

Chapter NR 328

SHORE EROSION CONTROL STRUCTURES IN NAVIGABLE WATERWAYS

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Note: Sections NR 328.01 to 328.09 were created as emergency rules effective April 19, 2004. Sections NR 328.01 to 328.09 were repealed and recreated by emergency rule effective August 24, 2004.

Subchapter I — Shore Erosion Control Structures on Inland Lakes and Impoundments

NR 328.01 Purpose. (1) The purpose of this subchapter is to establish reasonable procedures and limitations for exempt activities, general permits and individual permits for placement of shore erosion control structures in inland lakes and impoundments as regulated under s. 30.12, Stats., in order to protect the public rights and interest in the navigable, public waters of the state as defined in s. 30.10, Stats.

(2) The standards for exemptions, general permits and individual permits in this chapter balance the reasonable right of riparians to control shore erosion under Wisconsin law with the public rights and interests in navigable waters. (*Doemel v. Jantz*, 180 Wis. 225, 193 N.W., 393 (1923)). The public interest in navigable waters includes navigation, recreation, fish and wildlife habitat, water quality and natural scenic beauty.

(3) Natural shoreline features provide natural erosion control in various ways. Nearshore lakebeds and beach slopes change and shoals form, 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, foliage and fallen trees 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.

(4) Shoreline erosion control structures allowed under this rule are setting-dependent and based on erosive energy at a site. Erosive energy is a reflection of habitat features at a site. Low-energy settings are found to contain fine-size nearshore sediments, stable natural vegetation, and absent or natural levels of erosion. In low-energy and some moderate energy sites vegetation can effectively meet erosion control needs without infringement on the public interest. Shore protection from vegetation alone may be inadequate in some low- to moderate-energy settings and many high-energy settings; therefore, methods that rely on technical structures or a combination of vegetation with technical structures, i.e., large substrates, may be necessary. Riprap, vegetated riprap and integrated toe protection are preferred structural shore protection methods in high-energy settings with erosion problems.

(5) Standards for exemptions are intended to provide clear and consistent requirements so that individuals can determine whether they qualify, and easily design projects to meet the requirements. To achieve this, exemption standards establish reasonable installation practices to minimize environmental impacts, establish reasonable construction and design requirements consistent with the purpose of the activity, and establish reasonable limitations on location.

(6) Standards for general permits are intended to ensure that cumulative adverse environmental impact of authorized activities is insignificant and that issuance of the general permit will not injure public rights or interests, cause environmental pollution as defined in s. 299.01 (4), Stats., or result in material injury to the rights of any riparian owner. To achieve this, general permit standards establish: construction and design requirements consistent with the purpose of the activity; location requirements that ensure that the activity will not have an adverse impact on fish and wildlife habitat, water quality and natural scenic beauty, or materially interfere with navigation or have an adverse impact on the riparian property rights of adjacent riparian owners.

(7) Standards and factors for individual permits are intended to provide direction for detailed evaluation of permit applications, and to balance case-by-case review with consistent decision-making. Individual permits may only be granted where the department determines that the structure will not materially obstruct navigation, will not be detrimental to the public interest, and will not materially reduce the flood flow capacity of a stream.

History: CR 02-099: cr. Register April 2005 No. 592, eff. 5-1-05.

NR 328.02 Applicability. (1) Except as provided in s. 30.2023, Stats., this subchapter applies to construction, placement and maintenance of shore erosion control structures regulated under s. 30.12 (1), (1g) (a), (i), (j) and (k), (2m), (3) (a) 3c., 3g., 3r. and 13. and (3m), Stats. Any person that intends to construct, place or maintain a shore erosion control structure in any inland lake or impoundment shall comply with all applicable provisions of this chapter and any permit issued under this chapter.

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

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

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

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

History: CR 02-099: cr. Register April 2005 No. 592, eff. 5-1-05.

NR 328.03 Definitions. In this subchapter:

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

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

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

(b) A surface water identified as a trout stream by the department under s. NR 1.02 (7).

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

(c) An area that possesses significant scientific value, as identified by the department in s. NR 1.05.

Information and lists can be obtained by contacting the department, or found on the department’s website at <http://dnr.wi.gov>, under the topic “Waterway and Wetland Permits”.

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

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

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

(4) “Commercial marina” has the meaning in ch. NR 326.

(5) “Department” means the department of natural resources.

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

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

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

(9) “High energy site” means a site where the storm-wave height calculated under s. NR 328.08 (1) is greater than or equal to 2.3 feet, or where the erosion intensity score calculated under s. NR 328.08 (2) has a score of greater than 67.

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

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

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

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

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

(13) “Municipal marina” has the meaning in ch. NR 326.

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

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

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

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

(17) “Ordinary high water mark” means the point on the bank or shore up to which the presence and action of water is so continu-

ous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation or other easily recognizable characteristic.

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

Note: This incorporates the definition at s. 30.01(4m), Stats., and current case law, which requires a watercourse to have a bed and banks, *Hoyt v. City of Hudson*, 27 Wis. 656 (1871), and requires a navigable waterway to float on a regularly recurring basis the lightest boat or skiff, *DeGayner & Co., Inc. v. DNR*, 70 Wis. 2d 936 (1975); *Village of Menomonee Falls v. DNR*, 140 Wis. 2d 579 (Ct. App. 1987).

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

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

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

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

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

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

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

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

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

(25) “Storm-wave height” means the wave height estimated under s. NR 328.08 (1).

(26) “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.

(27) “Toe” means the most waterward edge of a shore erosion control structure.

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

(29) “Wave height” means the vertical distance between the wave crest and wave trough.

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

History: CR 02-099; cr. Register April 2005 No. 592, eff. 5-1-05; CR 09-123; am. (9) and (15) Register July 2010 No. 655, eff. 8-1-10.

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

(2) APPLICABLE ACTIVITIES. A biological shore erosion control structure that meets all the standards in subs. (3) and (4) shall be

exempt under s. 30.12 (1g) (k), Stats. Riprap repair that meets all the standards in subs. (3) and (5) shall be exempt under s. 30.12 (1g) (j), Stats. Riprap replacement that meets all the standards in subs. (3) and (6) shall be exempt under s. 30.12 (1g) (i), Stats.

Note: Eligibility for an exemption or general permit does not automatically result in a federal permit or state water quality certification for fill in wetlands. Some projects involving minimal wetland fill may be eligible for authorization under a U.S. Army Corps of Engineers general permit which has already been granted state water quality certification or a general permit under s. 281.36 (3g) (b), Stats. (under development). All other projects affecting wetlands will require individual water quality certification including public notice as required by s. 401, Federal Clean Water Act, and s. 281.36 (3b) (b), Stats. and carried out under chs. NR 103 and 299. For further instructions, see the department's website at <http://dnr.wi.gov> under the topic "Waterway and Wetland Permits."

(3) GENERAL STANDARDS. (a) The structure may not be located in an area of special natural resource interest.

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

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

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

(e) Erosion control measures shall meet or exceed the technical standards for erosion control approved by the department under subch. V of ch. NR 151. Any area where topsoil is exposed during construction shall be immediately seeded and mulched or riprapped to stabilize disturbed areas and prevent soils from being eroded and washed into the waterway.

Note: These standards can be found at the following website: <http://dnr.wi.gov/topic/stormwater/standards/>.

(f) Unless part of a permanent stormwater management system, all temporary erosion and sediment control practices shall be removed upon final site stabilization. Areas disturbed during construction or installation shall be restored.

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

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

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

(j) To stop the spread of invasive species and viruses from one navigable waterway to another navigable waterway, all equipment or portions of equipment used for constructing, operating, or maintaining the project, including tracked vehicles, barges, boats, silt or turbidity curtains, hoses, sheet piles, and pumps, shall be decontaminated for invasive species and viruses before and after use or prior to use within another navigable waterway. Decontamination activities shall be performed by taking actions specified in subd. 1. to 3. or 8. Decontamination shall include either subd. 4., 5., 6., 7., or 8. for any equipment, or portions of equipment, that is used in non-frozen navigable waters when the air temperature is above 19 degrees Fahrenheit at the time the decontamination procedures take place.

1. Inspect all equipment used for constructing, operating, or maintaining the project and remove all plants and animals, and other mud, debris, etc.

2. Drain all water from equipment used in navigable waters.

Note: This does not apply to water in closed engine cooling systems or water tanks, or containers of potable drinking water or other beverages meant for human consumption. If a tanker truck discharges water collected from navigable waters in upland areas, the tank does not require disinfection.

3. Dispose of plants and animals in the trash. An operator may not transfer plants or animals or water from one navigable waterway to another.

4. Wash equipment at a temperature of not less than 212 degrees Fahrenheit water (steam clean).

5. Wash equipment with soap and water or high pressure water of not less than 2000 pounds per square inch.

6. Allow equipment to dry thoroughly for not less than 5 days.

Note: Additional drying techniques including drying through natural or mechanical means or changes in drying duration may be submitted to the department for review and approval.

7. Disinfect equipment with 200 parts per million (0.5 ounces per gallon) chlorine for not less than 10 minute contact time. Every effort should be made to keep the disinfection solution and rinse water out of surface waters.

Note: Chlorine refers to either household bleach solution (5.25% chlorine) or granular chlorine (70% calcium hypochlorite).

8. Follow the most recent department approved disinfection protocols or department approved best management practices for infested waters. The department shall maintain on its website and make available at its offices a list of the most recent disinfection protocols or department approved best management practices for invasive species and viruses.

Note: See the department's website at <http://dnr.wi.gov> under the topic "Waterway and Wetlands". Recommendations for additional disinfection or decontamination protocols or department approved best management practices may be submitted to the department for review and approval to be added to this list.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(6) RIPRAP REPLACEMENT. Replacement of existing riprap is subject to the requirements and limitations of sub. (3) and this subsection:

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

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

(c) A deposit of sand, gravel or stone under s. 30.12 (1g) (a), Stats., may be associated with the riprap replacement provided the deposit is limited to the area immediately underneath the riprap and is less than 2 cubic yards, not including the riprap itself or clean washed gravel provided under par. (e) 7.

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

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

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

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

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

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

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

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

7. 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.

8. Riprap or other vegetated armoring along moderate energy sites shall be re-vegetated above the ordinary high water mark by using native plantings which may include native non-woody plants, native shrub plantings, native live stakes or native jointed plantings.

9. The applicant can document, using historical information and photos, the previous placement of riprap.

10. The applicant can demonstrate that the replacement structure is within the footprint of the previous structure.

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

(b) The department has the authority under s. 30.12 (1m), Stats., to require a permit in lieu of exemption.

History: CR 02-099: cr. Register April 2005 No. 592, eff. 5-1-05; CR 07-094: cr. (3) (j) Register November 2008 No. 635, eff. 12-1-08.

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

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

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

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

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

(2) APPLICABLE ACTIVITIES. Biological shore erosion control that meets all the criteria in sub. (3) shall be eligible for general permit coverage under ss. 30.12 (3) (d) and 30.206, Stats. Riprap that meets all the criteria in sub. (4), (5) or (6) shall be eligible for general permit coverage under ss. 30.12 (3) (a) 3g. and (d) and 30.206, Stats. Seawall replacement that meets all the criteria in sub. (7) shall be eligible for general permit coverage under ss. 30.12 (3) (a) 13. and 30.206, Stats.

Note: Eligibility for an exemption or general permit does not automatically result in a federal permit or state water quality certification for fill in wetlands. Some projects involving minimal wetland fill may be eligible for authorization under a U.S. Army Corps of Engineers general permit which has already been granted state water quality certification or a general permit under s. 281.36 (3g) (b), Stats. (under development). All other projects affecting wetlands will require individual water quality certification including public notice as required by s. 401, Federal Clean Water Act, and s. 281.36 (3b) (b), Stats., and carried out under chs. NR 103 and 299. For further instructions, see the department's website at <http://dnr.wi.gov> under the topic "Waterway and Wetland Permits."

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

(4) RIPRAP REPAIR OR REPLACEMENT. Repair of riprap or replacement of riprap on the bed or bank of a navigable water may be authorized under this general permit if it meets all of the requirements of s. NR 328.04 (3) with the exception that it may be located in an area of special natural resource interest, and with additional limitations as follows:

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

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

(c) Riprap repair/replacement may occur no more than once every 5 years.

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

and is less than 2 cubic yards, not including the riprap itself or clean washed gravel provide under par. (L).

(e) The repair/replacement will not disturb sensitive areas identified in ch. NR 107.

(f) The applicant can document, using historical information and photos, the previous placement of riprap.

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

(h) 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).

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

(j) For replacement, the final riprap slope may not exceed (be steeper than) 2 feet horizontal to one foot vertical.

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

(L) For replacement projects, the 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.

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

(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 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.

(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.

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

(6) REPLACEMENT OF AN EXISTING SEAWALL WITH RIPRAP OR VEGETATED ARMORING. Replacement of an existing seawall with 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 sub. (5) (c) to (j) and s. NR 328.04 (3) with the exception that it may be located in an area of special natural resource interest, and may not exceed 500 linear feet.

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

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

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

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

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

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

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

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

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

(f) For locations identified in par. (b) 3., rock riprap shall be placed in front of the seawall to dissipate wave energy, minimize scour at the base of the wall and provide aquatic habitat. Rock shall be placed to the top of the wall. Riprap shall be clean fieldstone or quarry stone 6 to 24 inches in diameter, placed at a slope not to exceed (be steeper than) 2 feet horizontal to one foot vertical, and may not extend more than 8 feet waterward of the face of the seawall.

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

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

(i) To stop the spread of invasive species and viruses from one navigable waterway to another navigable waterway, all equipment or portions of equipment used for constructing, operating, or maintaining the project, including tracked vehicles, barges, boats, silt or turbidity curtains, hoses, sheet piles, and pumps, shall be decontaminated for invasive species and viruses before and after use or prior to use within another navigable waterway. Decontamination activities shall be performed by taking actions specified in subd. 1. to 3. or 8. Decontamination shall include either subd. 4., 5., 6., 7., or 8. for any equipment, or portions of equipment, that is used in non-frozen navigable waters when the air temperature is above 19 degrees Fahrenheit at the time the decontamination procedures take place.

1. Inspect all equipment used for constructing, operating, or maintaining the project and remove all plants and animals, and other mud, debris, etc.

2. Drain all water from equipment used in navigable waters.

Note: This does not apply to water in closed engine cooling systems or water tanks, or containers of potable drinking water or other beverages meant for human consumption. If a tanker truck discharges water collected from navigable waters in upland areas, the tank does not require disinfection.

3. Dispose of plants and animals in the trash. An operator may not transfer plants or animals or water from one navigable waterway to another.

4. Wash equipment at a temperature of not less than 212 degrees Fahrenheit water (steam clean).

5. Wash equipment with soap and water or high pressure water of not less than 2000 pounds per square inch.

6. Allow equipment to dry thoroughly for not less than 5 days.

Note: Additional drying techniques including drying through natural or mechanical means or changes in drying duration may be submitted to the department for review and approval.

7. Disinfect equipment with 200 parts per million (0.5 ounces per gallon) chlorine for not less than 10 minute contact time. Every effort should be made to keep the disinfection solution and rinse water out of surface waters.

Note: Chlorine refers to either household bleach solution (5.25% chlorine) or granular chlorine (70% calcium hypochlorite).

8. Follow the most recent department approved disinfection protocols or department approved best management practices for infested waters. The department shall maintain on its website and make available at its offices a list of the most recent disinfection protocols or department approved best management practices for invasive species and viruses.

Note: See the department's website at <http://dnr.wi.gov> under the topic "Waterway and Wetlands". Recommendations for additional disinfection or decontamination protocols or department approved best management practices may be submitted to the department for review and approval to be added to this list.

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

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

History: CR 02-099: cr. Register April 2005 No. 592, eff. 5-1-05; CR 07-094: cr. (7) (i) Register November 2008 No. 635, eff. 12-1-08; CR 09-123: am. (6) Register July 2010 No. 655, eff. 8-1-10; correction in (2) made under s. 13.93 (4) (b) 7., Stats., Register May 2013 No. 689.

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

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

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

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

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

(2) APPLICABLE ACTIVITIES. Any shore erosion control structure which is not exempt under s. NR 328.04, is not authorized by a general permit under s. NR 328.05, requires authorization by an individual permit pursuant to s. 30.12 (1), Stats.

(3) RIPRAP. (a) *Moderate or high energy site.* Construction of new riprap at moderate or high energy sites which do not meet the general permit standards in s. NR 328.05 may be authorized

by an individual permit provided that the construction meets the standards in s. 30.12 (3m), Stats., and the rules promulgated thereunder.

(b) *Low energy site.* Construction of new riprap at low energy sites may be authorized by an individual permit provided one of the following can be shown:

1. The bank-edge recession described in s. NR 328.08 (3) is equal to or greater than 0.5 feet per year, and the construction meets the standards in s. 30.12 (3m), Stats., and sub. (5).

2. The EI score described in s. NR 328.08 (2) is equal to or greater than 40, and the construction meets the standards in s. 30.12 (3m), Stats., and sub. (5).

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

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

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

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

(5) ANALYSIS OF INDIVIDUAL PERMITS. The department shall consider factual data from applicants regarding all of the following factors in evaluating individual permit applications:

Note: The Department's analysis of individual permits is not constrained to the general permit standards identified in s. NR 328.05.

(a) Whether shore protection measures allowed without permits or with a general permit would provide adequate erosion control.

(b) 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: interference with navigation and its incidents, i.e., swimming, boating, fishing and hunting; impacts on natural scenic beauty; and impacts on special concern, threatened or endangered species.

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.

Note: Survey information indicates that special concern, threatened, or endangered species or their habitats are found near the site.

(c) Impacts on littoral zone and nearshore habitat including: reduced density of woody cover in shallow water; reduced density, coverage and diversity of nearshore vegetation, such as terrestrial, emergent, floating-leafed and submerged zones; designated sensitive areas, spawning or nursery habitat.; change in nearshore substrate that reduces its suitability for habitat.

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

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

(e) The effect of the project on the adjoining upland and its ability to prevent erosion and sedimentation into the waterway.

(f) Whether project designs or specific conditions 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.

(6) EXISTING PERMITS. A shore protection structure which is authorized by an existing department permit shall continue to be authorized, provided the structure is maintained in compliance with all the conditions of the original permit. Any modifications

to the structure that do not comply with the original permit conditions shall require a new individual permit and shall comply with all standards in this section.

History: CR 02-099; cr. Register April 2005 No. 592, eff. 5-1-05.

NR 328.07 Prohibited erosion control methods.

(1) **PERMANENT BREAKWATERS.** Except as provided in subch. II, construction of permanent breakwaters is prohibited.

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

(3) **NEW RIPRAP.** Construction of new riprap is prohibited at low energy sites, except as provided in s. NR 328.06 (3) (b).

Note: Construction of new riprap may be authorized at moderate and high energy sites as provided in s. NR 328.05 (5) or 328.06 (3).

History: CR 02-099; cr. Register April 2005 No. 592, eff. 5-1-05.

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

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

age depth applicants shall examine a lake map, sum the reported depths along the fetch, and divide by the number of recorded values. At least 5 equally placed intervals along the fetch shall be used.

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

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

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

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

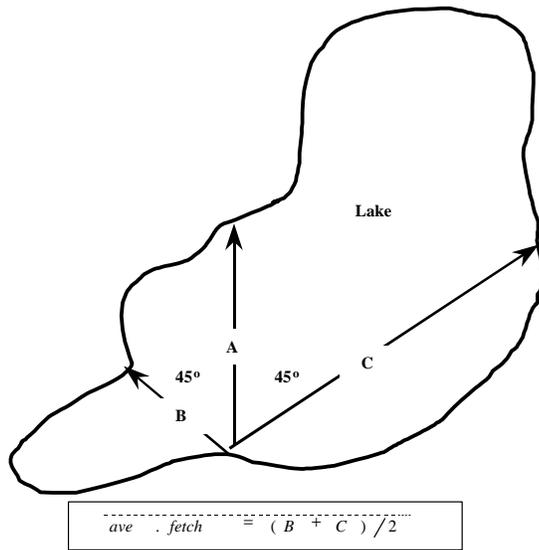
Table 1
Erosion Intensity (Ei) Score Worksheet

Applicants and department staff shall use this worksheet to calculate erosion intensity pursuant to s. NR 328.08 (2).

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

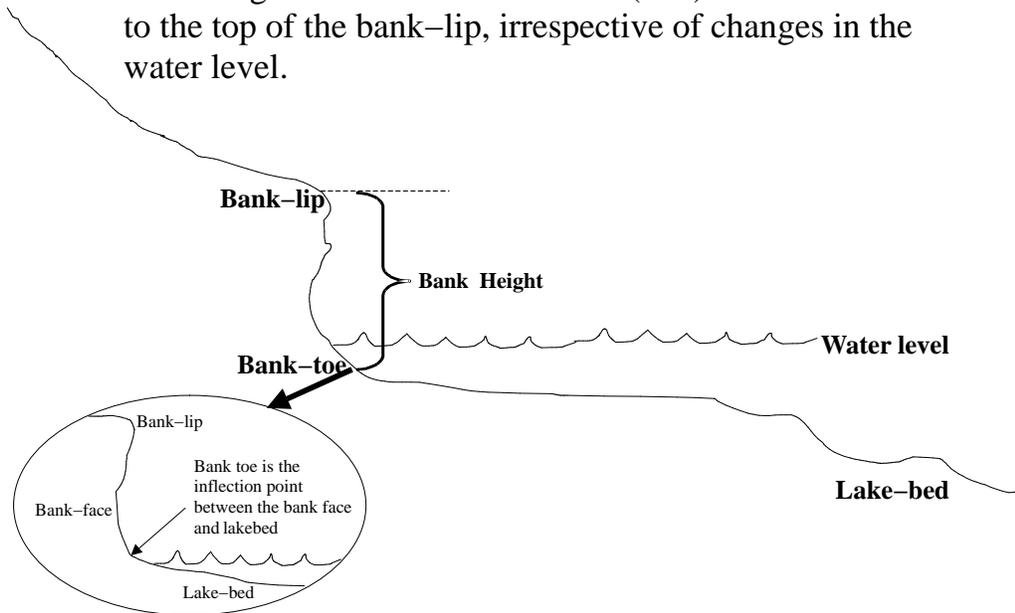
Note: Table 1 is adapted from Knutson, P. L., H. H. Allen, and J. W. Webb, 1990. "Guidelines for Vegetative Erosion Control on Wave–Impacted Coastal Dredged Material Sites," "Dredging Operations Technical Support Program Technical Report D–90–13, U.S. Army Engineer Waterways Experiment Station, Vicksburg,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

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



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

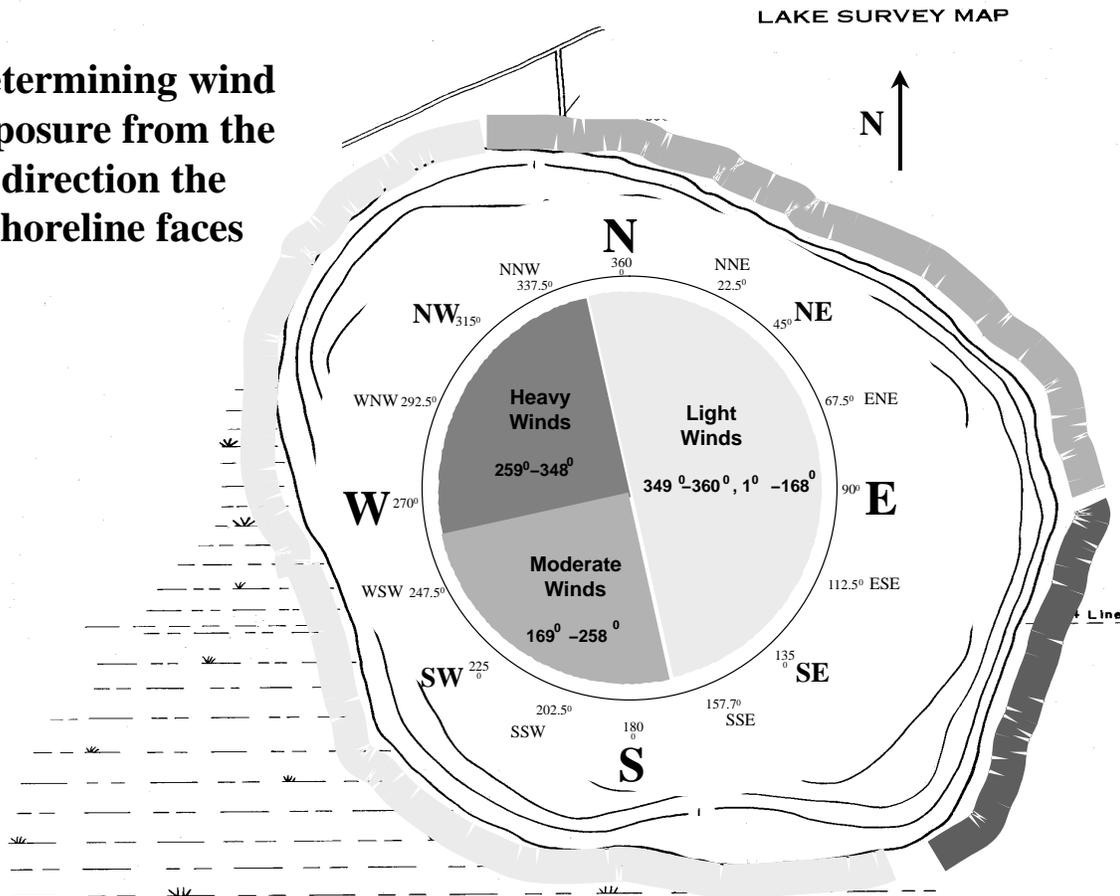
Bank height is the vertical measure (feet) from the bank-toe to the top of the bank-lip, irrespective of changes in the water level.



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

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

Determining wind exposure from the direction the shoreline faces



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

History: CR 02-099: cr. Register April 2005 No. 592, eff. 5-1-05.

NR 328.09 Enforcement. (1) Noncompliance with the provisions of ss. 30.12, 30.20 and 30.206, Stats., this chapter, or any conditions of an exemption, general permit or individual permit issued by the department, constitutes a violation and may result in a forfeiture, fine or imprisonment. The department may seek abatement under s. 30.294, Stats., for any activity in violation of ss. 30.12, 30.20 and 30.206, Stats.

(2) If the activity may be authorized by a general permit under s. 30.206, Stats., failure of an applicant to follow the procedural requirements may not, by itself, result in abatement of the activity.

(3) 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.

(4) Any violation of these rules shall be treated as a violation of the statutes they interpret or are promulgated under.

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

History: CR 02-099: cr. Register April 2005 No. 592, eff. 5-1-05.

Subchapter II — Municipal Breakwater Permits

NR 328.20 Purpose. The purpose of this subchapter is to establish when deposits of material constitute structures for the purpose of controlling shore erosion and to set criteria for determining when structures will be authorized under s. 30.12, Stats.

History: CR 01-103: cr. Register June 2002 No. 558, eff. 7-1-02.

NR 328.21 Applicability. (1) ELIGIBLE WATERWAYS. Permits for breakwaters may be issued for placement in the following water bodies: Castle Rock and Petenwell flowages, Adams and Juneau counties; Lake Koshkonong, Dane, Jefferson, and Rock counties; Beaver Dam lake, Fox lake, and Lake Sinissippi, Dodge county; Lake Puckaway, Green Lake county; Lake Nokomis – Rice River reservoir, Lincoln and Oneida counties; Big Eau Pleine reservoir, Marathon county; Lake DuBay, Marathon and Portage counties; Rainbow and Willow flowages, Oneida county; Lake Poygan, Winnebago and Waushara counties; Lake Winneconne and Lake Buttes des Morts, Winnebago county; Lake Winnebago, Calumet, Fond du Lac, and Winnebago counties; and impoundments of the Mississippi river.

Note: The listed waters are generally typified by the following conditions – artificially impounded; 2500 acres and larger; extensive water level fluctuation; high rate of wetland/shoreline loss from erosion; and historic loss of shoreline vegetation.

(2) WHO MAY APPLY. (a) Permits for breakwaters may be issued to municipalities and similar public entities, including but not limited to, state and federal government, inland lake protection and rehabilitation districts or similar special purpose units of government and public utilities. Owners of riparian upland adjacent to, or flowed lands underlying, the structures shall be co-applicants if the municipality or public utility is not the riparian owner.

(b) As part of the permit application, a public entity shall provide information to demonstrate to the satisfaction of the department that the public entity has all of the following:

1. Statutorily assigned duties, authorities or requirements that may reasonably be construed to include control of shore erosion and protection of aquatic habitat.
2. A system of governance that allows participation in decision making by a range of public interests.
3. Institutional permanence of a duration similar to the life of the structure.

History: CR 01-103; cr. Register June 2002 No. 558, eff. 7-1-02.

NR 328.22 Definitions. As used in this subchapter:

(1) “Breakwater” means the placement of stone, concrete or similar inert material 10 or more horizontal feet offshore, generally parallel to the shoreline for the purpose of controlling shore erosion and preserving or restoring aquatic habitat. Breakwater designs may include, but are not limited, to stone dikes, stone islands, barrier islands and submerged offshore shoals.

(2) “Comprehensive plan” means a plan that includes data on water resources, including public rights and interests in navigable waters; data on existing and potential uses of the water body and any use impairments; alternatives and recommended actions to protect or restore water resources or allocate uses of the water body.

(3) “Department” means the department of natural resources.

(4) “Municipality” means any town, village, city or county in this state.

(5) “Structure” means anything man-made, having shape, form and utility either permanently or temporarily attached to or extending above the ground or lakebed.

History: CR 01-103; cr. Register June 2002 No. 558, eff. 7-1-02.

NR 328.23 Standards. Breakwaters may be authorized where all of the following apply:

(1) They are determined by the department to be the best management practice to control shore erosion and preserve or restore aquatic habitat.

(2) The structure be designed by a licensed professional engineer to be stable under stated maximum water level and wave conditions in order to avoid a failed structure that quickly becomes a hazard to users of the waters.

(3) The practice is specifically recommended for the purpose specified in sub. (1) in a comprehensive plan approved by the department for management of a specific water body and its watershed.

(4) The requirements of s. 1.11, Stats., are met.

(5) The department has complied with the notice and hearing procedures in s. 30.02 (3) and (4), Stats.

Note: 2003 Wis. Act 118 repealed s. 30.02, Stats.

History: CR 01-103; cr. Register June 2002 No. 558, eff. 7-1-02.

NR 328.24 Conditions of permits. In addition to any conditions deemed necessary to protect public rights and interests in navigable waters under s. 30.12, Stats., any authorization issued by the department under this subchapter shall contain the following conditions:

(1) The structure shall remain under public ownership or control. Public ownership and control shall be established by documentation of at least one of the following as part of the permit application:

(a) Fee title ownership of the structure by a municipality or public entity.

(b) Lease with a term of 25 years or more of the structure to a municipality or public entity.

(c) Conservation easement on the structure held by a municipality or public entity that includes the rights to construct and maintain the structure, right of public access to the structure.

(d) Title to, lease of, or conservation easement securing necessary rights to use and management of the structure and the area to be protected from wave energy.

(2) No ancillary structures or facilities, other than scientific measuring devices and navigational markers, shall be located on or attached to the breakwater.

History: CR 01-103; cr. Register June 2002 No. 558, eff. 7-1-02.

Subchapter III — Shore Erosion Control Structures on Rivers and Streams

NR 328.31 Purpose. **(1)** The purpose of this subchapter is to establish reasonable procedures and limitations for general permits and individual permits for placement of shore erosion control structures in rivers and streams as regulated under s. 30.12, Stats., in order to protect the public rights and interest in the navigable, public waters of the state as defined in s. 30.10, Stats.

(2) The standards for general permits and individual permits in this chapter balance the reasonable right of riparians to control shore erosion under Wisconsin law with the public rights to navigation, recreation, fish and wildlife habitat, water quality and natural scenic beauty in navigable waters. (*Doemel v. Jantz*, 180 Wis. 225, 193 N.W., 393 (1923)).

(3) The standard for general permits recognizes that stream channels naturally move back and forth across their floodplains as the energy of water current is dissipated against the stream banks. Watershed land cover, reflecting rainfall infiltration and soil type, predicts the nature of in-stream habitat features as well as the extent of stream channel movement.

(4) This subchapter establishes differing choices of the types of general permits available based on ecoregion and land-use principles. Streams in predominantly forested watersheds have a high percent of natural shore vegetation, including wetlands and large woody cover. Streams of the Northern Lakes and Forests and the North Central Hardwood Ecoregions are environmentally healthy in comparison to other ecoregions that contain more agricultural and urban land use. Streams in predominantly forested watersheds also exhibit seasonally stable flows. Conversely, streams in agriculturally dominant watersheds exhibit more frequent and larger flooding events. These higher flows create severe bank erosion problems. Eroding banks deliver large amounts of sediment and impair instream habitat. Streams in predominantly urban watersheds are frequently confined by man-made structures, residences, and industries that cannot be moved. This subchapter establishes a broader array of general permits available for streams in agricultural or urban dominant watersheds.

(5) This subchapter authorizes bank erosion control treatments based on erosive potential at a site within the stream. Erosive potential is a reflection of habitat features at a site. Natural shoreline features provide natural erosion control in various ways. The force of current sorts out sand, gravel, cobbles, boulders and bedrock from beneath glacial till and other fine soils. These more energy resistant materials form energy-absorbing barriers that eliminate, or slow, erosion. Natural vegetation provides erosion control in several ways. Plant roots form a matrix that holds soil particles together to stabilize banks. Exposed stalks, stems, branches, foliage and fallen trees dampen waves, reduce local

flow velocities, and dissipate energy against the plant rather than eroding the soil. Low-erosion potential sites are often typified by abundant natural vegetation, gradually sloped banks, gravel/rubble/boulder substrates at the toe of the bank, and no stratified soil layers. At low erosion potential and some moderate erosion potential sites, vegetation can effectively meet erosion control needs without infringement on habitat, navigation, natural scenic beauty or other public interests. Vegetation alone may be inadequate in some moderate erosion potential sites and many high erosion potential sites; therefore, methods that rely on technical structures or a combination of vegetation with technical structures may be necessary. Re-vegetated, topsoil-covered riprap and integrated bank protection are preferred structural bank protection methods in high-erosive potential settings.

(6) Standards for general permits are intended to ensure that cumulative adverse environmental impact of authorized activities is insignificant and that issuance of the general permit will not injure public rights or interests, cause environmental pollution as defined in s. 299.01 (4), Stats., or result in material injury to the rights of any riparian owner. To achieve this, general permit standards establish: construction and design requirements consistent with the purpose of the activity; location requirements that ensure that the activity will not have an adverse impact on fish and wildlife habitat, water quality and natural scenic beauty, or materially interfere with navigation or have an adverse impact on the riparian property rights of adjacent riparian owners.

(7) Factors for individual permits are intended to provide direction for detailed evaluation of permit applications, and to balance case-by-case review with consistent decision-making. Individual permits may only be granted where the department determines that the structure will not materially obstruct navigation, will not be detrimental to the public interest, and will not materially reduce the flood flow capacity of a stream.

History: CR 06-126; cr. Register July 2007 No. 619, eff. 8-1-07.

NR 328.32 Applicability. (1) Except as provided in s. 30.2023, Stats., this subchapter applies to construction, placement and maintenance of bank erosion control structures regulated under s. 30.12 (1), (1g) (a), and (k), (2m), (3) (a) 3r. and 13. and (3m), Stats. Any person that intends to construct, place or maintain a bank erosion control structure in any river or stream shall comply with all applicable provisions of this chapter and any permit issued under this chapter.

(2) Erosion control measures such as grading to establish a stable slope, revegetation or other bioengineering methods that do not involve the placement of structures below the ordinary high water mark of a waterway or disturbance of more than 10,000 square feet on the bank are not regulated under s. 30.12 or 30.19, Stats., or this subchapter.

(3) Bank erosion control structures solely located above the ordinary high water mark are likely to migrate below the OHWM as the energy of water current is dissipated against the toe of the stream bank. When this migration occurs, the bank erosion control structure is considered subject to the provisions of this chapter.

Note: A permit is required if land disturbance or excavation exceeds 10,000 square feet on the bank of the navigable waterway (s. 30.19, Stats., and ch. NR 341) or if the activity is conducted in a wetland (ss. 281.17 and 281.36, Stats.).

Note: Erosion control activities may be subject to county, city or village ordinances. Local zoning ordinances place restrictions on grading, buffers, and the cutting of vegetation in the shoreland zone. The riparian is required to comply with, and obtain all necessary permits under, local shoreland ordinances.

History: CR 06-126; cr. Register July 2007 No. 619, eff. 8-1-07.

NR 328.33 Definitions. In this subchapter:

(1) "Bank erosion control structure" means a structure with defined shape, size, form and utility constructed and maintained for the purpose of protecting a streambank from erosion.

(2) "Biological materials" means living or organic materials that are 100% biodegradable such as native grasses, sedges, forbs,

shrubs and trees; live stakes and posts; non-treated wood for staking; jute netting; fiber rolls and mats, erosion control blankets and turf reinforcement mats composed of natural fibers; logs; root wads; tree revetments; and branches.

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

(3) "Biostabilization" means a structure that relies solely on biological materials and may include bank reshaping. Biological bank erosion control structures include but are not limited to native vegetation, fiber rolls, fiber mats, live stakes, brush mattresses, fascines, branch packing, erosion control blankets, turf reinforcement mats, brush layering, encapsulated soil lifts, or revegetation by seeding.

(4) "Commercial marina" has the meaning in ch. NR 326.

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

(8) "Integrated bank treatment" means a structure that combines 2 separate treatments: structural treatment with inert materials for toe protection at the base of the bank and biostabilization on the upper portion of the bank.

(9) "Municipal marina" has the meaning in ch. NR 326.

(10) "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 characteristic.

(11) "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.

Note: This incorporates the definition at s. 30.01(4m), Stats., and current case law, which requires a watercourse to have a bed and banks, *Hoyt v. City of Hudson*, 27 Wis. 656 (1871), and requires a navigable waterway to float on a regularly recurring basis the lightest boat or skiff, *DeGayner & Co., Inc. v. DNR*, 70 Wis. 2d 936 (1975); *Village of Menomonee Falls v. DNR*, 140 Wis. 2d 579 (Ct. App. 1987).

(12) "Replacement" means a degree of structural changes to the bank erosion control structure by which some or all of the structure is removed and recreated. For seawalls, any replacement of a portion of the seawall down to or at the footing of the structure is considered replacement. For riprap, replacement of filter fabric or replacement of the base substrate is considered replacement.

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

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

(15) "Seawall" means an upright structure that is steeper than 1.5 feet vertical to one foot horizontal and that is installed parallel to the bank to prevent the sliding or slumping of the land and to protect the adjacent upland from the action of surface water. Seawalls are commonly constructed of timber, rock (including gabions), concrete, steel or aluminum sheet piling, and may incorporate biological components. Biostabilization structures steeper than 1.5 feet vertical to one foot horizontal, such as encapsulated soil-lifts are not considered seawalls.

(16) "Structural treatment" means a system of non-living materials with a specific configuration installed as a means of bank stabilization including, but not limited to, riprap, tree revetments, logs, rootwads, dormant post, jacks, coir logs, bulkheads, and stream barbs.

(17) "Toe" means the break in slope at the foot of a bank where it meets the streambed.

(18) "Wetland" means an area where water is at, near or above the land surface long enough to be capable of supporting aquatic

or hydrophytic vegetation and which has soils indicative of wet conditions.

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

History: CR 06-126; cr. Register July 2007 No. 619, eff. 8-1-07.

NR 328.34 Pre-existing structures. A streambank erosion control structure authorized by department permit prior to August 1, 2007, shall continue to be authorized, provided the structure is maintained in compliance with all the conditions of the original permit. Any modifications to the structure that do not comply with the original permit conditions shall require a new permit and shall comply with all standards in this section. Bank erosion control structures that were not authorized prior to August 1, 2007, require authorization prior to any repair, modification or replacement.

History: CR 06-126; cr. Register July 2007 No. 619, eff. 8-1-07.

NR 328.35 General permits. (1) PROCEDURES. General permits shall be processed according to the procedures in ch. NR 310.

(2) APPLICABLE ACTIVITIES. Projects that meet all the criteria in sub. (3) and either sub. (4), (5) or (6) are eligible for general permit coverage under ss. 30.12 (3) (d) and 30.206, Stats.

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

1. The project avoids impacts to the endangered or threatened species in accordance with s. 29.604, Stats.
2. The project has received an incidental take authorization under s. 29.604, Stats.

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

(c) The bank erosion control structure may not be placed in a wetland.

Note: Eligibility for a general permit does not automatically result in a federal permit or state water quality certification for fill in wetlands. Some projects involving minimal wetland fill may be eligible for authorization under a U. S. Army Corps of Engineers general permit with has already been granted state water quality certification or a general permit under s. 281.36 (3g) (b), Stats. (under development). All other projects affecting wetlands will require individual water quality certification including public notice as required by s. 401, Federal Clean Water Act, and s. 281.36 (3b) (b), Stats., and carried out under chs. NR 103 and 299. For further instructions, see the department's website at <http://dnr.wi.gov> under the topic "Waterway and Wetland Permits."

(d) Bank erosion control structures may be placed only by a riparian.

(e) To minimize adverse impacts on fish movement, fish spawning, egg incubation periods and high stream flows, placement may not occur during any of the following time periods:

1. For trout streams identified under s. NR 1.02 (7) and perennial tributaries to those trout streams, September 15 through May 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 requirement 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 shore erosion control project, and that the local department fisheries biologist has determined that the requirements of this para-

graph are not necessary to protect fish spawning for the proposed project.

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

Note: A permit is required under s. 30.19, Stats., and ch. NR 341 if land disturbance or excavation exceeds 10,000 square feet on the bank of the navigable waterway. Bank shaping activities necessary to protect stream and river shorelines from erosion on lands used entirely for agriculture are exempt from this subchapter.

(g) Erosion control measures shall meet or exceed the technical standards for erosion control approved by the department under subch. V of ch. NR 151. Any area where topsoil is exposed during construction shall be immediately sodded, seeded and mulched, covered with erosion mat or ripped to stabilize disturbed areas and prevent soils from being eroded and washed into the waterway.

Note: These standards can be found at the following website: <http://dnr.wi.gov/topic/stormwater/standards/>.

(h) Unless part of a permanent stormwater management system, all temporary erosion and sediment control practices shall be removed upon final site stabilization. Areas disturbed during construction or installation shall be restored.

(i) Vegetation, such as seeding, plant plugs, and dormant plantings shall be plant species native to the area of Wisconsin where the project is located. Non-invasive cool season species such as Virginia wild rye, Timothy, alfalfa, alsike clover, orchard grass, Smooth brome grass and red top, may be incorporated into native seed mixes for the purpose of rapid stabilization of critical sites adjacent to agricultural fields.

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

(k) The stabilization method shall follow the natural contour of the shoreline. No waterward extension of the property is permitted other than what is reasonably necessary to conduct the project and protect the existing bank. Except as provided in sub. (4) (d), no soil or similar fill material may be placed in a wetland or below the ordinary high water mark of any navigable waterway.

(L) Erosion control structures shall begin and end at a stabilized or controlled point.

(m) Except as required for appropriate toe installation of the erosion control structure, dredging is not permitted under this section.

(n) The erosion control structure design and placement may not result in a net decrease in the density or size-structure of tree-falls or logs in the water or on the bed and banks of the stream.

(o) Except for the Driftless Area and Prairie Pothole Region, all trees greater than 4" DBH (diameter breast high) removed as part of the erosion control project within 35 feet of the ordinary high water mark shall be incorporated into the waterward portion of the erosion control design.

Note: Driftless Area and Prairie Pothole Region can be found in s. NR 328.38, Figure 1.

(p) To stop the spread of invasive species and viruses from one navigable waterway to another navigable waterway, all equipment or portions of equipment used for constructing, operating, or maintaining the project, including tracked vehicles, barges, boats, silt or turbidity curtains, hoses, sheet piles, and pumps, shall be decontaminated for invasive species and viruses before and after use or prior to use within another navigable waterway. Decontamination activities shall be performed by taking all actions specified in either subd. 1. to 3. or 8. Decontamination shall include either subd. 4., 5., 6., 7., or 8. for any equipment, or portions of equipment, that is used in non-frozen navigable waters when the air temperature is above 19 degrees Fahrenheit at the time the decontamination procedures take place.

1. Inspect all equipment used for constructing, operating, or maintaining the project and remove all plants and animals, and other mud, debris, and similar materials.

2. Drain all water from equipment used in navigable waters.

Note: This does not apply to water in closed engine cooling systems or water tanks, or containers of potable drinking water or other beverages meant for human consumption. If a tanker truck discharges water collected from navigable waters in upland areas, the tank does not require disinfection.

3. Dispose of plants and animals in the trash. An operator may not transfer plants or animals or water from one navigable waterway to another.

4. Wash equipment at a temperature of not less than 212 degrees Fahrenheit water (steam clean).

5. Wash equipment with soap and water or high pressure water of not less than 2000 pounds per square inch.

6. Allow equipment to dry thoroughly for not less than 5 days.

Note: Additional drying techniques including drying through natural or mechanical means or changes in drying duration may be submitted to the department for review and approval.

7. Disinfect equipment with 200 parts per million (0.5 ounces per gallon) chlorine for not less than 10 minute contact time. Every effort should be made to keep the disinfection solution and rinse water out of surface waters.

Note: Chlorine refers to either household bleach solution (5.25% chlorine) or granular chlorine (70% calcium hypochlorite).

8. Follow the most recent department approved disinfection protocols or department approved best management practices for infested waters. The department shall maintain on its website and make available at its offices a list of the most recent disinfection protocols or department approved best management practices for invasive species and viruses.

Note: See the department's website at: <http://dnr.wi.gov> under the topic "Waterway and Wetlands." Recommendations for additional disinfection or decontamination protocols or department approved best management practices may be submitted to the department for review and approval to be added to this list.

(4) BIOSTABILIZATION. Biostabilization on the bed or bank of a navigable river or stream may be authorized under this general permit if it meets the requirements of sub. (3) and all of the following requirements:

(a) The project site is not located on a federal or state, under ss. 30.26 and 30.27, Stats., designated wild or scenic river.

(b) The project site is located in the Driftless Area and Prairie Pothole Region, or Southeastern Wisconsin Till Plains and Chiswaukee Prairie Region, or is located in an urban watershed as identified in s. NR 328.38, or is within village or city limits.

Note: Driftless Area and Prairie Pothole Region, and Southeastern Wisconsin Till Plains and Chiswaukee Prairie Region can be found in s. NR 328.38, Figure 1.

Note: Village or city boundaries are identified according to Tiger 2000 Census.

(c) Structural treatment practices shall be sloped to 1.5 horizontal to one foot vertical or flatter. Bank treatments without structural toe protection and only revegetation shall be sloped to 2 foot horizontal to one foot vertical or flatter. Structural treatments may not include inert materials and are limited to biological materials.

(d) The placement of soil below the ordinary high water mark is allowed only for the establishment of biological materials.

(e) Except as provided in sub. (3) (i), revegetation shall follow Wisconsin NRCS Field Office Technical Guide (FOTG), Section IV, Practice Standard 643A Shoreland Habitat, found at <http://dnr.wi.gov/topic/ShorelandZoning/documents/NRCSshorehabstandard.pdf>.

(5) INTEGRATED BANK TREATMENT. Integrated bank treatment on the bed or bank of a navigable river or stream may be authorized under this general permit if it meets the requirements of sub. (3) and all of the following requirements and limitations:

(a) The project site is located in the Driftless Area and Prairie Pothole Region, or Southeastern Wisconsin Till Plains and Chiswaukee Prairie Region, or is located in an urban watershed as identified in s. NR 328.38, or is within village or city limits.

Note: Driftless Area and Prairie Pothole Region, and Southeastern Wisconsin Till Plains and Chiswaukee Prairie Region can be found in s. NR 328.38, Figure 1.

Note: Village or city boundaries are identified according to Tiger 2000 Census.

(b) For projects located within village or city boundaries in urban watersheds identified in s. NR 328.38 (1); The project site

must equal or exceed a Bank Erosion Potential Index (BEPI) of 20 as determined by the method in s. NR 328.38 (2), or the bank edge recession must equal or exceed 0.5 feet per year as described by the method in s. NR 328.38 (3). For all other project locations; the project site must equal or exceed a Bank Erosion Potential Index (BEPI) of 20 as determined by the method in s. NR 328.38 (2).

Note: NR 328.38 (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.

(c) The total project length may not exceed 500 linear feet of stream bank per ¼ mile of stream reach.

(d) The project site is not located on federal or state (under ss. 30.26 and 30.27, Stats.), designated wild or scenic river.

(e) Stone associated with toe protection shall be clean field stone or quarry stone appropriately sized according to the USDA, NRCS Wisconsin Supplement to the Engineering Field Handbook Chapter 16 – Streambank and Shoreline Protection.

Note: These standards can be found at the following website: <http://directives.sc.gov.usda.gov/OpenNonWebContent.aspx?content=17553.wba>.

(f) Toe protection materials may not be placed above the ordinary high water mark elevation plus one vertical foot in the Wisconsin Till Plains and Chiswaukee Prairie Region. Toe protection materials may not be placed above the ordinary high water mark elevation plus 2 vertical feet in the Driftless Area and Prairie Pothole Region, or is located in an urban watershed as identified in s. NR 328.38.

(g) Structural stabilization practices shall be sloped to 1.5 horizontal to one foot vertical or flatter. Banks treated only with vegetation shall be sloped to 2 feet horizontal to one foot vertical or flatter.

(h) Associated stream habitat structures shall practice standards found in NRCS Field Office Technical Guide (FOTG), Standard 395, Stream Habitat Improvement and Management.

(i) All stone above the ordinary high water mark shall be top dressed with a minimum of 6 inches of top soil.

(j) Except as provided in sub. (3) (i), revegetation shall follow Wisconsin NRCS Field Office Technical Guide (FOTG), Section IV, Practice Standard 643A Shoreland Habitat, found at <http://dnr.wi.gov/topic/shorelandzoning/documents/nrcsshorehabstandard.pdf> and <http://dnr.wi.gov/topic/ShorelandZoning/documents/NRCSBioTechNote.pdf>.

(6) REPLACEMENT OF SEAWALL OR RIPRAP BANK EROSION CONTROL STRUCTURE WITH INTEGRATED BANK TREATMENT. Replacement of riprap or a seawall placed prior to August 1, 2007, with integrated bank treatment on the bed or bank of a river or stream may be authorized under a general permit if it meets all of the requirements of subs. (3) and (5) (d) to (j), and with additional limitations as follows:

(a) The applicant can document using historical information and photographs that the seawall or riprap structure was placed prior to August 1, 2007.

(b) The integrated bank treatment may not exceed the lesser of the length of the existing structure or 300 linear feet of streambank.

(7) REPLACEMENT OF SEAWALL OR RIPRAP BANK EROSION CONTROL STRUCTURE WITH BIOSTABILIZATION. Replacement of riprap or a seawall placed prior to August 1, 2007, with biostabilization on the bed or bank of a river or stream may be authorized under a general permit if it meets all of the requirements of subs. (3) and (4) (c) to (e), and with additional limitations as follows:

(a) The applicant shall provide historic photographs demonstrating that the seawall or riprap structure was placed prior to August 1, 2007.

(b) The biostabilization treatment may not exceed the lesser of the length of the existing structure or 300 linear feet of streambank

(8) REPAIR OF RIPRAP BANK EROSION CONTROL STRUCTURE. Repair of riprap placed prior to August 1, 2007, may be authorized under a general permit if it meets all of the requirements of subs. (3) (a) to (k) and (5) (e) to (f), and with additional limitations as follows:

- (a) The repair site is located within village or city boundaries.
- (b) Redistribution or placement of stone is limited to the horizontal footprint of the existing structure and may not exceed the elevations identified in sub. (5) (f).
- (c) Stabilization work at elevations above those identified in sub. (5) (f) shall be limited to biostabilization practices and revegetation.
- (d) The repair may not exceed the lesser of the length of the existing structure or 300 linear feet of streambank.

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

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

History: CR 06-126: cr. Register July 2007 No. 619, eff. 8-1-07; CR 09-123: cr. (3) (p) Register July 2010 No. 655, eff. 8-1-10; correction in (2) made under s. 13.92 (4) (b) 7., Stats., Register May 2013 No. 689; corrections in (4) (e), (5) (j) made under s. 13.92 (4) (b) 6., Stats., Register February 2014 No. 698.

NR 328.38 Individual permits. (1) PROCEDURES. (a) Individual permits shall be processed according to the procedures in ch. NR 310.

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

1. The project avoids impacts to the endangered or threatened species in accordance with s. 29.604, Stats.
2. The project has received an incidental take authorization under s. 29.604, Stats.

(c) If the applicant modifies the project plans to meet the requirements of par. (b), the modified plans shall be submitted before the department may consider the application complete or issue an individual permit.

(2) ANALYSIS OF INDIVIDUAL PERMITS. The department shall consider factual data from applicants regarding all of the following factors in evaluating individual permit applications:

Note: The department's analysis of individual permits is not constrained to the general permit standards identified in s. NR 328.35.

(a) 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: interference with navigation and its incidents, such as swimming, boating, fishing and hunting; impacts on natural scenic beauty; and impacts on special concern, threatened or endangered species.

Note: Less developed reaches of rivers and streams will experience greater impacts on natural scenic beauty from the structure and its activity than other more developed reaches.

(b) Impacts on bank and in-stream habitat including: reduced density of woody cover in shallow water; reduced density, coverage and diversity of nearshore vegetation, such as terrestrial, emergent, floating-leafed and submerged zones; designated sensitive areas, spawning or nursery habitat; change in substrate that reduces its suitability for habitat.

(c) The bank erosion potential of the site as determined by the methods in s. NR 328.38 (2).

(d) The erosion potential of the site based on site-specific conditions, including ice.

(e) The effect of the project on the adjoining upland, its ability to prevent erosion and sedimentation into the waterway, and the relative contribution of bank erosion to any excess nutrient and sediment load to the stream.

Note: Assessments of bank erosion contribution to excess sediment load should consider whether the land is adjacent to a surface water identified as impaired by the department and listed pursuant to 33 USC 1313 and 40 CFR 130.7, if the impairment relates to excessive delivery of nutrients or sediments. Assessments may also consider whether the project is located within a watershed draining to surface water identified as impaired by the department, and if the impairment relates to excessive delivery of nutrients or sediments.

Note: Assessments of bank erosion contribution to excess sediment load should consider whether the land is adjacent to surface water identified as outstanding or exceptional resource water under s. 281.15, Stats. Assessments may also consider whether the project is located in watersheds draining to outstanding or exceptional resource waters designated under s. 281.15, Stats.

(f) Whether project designs or specific conditions can avoid or reduce impacts of the structure. Designs shall have high likelihood of success, and duration equal to the life-span of upland structures to be protected, if any.

(g) Whether streambank protection measures allowed without permits or with a general permit would provide adequate erosion control.

Note: Assessments landward of the erosion control site typically include: land use and management, waterway access and use, vegetation management, runoff and stormwater management.

(h) The degree to which the erosion control project rehabilitates or protects native plant community classes endemic to the site.

Note: The following habitat classification guides can be used as benchmarks in this assessment:

Kotar, J. and T.L. Burger (1996) A guide to forest communities and habitat types of central and southern Wisconsin. Department of Forest Ecology and Management, University of Wisconsin - Madison, Madison, Wisconsin.

Kotar, J., J. A. Kovach and T.L. Burger (2002) A guide to forest communities and habitat types of northern Wisconsin., 2nd Edition. Department of Forest Ecology and Management, University of Wisconsin - Madison, Madison, Wisconsin.

History: CR 06-126: cr. Register July 2007 No. 619, eff. 8-1-07.

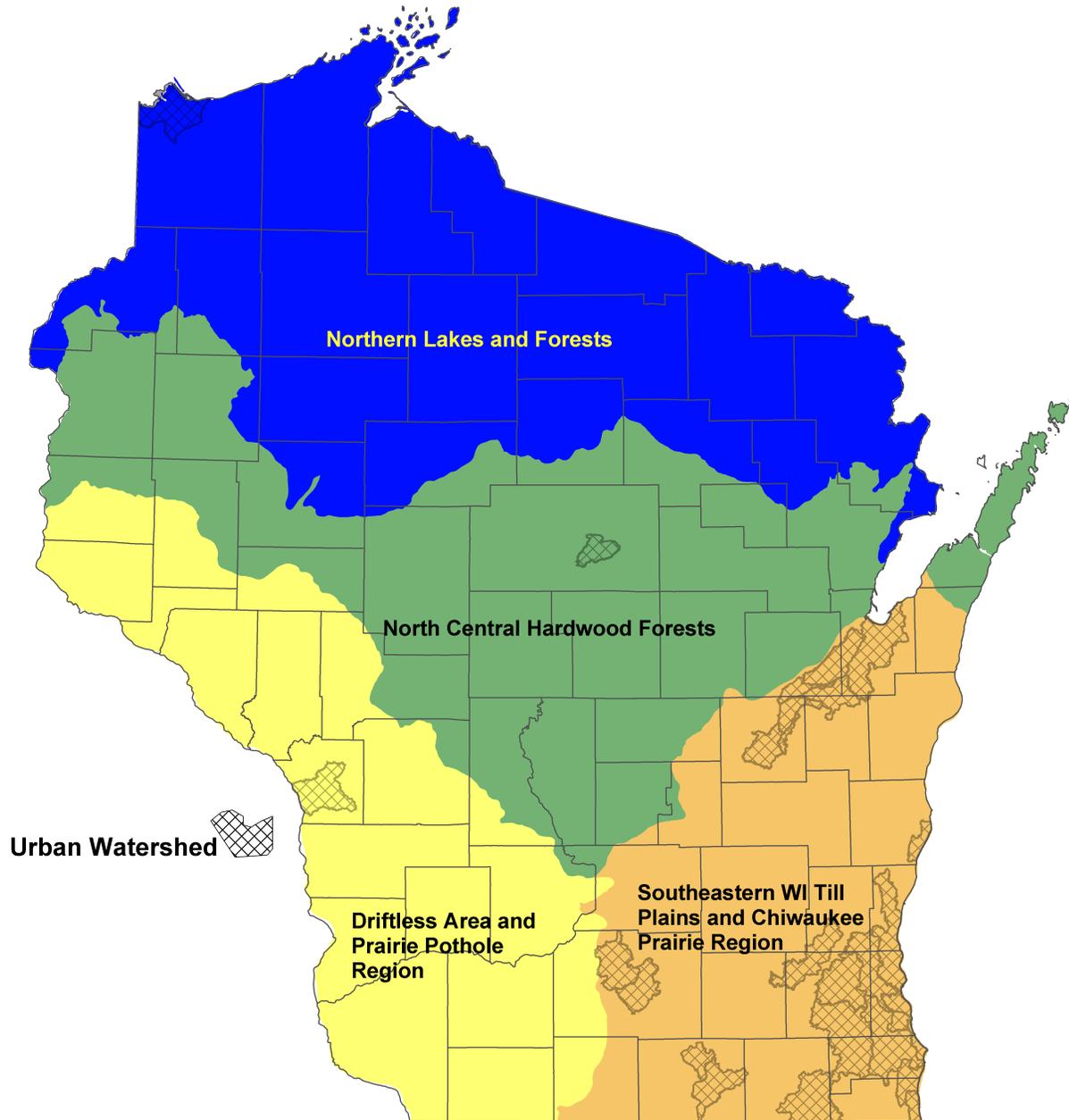
NR 328.38 Data requirements and site assessment methods. Applicants and department staff shall adhere to the following data requirements and site assessment methods:

(1) IDENTIFICATION OF ECOREGIONS AND URBAN AREAS. Ecoregions and urban areas identified in Figure 1 are based on scientific literature characterizing the ecology of Wisconsin streams (Lyons et al. 1996; Wang et al. 1997; Lyons et al. 2001; Wang et al. 2003; and Weigel et al. 2006), Omernik 1987, and Omernik et al. 2000. The department shall provide applicants with maps and internet-based location tools for the purpose of determining ecoregion and urban watersheds.

Figure 1.

Bank Erosion Control GP Permit Map

Based on Level III and IV Ecoregions of Wisconsin and urban watersheds.



Note: Lyons, J., L. Wang, and T. Simonson. 1996. Development and Validation of an index of biotic integrity for coldwater streams in Wisconsin. *North American Journal of Fisheries Management* 16: 241–265.

Lyons, J., R.R. Piette, and K.W. Niermeyer. 2001. Development, validation, and application of a fish-based index of biotic integrity for Wisconsin's large warmwater rivers. *Transactions of the American Fisheries Society* 130:1077–1094.

Omernik, J.M., 1987. Ecoregions of the conterminous United States (map supplement): *Annals of the Association of American Geographers*, v. 77, no. 1, p.

Omernik, J. M., Chapman, S. S., Lillie, R. A., Dumke, R. T. (2000) "Ecoregions of Wisconsin" *Transactions of the Wisconsin Academy of Sciences, Arts, and Letters* 88: 77–103

Wang, L., J. Lyons, P. Kanehl, and R. Gatti. 1997. Influences of watershed land use on habitat quality and biotic integrity in Wisconsin streams. *Fisheries* 22(6):6–12.

Wang, L., J. Lyons, P. Rasmussen, P. Seelbach, T. Simon, M. Wiley, P. Kanehl, E. Baker, S. Niemela, and P.M. Stewart. 2003. Watershed, reach, and riparian influences

on stream fish assemblages in the Northern Lakes and Forest Ecoregion, U.S.A. Canadian Journal of Fisheries and Aquatic Sciences 60: 491-505.

Weigel, B.M, J. Lyons, and P. Rasmussen. 2006. Relative influence of environmental variables at multiple spatial scales on fishes in Wisconsin's warmwater non-wadeable rivers. American Fisheries Society Symposium 48:493-511.

(2) CALCULATION OF STREAM BANK EROSION INTENSITY INDEX. The department shall provide applicants with worksheets and internet-based computer software for the purpose of calculating the bank erosion potential index (BEPI). When the department or

applicants assess erosion at the bank stabilization site, they shall apply methods outlined in Table 1 to calculate a bank erosion potential index (BEPI) score. For each continuous treatment site of 300 feet or less, applicants shall submit at least one BEPI assessment. For continuous treatments greater than 300 feet, applicants shall conduct and submit BEPI assessments at 150 foot intervals along the treatment site.

Table 1
Bank Erosion Potential Index (Bepi) Score Worksheet

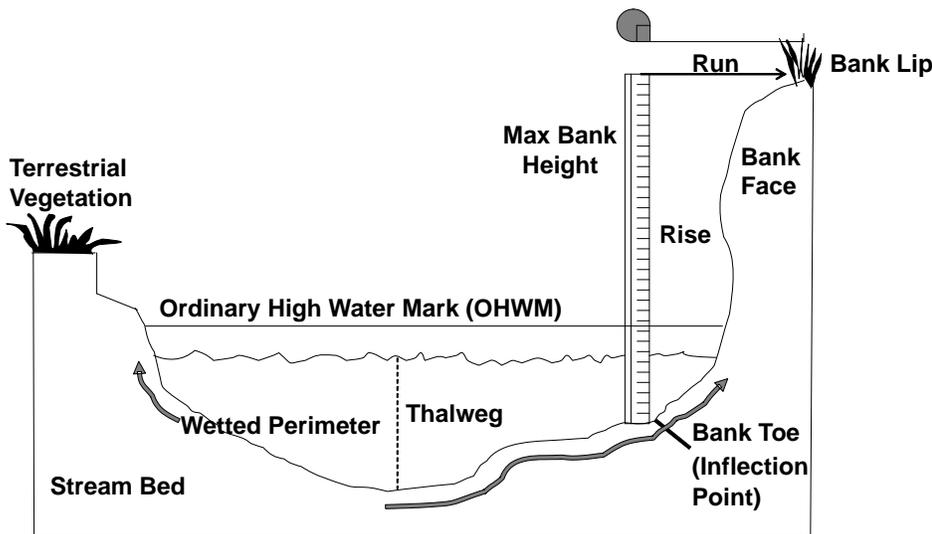
Applicants and department staff shall use this worksheet to calculate erosion intensity pursuant to s. NR 328.38 (2).

STREAMBANK VARIABLES	DESCRIPTIVE CATEGORIES						SCORE
	Erosion Intensity Value is Located in Parenthesis at Bottom of Each Category Box.						
Bank Materials – predominance of bank materials at toe (between bed and ¹ OHWM on bank face).	Bedrock Outcrop Stop assessment BEPI=0	Cobble >3 inches (-10 points)	Silt/Clay (0 points)	Gravel <3 inches (5 points)	Sandy Gravel (7 points)	Non plastic sands and silts (10 points)	
Hydraulic Influence of Upstream Structures – distance (number of channel widths) to bridges, culverts, or dams. <u>Calculation:</u> Number of Channel Widths= Stream Distance to Structure / Average Channel Width	10+ channel widths (1 point)	5.1-10 channel widths (2 points)	2.1-5 channel widths (3 points)	0-2 channel widths (4 points)			
²Max Bank Height (feet) Divided by the OHWM Height (feet) <u>Calculation:</u> Max Bank Height / OHWM Height	1 – 1.19 Very Low or Low (2 points)	1.2 – 1.5 Medium (5 points)	1.6 – 2.0 High (7 points)	2.1 – 2.8 Very High (8 points)	>2.8 Extreme (10 points)		
³Bank Slope (degrees) – measure rise/run and translate into angle degree <u>Calculation:</u> Bank Slope= Inverse Tangent (Rise/ Run)	0 – 20 Very Low (1 point)	21 – 60 Low (3 points)	61 – 80 Moderate (5 points)	81 – 90 Vertical (7 points)	91+ Undercut (10 points)		
⁴Stratification/ Bank Layering –type of soil layering occurring on the bank face.	No stratification (0 points)	No stratification, seepage present (3 points)	Stratified above OHWM (4 points)	Stratified above OHWM with seepage present, or stratified below OHWM (7 points)	Stratified below OHWM with visual seepage (10 points)		

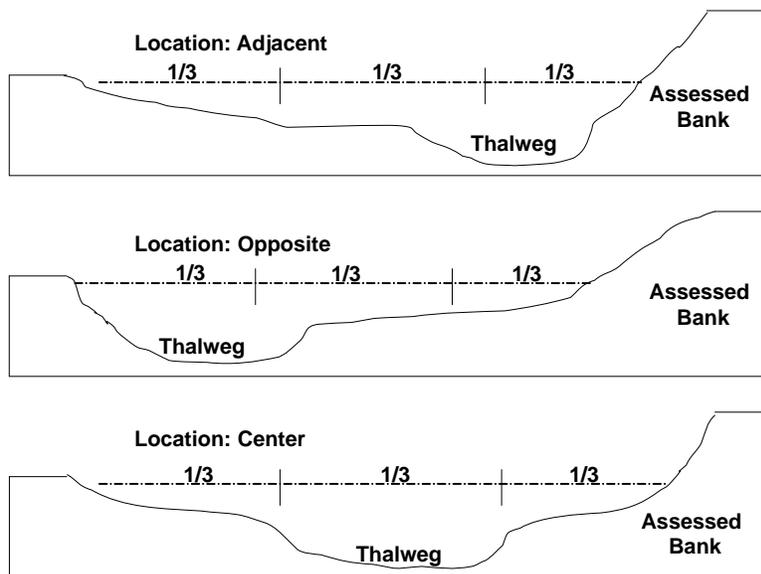
STREAMBANK VARIABLES	DESCRIPTIVE CATEGORIES Erosion Intensity Value is Located in Parenthesis at Bottom of Each Category Box.					SCORE
<p>⁵Bank Vegetation – abundance of the vegetation, roots, and tree–falls occurring between the OHWM and the bank lip.</p>	<p>Rock outcrop bank–unable to support vegetation. (–7 points)</p>	<p>Dense vegetation <30% bare soil visible (–4 points)</p>	<p>Clumps of vegetation 30–59% bare soil visible (0 points)</p>	<p>Sparse vegetation 60–90% bare soil visible (4 points)</p>	<p>Vegetation absent >90% bare soil visible (7 points)</p>	
<p>⁶Thalweg Location – deepest part of the channel and the location of stream current.</p>	<p>Located across the stream, against opposite bank (0 points)</p>	<p>Flowing down the center of the stream channel (2 points)</p>		<p>Immediately adjacent to bank proposed for erosion control (8 points)</p>		
<p>Bank Erosion Potential Index (BEPI) Score</p>						

Note: Table 1 is adapted from Rosgen, David L. "A Practical Method of Computing Streambank Erosion Rate", Wildland Hydrology Inc., Pagosa Springs, CO, 10 pp.

1. Ordinary High Water Mark (OHWM) 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. If bank material is composed of bedrock outcrop, stop with the BEPI assessment at this point; the reported total BEPI score is assumed equal to 0.
2. Maximum bank height means the vertical measure (feet) from the bank toe to the top of the bank lip, irrespective of changes in the water level. Bank toe is the inflection or bending point between the bank face and stream bed.
3. To measure the bank slope (degrees), the rise and run must be measured from the bank toe to the top of the bank lip. With your measure tape or stick, place the end firmly on the bank toe, parallel to the bank face and measure up to the bank lip to find the rise or max bank height. Subsequently, measure the run from the bank toe to the bank lip. From these measures, one should be able to calculate the bank slope with the formula 'bank slope= inverse tangent (rise/run)'. Additionally, the BEPI Calculator is available on the Department's website <http://dnr.wi.gov>. This website automatically calculates the bank slope and BEPI score after inputting fields for bank materials, structures upstream, OHWM height, max bank height, distance to bank face, bank layering/stratification, bank vegetation, and thalweg location.



4. Stratification or bank layering means soils consisting of alternating layers of varying soils or textures.
5. Bank vegetation is the type and abundance of vegetation occurring between the ordinary high water mark (OHWM) and the bank lip. To assess the abundance of vegetation on the targeted bank, apply a 10 foot wide window of assessment from the OHWM to the top of the bank. The following percentages are assigned for the categories: bare soil visible over less than 30% of the surface area=dense vegetation; bare soil visible across 30–59% of the surface area= clumps of vegetation; bare soil visible across 60–90% of the surface area = vegetation sparse; bare soil visible across > 90% of the surface area = vegetation absent. Root wads, tree falls, and snags on the bank are considered in this assessment, because of their influence on thalweg, sediment transport, scour, and bank protection. After assessing the percentage of bare soil in the 'box', record its associated point value.
6. Thalweg means the deepest part of the channel or the location of fastest current. To find the thalweg, the channel must be divided into thirds. The applicant needs to perform one or a mixture of tests for the three segments in determining its location. The following tests are suggested: float an object such as an orange peel down the stream to find the segment of fastest current, find the segment with the bubble line visible at the water's surface, or find the deepest part of the channel, if safe. After locating the thalweg, record its proximity to the tested bank, adjacent (closest), center, or opposite (furthest) and record its associated point value.



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

History: CR 06-126: cr. Register July 2007 No. 619, eff. 8-1-07.

NR 328.39 Enforcement. (1) Noncompliance with the provisions of ss. 30.12, 30.20 and 30.206, Stats., this chapter, or any conditions of an exemption, general permit or individual permit issued by the department, constitutes a violation and may result in a forfeiture, fine or imprisonment. The department may

seek abatement under s. 30.294, Stats., for any activity in violation of ss. 30.12, 30.20 and 30.206, Stats.

(2) If the activity may be authorized by a general permit under s. 30.206, Stats., failure of an applicant to follow the procedural requirements may not, by itself, result in abatement of the activity.

(3) 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.

(4) Any violation of these rules shall be treated as a violation of the statutes they interpret or are promulgated under.

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

History: CR 06-126: cr. Register July 2007 No. 619, eff. 8-1-07.