(4), Stats., or material injury to the riparian rights of any riparian owner.

(2) **IN WRITING.** The decision by the department to require an individual permit under this section shall be in writing. If the department does not inform the applicant within 30 days that an individual permit will be required, the activity will be authorized by the general permit and the applicant may proceed without further notice, hearing, permit or approval if the activity is carried out in compliance with all of the conditions of the general permit.

(3) **OPTION.** A person proposing an activity for which a general permit has been issued under this chapter may request that the department issue an individual permit in lieu of seeking authorization under the general permit.

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

(5) PONDS AND ARTIFICIAL WATERWAYS. Ponds or artificial waterways meeting the standards in s. 30.19(4), Stats., may be authorized under an individual permit.

**NR 343.11 Denial or revocation of individual permit.** The department may deny or revoke coverage under an individual permit for an individual pond or artificial water body if any of the following apply based on a review of the completed notice for pond or artificial water body or other relevant information:

(1) The activity will be detrimental to the public interest.

(2) The activity will cause environmental pollution as defined in s. 299.01(4), Stats.

(3) Any enlargement connected to a navigable waterway does not comply with all of the laws relating to platting of land and sanitation.

(4) Material injury will result to the riparian rights of any riparian owners of real property that abuts any water body that is affected by the activity.

**NR 343.12 Requirement for public access.** A permit issued under this chapter to construct a pond or artificial water body and to connect it to a navigable waterway shall require that the navigable portion of the pond or artificial water body be a navigable waterway if the connecting portion is navigable.

**NR 343.13 Enforcement.** (1) Noncompliance with the provisions of ss. 30.19 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. 30.19 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 construct, dredge or enlarge any part of a pond or artificial water body connected to or within 500 feet of a navigable waterway where the activity is not 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)

ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD  
CREATING RULES

The Wisconsin Natural Resources Board proposes an order to repeal Natural Resources Board Emergency Order FH-23-04(E) and create ch. NR 345 relating to dredging in navigable waterways.

FH-64-04(E)

**Analysis Prepared by the Department of Natural Resources**

Statutory Authority: ss. 30.20(1), (1k), (1t) and (2), 227.11(2) and 227.24, Stats.

Statutes Interpreted: ss 30.20(1), (1g), (1k), (1m), (1t) and (2), Stats.

Explanation of Agency Authority:

The Department has authority under s. 30.20, Stats., to promulgate rules that establish installation practices, construction and design requirements and limitations on the location of dredging conducted under statutory exemptions. The Department has authority under ss. 30.20 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.

NR345 cross-references the rules for exempt structures where the standards for associated dredging are set. It also sets standards under which manual dredging activities are exempt.

NR345 also establishes general permits for installation of utility lines, manual dredging in areas of special natural resource interest (ASNRIs), and maintenance dredging. The standards are similar to those required for exemptions above but have some additional standards specific to the activity being conducted including compliance with ATCP rules for drainage districts.

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** – Individual permit required (joint application with Corps). Exempts dredging in water courses with total drainage area of less than 5 square miles and not trout water. Prohibits dredging in number of cases including where dredging would not provide an effective solution to the problem. Similar Information requirements and permit conditions to Wisconsin's.

**Michigan** – Individual dredging permit required for all dredging from inland lakes and streams from MDEQ (Section 404 program has been assumed by state, so state permit serves as federal permit); individual permit dredging permit required from MDNR and Corps for dredging from Great Lakes waters and connecting waterways.

**Iowa** – Individual permit (joint application with Corps) required for all dredging projects in Iowa waters. Similar information requirements. Standard Corps permit conditions.

**Illinois** – Individual permit required to dredge from navigable waters. Disposal may require separate permit from Illinois EPA. Separate dredging permit required from Corps in navigable waters of the U.S.

Summary of Factual Data and Analytical Methodologies: Substantial published scientific literature on the effects on fish, wildlife and water quality during and after physical alterations to lake and streambeds is the basis for the rule parameters. In addition, data on actual field conditions during and after such alterations from department files is applied.

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 Emergency Order FH-23-04(E) is repealed.

SECTION 2. Chapter NR 345 is created to read:

#### **CHAPTER NR 345 DREDGING IN NAVIGABLE WATERWAYS**

**NR 345.01 Purpose.** The purpose of this chapter is to establish reasonable procedures and limitations for exempt activities, general permits and individual permits for removal of material from the beds of navigable waterways as regulated under s. 30.20, 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 345.02 Applicability.** This chapter applies to removal of material from the bed of navigable waterways under ss. 30.20(1), (1g)(b), (1m), (1t) and (2), Stats. Any person that intends to remove material from the bed of a navigable waterway shall comply with all applicable provisions of this chapter and any permit issued under this chapter.

Note: For most dredging projects, the discharge of carriage return water is regulated by ch. 283, Stats., and requires a Wisconsin pollutant discharge elimination system (WPDES) permit. Similarly, for most dredging projects, the disposal of dredged material is regulated by ch. 289, Stats., and requires authorization under ch. NR 500. In accordance with 2003 Wisconsin Act 118, removal of material from non-navigable waterways is no longer regulated under s. 30.20, Stats.

**NR 345.03 Definitions.** (1) "Area of special natural resource interest" has the meaning in s. 30.01(1am), Stats, and as identified by the department in s. NR 1.05.

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

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

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

(2) "De minimus" activity means the manual dredging, for non-commercial purposes, of less than 100 square feet and less than one foot deep in a calendar year from a specific waterbody and disturbance of bottom material during the manual removal of aquatic plants that meet the requirements of s. NR. 109.06(2).

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

(4) "Dredged material" means any material removed from the bed of a navigable waterway by dredging.

(5) "Dredging" means any part of the process of the removal of material from the bed of a navigable waterways, transport of the material to a disposal, rehandling or treatment facility; treatment of the material; discharge of carriage or interstitial water; and disposal of the material.

(6) "Hazardous substance" has the meaning specified in s. 289.01(11), Stats.

Note: Notwithstanding substances that meet the definition of hazardous substances in s. 289.01(11), Stats., for the purpose of removing material from the bed of navigable streams and lakes, "hazardous substances" includes all chemicals present at concentrations at, or greater than the *threshold effect concentration* as published in Consensus Based Contaminated Sediment Evaluation (DNR 2001).

(7) "Manual dredging" means removal or disturbance of bottom material by hand or using a hand-held device without the aid of external or auxiliary power. Manual dredging is often associated with the collection of aquatic insects for bait, removal of nuisance vegetation or debris and the panning for gold or other material. For the purpose of ch. 30, Stats., manual dredging does not include "de minimus" activities as defined in sub. (2).

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

(9) "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.

(10) "Previously dredged area" means an area below the ordinary high water mark of a navigable waterway from which material was historically removed.

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

(12) "Utility crossing" means dredging by plow, vibratory plow or open trench methods, below the ordinary high water mark of a navigable waterway for the installation of cables, conduits or pipelines by an entity providing service for conveying any fluids, gases, electricity and communications or other public or private utility functions.

**NR 345.04 Dredging. (1) EXEMPTIONS.** (a) *Procedures.* Exemptions shall be processed according to the procedures in ch. NR 310.

(b) *Applicable activities.* The dredging of a farm drainage ditch which was not a navigable stream before ditching that meets the standards in par. (c), is exempt from the permit requirements of s. 30.20(1) and (2), Stats., in accordance with s. 30.20(1g)(a)1., Stats. Manual dredging that meets the standards in par. (d), is exempt from permit requirements of s. 30.20(1) and (2), Stats., in accordance with s. 30.20(1g)(b)2., Stats.

(c) Standards for dredging of a farm drainage ditch which was not a navigable stream before ditching.

1. The project is located in a navigable stream that does not have stream history.
2. The applicant has notified the department of the proposed project 10 days prior to dredging.
3. The dredging may not have a long-term adverse effect on cold-water fishery resource or may not destroy cold water or warm water fish spawning beds or nursery areas.
4. The dredged material may not be temporarily or permanently placed in a wetland, floodplain or below the ordinary high water mark of a navigable waterway.
5. The person conducting the dredging is the riparian owner or has permission of the riparian owner to remove bottom material.

(d) *Standards for manual dredging activities.* 1. The dredging operation meets the definition of manual dredging in s. NR 345.03(7).

2. The dredging 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).

3. For each riparian property, the amount of bottom material dredged from a specific waterbody may not exceed 100 square feet in surface area and one foot in depth in a calendar year.

4. The material may not contain hazardous substances as defined in s. NR 345.03(6).

5. After or during dredging, the removed material may not be temporarily or permanently placed in a wetland, floodplain or below the ordinary high water mark of a navigable waterway.

6. No fill may be placed below the ordinary high water mark of a navigable waterway.

7. Mechanical equipment may not be operated below the ordinary high water mark or on the bed of a navigable waterway.

8. Erosion control measures shall meet or exceed the standards in 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](http://www.dnr.wi.gov), under the "Runoff Management" program.

9. The applicant is the riparian owner or has permission of the riparian owner to remove bottom material.

Note: When the state is the riparian property owner, the requirements of ch. NR 45 shall be met.

(e) Standards for dredging necessary to place or maintain an exempt structure under s. 30.20(1g)(b)1., Stats., are contained in the rules that describe the standards for those exempt structures.



Note: Chapters NR 320, 323, 328 and 329 contain rules regarding various exempt activities including culvert replacement, habitat structures, riprap replacement, intake and outfall structures and dry fire hydrants.

(f) Activities which do not meet the standards in par. (c) or (d) 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) *Projects affecting threatened or endangered species.* If the department determines that a dredging 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 dredging project avoids impacts to the endangered or threatened species in accordance with s. 29.604, Stats.

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

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

(c) *Applicable activities.* Dredging that meets the standards in par. (d) or (e) are eligible for a general permit under ss. 30.20(1t)(b) and 30.206, Stats. Dredging that meets the standards in par. (f) or (g) is eligible for a general permit under ss. 30.20(1t)(a) and (am) and 30.206, Stats.

(d) *Standards for installation of utility crossings.* Dredging to install a utility crossing is eligible for a general permit subject to the following limitations:

1. The location of the utility crossing shall be located to reduce environmental impacts by minimizing the disturbance of the following: adjacent wetland corridors, bank with slopes greater than 3 to 1 and fish and wildlife habitat within the waterway.

2. To protect fish habitat during spawning seasons, the dredging may not occur during the following time periods:

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

b. For all waters not identified in this subd. 2.a. and located south of state highway 29, March 15 through May 15.

c. For all waters not identified in this subd. 2.a. and located north of state highway 29, April 1 through June 1.

d. The applicant may request that the requirement 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 dredging project, and that the local department fisheries biologist has determined that the requirements of this paragraph are not necessary to protect fish spawning for the proposed project.

3. After or during dredging, the removed material may not be temporarily or permanently placed in a wetland, floodplain or below the ordinary high water mark of a navigable waterway.

4. Manual dredging shall be conducted to minimize the re-suspension of sediment to the maximum extent practicable in accordance with the following:

a. For trout streams identified under s. NR 1.02(7) and perennial tributaries to those trout streams, total suspended solid concentrations may not exceed 40 mg/L.

b. For all waters not identified in this subd. 3.a., the total suspended solid concentrations may not exceed 80 mg/L.

5. The general permit may authorize up to 10 waterway crossings that are part of a single project.

6. The size of the open trench or plow channel may not exceed a maximum of 36 inches in width in perennial streams and 60 inches in intermittent streams where no flow is present during construction.

7. The dredging shall conform to the dimensions and elevations shown on the application.

8. 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](http://www.dnr.wi.gov), under the "Runoff Management" program.

9. All equipment used for the project shall be designed and properly sized to minimize to the extent practicable, the amount of sediment that is re-suspended.

10. Any area within 75 feet of the ordinary high water mark, where topsoil is exposed during construction shall be stabilized within 24 hours to prevent soil from being eroded and washed into the waterway.

11. During construction and installation of the utility crossing, the entire volume of stream flow shall be maintained downstream from the project site.

12. The trench excavation, filling and installation of utility crossing the below the ordinary high mark shall be completed within a 6 hour period.

13. During excavation of the trench, dredged material may be temporarily stockpiled in an upland area provided best management practices are installed to prevent the material from re-entering navigable waters.

14. The dredged material may not be temporarily or permanently placed in a wetland or below the ordinary high water mark of a navigable waterway. The dredged material may not be permanently placed in within a floodplain.

15. In perennial streams, clean, washed gravel or crushed stone or clean river stone originally removed from the dredge area, shall be used as backfill material for the dredged trench to replace the excavated material. In intermittent streams with no flow present, the originally removed material may be used as backfill material for the dredged trench if the disturbed sited is immediately stabilized.

16. When the dredging is complete, the streambed contours shall be the same as the pre-construction contours.

17. All equipment used for the project shall be adequately de-contaminated for invasive and exotic species prior to use and after use. All equipment that comes in contact with infested waters, including but not limited to tracked vehicles, barges, boats, silt or turbidity curtain, sheet pile and pumps, shall be thoroughly disinfected.

18. The applicant is the riparian owner or has permission of the riparian owner to remove bottom material.

Note: When the state is the riparian property owner, the requirements of ch. NR 45 shall be met.

(e) *Standards for manual dredging.* A general permit, subject to the following limitations may authorize manual dredging activities that do not meet the exemption standards in s. NR 345.04(1)(d).

1. The dredging operation meets the definition of manual dredging in s. NR 345.03(7).

2. To protect fish habitat during spawning seasons, the manual dredging may not occur during the following time periods:

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

b. For all waters not identified in this subd. 2.a. and located south of state highway 29, March 15 through May 15.

c. For all waters not identified in this subd. 2.a. and located north of state highway 29, April 1 through June 1.

d. The applicant may request that the requirement 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 dredging project, and that the local department fisheries biologist has determined that the requirements of this paragraph are not necessary to protect fish spawning for the proposed project.

3. The applicant shall provide information that the dredged material does not contain any hazardous substance as follows:

a. Through the collection and laboratory analysis of the dredged material in compliance with ch. NR 347; or

b. Through the review of historical dredge material information from the vicinity of the proposed project that was collected and analyzed in accordance with ch. NR 347; or

c. By assessing the potential for hazardous substances to be present based upon the characteristic of the watershed, industrial and municipal discharges to the waterbody and dredge material data from similar waterways.

4. During or after dredging, the removed material may not be temporarily or permanently placed in a wetland, floodplain or below the ordinary high water mark of a navigable waterway.

5. Erosion control measures shall meet or exceed the standards in 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](http://www.dnr.wi.gov), under the "Runoff Management" program.

6. For each riparian property, the amount of bottom material removed from a specific waterbody may not exceed 10 cubic yards in a calendar year.

7. In waterways with flows less than 2 linear feet per second, a silt curtain shall be in the waterway around the dredging site. Silt curtain shall be left in place until the project has been completed. The silt curtain shall be inspected daily to insure sedimentation is being contained.

8. The applicant is the riparian owner or has permission of the riparian owner to remove bottom material.

Note: When the state is the riparian property owner, the requirements of NR 45 shall be met.

(f) *Standards for maintenance dredging of previously dredged areas.* Maintenance dredging of material from an area from which material has previously been removed is eligible for a general permit subject to the following limitations:

1. Unless the department previously authorized the project under s. 30.20, Stats., the dredging 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.

2. To protect fish habitat during spawning seasons, the dredging may not occur during time periods established in a prior authorization under s. 30.20, Stats. If no prior authorization exists, dredging may not occur during the following time periods:

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

b. For all waters not identified in this subd. 2.a. and located south of state highway 29, March 15 through May 15.

c. For all waters not identified in this subd. 2.a. and located north of state highway 29, April 1 through June 1.

d. The applicant may request that the requirement 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 dredging project, and that the local department fisheries biologist has determined that the requirements of this paragraph are not necessary to protect fish spawning for the proposed project.

3. The total amount of material removed from the area shall be less than 3000 cubic yards or, if greater than 3000 cubic yards, a previous environmental assessment or environmental impact statement shall meet the requirements of s. NR. 150.20(2)(c).

4. Dredging may not exceed the volume or extend beyond the dimensions of the previously constructed dredge project.

5. The applicant shall provide information that the dredged material does not contain any hazardous substance as follows:

a. Through the collection and laboratory analysis of the dredged material in compliance with ch. NR 347; or

b. Through the review of historical dredge material information from the vicinity of the proposed project that was collected and analyzed in accordance with ch. NR 347; or

c. By assessing the potential for hazardous substances to be present based upon the characteristic of the watershed, industrial and municipal discharges to the waterbody and dredge material data from similar waterways.

6. The applicant has provided information that the area meets the requirements of "previously dredged area" as follows:

a. The applicant can demonstrate that previous removal of material was previously authorized by the department; or

b. The applicant can demonstrate historical information documenting the previous removal of material including the date of removal, the volume of material removed and location of the material disposal.

7. Bottom materials shall be removed and transported by equipment which is designed and properly sized to minimize the amount of sediment that can escape into the water.

8. During or after dredging, the removed material may not be temporarily or permanently placed in a wetland, floodway or below the ordinary high water mark of a navigable waterway.

9. All equipment including, but not limited to, tracked vehicles, barges, boats, silt or turbidity curtain, sheet pile, and pumps, shall be adequately cleaned to remove invasive and exotic species prior to being used.

Note: Invasive and exotic species are listed on the department's website at [www.dnr.wi.gov](http://www.dnr.wi.gov).

(g) *Standards for maintenance dredging in established drainage districts.* Dredging to maintain a district drain which is part of a drainage district established under ch. 88, Stats., is eligible for a general permit subject to the following limitations:

1. Unless the department previously authorized the project under s. 30.20, Stats., the dredging 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. Unless the department previously authorized the project under s. 30.20, Stats., the dredging may not be located where there are public rights features as defined in s. NR 1.06.

3. Dredging shall comply with s. DATCP 48.32.

4. Maintenance of the district ditch and any structures in the ditch shall comply with the established specifications and compliance plan under ss. DATCP 48.20 and 48.22.

5. Dredging may not exceed the volume or extend beyond the dimensions of the previously constructed dredge project.

6. The total amount of material removed from the area shall be less than 3000 cubic yards or, if greater than 3000 cubic yards, a previous environmental assessment or environmental impact statement shall meet the requirements of s. NR. 150.20(2)(c).

7. The applicant shall provide information that the dredged material does not contain any hazardous substance as follows:

a. Through the collection and laboratory analysis of the dredged material in compliance with ch. NR 347; or

b. Through the review of historical dredge material information from the vicinity of the proposed project that was collected and analyzed in accordance with ch. NR 347; or

c. By assessing the potential for hazardous substances to be present based upon the characteristic of the watershed, industrial and municipal discharges to the waterbody and dredge material data from similar waterways.

8. Bottom materials shall be removed and transported by equipment which is designed and properly sized to minimize the amount of sediment that can escape into the water.

9. During and after dredging, the removed material may not be temporarily or permanently placed in a wetland, floodplain or below the ordinary high water mark of a navigable waterway.

10. All equipment used for the project shall be adequately de-contaminated for invasive and exotic species prior to being used. All equipment that comes in contact with infested waters including, but not limited to, tracked vehicles, barges, boats, silt or turbidity curtain, sheet pile, and pumps shall be thoroughly disinfected.

(h) Activities which do not meet the standards in par. (d), (e), (f) or (g) or a general permit issued by the department shall require an individual permit or contract.

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

(b) *Applicable activities.* Any dredging 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 require authorization by an individual permit pursuant to s. 30.20(1), Stats.

(c) *Standards.* Dredging which meets the standards in s. 30.20(2), Stats. may be authorized under an individual permit or contract. All applicable provisions in chs. NR 346 and 347 shall be met.

**NR 345.05 Enforcement.** (1) Noncompliance with the provisions of ss. 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. 30.20 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 remove material from the bed of a navigable waterway where 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 I of the Wisconsin Constitution.

2003 Act 118 identifies certain activities that may be undertaken in public trust waters exempt from a permit, or under a general permit. Certain activities may not be undertaken in waters that are defined as

"areas of special natural resource interest" or at other locations where the activity would cause detrimental impacts on public rights and interests in navigable waters. Without emergency rules to aid in administering the new law, the following severe problems will occur:

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

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

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

SECTION 5. BOARD ADOPTION. This rule was approved and adopted by the State of Wisconsin Natural Resources Board on August 16, 2004.

Dated at Madison, Wisconsin

8/17/04

STATE OF WISCONSIN  
DEPARTMENT OF NATURAL RESOURCES

By

Scott Hassett  
Scott Hassett, Secretary

(SEAL)

## NAVIGABLE WATERS (CHAPTER 30)

- \* Permits will be prioritized into three categories
  - \* Exemptions where appropriate
  - \* General permits for routine activities with minimal environmental impact
  - \* A streamlined individual permit process.
  
- \* General permits will save DNR and the applicant time and resources
  - \* Conditions of the permit will be specified by DNR rule
  - \* An applicant informs the department of a project, and describes how the project conforms to the general permit conditions
  - \* The applicant may proceed after a 30-day waiting period, unless the department indicates that the project does not meet the conditions.
  
- \* Individual permits will be more timely and predictable
  - \* The DNR will issue a decision within 30 days of holding a public hearing (There is no "presumptive approval" requirement.)
  - \* Public hearings will take the place of more expensive and time-consuming contested case hearings at the beginning of the process.
  - \* Contested case hearings, where needed, will occur on a defined timetable
  
- \* The two most critical permits for economic development: grading and ponds, will be processed as general permits. Currently these permits take an average of 4 months to process.
  
- \* The bank of a navigable waterway (which is the area subject to grading permits) will be clearly defined in a temporary statute, followed by a rulemaking process.
  
- \* Replacing small culverts will be exempt, while placing new culverts will be the subject of a general permit.
  - \* The public rights in navigable waters will be protected
    - \* Contentious permits will continue to receive individual review
      - \* Stream relocations
      - \* New dredging activity
      - \* Large piers
    - \* The DNR may require greater scrutiny of all newly-exempt projects and general permits if a site investigation determines there is potential for significant adverse impact to public rights or the environment.
  
- \* Projects that go to a contested case hearing will automatically be stayed, and may be put on hold until the hearing is complete



## AIR MANAGEMENT (CHAPTER 285)

### Air Permit Streamlining

Obtaining necessary air permits in a timely manner is the single biggest regulatory impediment for manufacturers looking to expand or build in Wisconsin. This bill modifies Chapter 285 to help assure timely permits, and otherwise streamline and consolidate administrative hurdles impeding business expansion. None of these components lower environmental standards – business must still meet all applicable emission standards – but they do reduce unnecessary red tape and related delay and costs companies face when trying to expand or locate in Wisconsin. These provisions would include:

- Direct DNR to promulgate new permit exemptions for sources that do not present any meaningful air quality threat.
- Create a registration permit program for small sources to avoid needless permit negotiations on simple processes.
- Expand the use of general permits for similar activities conducted by multiple companies.
- Allow persons to petition for exemptions, and registration and general permits, and require DNR to act on the petition within 30 days.
- Require DNR to make permit streamlining a priority; to continually assess its permit program for opportunities to consolidate permits, expand exemptions and make available registration/general permits and construction permit waivers; and, to submit a report to the Legislature within 6 months on its permit streamlining efforts, including related draft rules.
- Allow for the construction or installation of equipment prior to obtaining a construction permit in situations where the requirement presents an undue hardship or as otherwise deemed appropriate by DNR. (Permits would still be required for the operation of the equipment.)
- Provide a process that allows businesses to appeal proposed monitoring requirements that they deem unreasonable.
- Require DNR to issue a "completeness determination" within 20 days of permit application submittal that triggers deadlines for permit action. Once an applicant responds, the DNR has 15 days to review the submittal and may not ask for additional information before making the final determination.
- Reduce the length of construction permit deadlines and provide for agency accountability for missed deadlines.

### Clarifying when DNR can Exceed Federal Requirements

Provisions in the Jobs Creation Act provide additional clarification of when DNR may exceed federal requirements. These provisions maintain all of DNR's existing authorities to develop Wisconsin-specific programs, but make clear that such programs should be consistent with federal programs and to the extent possible not put Wisconsin businesses at a competitive disadvantage. The bill would:

- In the absence of federal standards, require DNR prospectively to base its finding of need for

state-only hazardous air standards or ambient air quality standards on a public health risk assessment. DNR is also to evaluate and select cost-effective compliance alternatives and compare its proposals to programs in neighboring states.

- When federal hazardous air standards exist, expand current requirement that DNR adopt similar, no more restrictive standards, to require related administrative requirements also be consistent.
- Clarify that if federal hazardous air standards address state-only pollutants, those state pollutants are not also to be regulated by DNR.

### **Review of State Implementation Plans & Nonattainment Recommendations**

Under existing rule-making procedures (Chap. 227), State Implementation Plans (SIPs) and nonattainment designation recommendations are not considered rules despite the fact they create federal mandates to produce dozens of rules and related regulatory programs. Thus, under current law, there is no opportunity for meaningful public or legislative review on these critical policy determinations required by the Clean Air Act.

This bill requires a streamlined process to allow for public and legislative review of proposed SIP revisions and nonattainment designation recommendations, including:

- Require submittal of draft SIPs and related documentation to the Legislature 60 days before they are due EPA, and require DNR to respond to legislative comments. Require a public notice of the availability of these documents.
- Require DNR provide the Legislature with a description of existing Wisconsin SIPs with recommendations on priorities to remove components not required by the federal Clean Air Act. (Generally, these measures would remain as state rules.)
- Require that "Control measures or strategies" for SIPs be promulgated as rules prior to the SIP's submittal to EPA.
- Provide that existing SIP measures for Total Suspended Particulates (TSP) be removed and enforced only as state requirements.
- Require submittal of DNR recommendations and related documents for nonattainment designations to the Legislature 60 days before they are due EPA, and require DNR to respond to legislative comments. Require a public notice of the availability of these documents.
- Clarify that Wisconsin may not recommend ozone nonattainment designation of any county unless that county violates the federal standard, unless otherwise required by the Clean Air Act.

## Public Trust Fact Sheet

**Background:** Yesterday, concerns were raised regarding whether compromise language in the Job Creation Act bill draft lowers environmental standards and “takes away public trust exemptions from 93% of our waterways.” While this sort of confusion may be understandable when dealing with a piece of legislation as large and complex as the Job Creation Act, those “public trust” concerns are the result of differences in statutory interpretation. Below are facts about the actual Job Creation Act language that we hope help clear up some of the misunderstanding surrounding this issue.

- The Jobs Creation Act does not alter any of the current requirements to consider public rights and interests for any of the individual permits in Chapter 30 for any waters of the state.
- There are 14 permit exemptions for very minor activities in the substitute amendment that were agreed to by both the legislature and the Doyle administration. **For each of the exemptions listed below, the DNR is allowed, under Section 24 of the Job Creation Act, to require a person to apply for an individual permit if there are concerns related to public rights/public trust.** The public trust is simply not diminished by the amendment. In addition to being minor activities with a minimal impact, many of the exemptions are for activities that currently require no permit from the DNR. Permit exemptions in the Job Creation Act include:
  - (1) Incidental deposits of rock or gravel (limited to 2 cubic yards) that are necessary to accomplish another activity that is exempt from permitting.
  - (2) Piers and wharfs that meet the DNR “Pier Planner” guidance (these are currently exempt).
  - (3) Seasonal structures (boat hoists, boat shelters, swim rafts) that meet the existing NR 326 criteria.
  - (4) Repair of existing rip rap (up to 300 feet) or replacement of existing rip rap (up to 100 feet).
  - (5) Placement of fish habitat structures under s. 30.12(3)(a)2.
  - (6) Placement of bird nesting platforms under s. 30.12(3)(a)2m.
  - (7) Intake or outfall structures less than 25% of channel width.
  - (8) Intakes for dry fire hydrants under s. 30.12(3)(a)7
  - (9) Pilings for ice deflection under s. 30.12(3)(a)8
  - (10) Biological shore erosion control structures.
  - (11) Replacement of culverts that were previously permitted, or that have a diameter less than 24 inches.
  - (12) Dredging for the limited purpose of placing or maintaining an exempt structure.
  - (13) Extension of an existing maintenance dredging contracting for one term of either 5 or 10 years.
  - (14) Manual dredging.

## **RULEMAKING PROCEDURES (CHAPTER 227)**

### **Agency Records**

The Job Creation Act requires all agencies to more thoroughly document their justification for rules by expanding analysis and related record requirements. Existing law merely requires the agency "reference" its authority, and provide a "brief" summary of the rule that goes out to hearing. Requiring agencies to provide more comprehensive analysis and justification will help assure thoughtful deliberation by agencies and provide affected parties with a more meaningful opportunity to assess and comment on regulatory proposals. Under the Act, the agency's record would be expanded to include:

- An explanation of the agency's authority to promulgate the rule.
- A detailed statement explaining the basis and purpose of the proposed rule, including how the proposed rule advances relevant statutory goals or purposes.
- A summary of and preliminary comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the rule.
- A summary of the factual data and analytical methodologies that the agency used in support of the proposed rule and how the related findings support the regulatory approach chosen for the rule.
- A comparison of similar rules in adjacent states.
- The analysis and supporting documentation used in preparation of its Small Business Analysis and Economic Impact Reports.
- A summary of public comments to the proposed rule and the agency's response to those comments, and an explanation of any modification made in the proposed rule as a result of public comments or testimony received at a public hearing.

### **Economic Impact Reports**

Creates the right for affected parties to petition for the preparation of an Economic Impact Report on their regulatory proposals. The report would include:

- An analysis and quantification of the problem, including any risks to public health or the environment that the rule is intending to address.
- An analysis and quantification of the economic impact of the rule, including costs reasonably expected to be incurred by the state, governmental units, associations, businesses, and affected individuals.
- An analysis of benefits of the rule, including how the rule reduces the risks and addresses the problems that the rule is intended to address.

In addition, the Act would require certain agencies to prepare fiscal estimates of the anticipated costs that will be incurred by the private sector in complying with the rule, but only if the agency first determines the rule may have a significant fiscal effect on the private sector.

### **Miscellaneous Administrative Procedures**

Clarifies other Chapter 227 procedures to assure the regulated community has a fair opportunity to challenge agency actions that adversely affect their businesses. These provisions include:

- Authorize the award of certain costs against parties who bring legally or factually frivolous claims.
- Establish a system for assigning hearing examiners to ensure, to the extent practicable, that hearing examiners are assigned to different subjects on a rotating basis. The system may include the establishment of pools of examiner responsible for certain subjects.
- Prohibit ALJ's from deciding certain constitutional issues.

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## **THE EMPIRE STRIKES BACK: The DNR's Attempt to Repeal the Job Creation Act**

### **I. History of the Job Creation Act**

- A. Most comprehensive regulatory reform in a generation.
- B. Required timely permit review and action.
- C. Required clear and consistent standards.
- D. Reformed regulations without reducing environmental standards.
- E. Developed through bi-partisan work with Governor Doyle and new DNR Secretary Scott Hassett.
- F. Vigorously opposed from ex-DNR head George Meyer and others in the DNR who for years had used their positions to infringe on property rights and create a regulatory hell in Wisconsin.
- G. The Job Creation Act was a huge victory for Wisconsin property owners, and job creators.

### **II. The Empire Strikes Back**

- A. The DNR is now trying to circumvent state law and repeal the Job Creation Act reforms by emergency rule. They are using the emergency rule process as a way to launch a wholesale counter-attack on property rights and dramatically expand their regulatory power.
  - 1. The law created four categories of waters that would be protected as special areas of resource interest. That list comprised about 7% of waters in Wisconsin. The DNR rules create nine new categories of waters comprising 50-75% of the state's waters.
  - 2. The law codified DNR policy for exempting new piers and specifically exempted certain seasonal structures from permitting. The DNR rule adds new regulations on piers instead of streamlining existing ones, it requires permits for thousands of piers that have to date not needed them and it limits or eliminates the right of property owners to keep maintain or transfer ownership in piers. In short these rules would make thousands of existing piers illegal and subject to DNR fine.

3. The law specifically exempted certain shoreline maintenance activities from shoreline protection permits and provided general shoreline permits for other activities. The DNR rule ignores the law and refuses to create those new general permits, and instead rams through new complex shoreline protections permitting requirements that it had been unwilling to promulgate in the past because they knew the Natural Resources board and legislature would oppose them.
- B. The DNR has thumbed its nose at the law and created emergency rules that have no relation to, and in some cases are in clear defiance of, the Job Creations Act's legal requirements.

### **III. Protecting the Integrity of the Job Creation Act**

- A. JCRAR is holding a hearing on the DNR emergency rules and will be suspending them.
- B. We will draft new rules consistent with the Job Creation Act.
- C. The lesson here is to be ever vigilant. There are some folks at the DNR who are willing to do anything – including violating the law – in order to protect their command and control fiefdom.
- D. We need private property owners to support our efforts and to tip us off when the DNR is acting up.

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May 27, 2004

Ms. Liesa Nesta  
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RE: Comments on Chapter 30 Emergency Rules

Dear Ms. Nesta:

These comments on the Chapter 30 Emergency Rules are being submitted on behalf of the Wisconsin Builders Association and the Riparian Owners and Marine Contractors Association. As you know, we have been integrally involved with the process leading to the adoption of Act 118 and in the subsequent emergency rule process. We have appreciated the opportunity to work with Department staff, the administration and stakeholders in the development of the emergency rules. In a number of cases, we now have a framework which should serve as a constructive basis for the permanent rule process. This is true for the provisions relating to ponds under NR 343, grading under NR 341, and the bridges and culverts under NR 320. We anticipate the need for some revisions to those rules but we have a workable framework upon which we can build.

However, with respect to the provisions in NR 1, NR 326, NR 328, and portions of NR 310, the best that can be said is that some of the most immediate problems have been addressed while substantial problems remain. Therefore, the primary focus of these comments is to outline those areas that are most problematic in these remaining rule chapters. We will, however, continue to participate at all levels as the permanent rule process moves forward. Nothing in these comments should be viewed either as a waiver or limitation on any additional comments we may have as this process proceeds on any of the Chapter 30 rules.



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## GENERAL COMMENTS

### 1. Scope of Act 118.

Based on the public hearing presentation, there appears to be general agreement on the overall goals of Act 118: to simplify the permitting process, to provide greater consistency in permit decisions and to protect the public trust. From our perspective, the specific goals of the Chapter 30 reforms in Act 118 can be summarized as follows:

- To simplify the permitting process by moving minor and routine activities to exemptions and general permits.
- To develop standards defined by rule rather than guidance for the exemptions and general permits. This provides accountability through the rulemaking process, certainty for the applicant, and consistency in decision making for the Department.
- To establish timeframes by statute to govern all of the permitting processes.
- To focus limited Department resources on more significant projects and to allow Department staff to spend more time in education and enforcement rather than in writing permits.
- To provide options for individual review of activities otherwise eligible for exemptions or general permits on a case-by-case basis to ensure public trust protections will be maintained.
- To provide broader rights of public notice and opportunities for comment in the individual permit process.

These objectives can only be maintained if all three levels of the permitting process -- exemptions, general permits and individual permits -- are fully implemented. If, for example, these rules are crafted in such a way that exemptions are not available, the additional requirements for public notice and hearing under the individual permit section will not be manageable. Also, given the number of regulated activities, and the increasingly limited staff available to the Department, it is critical that the regulated community be engaged as partners rather than adversaries. A rule that creates adversarial relationships will not be productive long term.

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## 2. Public Trust Considerations.

Several outspoken critics of Act 118 have argued that legislation, as written, violates the public trust and therefore it is up to the Department through the rulemaking process to ameliorate those adverse impacts. This criticism is particularly directed at the various exemptions. This argument is fundamentally flawed.

### A. The Legislation As Written Protects The Public Trust.

Act 118 and its list of exempt activities is fully consistent with the public trust. Public trust considerations are taken into account through the following provisions:

- **Limited Scope.** The original list of exemptions applied to activities limited in scope. The original list was further narrowed in scope during the legislative negotiations.
- **Exclusions for defined waters of special natural resource interest.**
- **Recapture provisions were added for all exemptions.**
- **Rule provisions were added for all exemptions.**

It is simply not necessary to exclude additional projects from eligibility for exemptions to meet public trust considerations.

### B. The Public Trust Does Not Preclude The Granting Of Exemptions.

For decades, there have been far broader exemptions in Chapter 30. See, e.g., Wis. Stat. § 30.19 exemptions for Milwaukee County and "agricultural uses." These exemptions do not have any "carve-outs" for defined waters, they do not have any recapture provisions and they do not have any rule provisions. Yet, there has never been a challenge to these provisions on public trust grounds. Moreover, despite certain press statements, no group has stepped forward to challenge the validity of Act 118.

There is a reason why there are no such challenges. The Public Trust Doctrine has never required that the waters of the state be free from any adverse impact. What the Public Trust Doctrine does require is that the waters be held in trust for the public. That has always involved a balancing of the various public uses of the water and it will continue to do so. In *State v. Village of Lake Delton*, 93 Wis. 2d 78, 93-94, 96, 286 N.W.2d 622 (Ct. App. 1979), the Court noted,

In many cases the supreme court has upheld a variety of intrusions into the public waterways, sometimes in the service of commercial interests, even when such intrusions are permanent in

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nature and destructive of other interests protected by the trust. The test employed in each case has been a balancing test in which the court has weighed the harm done by the intrusion against the benefits conferred allowing it.

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The principle established by the *Merwin* and *Milwaukee* cases is that no single public interest in the use of navigable waters, though afforded the protection of the public trust doctrine, is absolute. Some public uses must yield if other public uses are to exist at all. The uses must be balanced and accommodated on a case by case basis. The principle has been reasserted in many decisions of the supreme court.

Here, the balance of public trust interests has been determined by the Legislature in Act 118.

**C. The Scope Of The Public Trust Is For The Legislature And The Courts, Not The DNR To Determine.**

One group characterized DNR's rules as "restor[ing] many of the protective standards that were deleted from the statutes in Act 118." This suggests that the DNR can substitute its judgment for that of the Legislature when it believes the Legislature has acted outside of the public trust. That is not the law.

The primary responsibility for implementing the Public Trust rests with the Legislature not the DNR. "The legislature has the primary authority to administer the public trust and has the power of regulation to effectuate the purposes of the public trust." *Gillen v. City of Neenah*, 219 Wis. 2d 807, 380 N.W. 2d 628 (1998). Of course, the legislature must make enactments consistent with the public trust. If legislation is enacted which violates the public trust, the Courts can declare such legislation unconstitutional.

The legislature can and has delegated to the DNR authority to implement Chapter 30. But as an agency of the State, the DNR has only those powers granted by the legislature. The legislature can add to or take away from the powers of any agency, including the DNR. The DNR has no authority to declare an enactment of the Legislature invalid.

**SPECIFIC COMMENTS**

**1. NR 1.05. Areas Of Special Natural Resource Interest.**

The Department's definition of areas of special natural resource interest is inconsistent with the legislative language, inconsistent with legislative intent and removes the effective use of any of the statutory exemptions. This section needs to be substantially revised.

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**A. Legislative Provisions and Intent.**

Act 118 defines four specific areas as "areas of special natural resource interest". Exemptions under §§ 30.12 and 30.20 do not apply in those areas. The statutory definition provides:

30.01 (1am) "Area of special natural resource interest" means any of the following:

(a) A state natural area designated or dedicated under ss. 23.27 to 23.29.

(b) A surface water identified as a trout stream by the department.

(bm) A surface water identified as an outstanding or exceptional resource water under s. 281.15.

(c) An area that possesses significant scientific value, as identified by the department.

The Department has taken this last category and expanded it to include another nine categories of waters. This is not what the Legislature intended.

**B. The Scope of Areas Of Special Natural Resource Areas: Scientific Areas Definition.**

Special Natural Resource Areas were designed to be limited and defined areas. The statutory areas can be readily ascertained. Everyone recognized the limited scope of these waters of the state. It was not an open-ended list.

Areas of "significant scientific value designated by the department" were intended to reflect those areas designated by the department as having some unique scientific significance that warranted protection. There is a general description of Natural and Scientific areas in NR 1.32. The annotation to this section notes that natural areas are those at which "presettlement conditions are approached." Scientific areas are those natural areas useful for education and research:

**NR 1.32 Natural areas and scientific areas.**

(1) The legislature has indicated its intent to acquire, establish and preserve natural areas and scientific areas by creating ss. 15.347(4), 23.27 and 23.092, Stats. The natural resources board agrees that such areas, by their preservation, protect the state's natural diversity, provide sites for research and environmental education, and serve as benchmarks for assessing and guiding use of other lands in the state.

Note: Section 23.27, Stats., defines "natural areas" to include tracts of land or water which have native biotic communities, unique natural features or significant geological or archeological sites. Generally, natural areas are remnant areas which largely have escaped disturbance since settlement or which exhibit little recent disturbance so that recovery has occurred and presettlement conditions are approached. Generally, scientific areas are natural areas of at least statewide significance and useful for education or research.

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There is also a specific listing of scientific areas in NR 132.04(25). NR 1.05 is a comprehensive listing of waters throughout the state without any reference to either the criteria in NR 1.32 or the listing in NR 132.

As currently proposed, the NR 1.05 list includes half to three-fourths of the waters in the state. The following are a few examples:

- a. Musky waters (DNR Pub 1-36000(82) There are about 270,000 acres of Class A and B musky waters in the state, which is about 21% of the lake surface area in the state.
- b. Ceded territory waters in the northern 1/3 of the state with a self-sustaining walleye population. Using a Douglas, Oneida, and Chippewa county lakes as examples (not including rivers), we find:
  - Douglas: 13,000 acres of lakes, and 7,258 acres of lakes with self-sustaining walleye populations (56%)
  - Oneida: 66,545 acres of lakes, and 20,147 acres of lakes with self-sustaining walleye populations (30%)
  - Chippewa: 19,138 acres of lake, and 14,166 acres of lakes with self-sustaining walleye populations (74%)
- c. Sturgeon waters. This not only encompasses the entire Fox Valley through Lake Winnebago but also the Wisconsin River, St. Croix River, and the Chippewa River according to the Distribution and Relative Abundance of Fishes in Wisconsin (DNR Tech Bulletin No. 175).

There are another six categories of even broader reach.

## C. The NR 1.05 List Is Not Readily Ascertainable To The Public.

One of the goals stated by the Department at the public hearing on the emergency rules was to simplify the rule process. The listing of waters on NR 1.05 cannot be readily ascertained. There is no comprehensive integrated list to determine whether a project is or is not included. Even if there were, there should be an opportunity for public comment and review. Such opportunity is precluded by the wholesale listing of these categories of waters.

## D. NR 1.05 Provides No Principled Basis For Adding Or Subtracting To The List Of Waters.

If, in fact, the statutory definitions and the references to scientific areas in the administrative code are ignored, there is no limiting basis for placing any category of water onto the NR 1.05 list. There is no basis for excluding any particular type of fish and indeed, additions have already been suggested. There is no basis to limit this list to fishery resources. One could even argue that scientific study undertaken of waters that are impaired could also add those waters to the list.

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The bottom line is this list is an unprincipled expansion well beyond statutory language and statutory intent. More importantly, its effect is to eviscerate the use of exemptions that the Legislature has enacted. By placing the majority of state waters on this list, exemptions cannot be utilized in the majority of state waters.

## 2. NR 1.06 Public Rights Features.

NR 1.06 creates a wholly new category not identified by statute. It is an exceptionally broad list that could be used to identify virtually any water in the state. For example, public rights features include "fish and wildlife habitat, including but not limited to spawning, nursery and feeding areas." NR 1.06(4)(a). This could include virtually any kind of fish or wildlife. For example, a breeding area for crayfish or even an invasive species could be determined to be fish and wildlife habitat. Similarly, another feature is "reaches of bank, shore or bed that are predominantly natural in appearance." Again, such features could encompass virtually any water in the state. The breadth of this rule is further compounded by provisions in NR 1.06(7) which includes any of the waters on NR 1.05 to be public rights features. There is nothing in this rule that creates any limits on what the Department could designate as a public rights feature water.

The implementation and impact of this provision is also unclear. NR 1.06(6) specifies a procedure for identifying public rights features which suggests that there will be specific mapped areas so designated. However, in NR 310.04(2), the rule provides that a person may only undertake an exempt activity after they have evaluated the site and determined that no public rights features may be affected by their activity. It is not clear whether the public rights features referenced in this section are tied to those specifically mapped under NR 1.06(7). A similar question arises in the context of enforcement. If a person determines that there are no mapped public rights features, can the Department later issue a citation to an individual if it determines that the location of a pier is in a predominantly natural area? In short, not only the listing of these waters but the implementation of how this list is to be used needs substantial additional clarification.

## 3. NR 326. Piers And Seasonal Structures.

The language and intent of Act 118 was intended to accomplish two simple points relative to piers and seasonal structures. The first was to indicate that piers meeting the dimensions authorized under the pier planner guidance document were exempt. As you know, in recent years, the Department utilized the pier planner as a basis for determining which piers did not need a permit in accordance with the statutory authorization under § 30.13. Act 118 simply was designed to codify current DNR practice. The legislation did not otherwise alter the requirements of § 30.13. Moreover, while there were attempts to create general permits for certain piers, those attempts were rejected and did not appear in the final legislation. Second, there was an exemption for certain seasonal structures which the Department had previously exempted under NR 326.

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The Department has taken these two simple exemptions that were designed to implement existing DNR policy and has crafted a code which is nearly impossible to follow and fundamentally alters basic rights of property owners. It is difficult to conceive that the Department intended the results dictated by this rule. There are several fundamental problems with NR 326 that must be addressed:

**A. The Rules Effectively Eliminate The Legislative Exemption.**

Notwithstanding the fact that piers meeting pier planner guidance were routinely authorized by the Department prior to the enactment of Act 118, NR 326.08(1)(c) now establishes twenty separate conditions to be entitled to the pier planner exemption. Some of those requirements can be found in the original pier planner, many others cannot. Among the most significant is that piers may not be located in waters designated under either NR 1.05 or NR 1.06. Several other requirements are far more specific and restrictive than set forth in the pier planner guidance (see, e.g., NR 326.08(1)(c)12, 13, 17, 18).

In addition, NR 326.08(1)(c)(15) sets forth a new requirement that the pier "be exclusively for the private use of the riparian and their guests only, and is not associated with any commercial activity, commercial marina or municipal marina." That is a substantial restriction of the existing statutory language under § 30.12(3m). It also exceeds the statutory authority to promulgate rules under § 30.12(1p) since usage is not within the statutory authority for promulgating rules. The net effect of these restrictions is that the statutory exemption for pier planner piers has been eviscerated.

**B. The Rules Now Impermissibly Restrict Piers Under § 30.13 To The Same Restrictions As The Pier Planner Exemption.**

Nothing in Act 118 was intended or designed to impact the existing exemption under Wis. Stat. § 30.13. Indeed, it was this provision that the Department has utilized to allow the majority of piers in Wisconsin to continue to exist without a permit. Until now, the Department has been unable to promulgate rules limiting 30.13 piers and therefore, any enforcement actions would have had to proceed based upon the statutory language. The Department would not have been able to rely upon the pier planner as an enforcement tool since it had not been promulgated as a rule. While case law has recognized the pier planner as a basis for establishing reasonable use in the permitting context, a guidance document does not have the force and effect of law and cannot be used in an enforcement context. See, *Wisconsin Electric Power Co. v. DNR*, 93 Wis. 2d 222, 287 N.W.2d 113 (1980).

Notwithstanding the foregoing, the Department has now engrafted all of the pier planner standards under NR 326.08(1)(c) into any determination under § 30.13. In particular, NR 326.08(1)(d) now provides that with limited exceptions, a 30.13 pier may not be placed unless

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the structure complies with all of the requirements under NR 326.08(1)(c) with minor exceptions. The effect of this change is to move from unenforceable guidance documents to enforceable rules. A pier that does not meet the twenty conditions in (1)(c), is now no longer eligible for an exemption under § 30.13. While there are a few exceptions, the vast majority of piers that do not comply with the pier planner will not meet the new § 30.13 exemption. For example, a pier that is wider than 6 feet, a pier that is longer than the 3 foot depth level, a pier that has more than one additional boat slip for its amount of frontage, and piers that may be in areas with public rights features are no longer eligible for a 30.13 exemption. The result is that there are thousands of piers that had been allowed under § 30.13, but are now subject to enforcement by the Department as noncompliant piers. Thus, the emergency rules not only eviscerate the new exemption, they eviscerate the old 30.13 exemption also.

**C. The General Permit Provision Does Not Provide Effective Relief.**

The Department has promulgated a general permit for certain existing piers and wharfs. While this could have ameliorated some of the problems created by the new exemption language, it fails to accomplish that purpose for several reasons. First, it is limited to piers and wharfs that have been in place in five of the last six years, which is not only a limited time horizon but difficult to document. Second, it also only extends relief for piers that have exceedences of two boat slips, minor decks and piers in NR 1.05 waters. It does not provide any relief for piers that may have been wider, longer, or otherwise do not meet the configuration requirements under the new pier planner exemption in NR 326.08(1)(c).

Finally and perhaps most troubling, even if there are piers that could be eligible for this general permit, the general permit expires upon property transfer. This provision is particularly frustrating because it was discussed at length in the context of drafting Act 118. We had proposed an alternative provision for grandfathering piers and the Administration had proposed a grandfathering provision for expiration upon transfer. (Neither of which, by the way, was limited to the narrow scope of general permits now at issue). In any event, because of the controversial nature of this issue, it was determined not to include a grandfathering provision in Act 118 and allow that to be the subject of additional legislation. Now the Department has drafted by rule what it could not achieve through the legislation.

**D. Other Comments on NR 326.**

There are numerous other comments with respect to NR 326 both for piers, boat shelters, and other seasonal structures which we will attempt to address as the rule process continues. However the considerations noted above are the fundamental flaws that must be addressed.



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4. NR 328 Erosion Control Structures.

NR 328 has been in the draft stages for the last several years. It has proved to be controversial in a number of aspects. It is not the purpose of these comments to reiterate that debate, but rather to highlight a few of the more significant concerns we have with this provision. It is again frustrating to see that the Department is using the process under Act 118 to accomplish a number of purposes well beyond the scope of Act 118.

Whereas Act 118 directed the Department to grant certain limited exemptions and general permits for riprap, the Department has used NR 328 as an opportunity to create prohibitions on riprap and seawalls on a significant number of inland lakes. While the exemptions and general permits were designed to provide for an easy method to address existing riprap, the new rule adopts a methodology for determining erosion well beyond what was required for purposes of implementing the provisions of Act 118. Again, the Department appears to obtain through emergency rules what it was unable to obtain through the normal rule making process. While many of these provisions are objectionable on that basis alone, the following represent some additional specific areas of concern.

A. The Department Has Unlawfully Restricted The Scope Of The Riprap Repair And Replacement Exemption.

Act 118 was very clear about the scope of riprap to be allowed as an exemption. It was limited to repair and replacement (both of which were defined); it was limited to specified lengths of repair and replacement; and it was limited to certain inland lakes. There was no additional requirement that repair or replacement be limited to areas where riprap had been previously permitted. Unlike the exemption for certain replacement culverts, which was specifically tied to previously permitted culverts, no such limitation was part of the Act 118 requirements for riprap. Moreover, this issue was explicitly discussed with the administration and an agreement was reached not to require an existing permit. The rules now ignore both the statutory language and the express agreement with the Administration. While this may be acceptable for the emergency rule period if there is a workable general permit, it is clearly unacceptable as a permanent rule.

B. The Riprap Prohibition For Low Energy Sites Is Unacceptable.

Both the general permit and the individual permit provisions of NR 328 prohibits the use of riprap in a "low energy" environment. This precludes any consideration of riprap on inland lakes in the range of 300 acres or less. Nevertheless, there are many lakes where there is erosion due to ice or boat traffic or soil conditions. We have previously provided various examples of this to the Department. It is simply unacceptable for riprap to be categorically restricted from use for lakes and other shorelines that are experiencing significant erosion.

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In this regard, there are two related points that need to be emphasized. First, the Department is proceeding from an underlying assumption that riprap is detrimental to shorelines. The Department's own studies show that this is not the case. Riprap treatments provide as good or better habitat for fish and aquatic life than natural shorelines. While riprap may limit littoral zone vegetation and provide certain barriers for amphibians, the most that any public studies to date have demonstrated is problematic only when an entire shoreline is placed into a riprap treatment. To suggest that it is better for a bank to erode at the rate of 2 feet or more a year than to be preserved through riprap makes no sense as a matter of public policy and is not supported by the science.

Second, the methodologies contained in NR 328 for demonstrating erosion potential lack real world grounding. Under the wind wave model methodology it is impossible for a lake less than 300 acres to qualify as anything other than a low energy site. The erosion intensity index yields the same result. And the bank recession model states that unless your bank is eroding at more than 2 feet a year, you have a low energy environment. There must be a way of introducing simplicity and common sense into this regulatory scheme so that erosion caused by common forces can be treated by the riparian owners in an appropriate means.

### C. Other Comments

There are a number of specific comments that need to be resolved both for riprap and seawall permits. Jeff Christensen's testimony has identified a number of those areas and we anticipate additional areas will be brought forth through the rule making process.

#### 5. NR 310 Procedures and Timeframes.

There are a number of specific issues with respect to the NR 310 process that need to be made to conform with Act 118 provisions. In a number of cases, the Department has provided itself time periods beyond those authorized by statute. Some of those may be manageable, others are going to require additional attention. We anticipate working through that process with the Department before these rules become permanent.

One area of particular concern, however, is the provision for individual permits under NR 310.17(4) that provides for a delayed effective date for decisions on individual permits. This was neither contemplated nor intended by the provisions of Act 118. Decisions by the Department are effective upon issuance. If a party wishes to file a contested case hearing and seek a stay of the permit through that process, it has 30 days to do so. If the party seeking a contested case hearing believes that a stay is appropriate, that request for a contested case hearing can be filed immediately. It is not necessary to hold up every individual permit decision for 30 days in the chance that a contested case hearing might be filed.

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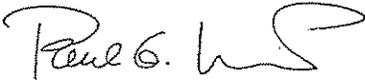
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CONCLUSION

We are encouraged by the progress that has been made with respect to general permits for ponds and grading and see that as a hopeful sign that the remaining rules will be made effective. We remain concerned about the impact of these rules on the use of exemptions and the impact (whether intended or not) on riparian owner interests. We hope that the constructive dialogue that has allowed us to proceed forward in other contexts will be able to bring the remaining portions of these rules into a workable document, so that the promise of Act 118 can be realized for the regulated community, the Department and the public. We look forward to working with you as these rule processes move forward.

Very truly yours,

ANDERSON & KENT, S.C.



Paul G. Kent

PGK/mai

cc: Mr. Gerard Deschane, Wisconsin Builders Association  
Jeff Christensen, Riparian Owners and Marine Contractors Association