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(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ... PUBLIC HEARING - COMMITTEE RECORDS

2005-06

(session year)

Senate

(Assembly, Senate or Joint)

Committee on ... Natural Resources and Transportation (SC-NRT)

COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
(**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
(**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

* Contents organized for archiving by: Mike Barman (LRB) (July/2012)

Senate

Record of Committee Proceedings

Committee on Natural Resources and Transportation

Clearinghouse Rule 02-099

Relating to department standards for erosion control of inland lakes and impoundments.

Department of Natural Resources

January 12, 2005 Referred to Committee on Natural Resources and Transportation.

February 23, 2005 **PUBLIC HEARING HELD**

Present: (5) Senators Kedzie, Stepp, Kapanke, Wirch and
Breske.

Absent: (0) None.

Appearances For

- Todd Ambs, Madison — WI Department of Natural Resources
- Mary Ellen Vollbrecht, Madison — WI Department of Natural Resources
- Paul Cunningham, Madison — WI Department of Natural Resources
- George Meyer, Madison — WI Wildlife Federation
- Jeff Smith, Madison — Trout Unlimited
- Lisa Reas, Green Lake — LJ reas Environmental Consulting Corp.
- Peter Murray, Madison — WI Association of Lakes
- Denny Caneff, Madison — River Alliance of Wisconsin
- Becky Abel, Madison — WI Wetlands Association
- Steve Books, Mount Horeb — self
- Jeff Nania, Portage — WI Waterfowl Association
- Robert Livingston, Twin Lakes — Crane Landscape and Design Inc.

Appearances Against

- Jay Verhulst, Arbor Vitae — Vilas County Board Supervisor

Appearances for Information Only

- Tom Larson, Madison — WI Realtors Association

Registrations For

- Sue Moline-Larson, Madison — Reverend, Lutheran Office for Public Policy in Wisconsin

- Anne Sayers, Madison — WI League of Conservation Voters
- Derek Scheer, Madison — Clean Wisconsin
- Caryl Terrell, Madison — Sierra Club - John Muir Chapter
- Gary Neu, Madison — self
- Karen Etter Hale, Madison — WI Audobon Council and Madison Audobon Society

Registrations Against

- Sandra Verhulst, Arbor Vitae — self

February 28, 2005 EXECUTIVE SESSION - POLLING

Moved by Senator Kedzie that **Clearinghouse Rule 02-099** be recommended for modifications requested.

Ayes: (5) Senators Kedzie, Stepp, Kapanke, Wirsch and Breske.

Noes: (0) None.

MODIFICATIONS REQUESTED RECOMMENDED, Ayes 5,
Noes 0

March 9, 2005 MODIFICATIONS RECEIVED FROM THE AGENCY, Pursuant to s. 227.19(4)(b)2., Wis. Stats..

March 25, 2005 **NO ACTION TAKEN**

Dan Johnson
Committee Clerk

February 25, 2005

MOTION

Requests for Modification to Rules

The Senate Committee on Natural Resources and Transportation, pursuant to s. 227.19 (4) (b) 2., Stats., requests the Department of Natural Resources to consider the following modifications to Clearinghouse Rule 02-099, relating to department standards for erosion control of inland lakes and impoundments:

1. Add a sentence at the end of s. NR 328.04 (4) (c), as follows:

NR 328.04 (4) (c) Vegetation shall be plant species that are native to the area of Wisconsin where the project is located. Vegetative treatments shall be installed according to Natural Resources Conservation Service Conservation Practice Standard Code 580 (Streambank and Shoreline Protection) or the Natural Resources Conservation Service Engineer's Handbook.

2. Add the following at the end of s. NR 328.05 (5) (b):

NR 328.05 (5) (b) The project site is a moderate or high energy site; or a low energy site where the bank-edge recession described in s. NR 328.08 (3) is equal to or greater than 0.5 feet per year and the applicant can show a biological erosion control structure was previously placed according to the standards in s. NR 328.04 (3) and (4).

Note: NR 328.08(3) requires that the time between separate measurements shall equal or exceed 3 months during the open-water season.

Note: The applicant will satisfy the "equal to or greater than 0.5 feet per year" requirement by demonstrating that the bank-edge recession is equal to or greater than 1.5 inches per 3 months during the open-water season.

The Senate Committee on Natural Resources and Transportation, pursuant to s. 227.19 (4) (b) 2., Stats., requests the Department of Natural Resources to consider the following modifications to Clearinghouse Rule 04-066, relating to natural resources board policies on protection and management of public waters:

1. Modify the note following s. NR 1.05 (2) as follows:

Note: Activities not exempted in areas of special natural resource interest under ss. 30.12 and 30.20, Stats., are: deposits less than 2 cubic yards; seasonal structures other than piers or wharves; fish habitat structures; bird nesting platforms; dry hydrants; pilings; riprap repair or replacement; biological shore erosion control structures; intake or outfall structures; dredging to place or maintain an exempt structure; dredging without auxiliary power. Activities not exempted in areas of special natural resource interest under ch. NR 320 are culvert replacements. ~~Piers meeting the dimensional standards in s. 30.12, Stats., are exempt in areas of special natural resource interest under s. 30.13, Stats., unless 30.12 (2m), Stats., applies.~~ However, new and existing piers may be exempt in areas of special natural resource interest under s. 30.13, Stats., as set forth in ch. NR 326.

2. Delete the "and" between "30.12 (1g)" and "(km)" in s. NR 1.06 (2).
3. Modify the note following s. NR 1.06 (2) as follows:

Note: Exemptions not allowed in locations of public rights features are: intake or outfall structures other than dry hydrants; replacement culverts with inside diameter not more than 24 inches; dredging without auxiliary power. ~~In locations of public rights features, piers exceeding the dimensional standards in s. 30.12, Stats., are unlikely to qualify for the exemption under s. 30.13, Stats.~~ However, new and existing piers may be exempt in areas with public rights features under s. 30.13, Stats., as set forth in ch. NR 326.

The Senate Committee on Natural Resources and Transportation requests the department to inform the chairperson whether it agrees to consider these modifications in a letter addressed to the chairperson and received by the chairperson no later than 4:30 p.m., March 2, 2005.

VOTE ON MOTION:

YES

NO

Signed: _____

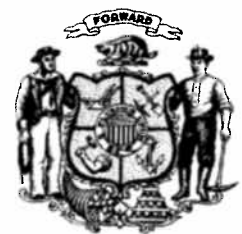
Neal J. Ketzia

Date: _____

2/28/05



WISCONSIN STATE LEGISLATURE





WISCONSIN REALTORS* ASSOCIATION
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Fax: 608-241-2901
E-mail: wra@wra.org
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Kitty Jedwabny, CRB, CRS, Chairman
E-mail: kjedwabny@coldwellhomes.com

William Malkasian, CAE, President
E-mail: wem@wra.org

January 12, 2005

Secretary Scott Hassett
Wisconsin Department of Natural Resources
1 S. Webster Street
Madison, WI 53707

Dear Secretary Hassett

Thank you for meeting with Tom Larson and I to discuss the concerns of the Wisconsin REALTORS Association (WRA) related to the Ch. 30 administrative rules (NR 1, NR 326 and NR 328) and proposed changes to NR 115. We feel that the meeting was productive and we hope that we will be able to work together to address these concerns in an expeditious and satisfactory manner.

As we discussed, some of our concerns have a more immediate need of being addressed than others due to where the related rules are in the rulemaking process. Because NR 1 and NR 328 have been approved by the Natural Resources Board and have been submitted to the legislature for review, they are a more immediate priority. More time remains to address the concerns related to NR 326 and NR 115, as final drafts of these rules have yet to be completed.

NR 1 & NR 326

We have attached a memo highlighting our specific concerns with respect to NR 1 and NR 328. Our primary concerns related to NR 1 are what we believe to be a lack of adequate public input and oversight by elected officials prior to (a) the identification of some "areas of special natural resources interest" waters and waters with "public rights features," and (b) the use of these waters for regulatory purposes. While we are worried about the possible use of these waters for regulatory purposes in future administrative rules, our most immediate concern is their impact on NR 326.

In an effort to expedite the rulemaking process, we would be willing to remove our concerns related to NR 1 if we received adequate written assurances from Governor Doyle's administration that our concerns will be addressed in NR 326. Specifically, we would like to receive written assurances that the administration (a) supports our two primary objectives (as outlined below) for all pier regulations and (b) will direct the department to make the necessary changes to NR 326 so that the rule is consistent with these objectives. Without these assurances, we cannot be certain that our concerns will be adequately addressed.

WRA Objective #1 -- Grandfather all existing piers that were not in violation of pier regulations that were in effect at the time of pier placement.

WRA Objective #2 -- All property owners should be guaranteed the right to place a pier. They may have to place it in a particular location or, for example, design it in a way to minimize impacts to fish spawning areas, but they must be able to place a pier.



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Secretary Scott Hassett
Page 2

NR 328

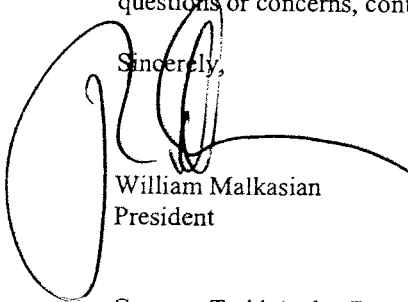
With respect to NR 328, we are concerned that the rule (a) prevents property owners from being able to adequately protect their property from erosion (especially on low energy lakes) and (b) has not been subject to adequate review and comments by affected property owners (the last public hearing on the rule was over two years ago and the rule has been modified since that time). We strongly encourage the department to withdraw the rule and send it out to public hearing so that property owners can adequately assess the impacts of the rule on their property and provide the department with necessary feedback.

As we discussed during our meeting on January 10th, one of the primary objectives of the WRA is to protect the interests of homeowners and property owners throughout the state. Among other things, property owners have a strong interest in maintaining high property values, and preserving the ability to use and enjoy their property. Strong environmental regulations play an important role to maintaining property values, especially in waterfront areas. However, sometimes regulations can go too far and begin to have an adverse impact on value, use and enjoyment of property. We believe that various provisions in NR1 and NR 328, as currently drafted, would have an adverse impact on the value and use of waterfront property and, therefore, we must oppose the proposed rules in their current form.

We have identified a few ways in which our concerns can be addressed and would be willing to consider other possible solutions. We are willing to work with the department to resolve these concerns prior to the consideration of these rules by the Wisconsin Legislature. However, if we are unable to resolve these concerns in a manner that is satisfactory to both parties, the WRA will attempt to have our concerns addressed by the appropriate legislative standing committees.

Please let us know if you are interested in working with us to resolve these concerns. If you have any questions or concerns, contact Tom Larson or myself at (608) 241-2047.

Sincerely,

A large, stylized handwritten signature in black ink, appearing to be 'W. Malkasian', with a long horizontal flourish extending to the right.

William Malkasian
President

Cc Todd Ambs, Department of Natural Resources
Patrick Henderson, Deputy Legislative Director



Chapter 30 Administrative Rules Remaining Concerns

NR 1.05 -- Areas of Special Natural Resources

1. NR 1.05(4)(a) – “special concern species” and “unique ecological communities”
 - a. No public notice, hearings, or opportunity for comments before species are placed on these lists
 - b. These species have not been used for regulatory purposes in Wisconsin or other states
 - c. DNR notifies legislature and counties in January of each year, but AFTER waters where these species are located have been identified and used for regulatory purposes (See NR 1.05(5)(a) and NR 1.05(7))

NR 1.06 – Public Rights Features

1. **NR 1.06(4) – The definition of “public rights features” is EXTREMELY broad.** The broad definition provides DNR with unlimited discretion to designate PRFs and stop economic development projects or require property owners to apply for an individual permit
 - a. Fish and wildlife habitat (NR 1.06(4)(a))
 - i. Would seemingly cover most waters and lands. What section of water is not a fish or wildlife (includes aquatic plants) habitat?
 - b. Physical features of lakes and streams that ensure protection of water quality (NR 1.06(4)(b))
 - i. Includes aquatic plants and boulders
 - c. Areas that are “predominantly natural in appearance” (NR 1.06(4)(c))
 - i. Would seemingly include any undeveloped areas
 - d. Areas that “screen man-made or artificial features” (NR 1.06(4)(c))
 - i. Would seemingly cover any areas with trees or bushes
2. **NR 1.06(8) – “Public rights features” are not required to be identified on DNR website BEFORE used for regulatory purposes.** Property owners, therefore, will not be able to independently determine whether their property contains PRFs. Without independent prior knowledge of PRFs on or near their property, property owners will be more likely be in noncompliance with the regulations which will subject them to possible DNR enforcement actions.

- a. This provision is not clear whether an area can be considered a "public rights feature" if it is not identified on the DNR's website.

NR 326 – Pier Rules

1. **WRA Concern #1 – The proposed pier rules fail to grandfather all existing piers that were in compliance with the pier regulations that were in effect at the time of pier placement.**

- a. **Existing piers wider than 6 feet will need an individual permit.** (See NR 326.08(1)(c)(6) and NR 326.08(2)(c)(4)) Note - an existing pier may be eligible for a general permit if it is (a) not wider than 8-ft; (b) located in Walworth County; and (c) placed on rock-filled cribs.
- b. **Existing piers that extend beyond a 3-foot water depth or beyond what is necessary to moor a boat, whichever is greater, will need a general or individual permit.** (See NR 325.08(1)(c)(5)) (See also definition of "line of navigation", NR 326.03(9)) (Note -- an existing pier will qualify for a general permit only if it was placed prior to January 1, 1998 and has been placed 5 out of the last 6 years -- See NR 326.08(2)(c)(1))

➤ **Comments --** As drafted, this provision says that the pier can only be long enough to moor "a" boat. It is not clear how this provision will be interpreted. If the pier is designed to accommodate multiple boats and users and some of the boats are in water deeper than others, these piers "may" be required to obtain a permit.

- c. **As drafted, only piers that are configured in an "L" or "T" shape are exempt from the permitting requirements.** (See NR 326.08(1)(c)(6))

➤ The DNR maintains otherwise, but this is not what the rule says. Section NR 326.08(1)(c) outlines the specific criteria one must meet in order to be exempt from the permitting requirements. Provision (6) in this section deals with pier size and shape and states that "the pier or wharf may be configured in an 'L' or 'T' shape." Despite DNR's contentions, no other section of the rule says that an "I" shape pier is allowed or any other configuration is allowed. While the section uses the word "may", no other configurations or shapes are mentioned anywhere else in the rule. Compare this provision to section NR 326.08(2)(c)(4), which specifies the configuration and shape requirements for a general permit. In this section, the provision "the pier or wharf may be configured in an 'L' or 'T' shape" is missing. The other language in this section is substantially similar to the dimension/shape language in NR 326.08(1)(c)(6). By including the provision in the exemption section and not including it in the general permit section, one can only conclude that you must have a pier with this shape in order to be exempt.

- This is likely a drafting oversight that will be corrected in the next draft, but I think it is important to recognize how the DNR has handled this publicly -- denying that this is what the rule says. This is exactly why people don't trust them.

d. Piers with a loading platform at the end of the pier that exceeds 120 sq. ft. are not exempt and, thus, must obtain either a general or individual permit. (See NR 326.08(1)(c)(6))

- Piers with a loading platform that is up to 200 sq. ft. are eligible for a general permit. (See NR 326.08(1)(c)(4)) Piers with a loading platform that is greater than 200 sq. ft. require an individual permit.

e. Property owners are allowed (a) 2 boat slips, if they have less than 50 feet of shoreline frontage, (b) 3 boat slips, if they have a full 50 feet of shoreline frontage, and (c) 1 additional boat slip for each additional 50 feet of shoreline frontage. (See NR 326.08(1)(c)(7))

- Existing piers that exceed these standards are not exempt and thus are eligible for a general or individual permit. (See NR 326.08(2)(c) -- the # of boat slips is not one of the criteria for obtaining a general permit) New piers that exceed these standards require an individual permit. (See NR 326.08(2)(f))

f. Existing and new boat hoists may be placed in areas with "public rights features" only after receiving an individual permit. (See NR 326.09(1)(c)(2) and NR 326.09(2)(b) (Note -- boat hoists are not "permanent boat shelters" and thus do not qualify for a general permit))

- The term "public rights feature" is incredibly broad, covering areas that are "predominantly natural in appearance" or that "screen man-made or artificial features." (See NR 1.06(4)(c)) In other words, if a property owner has an undeveloped lot or a developed lot with considerable trees and shrubs, he/she may have "public rights features" on his/her property, which will subject the property owner to a higher level of DNR scrutiny before a permit is issued. This is an extremely vague provision that could give the DNR unlimited discretion to regulate the placement of piers.
- It is not clear why are existing piers in areas with "public rights features" exempt from the permitting requirements, but not existing boat hoists.

g. Newer, existing piers do not qualify for general permits. (See NR 326.02(1)(c)(1))

of
Years

- To qualify for a general permit, an existing pier must (1) have been placed before January 1, 1998, (2) have been placed at least 5 of the last 6 years thereafter, and (3) not expanded or relocated since January 1, 1998. The property owner must be able to prove that the existing pier meets these requirements. Existing piers that do not meet these requirements must obtain an individual permit.

2. WRA Concern #2 – The proposed pier rules do not recognize and protect the fundamental right of waterfront property owners to place a pier.

a. New piers located in waters designated as "areas of special natural resource interest" do not qualify for an exemption and thus must obtain a general or individual permit. (See NR 326.08(c)(2))

- "Areas of special natural resource interest" includes over 7,000 water bodies or sections of water bodies throughout Wisconsin. Waters can be added or subtracted from the list of "areas of special natural resource interest" by DNR staff, without public notice, public hearings, or approval by elected officials. (See NR 1.05(3)(d) – "special concern species" and "unique ecological communities" are determined by the Natural Heritage Inventory (a group of "scientists" are not directly accountable to the public, nor are they required to hold public hearings or issue public notice prior to adding/removing species from this list.)
- The DNR has significant discretionary authority to grant individual permits. The individual permitting process lacks specific, objective criteria and thus property owners have cannot be reasonably certain that they will actually receive an individual permit.

b. All new piers located in areas with "public rights features" do not qualify for an exemption or a general permit and thus must obtain an individual permit. (See NR 326.08(1)(c)(3) and NR 326.08(2)(b), (c), (d) and (e))

- See comments above.

3. Other Concerns – New permanent boat shelters are not allowed in undeveloped areas. (NR 326.09(2)(c)(5))

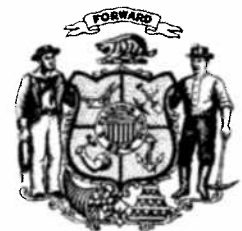
- Permanent boat shelters are allowed only where there are at least 5 contiguous riparian properties (including the applicant's property) which each have a residential structure located within 500 feet of the proposed permanent boat shelter. Permanent boat shelters, in some cases, may be better for the environment than seasonal boat shelters because they do not disrupt the sediment each year when they are installed and removed.

NR 328 – Riprap rules

- a. No public hearings held on this rule.
 - Last public hearing held on this rule took place approximately 2 years ago and the public expressed a significant number of concerns. This rule has been modified, but will continue to impact a great number of property owners and thus should be subject to statewide public scrutiny.
- b. Prohibits riprap on “low energy” lakes
 - Low energy lakes include almost all lakes less than 400 square acres
 - Low energy lakes make up 50-75% of Wisconsin’s waterways.
 - Presumption – low energy lakes are not eligible for an individual permit, unless you
 - Score between 40-48 pts on EI model
 - Stake out property and prove 6 inches of erosion per year
- c. The rule is very complicated and will require property owners to hire expensive consultants to get through the permitting process, determine EI scores, and defend their rights.



WISCONSIN STATE LEGISLATURE



Mike Theo
Tom Larson

2/3/05 Rip Rap - Chap 30

- 40-48 on erosion index
- Must show no more than 6" erosion

DNR thinks bio logs are the answer.

< 400 acres low energy lake

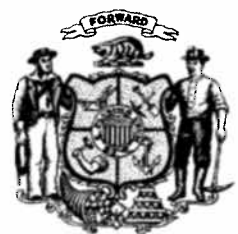
potential:

also low energy sites on a large lake

Wind Wave model does not consider Boat waves
or ice -



WISCONSIN STATE LEGISLATURE



GOOD NEWS!

Johnson, Dan (Legislature)

From: Larson, Tom [tlarson@wra.org]
Sent: Tuesday, February 22, 2005 10:04 AM
To: Bruhn, Mike; Johnson, Dan (Legislature)
Cc: Henderson, Patrick - Office of Governor Jim Doyle; Nowak, Ellen; Manley, Scott; Theo, Mike - VP Public Affairs
Subject: FW: Rip Rap Rule NR328

Mike and Dan,

I just wanted to give you an update on our negotiations with the DNR on NR 328 (riprap) and NR 1 (special waters). **We have made excellent progress** and we are **very close to a deal**. We have agreed in concept and now we are working on the actual language.

With respect to NR 1, our concern was that the **broad definition of ASNRI and "public rights features"** would **provide the DNR with unlimited discretion** to kick any regulated activity into an individual permitting process. We were most concerned about the relationship between NR 1 and the pier rules (NR 326) because the advisory committee in charge of drafting the pier rule has been working under the premise that existing boat hoists and new piers located in these special waters must go through the IP process. We wanted to make it clear in NR 1 that these special waters in no way limit the NR 326 advisory group's ability to exempt all piers in special waters if they chose to do so. We know that we will have this fight with the pier rules, but did not want to hold up NR 1 in the process.

The DNR agreed to add a note in NR 1 indicating that piers may be exempt in ASNRI waters and in areas with public rights features. Below is the actual language that will be added after NR 1.05 (ASNRI) and NR 1.06 (public rights features):

However, new and existing piers may be exempt in [areas of special natural resource interest/areas with public rights features] under s. 30.13, Stats., as set forth in NR 326. (Emphasis added)

We have been told that the NR Board will pass a motion today approving this language and authorizing it to be added to the rule.

With respect to the riprap rules (NR 328), **our primary concern, as you know, was with the effective prohibition of riprap on smaller lakes.** (The rule actually allows for property owners on smaller lakes to apply for an IP, but only if they can meet one of two relatively high standards.) We have been told that alternative erosion control methods (i.e., biologs) don't work very well in areas with heavy boat traffic or ice jacking in the Spring, and that riprap is a more effective means of controlling such erosion. The DNR maintains that biologs are actually more effective at controlling erosion if installed properly and cost significantly less than riprap. Given that we did not have the data to refute the claims by the DNR, **we decided that a reasonable compromise would be to make property owners on smaller lakes eligible for a GP to install riprap if the biolog failed to control erosion.** In other words, property owners on smaller lakes will be able to install riprap through (a) the IP process, if they can demonstrate that they are experiencing 1.5 inches of erosion during any 3 months of open water season or score between a 40-48 on the Erosion Index, or (b) the GP process, if they install a biolog and can demonstrate that they are still experiencing 1.5 inches of erosion during any 3 months of open water season. In addition, the DNR will be gathering data on the effectiveness of biologs to control erosion and will be presenting this data to the legislature's standing committees on an annual basis.

Assuming that we both agree to the final draft language (see e-mail exchange below), **our two primary concerns with respect to this package of rules will have been adequately addressed.** We still have concerns about the scope of NR 1 and the lack of recent public hearings on NR 328, but we are willing to let the rules pass and see how they are implemented over the next year, with the understanding that we may be asking the legislature to revisit these rules if problems arise in the future. Lastly, we still have major concerns with the pier rules, but we are working to address them before they are sent to the NR committees later this Spring.

02/22/2005

Please let me know if you have any questions. Thanks.

Tom

 Thomas D. Larson - Director of Regulatory and Legislative Affairs
 Wisconsin REALTORS Association
 4801 Forest Run Road Suite 201
 Madison, WI 53704-7337
 Phone 608-241-2047
 Fax 608-241-2901
 <<<<http://www.wra.org/>>>>

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-----Original Message-----

From: Larson, Tom
Sent: Monday, February 21, 2005 5:27 PM
To: 'Henderson, Patrick - Office of Governor Jim Doyle'; Larson, Tom
Cc: Theo, Mike - VP Public Affairs
Subject: RE: Rip Rap Rule

Pat,

We would prefer that the second note under 328.05(5)(b) be drafted more clearly so that it is not left open to interpretation. Below you will find our suggested change for the second note. Please let us know if you are agreeable to this change. Also, I will get back to you on the Code 580 Standard. Thanks.

Tom

Note: The applicant will satisfy the "equal to or greater than 0.5 feet per year" requirement by demonstrating that the bank-edge recession is equal to or greater than 1.5 inches per 3 months during the open-water season.

[Larson, Tom]

-----Original Message-----

From: Henderson, Patrick - Office of Governor Jim Doyle [<mailto:Patrick.Henderson@gov.state.wi.us>]
Sent: Monday, February 21, 2005 5:09 PM
To: 'Larson, Tom'
Cc: Theo, Mike - VP Public Affairs
Subject: RE: Rip Rap Rule

Hi Tom and Mike,

As discussed earlier with Tom, here is the proposed modifications to NR 328 relating to biological erosion control standards. This language is intended to meet the proposal you made on Friday.

Additionally, the language that Tom sent us regarding the note in NR 1 and its relationship to NR 326 will be made through a motion by Jonathan Ela at the Board meeting tomorrow and will be exactly what Tom sent us earlier.

I think this gets us where we want to be. If we all go together to talk with Senator Kedzie and Rep. Gunderson I'm sure we can convince them to send us this modification and let the other rules go forward. Then we'll take this specific modification to the March DNR Board meeting and have this rule in place late March or early April.

Thanks and let me know what you think of this attachment and this plan.

Patrick Henderson
Office of Governor Jim Doyle
Legislative Director
(608) 266-1338

-----Original Message-----

From: Larson, Tom [mailto:tlarson@wra.org]
Sent: Monday, February 21, 2005 4:06 PM
To: 'Henderson, Patrick - Office of Governor Jim Doyle'
Cc: Theo, Mike - VP Public Affairs
Subject: RE: Rip Rap Rule

Pat,

Thanks for the voice-mail and e-mail messages. We too think we are close to a deal, but we have not heard back from Mary Ellen yet to confirm. Specifically, we are waiting to hear whether the Department is willing to sign off on (a) the compromise agreement that our ad-hoc committee voted in favor of (no sunset), and (b) the language we recommended to be added to the note in NR 1 indicating that NR 1 does not restrict the ability of NR 326 to exempt piers in ASNRI waters or waters with public rights features. Please let us know whether you have heard from her or whether you have the authority to sign off on the DNR's behalf.

I left you a voice-mail message indicating that it is best to reach me at our downtown office (204-0294). You can also try to reach me on my cell phone (212-0066).

Tom

-----Original Message-----

From: Henderson, Patrick - Office of Governor Jim Doyle
[mailto:Patrick.Henderson@gov.state.wi.us]
Sent: Monday, February 21, 2005 3:24 PM
To: 'mtheo@wra.org'; 'tlarson@wra.org'
Subject: Rip Rap Rule

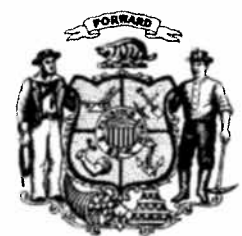
Hi Mike and Tom,

I left you each a voice mail but if you could give me a call that would be much appreciated. Thank you for your email from Friday it has proven to be extremely helpful and I believe we are in agreement with how to proceed. We should talk briefly to make sure we are understanding the email correctly and then talk about the logistics of making the revisions in the rule. If we have the cooperation of the standing committees it won't take long at all. Please give me a call. If you get this message on Tuesday the best way to reach me will be on my cell because I'll be running around between the Senate and Assembly tomorrow. That number is 575-8472. Thanks.

Patrick Henderson
Office of Governor Jim Doyle
Legislative Director
(608) 266-1338



WISCONSIN STATE LEGISLATURE





State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Jim Doyle, Governor
Scott Hassett, Secretary

101 S. Webster St.
Box 7921
Madison, Wisconsin 53707-7921
Telephone 608-266-2621
FAX 608-267-3579
TTY Access via relay - 711

March 1, 2005

Honorable Neal Kedzie, Chair
Senate Committee on Natural Resources and Transportation
Room 313 South
State Capitol

Re: Clearinghouse Rules No. 02-099 and 04-066

Dear Senator Kedzie:

In response to your letter of February 28, 2005, the Department of Natural Resources agrees to consider modifications to Clearinghouse Rule 02-099 relating to department standards for erosion control of inland lakes and impoundments and Clearinghouse Rule No. 04-066 relating to Natural Resources Board policies on protection and management of public waters.

The Department will be recommending that the Natural Resources Board adopt the specific changes requested by your committee. The Natural Resources Board has already received the language of the revised ch. NR 1 notes with an explanation at its February 22, 2005 meeting. While they did not have the matter before them to vote, the members expressed no concerns with the change.

As the Department has already discussed with your Committee, the Natural Resources Board will also be asked to consider a germane modification to Clearinghouse Rule No. 04-065 creating ch. NR 310 relating to timelines and procedures for exemptions, general permits and individual permits for activities in navigable waters. This amendment would incorporate into Natural Resources Board Order No. FH-37-04 the Board's December 8, 2004 motion directing the Department to evaluate the performance of the rules, involving key stakeholders and reporting to the Board and to the Senate and Assembly Natural Resources Committees.

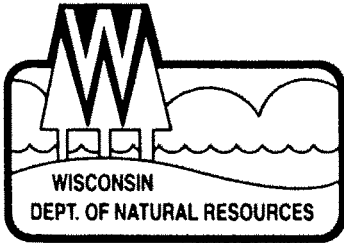
Department staff are working with the Natural Resources Board members to schedule consideration of these matters as soon as possible.

Sincerely,

Scott Hassett
Secretary

cc: Rep. Scott Gunderson
Todd Ambs - AD/5
Mel Vollbrecht - FH/4
Carol Turner - LS/5
Amber Smith - AD/5





State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Jim Doyle, Governor
Scott Hassett, Secretary

101 S. Webster St.
Box 7921
Madison, Wisconsin 53707-7921
Telephone 608-266-2621
FAX 608-267-3579
TTY Access via relay - 711

March 9, 2005

Honorable Scott Gunderson, Chair
Assembly Committee on Natural Resources
Room 7 West
State Capitol

Honorable Neal Kedzie, Chair
Senate Committee on Natural Resources and Transportation
Room 313 South
State Capitol

Re: Clearinghouse Rule No. 02-099 relating to department standards for erosion control of inland lakes and impoundments
Clearinghouse Rule No. 04-065 relating to timelines and procedures for exemptions, general permits and individual permits for activities in navigable waters
Clearinghouse Rule No. 04-066 relating to Natural Resources Board policies on protection and management of public waters

Gentlemen:

I write in response to the February 28, 2005 Senate Natural Resources and Transportation Committee request to make modifications to Clearinghouse Rules No. 02-099 and 04-066, the March 2, 2005 Assembly Natural Resources Committee request for identical changes, as well as the Assembly Committee on Natural Resources request for unspecified changes to ss. NR 1.05 and 1.06 in Clearinghouse Rule No. 04-066.

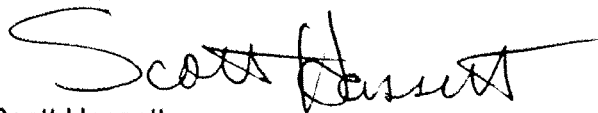
At a meeting on March 8, 2005, the Natural Resources Board adopted the modifications shown on Attachment A which include all of the modifications specified by the Senate Committee and additional items that the Department has been able to determine may be responsive to the Assembly Committee's request for unspecified modifications.

A germane modification to Clearinghouse Rule 04-065 was also adopted by the Natural Resources Board. This modification incorporates the December 8, 2004 motion of the Natural Resources Board regarding evaluating the implementation of Act 118 through the public waters rules.

A copy of the revised orders with the modifications incorporated is attached.

If you have questions about these modifications or about other aspects of these rules, please feel free to contact Todd Ambs or Mary Ellen Vollbrecht of my staff.

Sincerely,

A handwritten signature in black ink that reads "Scott Hassett". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Scott Hassett
Secretary

cc: Todd Ambs – AD/5
Mary Ellen Vollbrecht – FH/4
Carol Turner – LS/5

Attach.

ATTACHMENT A

Modifications to Public Waters Rules requested by Senate & Assembly Natural Resource Committees

CHR-02-099 (NR328)

NR 328.04 (4) (c) Vegetation shall be plant species that are native to the area of Wisconsin where the project is located. Vegetative treatments shall be installed according to Natural Resources Conservation Service Conservation Practice Standard Code 580 (Streambank and Shoreline Protection) or the Natural Resources Conservation Service Engineering Field Handbook (chapter 16).

NR 328.05 (5) (b) The project site is a moderate or high energy site; or a low energy site where the bank-edge recession described in s. NR 328.08 (3) is equal to or greater than 0.5 feet per year and the applicant can show a biological erosion control structure was previously placed according to the standards in s. NR 328.04 (3) and (4).

Note: NR 328.08(3) requires that the time between separate measurements shall equal or exceed 3 months during the open-water season.

Note: The applicant will satisfy the "equal to or greater than 0.5 feet per year" requirement by demonstrating that the bank-edge recession is equal to or greater than 1.5 inches per 3 months during the open-water season.

CHR-04-066 (NR 1)

Note following s. NR 1.05 (2)

Note: Activities not exempted in areas of special natural resource interest under ss. 30.12 and 30.20, Stats., are: deposits less than 2 cubic yards; seasonal structures other than piers or wharves; fish habitat structures; bird nesting platforms; dry hydrants; pilings; riprap repair or replacement; biological shore erosion control structures; intake or outfall structures; dredging to place or maintain an exempt structure; dredging without auxiliary power. Activities not exempted in areas of special natural resource interest under ch. NR 320 are culvert replacements. ~~Piers meeting the dimensional standards in s. 30.12, Stats., are exempt in areas of special natural resource interest under s. 30.13, Stats., unless 30.12 (2m), Stats., applies.~~

Note following s. NR 1.06 (2)

Note: Exemptions not allowed in locations of public rights features are: intake or outfall structures other than dry hydrants; replacement culverts with inside diameter not more than 24 inches; dredging without auxiliary power. ~~In locations of public rights features, piers exceeding the dimensional standards in s. 30.12, Stats., are unlikely to~~

qualify for the exemption under s. 30.13, Stats. However, new and existing piers may be exempt in areas with public rights features under s. 30.13, Stats., as set forth in ch. NR 326.

[Typographical correction: In s. NR1.06(2), the “and” between “30.12 (1g)” and “(km)” will be eliminated.]

Note following NR1.05 (4)(a)

Note: The definition of special concern species and scientific protocols for their identification are established in the Wisconsin Natural Heritage Working List available at http://dnr.wi.gov/org/land/er/working_list/taxalists/key.htm. Special concern species are those species about which some problem of abundance or distribution is suspected but not yet proved. The main purpose of this category is to focus attention on these species before they become threatened or endangered.

NR1.05(7) . The department shall report to the chairs of the standing natural resource committees of the Legislature and to the co-chairs of the joint committee for review of administrative rules in July ~~January~~ of each year the aquatic-dependent species of special concern that may be have been added or removed from the state’s list and those bodies of water that may be are known be impacted by the addition or removal of those species. The department will notify the chairs of the standing natural resource committees of the Legislature and to the co-chairs of the joint committee for review of administrative rules in January of those bodies of water that have been added to or removed from the consolidated list of areas of special natural resource interest as required in NR1.05(6) that result from identification of special concern species. This notification ~~report~~ shall be included in an annual report on waterway and wetland permit program performance that is provided to all members of the legislature and the clerk of each county.

CHR-040065 (NR310)

SECTION 10. Evaluation. The department shall report to the Natural Resources Board, with copies to the chairs of the Senate and Assembly Natural Resources Committees, no later than one year after the effective date of this permanent rule on the implementation of Act 118 through rules promulgated thereunder.

(1) The report should cover all aspects of implementation but shall specifically address the following:

(a) Number and type of permits and exemption determinations issued, the average time taken to process them, and performance in meeting permit deadlines.

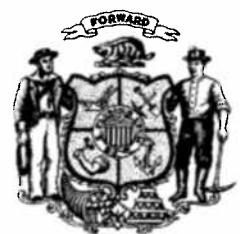
(b) Use of the waters designations including extent and nature of waters added to the Areas of Special Natural Resource Interest, Public Rights Features or Priority Navigable Waters lists, and accessibility of list or maps as required by rule.

- (c) Performance of the new public hearing and individual permit process including number of hearings held, number of objections registered, number of individual permits issued with delayed effective dates, and number of contested case hearings.
- (d) Number and circumstances of general permits required in lieu of exemptions and individual permits required in lieu of a general permit.
- (e) Adverse effects of exempt or general permit activities on habitat, natural features, water quality or navigation, including cumulative and long-term effects on fish and wildlife habitat.
- (f) Results of compliance monitoring program based on inspections of at least a sample of known exempted activities, and general and individual permits.
- (g) Efficiency of permitting complex projects with multiple permitted activities including number of such projects, average number of permitted activities and number of applicants who voluntarily requested a combined permit.
- (h) Experience with making grading jurisdiction determinations using slope measurements and the number of projects requesting the voluntary distance stipulation.
- (i) Experience with applicants requesting fish spawning window waivers.
- (j) Additional activities that could be more efficiently permitted using general permits.
- (k) Alternative processes for general permit development.
- (l) Experiences with making wetland water quality determinations on general permits including estimates of total wetland loss.
- (m) For decisions under NR328, the number of permit applications, application withdrawals, and permit denials; the time period between the application submittal and final action by the department; name and contact information for each permit applicant; and the physical site features of such applications each year.
- (2) The department shall establish an advisory group consisting of interested stakeholders who will provide recommendations to the Department and Natural Resources Board on implementation issues to be evaluated and any needed changes to administrative rules or operating procedures. Members of the advisory board should include at least representatives from the Wisconsin Wildlife Federation, River Alliance, Wisconsin Association of Lakes, Wisconsin Builders Association, Wisconsin Realtors Association, Senate and Assembly Natural Resources Committees, and other interested parties as determined by the Secretary.
- (3) The Secretary may extend the evaluation, reporting and advisory group for additional years based on the results and recommendations of the initial report.

Section 10 11. BOARD ADOPTION. This rule was approved and adopted by the State of Wisconsin Natural Resources Board on _____.



WISCONSIN STATE LEGISLATURE



ADOPTED BY
NR BOARD 2/8/05

**Modifications to Public Waters Rules
requested by Senate & Assembly Natural Resource Committees**

CHR-02-099 (NR328)

NR 328.04 (4) (c) Vegetation shall be plant species that are native to the area of Wisconsin where the project is located. Vegetative treatments shall be installed according to Natural Resources Conservation Service Conservation Practice Standard Code 580 (Streambank and Shoreline Protection) or the Natural Resources Conservation Service Engineering Field Handbook (chapter 16).

NR 328.05 (5) (b) The project site is a moderate or high energy site; or a low energy site where the bank-edge recession described in s. NR 328.08 (3) is equal to or greater than 0.5 feet per year and the applicant can show a biological erosion control structure was previously placed according to the standards in s. NR 328.04 (3) and (4).

Note: NR 328.08(3) requires that the time between separate measurements shall equal or exceed 3 months during the open-water season.

Note: The applicant will satisfy the "equal to or greater than 0.5 feet per year" requirement by demonstrating that the bank-edge recession is equal to or greater than 1.5 inches per 3 months during the open-water season.

CHR-04-066 (NR 1)

Note following s. NR 1.05 (2)

Note: Activities not exempted in areas of special natural resource interest under ss. 30.12 and 30.20, Stats., are: deposits less than 2 cubic yards; seasonal structures other than piers or wharves; fish habitat structures; bird nesting platforms; dry hydrants; pilings; riprap repair or replacement; biological shore erosion control structures; intake or outfall structures; dredging to place or maintain an exempt structure; dredging without auxiliary power. Activities not exempted in areas of special natural resource interest under ch. NR 320 are culvert replacements. Piers meeting the dimensional standards in s. 30.12, Stats., are exempt in areas of special natural resource interest under s. 30.13, Stats., unless 30.12 (2m), Stats., applies. However, new and existing piers may be exempt in areas of special natural resource interest under s. 30.13, Stats., as set forth in ch. NR 326.

Note following s. NR 1.06 (2)

Note: Exemptions not allowed in locations of public rights features are: intake or outfall structures other than dry hydrants; replacement culverts with inside diameter not more than 24 inches; dredging without auxiliary power. In locations of public rights features, piers exceeding the dimensional standards in s. 30.12, Stats., are unlikely to

qualify for the exemption under s. 30.13, Stats. However, new and existing piers may be exempt in areas with public rights features under s. 30.13, Stats., as set forth in ch. NR 326.

[Typographical correction: In s. NR1.06(2), the "and" between "30.12 (1g)" and "(km)" will be eliminated.]

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Note: The definition of special concern species and scientific protocols for their identification are established in the Wisconsin Natural Heritage Working List available at http://dnr.wi.gov/org/land/er/working_list/taxalists/key.htm. Special concern species are those species about which some problem of abundance or distribution is suspected but not yet proved. The main purpose of this category is to focus attention on these species before they become threatened or endangered.

NR1.05(7) . The department shall report to the chairs of the standing natural resource committees of the Legislature and to the co-chairs of the joint committee for review of administrative rules in July ~~January~~ of each year the aquatic-dependent species of special concern that may be ~~have been~~ added or removed from the state's list and those bodies of water that may be ~~are known~~ be impacted by the addition or removal of those species. The department will notify the chairs of the standing natural resource committees of the Legislature and to the co-chairs of the joint committee for review of administrative rules in January of those bodies of water that have been added to or removed from the consolidated list of areas of special natural resource interest as required in NR1.05(6) that result from identification of special concern species. This notification ~~report~~ shall be included in an annual report on waterway and wetland permit program performance that is provided to all members of the legislature and the clerk of each county.

CHR-040065 (NR310)

SECTION 10. Evaluation. The department shall report to the Natural Resources Board, with copies to the chairs of the Senate and Assembly Natural Resources Committees, no later than one year after the effective date of this permanent rule on the implementation of Act 118 through rules promulgated thereunder.

(1) The report should cover all aspects of implementation but shall specifically address the following:

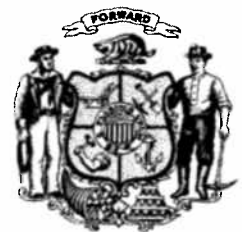
- (a) Number and type of permits and exemption determinations issued, the average time taken to process them, and performance in meeting permit deadlines.
- (b) Use of the waters designations including extent and nature of waters added to the Areas of Special Natural Resource Interest, Public Rights Features or Priority Navigable Waters lists, and accessibility of list or maps as required by rule.

- (c) Performance of the new public hearing and individual permit process including number of hearings held, number of objections registered, number of individual permits issued with delayed effective dates, and number of contested case hearings.
- (d) Number and circumstances of general permits required in lieu of exemptions and individual permits required in lieu of a general permit.
- (e) Adverse effects of exempt or general permit activities on habitat, natural features, water quality or navigation, including cumulative and long-term effects on fish and wildlife habitat.
- (f) Results of compliance monitoring program based on inspections of at least a sample of known exempted activities, and general and individual permits.
- (g) Efficiency of permitting complex projects with multiple permitted activities including number of such projects, average number of permitted activities and number of applicants who voluntarily requested a combined permit.
- (h) Experience with making grading jurisdiction determinations using slope measurements and the number of projects requesting the voluntary distance stipulation.
- (i) Experience with applicants requesting fish spawning window waivers.
- (j) Additional activities that could be more efficiently permitted using general permits.
- (k) Alternative processes for general permit development.
- (l) Experiences with making wetland water quality determinations on general permits including estimates of total wetland loss.
- (m) For decisions under NR328, the number of permit applications, application withdrawals, and permit denials; the time period between the application submittal and final action by the department; name and contact information for each permit applicant; and the physical site features of such applications each year.
- (2) The department shall establish an advisory group consisting of interested stakeholders who will provide recommendations to the Department and Natural Resources Board on implementation issues to be evaluated and any needed changes to administrative rules or operating procedures. Members of the advisory board should include at least representatives from the Wisconsin Wildlife Federation, River Alliance, Wisconsin Association of Lakes, Wisconsin Builders Association, Wisconsin Realtors Association, Senate and Assembly Natural Resources Committees, and other interested parties as determined by the Secretary.
- (3) The Secretary may extend the evaluation, reporting and advisory group for additional years based on the results and recommendations of the initial report.

Section 40 11. BOARD ADOPTION. This rule was approved and adopted by the State of Wisconsin Natural Resources Board on _____.



WISCONSIN STATE LEGISLATURE



Revision to NR 328.05 General permits.

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

(a) Riprap or vegetated armoring may not exceed 200 linear feet of shoreline.

(b) The project site is a moderate or high energy site; or where the bank-edge recession described in s. NR 328.08(3) is equal to or greater than 0.5 feet per year and the applicant can show a biological erosion control structure was previously placed according to the standards in NR 328.04 subs. (3) and (4).

Note: NR 328.08(3) requires that the time between separate measurements shall equal or exceed 3 months during the open-water season.

Note: equal to or greater than 0.5 feet per year also means equal to or greater than 0.5 inches per month.

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

(d) The toe of the riprap may not extend more than 8 feet waterward of the ordinary high water mark.

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

(f) Riprap may not be placed at an elevation higher than the ordinary high water mark plus the storm-wave height as calculated in s. NR 328.08(1). For waters subject to subch. II, riprap may not be placed at an elevation higher than the ordinary high water mark plus 1.5 times the storm-wave height calculated in s. NR 328.08.

Note: The listed waters in subch. II are typified by following conditions – impounded; 2500 acres and larger; extensive water level fluctuation; high shoreline recession rates; historic loss of shoreline vegetation.

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

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

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

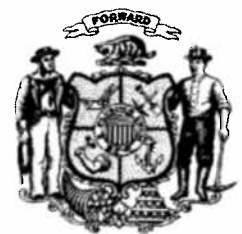
(j) Riprap or other vegetated armoring along moderate energy sites shall be re-vegetated above the ordinary high water mark by using native shrub plantings, native live stakes or native jointed plantings.

Revision to NR328.04 Biological shore erosion control standard

(c) Vegetation shall be plant species that are native to the area of Wisconsin where the project is located. Vegetative treatments shall be installed according to Natural Resources Conservation Service Conservation Practice Standard Code 580 (Streambank and Shoreline Protection).



WISCONSIN STATE LEGISLATURE



Clearinghouse Rule 02-099

Rule Sent to Clearinghouse

ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD CREATING RULES

The Wisconsin Natural Resources Board proposes an order to create NR 328, subch. I relating to department standards for erosion control of inland lakes and impoundments.

FH-39-02

Analysis prepared by the Department of Natural Resources

Statutory authority: s. 30.2035, Stats.

Statutes interpreted: s. 30.12(2) and (3)(a)3., Stats.

Section 30.12(2) and (3)(a)3., Stats., allows the Department of Natural Resources (DNR) to issue permits to place materials or structures on the beds of navigable waters. This subchapter establishes standards for granting permits for projects that place materials or structures on the beds of inland lakes and impoundments in order to control erosion. The standards: (1) prevent projects from causing serious degradation of water quality, fish and wildlife habitat, public interests in recreation, and natural scenic beauty during and after construction; and (2) help the Department consistently and efficiently apply the law governing navigable waters to such projects. This order codifies the findings of a department study on shoreline protection measures as required under s. 30.2035, Stats..

Replacing natural shorelines with bare rock or walls causes habitat changes that have cumulative environmental side effects on fish and fishing. Bare rock or walls generally reduce complex natural nearshore habitats. Riprap replaces natural complex substrate elements with coarse substrates. Shorelines with erosion control structures generally lack woody cover, tree-falls and hanging bank cover. Shorelines with erosion control structures also have less emergent and floating vegetation than sites with no structures. Riprap, vegetated riprap and integrated toe protection cause less adverse effects upon waterways and adjoining property than bulkheads do, and accordingly are preferred over bulkheads as methods to protect shores from erosion in high-energy settings.

The rule improves the consistency and speed of permit decisions and protects near shore fish habitats more effectively by simplifying regulation of erosion control practices that benefit fish and wildlife, while prohibiting practices that severely degrade near shore habitats at site where erosion can be controlled by other methods. The rule reduces the need for case-by-case analysis in two ways: 1) it identifies effective and appropriate erosion control practices (particularly restoration of nearshore vegetation and bioengineering approaches) in settings where permits are either not needed or short-form permits will be used; and 2) it prohibits erosion control practices that severely degrade nearshore habitats in settings where erosion control can be accomplished by more appropriate techniques.

Subchapter I of the rule uses 3 easily obtainable measures to group shorelines exposed to similar erosive force. Chin Wu, (University of Wisconsin, Civil and Environmental Engineering) developed a method that estimates wave heights under various environmental settings using fetch, depth and wind speed as factors. (Young, 1997) Using a lake map, applicants can simply measure fetch at their site and average mean depth (5 evenly spaced points along the fetch line). Windspeed is provided to the applicant in the rule. Applicants use these 3 measures to calculate storm-wave height (feet) for their sites using either a worksheet provided by the Department or information provided on the Department's website. The rule uses the storm-wave heights resulting from this calculation to categorize a site as either a low (<1foot), moderate (• 1foot and <2.3 feet), or high (• 2.3 ft.) energy site, and specifies appropriate erosion control

options for each category. Various erosion control treatments are identified for each site category as: 1) designs typically approved (short-form permit process); 2) designs generally discouraged and critically reviewed by the Department (long-form permit process); and 3) designs prohibited.

The subchapter also provides a more site-specific method (EI) that either the applicant or Department may use to assess erosion. The EI method uses additional site information (ie. bank height, bank soils, offshore depth, offshore and bank vegetation, shore orientation, shore geometry, boating activity, etc.) to more fully assess the severity of erosion at a site, and also groups sites according to scores as either low, moderate or high energy sites. If a site is classified differently by the 2 methods, the category determined by the EI method must be used.

After the rule takes effect the Bureau of Fisheries Management and Habitat Protection will develop a shoreline erosion web page providing information on erosion control topics. The web page will also provide calculators that persons accessing the web page can use to categorize sites by the wave height method and the Erosion Intensity (EI) method. From the web page a person will be able to input fetch, depth, and wind speed at a specific site into the wave height calculator, which will calculate a storm-wave height value that will be used to determine appropriate shoreline erosion control methods for that site from a table on the web page. The Bureau of Fisheries Management and Habitat Protection will also develop a rule implementation booklet entitled, A Waterfront Property Owners Guide to Controlling Erosion and Protecting Fish and Wildlife Habitat.

The Bureau will create new short form applications for the many biological and biotechnical shoreline erosion techniques authorized under the rule. The new short form applications, modeled after short form applications now used for certain regulated activities such as rip rap, will provide a quick method for permitting, while still providing technical standards for construction.

SECTION 1. Chapter NR 328, subch. I is created to read:

**CHAPTER NR 328
STANDARDS FOR SHORE EROSION CONTROL
OF INLAND LAKES AND IMPOUNDMENTS**

Subchapter I – Shore Protection Structures

NR 328.01 Purpose .Section 30.12(2) and (3)(a)3., Stats., allows the department to issue permits to place materials or structures on the beds of navigable waters. The legislature recognizes that, if unregulated, erosion control structures can be detrimental to public rights or interests in navigable waterways. This subchapter establishes standards for granting permits for such structures that will avoid serious degradation of water quality, fish and wildlife habitat, public interests in recreation, and natural scenic beauty caused during and after their construction.

Note: In establishing energy levels, categorizing erosion control treatments and making decisions on long form permits the department recognizes the following:

(1) The reasonable right of riparians to control shore erosion under Wisconsin law. Where erosion control measures or structures enter public waters, the riparian right to protect the shore is subject to the public rights (*Doemel v. Jantz*, 180 Wis. 225, 193 N.W., 393 (1923)). Public rights include navigation in all its forms - swimming, fishing, boating, passive enjoyment of natural scenic beauty - in waters of appropriate quality and quantity (*Muench v. PSC*, 261 Wis. 492 (1952) and others).

(2) The following findings in department studies and other scientific literature.

(a) Natural shoreline features provide erosion control in various ways. Nearshore shoals, bars and beach slopes form as erosion uncovers or sorts out sand, gravel, cobbles, boulders and bedrock from beneath glacial till and other fine soils. These more energy resistant materials are formed into wave-

breaking, energy-absorbing barriers that eliminate, or slow, further erosion. Natural vegetation provides erosion control in several ways. Plants form a network of roots that hold soil particles together and stabilize the bank. Exposed stalks, stems, branches and foliage dampen waves, reduce local flow velocities, and dissipate energy against the plant rather than eroding the soil. Vegetation also acts as a buffer to trap suspended sediment and induce its deposition.

(b) Natural vegetation improves conditions for fisheries and wildlife, improves water quality, and can protect natural scenic beauty and cultural or archeological resources. Natural shorelines contain a rich mosaic of habitats and the fauna that inhabit them. An accumulation of hard structures along shorelines changes habitat and reduces the diversity of this mosaic.

(c) Vertical surfaces of bulkheads reflect wave energy in ways that may increase beach erosion. The incoming and reflected waves create standing waves with higher amplitudes and higher velocities that re-suspend and transport erodible sediment from in front of the structures. This scouring prevents aquatic vegetation from becoming established in front of the bulkhead. Retaining walls may also prevent waterfowl broods and other species from accessing nearshore habitats that are critical for breeding, nesting, feeding, and basking.

NR 328.02 Applicability. Except as provided in s. 30.12(3)(bt), Stats., this subchapter applies to all applications for a permit pursuant to s. 30.12(2) or (3)(a)3., Stats., to construct shore erosion control structures on the bed and bank of an inland lake or impoundment.

Note: This subchapter does not apply to the Great Lakes.

(1) Shore erosion control measures such as grading of less than 10,000 square feet of the bank and adjoining upland to a stable slope, revegetation or other bioengineering methods that do not involve the placement of structures on the bed of a waterway, do not require state permits under s. 30.12(2) or (3), Stats.

(2) All of the provisions of this subchapter apply to the replacement of erosion control structures. Repair of structures is not subject to the provisions of this subchapter. Planting or replanting of vegetation is considered repair of the structure. For revetments and toe protection structures, redistribution of rock material and minor additions of rock is considered repair. Placement of additional rock must be within the footprint of the existing structure, either as shown in a permit or as physically evident at the site. Repair does not involve excavation of material.

(3) Conditions of pre-existing issued permits remain in force unless amended by action of the department.

NR 328.03 Definitions. In this subchapter and in s. 30.12(2) or (3)(a)3., Stats.:

(1) "Bank" means the land surface abutting the bed of any navigable waterway which, either prior to any project or alteration of land contours or as a result of the proposed project or alteration, slopes or drains without complete interruption into the waterway.

(2) "Biological erosion control" means a technique that relies on biological components as the structural elements in a shoreline protection system.

Note: Biological components are living or organic materials that are biodegradable such as native grasses, sedges and forbs; live stakes and posts; non-treated wood; jute netting; fiber rolls and mats. Temporary breakwaters, with non-biodegradable elements, are considered a permissible element during the plant establishment phase of a biological erosion control project.

(3) "Bulkhead" means a vertical structure that is installed parallel to the shore to prevent the sliding or slumping of the land and to protect the adjacent upland from wave action.

Note: Structures steeper than one foot horizontal distance for every 1.5 feet vertical distance are considered vertical. Bulkheads are commonly constructed of timber, rock (gabions), concrete, steel or aluminum sheet piling, and may incorporate biological components.

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

(5) "Erosion intensity" or "EI" means the degree of erosion as estimated under s. NR 328.05(2).

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

(7) "Hard armoring" means a designed structure based on engineering principles that relies solely on inert components.

Note: Inert components are materials that slowly degrade, such as chemically treated wood, stone, concrete, brick, plastics and synthetic polymers.

(8) "High energy site" means a site where the storm-wave height is greater than or equal to 2.3 feet. Wherever erosion intensity score has been calculated, a score greater than 70 is high energy.

(9) "Integrated toe protection" means a structure combining 2 separate treatments: toe protection at the base of the bank and vegetation establishment on the remaining upper portion of the bank.

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

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

(10) "Long form permit" means any permit authorized under s. 30.12 (2), Stats., that requires submittal of site-specific plans and information as required by the department to make determinations under this subchapter and that results in a decision containing site-specific findings of fact and permit conditions.

Note: Public notice under s. 30.02 (3) and (4), Stats., is required.

(11) "Low energy site" means a site where the storm-wave height is less than 1.0 foot. Wherever erosion intensity score has been calculated, a score of 50 or less is low energy.

(12) "Maximum toe elevation" means the elevation of the ordinary high water mark plus the storm-wave height estimated under s. NR 328.05(1)

(13) "Moderate energy site" means a site where the storm-wave height is greater than or equal to 1.0 foot and less than 2.3 feet. Wherever erosion intensity score has been calculated, a score greater than 50 and less than or equal to 70 is moderate energy.

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

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

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

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

(17) "Replacement" means a degree of structural changes to the erosion control structure by which a section of the structure is being recreated.

Note: For bulkheads, any repairs down to or at the footing of the structure are considered replacement. For revetments, replacement of filter fabric or replacement of the base substrate is considered prima facie evidence of replacement.

(18) "Revetment" means a structure fitted to the slope and shape of the shoreline.

Note: Slopes steeper than 1.5 feet horizontal distance for every one foot vertical distance are generally unsuitable to revetments. Revetments may or may not incorporate plant material into their design. Revetments may exceed the maximum toe elevation. Examples of hard-armoring revetments include articulated concrete block systems and riprap. Examples of vegetated-armoring revetments include vegetated concrete block systems, vegetated geogrids and vegetated riprap.

(19) "Riprap" means a layer of rock, including filter material, placed on the bed and bank of a navigable waterway to prevent erosion, scour or sloughing of the existing bank. Riprap is another term for one type of revetment.

(20) "Short form permit" means any permit authorized under s. 30.12 (3)(a), Stats., that uses standard findings of fact, project plans, specifications and permit conditions.

Note: No site visit or public notice is required.

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

(22) "Storm-wave height" means the wave height estimated under s. NR 328.05(1).

(23) "Structure" means any artificial creation which has a defined shape, size, form and utility as opposed to a mere pile or dump of materials.

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

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

(25) "Vegetated armoring" means a structure that combines biological and inert components.

Note: Inert components include wood, stone, concrete, plastics and synthetic polymers. Vegetated-armoring techniques fall into the following 4 categories: integrated toe protection, vegetated-revetment, vegetated-bulkhead and vegetated breakwater.

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

NR 328.04 Permit application. A riparian property owner or duly authorized agent who proposes to install shore erosion control shall submit an application to the department on a form provided by the department. The department shall, upon request, meet with a project applicant and other interested persons to make a preliminary analysis of the potential for compliance with this subchapter. The permit application shall include a calculation of storm-wave height and may include a calculation of the erosion intensity score. The department may also require plan drawings, photographs and data to assess the erosion intensity at the site.

NR 328.05 Data requirements and site assessment methods. Applicants and department staff shall adhere to the following data and methods:

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

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

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

Note: Fetch means the longest continuous linear distance originating from the shore protection site across the water surface to the opposite intersect with the shore or land.

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

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

NR 328.06 Erosion control methods and permit process. Eligible methods of erosion control and permit processing are as follows based on the erosion potential at the applicant's shore site:

(1) LOW ENERGY SITES. At low energy sites:

(a) Permit applications for all biological erosion control methods, including fiber rolls and mats, live stakes, brush mattresses and layers, branchbox breakwaters, and temporary breakwaters are eligible. Short-form permits shall be used.

(b) Permit applications for vegetated-armoring and hard-armoring methods are prohibited except as provided in sub. (4)(a) or subch. II.

(2) MODERATE ENERGY SITES. At moderate energy sites:

(a) Permit applications for all biological erosion control methods as described in sub. (1)(a) and temporary breakwaters are eligible. Short-form permits shall be used.

(b) Permit applications for vegetated armoring are limited to integrated toe protection and vegetated revetments, such as vegetated block systems, vegetated riprap, and rock toe with bank revegetation, are eligible. Short-form permits shall be used.

(c) Permit applications for hard-armoring revetments, such as riprap or concrete block systems, are eligible. Long-form permits are required.

(d) Permit applications for bulkheads and permanent breakwaters are prohibited except as provided in sub. (4) or subch. II.

(3) HIGH ENERGY SITES. At high-energy sites:

(a) Permit applications for all biological erosion control methods as described in sub. (1)(a) and temporary breakwaters are eligible. Short-form permits shall be used.

(b) Permit applications for vegetated armoring are limited to integrated toe protection and vegetated revetments, such as vegetated block systems, vegetated riprap, rock toe with bank revegetation, are eligible. Short-form permits shall be used.

(c) Permit applications for hard-armoring revetments, such as riprap or concrete block systems, are eligible. Short-form permits shall be used.

(d) Permit applications for bulkheads are eligible. Long-form permits shall be used.

(e) Permit applications for permanent breakwaters are prohibited, except as provided in subch. II.

(4) EXCEPTIONS. Permit applications for bulkheads are eligible in the following settings:

(a) Locations where vertical docking facilities are needed such as municipal or industrial harbor areas and boat marinas. Long-form permits shall be used.

(b) Navigational channels actively used as thoroughfares or for access, with slopes greater than one foot horizontal distance for every 1.5 feet vertical distance, showing evidence of erosion, where alternative methods of erosion control would impede navigation. Long-form permits shall be used.

(c) Locations where slopes are one foot horizontal distance for every 1.5 feet vertical distance or steeper, and where the applicant demonstrates that alternative measures are not practicable taking into consideration bank height and the location of permanent structures. Long-form permits shall be used.

Table 1. Erosion Intensity (EI) Score Worksheet. Applicants and department staff shall use this worksheet to calculate erosion intensity pursuant to s. NR 328.05(2).

SHORELINE VARIABLES	DESCRIPTIVE CATEGORIES						ASSIGNED EI	
	EROSION INTENSITY VALUE IS LOCATED IN PARENTHESIS ON LEFT SIDE OF EACH CATEGORY BOX							
FETCH-AVERAGE, longest continuous linear distance the site across the water surface to the opposite intersect with the shore or land.	(0) <1/10	(2) 1/10 -1/3	(4) 1/3-1	(7) 1 -3	(10) 3-10	(13) 10-30	(16) >30	
DEPTH AT 20 FEET, Depth of water (feet) 20 feet from shoreline	(1) <1	(2) 1-3	(3) 3-6	(4) 6-12	(5) >12			
DEPTH AT 100 FEET, depth of water (feet) 100 feet from shoreline	(1) <1	(2) 1-3	(3) 3-6	(4) 6-12	(5) >12			
BANK HEIGHT, height of bank (feet) at the shoreline or just behind the sediment beach	(1) <1	(2) 1-5	(3) 5-10	(4) 10-20	(5) >20			
BANK COMPOSITION composition and degree of cementation of the sediments	(0) Rock, marl, tight clay, well cemented sand (dig with a pick or swamp forest)		(7) soft clay, clayey sand, moderately cemented (easily dug with a knife)		(15) uncemented sands or peat (easily dug with you hand)			
INFLUENCE OF ADJACENT STRUCTURES, likelihood that adjacent structures are causing flank erosion at the site	(0) no hard armoring on either adjacent property	(1) hard armoring on one adjacent property	(2) hard armoring on both adjacent properties	(3) hard armoring on one adjacent property with measurable recession	(4) hard armoring on both adjacent properties with measurable recession			
AQUATIC VEGETATION type and abundance of vegetation occurring in the water off the shoreline	(1) dense or abundant emergent, floating or submerged vegetation		(4) scattered or patchy emergent, floating or submergent vegetation		(7) lack of emergent, floating or submergent vegetation			
SHORE VEGETATION type and abundance of the vegetation occurring between the bank and shoreline	(0) rocky substrates unable to support vegetation.	(1) dense continuous vegetation, marsh fringe and shrubs	(4) scattered or patchy vegetation, upland trees and shrubs		(7) lack of vegetation			
BANK VEGETATION, type and abundance of the vegetation occurring on the bank and immediately on top of the bank lip	(1) dense vegetation, upland trees, shrubs and grasses		(4) clumps of vegetation alternating with areas lacking vegetation		(7) lack of vegetation (cleared), crop or agricultural land			
SHORELINE GEOMETRY general shape of the shoreline at the point of interest plus 200 yards on either side.	(1) coves		(4) irregular shoreline		(8) headland, point or straight shoreline			
SHORELINE ORIENTATION general geographic direction the shoreline faces	(0) < 1/3 mile fetch	(1) south to east	(4) south to west		(8) west northwest to north to east-northeast			
BOAT WAKES proximity to and use of boat channels	(1) no channels within 100 yards, broad open water body, or constricted shallow water body		(6) minor thoroughfare with 100 yards carrying limited traffic, or major channel 100 yards to 1/2 mile offshore		(12) major thoroughfare within 100 yards carrying intensive traffic.			
EROSION INTENSITY SCORE (EI)							→	

NR 328.07 Analysis criteria for long-form permits. The department shall apply the following factors in evaluating long-form permit applications:

- (1) Whether shore protection measures allowed without permits or with a short-form permit would provide adequate erosion control.

(2) The cumulative and individual impact on public rights and interests including fish and wildlife habitat, physical, chemical and biological effects on the adjacent waterway and natural scenic beauty including all of the following:

(a) Interference with navigation and its incidents, including but not limited to swimming, boating, fishing and hunting.

(b) Impacts on natural scenic beauty.

Note: Less developed areas of the lake or less developed lakes in general will experience greater impacts on natural scenic beauty from the structure and its activity than other more developed areas or lakes.

(c) Development density.

(d) Impacts on threatened or endangered species.

Note: Survey information indicates that threatened or endangered species or their habitat are found near the site.

(3) Impacts on fish and wildlife habitat including all of the following:

(a) Reduced density of woody cover in shallow water.

(b) Reduced density, coverage and diversity of nearshore vegetation, such as terrestrial, emergent, floating-leafed and submerged zones.

(c) Designated sensitive areas, spawning or nursery habitat.

Note: The structure and its associated activity located in or near spawning/nursery habitats or designated sensitive areas.

(d) Change in nearshore substrate that reduces its suitability for habitat.

(4) The erosion exposure of the project site based on site-specific conditions, including ice and the presence of natural ice ridges.

(5) The effect of the project on the adjoining upland.

(6) Whether project designs can avoid or reduce impacts of the structure. Designs shall have high likelihood of success, and duration equal to the life-span of the structure.

(7) The effect of the project on unique cultural or archeological resources.

NR 328.08 Short-form permits. (1) The department shall grant an application for a short-form permit where the department determines the applicant has shown all the following:

(a) Based on the analysis criteria in this subchapter, the data used by the applicant in preparing the site assessment reasonably reflects actual site conditions.

(b) All proposed onshore structures intrude into the adjacent waterway only to the minimum extent necessary to provide a sound foundation and structural stability.

(c) The proposed erosion control project complies with the provisions of this chapter.

(2) Notwithstanding sub. (1), the department shall deny an application for a short form permit if the department determines any of the following:

(a) The erosion control project will result in extensive and unnecessary removal of dense natural bank vegetation, dense emergent vegetation or dense floating vegetation.

(b) The erosion control project materially obstructs navigation.

Note: Grading more than 10,000 square feet of the bank and adjoining upland requires a grading permit under s. 30.19, Stats.

The foregoing rules were approved and adopted by the State of Wisconsin Natural Resources Board on _____.

The rules shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22(2)(intro.), Stats.

Dated at Madison, Wisconsin _____.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By _____
Darrell Bazzell, Secretary

(SEAL)