ATTACHMENT B
DNR Response to Comments
Proposed Revisions to Ch. NR 115, Wis. Adm. Code
Board Order WT-06-12

I. GENERAL SUMMARY

The department scheduled five public hearings and accepted public comment from June 27th until September 9th, 2013. Public Hearings were held in Greenville, Delafield, Tomah, Spooner and Tomahawk. A total of 146 people attended the hearing, but only 44 people provided oral testimony at the hearings. During the public comment period, the department received 410 comments, both written or oral, from individuals, organizations and local governments on the proposed rule revisions. Of the comments that were received 93 comments were in support of the proposed revisions, 280 comments were opposed, and 37 comments were neutral. Of those that were opposed to the rule revisions there were 256 comments that were opposed because the rule was too permissive and 24 comments were opposed because the rule was too restrictive. The following state legislative representatives, organizations and local governments provided oral or written comments on the proposed rule revisions.

In Support

Big Hills Lake Management District
Dodge County Zoning
Door County Zoning Administration
Kenosha County Planning & Development.
League of Wisconsin Municipalities
Lincoln County Zoning
Marathon County Planning & Development
North Lake Management District
Oneida County Planning & Development
Realtors Association of NW Wisconsin
Sen. Tom Tiffany – 12th Senate District
Town of Merrimac
Town of Oshkosh
Vilas County Zoning Department
Waushara County Land Conservation & Zoning
Wisconsin Counties Association
Wisconsin County Code Administrators
Wisconsin Realtors Association
Wisconsin Realtors Association of SE WI

In Opposition- rule too permissive

Bayfield County Lakes Forum
Clean Wisconsin
Diamond Lake Assoc.
Douglas Co. Association of Lakes & Streams
Eagle Springs Management District
Eau Claire Area Lakes Property Owners
Manitowish Waters Lake Association
Midwest Environmental Advocates
Milwaukee Riverkeeper
River Alliance of WI
St. Croix River Association Board of Directors
Tainter Menomin Lakes Improvement Association
Terra Firma WI
Tri-Lakes Protection Association
Town & County Resource Conservation & Develmnt.
US Department of Interior
Vilas County Lakes and Rivers Association
Washburn Co. Lakes & Rivers Assoc
Waupaca Chain O' Lakes Protection & Rehab Dis
Whitefish Lake Conservation Organization
Wisconsin Association of Lakes
Wisconsin Chapter of the Nature Conservancy
Wolflake Property Owners Association

In Opposition- rule still too restrictive

Rep. Garey Bies – 1st Assembly District
Rep. Mary Czaja – 35th Assembly District
Forest County
Forest County Zoning
Rep. Jeff Mursau – 36th Assembly District
Rep. John Nygren – 89th Assembly District
Rep. Al Ott – 23rd Assembly District
Racine County
Racine County Planning & Zoning
Rep. Rob Swearingen – 34th Assembly District
Town of Burlington
Town of Peshtigo
Town of Waterford
Town of Wausaukee Land Use Committee
Waterford Waterway Management District

The department also received comments from the Legislative Council Rules Clearinghouse. The department thoroughly considered and evaluated all of the comments that were received and has attempted to address the concerns of the Legislative Council Rules Clearinghouse. The department has re-organized the impervious surface section of NR 115 to provide additional clarity and has made a couple of other modifications to the nonconforming structure section and impervious surface section to address comments and concerns that were expressed during the public comment period. Section II contains a summary of the suggested modifications to the proposed rule, which were received during the public comment period, beginning with the comments from the Legislative Council Rules Clearinghouse and then those that were received from counties, organizations or individuals. Then Section III includes a summary of the most common general comments received by the department, separated by those that are in support and those that are opposed to the proposed rule revisions and the department's response to those comments.

II. SUGGESTED MODIFICATIONS TO THE PROPOSED RULE LANGUAGE

During the public comment period the department received a number of suggested modifications to the proposed rule language including those from the Legislative Council Rules Clearinghouse. The department has considered the suggested modifications and has attempted to address a number of the suggested modifications through slight modifications in the proposed rule language. The changes provide clarity, flexibility and should address most of the concerns expressed. The suggested modifications are below, including the department's response, and are broken into two sections: the comments from the Rules Clearinghouse and the other suggested modifications.

A. COMMENTS FROM THE LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

2. Form, Style and Placement in Administrative Code

a. In the enumeration of sections treated by the proposed rule, "NR 115.01 (c) 2. d." should be written as "NR 115.05 (1) (c) 2. d.". Similarly, the enumeration of sections treated by the rule should refer to "NR 115.05 (1) (e) (intro.), 1., and 2".

Response: This change was made.

b. In the analysis prepared by the department, in the "Revision Rationale" section, the slashed alternative "and/or" should be deleted and replaced with the word or phrase that reflects the department's intent. [See s. 1.01 (9) (a) Manual.]

Response: This change was made.

c. The rule analysis should specify the place where comments may be submitted and a deadline for submission. [See s. 1.02 (2) (a) 13., Manual.]

Response: No change was made prior to the public hearings and public comment period.

d. Generally, the department may wish to revise SECTION 2 of the proposed rule to better reflect the substance of the department's amendments. For example, the underscored material appears to relate to two definitions of "highly developed shoreline" as well as two impervious surface standards (one general standard, one standard for highly developed shoreline). The substance of these amendments may be better communicated by repealing and recreating the entire par. (e). [See s. 1.02 (3), Manual.]

Response: The department has attempted to address this comment by re-organizing the impervious surface section in NR 115.05(1)(e).

e. Throughout the proposed rule, cross-references should conform to the styles prescribed by s. 1.07 (2), Manual. If a sentence ends with a cross-reference that includes a period, a second period is unnecessary.

Response: This change was made.

f. When a rule provision is repealed and recreated, or created, the treated material should not be underscored.

Response: This change was made.

g. SECTION 6 of the proposed rule includes many rule provisions that are not subject to treatment. It appears that more specific treatments may be appropriate. For example, it appears SECTION 6 could be replaced by sections of the proposed rule that amend s. NR 115.05 (1) (g) 4. (Note), 5. (intro.), a., and c., and 6. a.; and repeal s. NR 115.05 (1) (g) 6. f. and 7. It appears unnecessary to renumber s. NR 115.05 (1) (g) 6. g.

Response: This change was made.

h. In SECTION 8, material to be removed from the code should be indicated and stricken-through.

Response: This change was made.

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. In the analysis prepared by the department, in the "Major provisions and new requirements" section, "current" should be changed to "currently".

Response: This change was made.

b. In s. 115.05 (1) (e) 2. b., it appears that "over 30% of the lot" should be changed to "over 30% of the lots".

Response: This change was made.

c. In s. 115.05 (1) (e) 3m. title, "Impervious Surfaces" should be changed to the lowercase.

Response: This change was made.

B. OTHER SUGGESTED MODIFICATIONS

1. *COMMENT: Modify the hearing requirement for the adding areas of highly developed shorelines, to that used for variances, special exceptions or conditional uses, and map amendments under NR 115.05(4)(h). .*

Response: While this is the administrative process that the department intended for counties to utilize in creating additional areas of highly developed shorelines, the department has attempted to clarify the language in the proposed rule language NR 115.05(1)(e)2m.b.

2. *COMMENT: The department should require that any stormwater devices utilized to treat runoff under NR 115.05(1)(e)3m. should be engineered devices that are stamped by a state-licensed engineer and should provide guidance to counties for implementing, monitoring and enforcing this requirement.*

Response: No change was made. However, the department plans on providing guidance to the counties to aid in the implementation and enforcement of this provision and counties may require the devices be engineered and stamped by a licensed professional engineer.

3. *COMMENT: Instead of limiting the application of the impervious surface limits to riparian properties or only non-riparian properties that fall entirely within 300 feet of the ordinary high water mark under NR 115.05(1)(e)1., the department should require that any property that falls within 300 feet of the ordinary high water mark, even if it is only a portion of the lot, then the impervious surface limits apply to the entire property.*

Response: No change was made. The purpose of the rulemaking process was to ease the administrative burden on counties. The proposed language would limit the number of properties that would fall within the impervious surface limits, thus reducing the administrative workload for counties in implementing the impervious surface standards. However, counties may be more restrictive in regulating impervious surfaces and could adopt the proposed modifications mentioned in this comment and regulate any property that falls even partially within 300 feet of the ordinary high water mark.

4. *COMMENT: Limiting the application of the impervious surface limits to riparian lots or non-riparian lots that fall entirely within 300 feet of the ordinary high water mark, will allow property owners who have deeper lots, in excess of 300 feet, to create an outlot along the lakeshore to avoid the impervious surface limits. The language in the rule should be modified to address this situation.*

Response: The department has attempted to address this concern by adding a sentence in NR 115.05(1)(e)1m. Further, the county may have other zoning restrictions or standards that could prevent or discourage property owners from creating an outlot to avoid the impervious surface limits. For example, some counties review all land divisions, some counties prohibit the construction of an accessory structure, such as a boathouse or stairs, if there is not a principal structure on the property and some counties may choose to be more restrictive in regulating impervious surfaces and could adopt the proposed modifications mentioned in comment 3) above and regulate any property that falls even partially within 300 feet of the ordinary high water mark.

5. *COMMENT: The proposed rule creates differential treatment for urban areas and rural areas in the proposed impervious surface limits for highly developed shorelines. The proposed rules should not provide preferential treatment for urban areas but should provide economic and regulatory equality for all areas of Wisconsin, when limiting the amount of impervious surfaces on the property.*

Response: Modification to the rule language was made in NR 115.05(1)(e)2m.c. to provide more flexibility for counties that choose to adopt a highly developed shoreline standard and to encompass more areas of the state that may be already developed above the impervious surface limits.

6. *COMMENT: Modify the proposed horizontal or lateral expansion provision in NR 115.05(1)(g)5.(c) to limit the lateral expansion of a nonconforming principal structure to 200 sq. feet over the life of the structure instead of a one-time expansion of 200 sq. feet to allow property owners to build smaller expansions if desired.*

Response: Modification to the rule language was made in NR 115.05(1)(g)5.(c).

7. *COMMENT: The proposed rule should recognize that relocation of some principal structures to meet the setbacks would actually result in more environmental damage and undue hardship to the property owner or clarify that variance should be issued in these situations.*

Response: No change. For principal structures that are at least 35 feet from the ordinary high water mark, counties should take into consideration the potential limitations on the property when considering the relocation of a nonconforming principal structure, NR 115.05(1)(g)6.d.. This would include other zoning restrictions, such as highway setbacks, utilities, topographic or other environmental limitations on the property. If the structure is within 35 feet, the property owner would have to obtain a variance to expand or replace a nonconforming structure, because these structures are located within the vegetative buffer zone and tend to have the greatest impacts on the shoreland zone. The standards for issuance of a variance are established by statute and broadly apply to any zoning variance. These standards have been further defined over time through case law. Boards of Adjustment can certainly take into consideration property limitations and the hardship that relocation of the structure would put on the property owner, when taking into consideration the issuance of a variance.

8. *COMMENT: The department should modify the language regarding maintenance and repair of nonconforming structures to clarify whether a property owner can conduct exterior remodeling, and replace or enhance components of the structure.*

Response: The department made some slight modifications to NR 115.05(1)(g)4. to clarify that exterior remodeling is allowed and that electrical and plumbing systems, insulation, doors, windows or a roof may be replaced or enhanced. The department did not modify the requirements that maintenance and repair of a nonconforming principal structure must be within the existing building envelope of the existing structure.

9. *COMMENT: In calculating of the impervious surface limits on a property the department should clearly reference that counties do not need to include treated impervious surfaces in that calculation.*

Response: The department modified NR 115.05(1)(e)1m. and 3m. to cross reference the calculation of impervious surfaces with the treated impervious surface section.

10. *COMMENT: The proposed rule should exclude areas from the impervious surface limits if the area is served by a public sanitary sewer.*

Response: Modification to the rule language was made in NR 115.05(1)(e)2m.c. to provide more flexibility for counties that choose to adopt a highly developed shoreline standard for those areas that are currently served by sanitary sewer.

III. OTHER GENERAL COMMENTS RECEIVED DURING THE PUBLIC COMMENT PERIOD

Comments- Neutral	37
Comments- Support	93
Comments - Opposed-too restrictive	24
Comments -Opposed-too permissive	256
Total Number of Comments	410

A. COMMENTS IN SUPPORT OF THE RULE REVISIONS

There were 93 people that submitted comments in support of the proposed rule revisions. The comments in support of the rule revisions and the department's response may be summarized as follows.

1. *Comment: The proposed revisions represent a better balance between property rights and the environment and will provide more flexibility for property owners.*

Response: Wisconsin statutes require the Department to set minimum statewide standards to protect water quality, fish and wildlife habitat and natural scenic beauty (s. 281.35, Wis. Stats.). While some supporters prefer more restrictive or more lenient standards, the rule attempts to balance science with private property rights. Shoreland zoning is ultimately a partnership and it requires that the department work with counties to develop a rule that balances protection of the resource with the administrative burden of implementing the minimum standards in the rule.

2. *Comment: Stricter shoreland standards are not the answer.*

Response: The existing and proposed rule language in NR 115 represents an interwoven web of standards that allow some reasonable development within the shoreland zone while requiring property owners to offset those impacts through mitigative measures such as restoration of the shoreland buffer zone, rain gardens or other stormwater treatment devices.

3. *Comment: Will promote denser development*

Response: The proposed rule revisions would not modify the minimum lot size standards that have been in NR 115 since its initial adoption in 1968. Therefore, development won't necessarily be denser as a result of the proposed revisions, but would allow already densely developed areas more flexibility to develop their parcels.

4. *Comment: Current impervious surface standards are too restrictive and impracticable.*

Response: Numerous studies have shown that fish and amphibian species decline significantly as impervious surfaces and development increases within the shoreland zone. Additionally the diversity of species, including birds and aquatic insects, declines as development occurs. Most of the studies have

found that when impervious surfaces exceed 12% within a watershed, that the fish and wildlife diversity declines sharply.

While some studies have shown that maintenance of a shoreland buffer and stormwater ponds may mitigate some of these impacts to fish and wildlife habitat, the studies agree that there are no longer detectable benefits once the impervious surfaces in the watershed exceed 30%. However, it is important to note that once impervious surfaces exceed 30% within the watershed, the impacts on water quality and fish and wildlife habitat begin to be marginalized over time. Consequently, those watersheds that already exceed 30% impervious are likely already experiencing impacts to water quality and fish and wildlife habitat, such that the proposed rule changes may not result in any further measurable impacts over time.

The proposed changes to the impervious surface limits recognizes that some lakes and rivers in Wisconsin already exceed 30% impervious along their shorelines and the current standards would require mnay property owners to receive variances for even minor additions. The proposed rule attempts to allow some additional development within the shoreland zone with the implementation of a shoreland mitigation project.

5. Comment: Even with these modifications the rule is still too burdensome

Response: While the revision offers more flexibility than current law, waterfront property owners will have to make calculated decisions when considering improving or making changes on their lots. Therefore, costs will differ for each property owner based on their individual goals for their property and adjacent water body. Property owners may incur costs to mitigate, but only when they choose to modify buildings or surfaces in ways that exceed dimensional standards. In some cases, mitigation measures may save money for property owners. Corporate landowners can save between $270 to $640 per acre in annual mowing and maintenance costs when they keep open lands as a natural buffer instead of replacing it with turf.

While local county governments will experience fiscal impacts to amend their shoreland ordinances the costs will depend upon whether: a) the county merely adopts the minimum standards, b) the county adopts an ordinance that is more restrictive than the minimum standards, or c) the county chooses to adopt an ordinance that allows higher impervious surface standards for highly developed shorelines Adoption of the model ordinance would require the least amount of staff time and effort, but an ordinance that develops more restrictive standards or allows for higher impervious surface standards for highly developed shorelines will result in additional costs for the counties to adopt an ordinance.

To help counties defray the cost of ordinance amendments, the proposed rule language would allow counties at least one year to bring their ordinance into compliance. Counties may also be able to apply for and obtain Lakes Planning grants and River Planning grants from the department to help further defray amendment costs. Currently there are 12 counties that have adopted the standards in the current NR 115, Wis. Adm. Code. It is unclear whether or to what extent these 12 counties would further revise their shoreland zoning ordinance as a result of the proposed rule language.

Once the county adopts an ordinance, initial implementation of the ordinance will have short-term costs associated with county staff time explaining the new ordinance language to landowners and businesses. However these costs will decrease over time as county staff, landowners and businesses become more familiar with the new requirements. Additionally, each county will realize cost savings from the proposed rule language due to the reduced number of variances needed if the impervious surface and nonconforming structure standards are adopted.

B. COMMENTS OPPOSED TO THE RULE BECAUSE IT IS TOO RESTRICTIVE

There were 24 people that submitted comments opposed to the proposed rule revisions because the proposed rule was still too restrictive. The comments from and response to those who were opposed to the rule because it was still too restrictive may be summarized as follows:

1. *Comment: The proposed rule is still too burdensome for property owners and the counties.*

Response: While the revision offers more flexibility than current law, waterfront property owners will have to make calculated decisions when considering improving or making changes on their lots. Therefore, costs will differ for each property owner based on their individual goals for their property and adjacent water body. Property owners may incur costs to mitigate, but only when they choose to modify buildings or surfaces in ways that exceed dimensional standards. In some cases, mitigation measures may save money for property owners. Corporate landowners can save between $270 to $640 per acre in annual mowing and maintenance costs when they keep open lands as a natural buffer instead of replacing it with turf.

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2. *Comment: NR 115 will negatively affect property values.*

Response: Studies show that property values do not decrease in response to zoning ordinances and in many cases continue to increase under more restrictive zoning provisions. Searches revealed no data showing that property values have decreased as a result of the adoption of zoning standards.

Data from Wisconsin and across the nation demonstrate that water quality, fish and wildlife, and natural scenic beauty have a quantifiable positive effect on property values and recreation-based economic sectors. Local and state economies are affected by water quality, fish and wildlife, and natural scenic beauty, as demonstrated by studies in Wisconsin and elsewhere. The presence of water resources of good quality contributes positively to local economic activity.

3. Comment: Should give more counties relief from the impervious surface limits

Response: The purposes, established by the Wisconsin legislature, were to set the minimum statewide shoreland zoning standards to protect water quality, fish and wildlife habitat and natural scenic beauty (s. 281.31, Wis. Stats.). While some would prefer more restrictive standards and some would prefer more lenient standards, shoreland zoning is a partnership and the department must balance the purposes of shoreland zoning and science with the rights of property owners and the burden on counties to implement the rule. The impervious surface standards play an important role in protecting our lakes and rivers while allowing a reasonable level of development.

4. Comment: Shoreland zoning is an unfunded mandate for counties

Response: With the exception of Milwaukee County, all counties currently administer shoreland ordinances. Ordinance development and adoption are eligible for DNR Lake and River grants of $10,000 to $50,000 available on an annual basis. In the past, many counties have taken advantage of available grants to revise ordinances and improve administrative practices.

By rule the Department cannot provide or require funding or specific commitments of funds. However, in the past the Department has been able, through existing grant programs (see above), to fund ordinance adoption during the two-year adoption period and develop model grant proposals for ordinance adoption.

Additionally, the changes to the administrative and enforcement provisions create more flexibility and should reduce county costs of administering the current rule by easing the application of the impervious surface limits, reducing the number of variances by allowing counties to adopt higher impervious surface limits for highly developed shorelines and providing more flexibility for nonconforming structures, and eliminating the requirement that counties submit copies of all nonconforming structure permits. Also some of the Department duties, such as providing a model ordinance, technical assistance and training for local governments, reduce local costs .

5. Comment: NR 115 takes away property rights and violates citizens constitutional rights

Response: Private property rights are fundamental to American society and are recognized in the proposed rule (e.g., provisions increasing flexibility for continued use of existing buildings and substandard lots; proposed standards do not strictly adhere to scientific thresholds for water quality or habitat impacts). Socially and legally, the right to use property is not so absolute that it allows the right to harm others (*Just v. Marinette,* 1972). With the importance of water resources to Wisconsin's economy and culture, the state's Constitution, legislative, judicial and administrative systems treat lakes and streams as if they are owned by all and seeks to maximize the benefits for all (Hixon v. PSC).

6. Comment: There is no scientific proof that the shoreland zoning standards are necessary to protect the environment. Other sources of pollution to lakes should be controlled first.

Response: Since the adopt of NR 115 in 1968, numerous studies have found that protection of the shoreland zone is necessary to maintain water quality and fish and wildlife habitat and that shoreland zoning is important to protect the natural scenic beauty of our waterways and tourism.

Other sources of pollution to our lakes and rivers are regulated under different local and state programs. For example construction site erosion control and stormwater runoff is regulated by the DNR, Dept. of Transportation, municipal ordinances, and the Department of Safety and Professional Services. Agricultural runoff is regulated by the DNR, Department of Agriculture, Trade and Consumer Protection, and through municipal ordinances. Pesticides and Fertilizers are regulated by the Department of Agriculture, Trade and Consumer Protection and through municipal ordinances. Finally, wastewater discharges are regulated by the DNR.

7. *Comment:* NR 115 discriminates against town residents because the rules don't apply in cities and villages

Response: While Section 59.692(7) requires cities and villages to apply the county shoreland provisions to areas annexed after May 7, 1982 and areas incorporated since April 30, 1984. However, no Wisconsin Statutes require shoreland zoning in areas of cities and villages within the municipal boundary before May 7, 1982. Absent such a statutory mandate from the legislature, the Department has no authority to require local governments to adopt shoreland zoning for areas not required to adopt such zoning by the legislature.

C. COMMENTS OPPOSED TO THE RULE BECAUSE IT IS TOO PERMISSIVE

There were 256 people that submitted comments opposed to the proposed rule revisions because the rule was too permissive. The comments from and response to those who opposed the rule because it was too permissive may be summarized as follows:

1. Comment: Opposed to the relaxation of the impervious surface and nonconforming structure standards.

Response: The Wisconsin legislature stated that the purpose of setting the minimum statewide shoreland zoning standards was to protect water quality, fish and wildlife habitat and natural scenic beauty (s. 281.31, Wis. Stats.). However, shoreland zoning is a partnership and the department must balance the purposes of shoreland zoning and science with the rights of property owners and the burden on counties to implement the rule. Counties have the ability and may choose to establish more restrictive impervious surface standards. While the nonconforming structure standards will now be the minimum and maximum standards, any expansion of a nonconforming structure will also have to comply with the impervious surface limits in NR 115.

2. Comment: The current rule was already a compromise between science and property rights and should be implemented.

Response: Wisconsin statutes require the Department to set minimum statewide standards to protect water quality, fish and wildlife habitat and natural scenic beauty (s. 281.31, Wis. Stats.). While some supporters prefer more restrictive standards or explicit adherence to scientifically derived parameters (e.g., impervious surface), the rule attempts to balance science with private property rights. Further, shoreland zoning is a partnership that requires the department to work with counties to develop a rule that balances protection of the resource with the administrative burden of implementing the minimum standards in the rule.

3. *Comment: The proposed revisions would not protect the shoreland zone and will impact fish and wildlife habitat*.

The department agrees that the cumulative effect of development within the shoreland zone may negatively impact the water quality, fish and wildlife habitat or natural scenic beauty of Wisconsin's lakes and rivers. However, the existing and proposed rule language in NR 115 represents an interwoven web of standards that allow some reasonable development within the shoreland zone while requiring property owners to offset those impacts through mitigative measures such as restoration of the shoreland buffer zone, rain gardens, or other stormwater treatment devices.

4. *Comment:* The proposed changes to the impervious surfaces standards will not reduce county oversight and will ultimately result in more runoff to lakes and rivers.

Response: While the department agrees that oversight of the impervious surface limits will still be necessary even with the revisions to NR 115, reducing the application of the impervious surface limits to only riparian lots or non-riparian lots that are entirely within 300 feet of the will reduce some of the administrative burden for counties. Additionally the higher impervious surface limits will reduce the number of variances counties will need to process for properties that are located within a highly developed shoreline by allowing some expansion. The pre-treatment option for impervious surfaces and the requirement that property owners complete a shoreland mitigation project if they exceed the impervious surface limits, will help to offset the water quality impacts from the proposed development.