

01-103

State of Wisconsin
Department of Natural Resources

**NOTICE TO PRESIDING OFFICERS
OF PROPOSED RULEMAKING**

Pursuant to s. 227.19, Stats., notice is hereby given that final draft rules are being submitted to the presiding officer of each house of the legislature. The rules being submitted are:

Natural Resources Board Order No. FH-31-01

Legislative Council Rules Clearinghouse Number 01-103

Subject of Rules Shore erosion control for inland lakes and flowages

Date of Transmittal to Presiding Officers January 30, 2002

Send a copy of any correspondence or notices pertaining to this rule to:

**Carol Turner, Rules Coordinator
DNR Bureau of Legal Services
LS/5, 101 South Webster**

Telephone: 266-1959
e-mail: turnec@dnr.state.wi.us

An electronic copy of the proposed rule may be obtained by contacting Ms. Turner

REPORT TO LEGISLATURE

NR 328, Wis. Adm. Code
Shore erosion control for inland lakes and flowages

Board Order No. FH-31-01
Clearinghouse Rule No. 01-103

Statement of Need

Several of Wisconsin's large inland flowages exhibit systemic problems related to water level management. One of the most severe problems is loss of their adjacent wetlands. Lateral recession rates of 5 to 10 feet per year are now common. Historically, these wetlands have been protected by summer drawdown (to reestablish emergency plants) or by placing of riprap against the face of the wetland. Permanent breakwaters are another newer approach that protects the wetland from erosion while promoting a natural transition zone. This approach entails the construction of an offshore, wave-arrestor structure to absorb wave energy which provides a quiet zone behind it. Aquatic plants soon colonize the quiet zone and provide a natural transition between the water and the wetland. The wave arrestors are typically linear rock structures placed 50 to 100 feet off shore, roughly parallel to the shoreline.

The proposed rule deals with opportunities to permit offshore permanent breakwaters for a special set of listed waters. These waters are typified by the following conditions – impounded; 2,500 acres and larger; extensive water level fluctuation; high shoreline/wetland recession rates; historic loss of shoreline vegetation. The proposed rule enables the Department to identify waters where permanent breakwaters are useful for erosion control and restoration of aquatic habitat. The purpose of the proposed rule is to establish where deposits of material constitute structures (as opposed to fill) for the purpose of controlling shore erosion and to set standards for determining when structures may be authorized under s. 30.12, Stats.

Modifications as a Result of Public Hearing

The following modifications were made as a result of public comment:

Expanded eligibility to other 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.

Specifically identified owners of riparian upland adjacent to, or flowed lands underlying, such structures shall be co-applicants.

Broadened and clarified conditions of permits as related to public control.

Eliminated wording related to navigational marking.

Added waters to eligible list – Lake Sinnissippi, Lake Puckaway, Rainbow Flowage, Willow Flowage, Fox Lake, and impoundments of the Mississippi river.

Require structure be designed by professional engineer.

Appearances at the Public Hearings and Their Position

October 15, 2001 – Madison

In support – None

In opposition:

Bob Grundie, Northfield Block Co., S75 W31492 Arbor Drive, Mukwonago, WI 53149

As interest may appear:

Hank Sutton, Lake Rip Rap, Inc., 15890 Oak Lane, Girard, IL 62640

October 16, 2001 – Stevens Point

In support:

Mark E. Anderson, Consolidated Water Power Company, P.O. Box 8050 Wis. Rapids, WI 54495

In opposition – None

As interest may appear:

Clifford Anderson, 2941 Highway Y, Marshfield, WI 54449

Bernard P. Coerper, 1400 W. River Drive, Stevens Point, WI 54481

October 17, 2001 – Oshkosh

In support:

Debbie Johnston, Johnston Pile Driving, 611 Kennedy Avenue, Omro, WI 54963

Brady Johnston, Johnston Pile Driving, 611 Kennedy Avenue, Omro, WI 54963

In opposition:

Pete Van Airsdale, Winnebago Co. Land & Water Conservation Dept., 625 E. County Road Y,
Oshkosh, WI 54901

Michael Haase, Calumet Co. LWCD, 206 Court Street, Chilton, WI 53014

As interest may appear:

Dan Rudereck, Lake Poygan Sportsman's Club, 7769 Haase Road, Larsen, WI 54947

Jeff Christensen, Radtke Contractors, Inc., 6408 State Road 110, Winneconne, WI 54986

Ron Koepler, Lake Poygan Sportsman's Club, 7851 Cut-Off Lane, Larsen, WI 54947

Dick Koerner, 540 Sunrise Bay Road, Neenah, WI 54956

John Badnar, Winnebago Co. Land & Water Conservation Dept., P.O. Box 2808,
Oshkosh, WI 54901

Response to Legislative Council Rules Clearinghouse Report

The Legislative Council Rules Clearinghouse Report commented on both subchs. I and II to ch. NR 328. At the present time, the Department is only adopting subch. II to ch. NR 328. The comments relevant to subch. II have been incorporated into the proposed rule.

Final Regulatory Flexibility Analysis

Permit requirements for riparian waterfront property owners altering their shoreline are already established under s. 30.12, Stats., and no further reporting requirements are imposed on small business. Therefore, pursuant to s. 227.114(8)(b), Stats., these rules will not directly affect small business and no analysis is required.

ORDER OF THE STATE OF WISCONSIN
NATURAL RESOURCES BOARD
CREATING RULES

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

FH-31-01

Analysis prepared by the Department of Natural Resources

Statutory authority: s. 30.2035, Stats.
Statutes interpreted: s. 30.12(2) and (3)(a)3., Stats.

This order codifies the findings of a department study on shoreline protection measures as required under s. 30.2035, Stats., to prevent adverse effects caused during and after shore protection construction activities and to achieve consistency in the application of navigable water laws for the construction of erosion control structures.

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

Chapter NR 328
Standards for Shore Erosion Control
in Lakes and Impoundments

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.

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 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.

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.

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.

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.

The foregoing rules were approved and adopted by the State of Wisconsin Natural Resources Board on December 5, 2001.

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

Dated at Madison, Wisconsin _____.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By _____
Darrell Bazzell, Secretary

(SEAL)

Fiscal Estimate — 2001 Session

- Original Updated
 Corrected Supplemental

LRB Number	Amendment Number if Applicable
Bill Number	Administrative Rule Number NR 328

Subject
 Ch. NR 328 Standards for Shore Erosion Control in Navigable Lakes and Impoundments

Fiscal Effect

State: No State Fiscal Effect

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.

- Increase Existing Appropriation Increase Existing Revenues
 Decrease Existing Appropriation Decrease Existing Revenues
 Create New Appropriation

- Increase Costs — May be possible to absorb within agency's budget.
 Yes No
 Decrease Costs

Local: No Local Government Costs

1. Increase Costs
 Permissive Mandatory
2. Decrease Costs
 Permissive Mandatory
3. Increase Revenues
 Permissive Mandatory
4. Decrease Revenues
 Permissive Mandatory

5. Types of Local Governmental Units Affected:
 Towns Villages Cities
 Counties Others
 School Districts WTCS Districts

Fund Sources Affected

- GPR FED PRO PRS SEG SEG-S

Affected Chapter 20 Appropriations

Assumptions Used in Arriving at Fiscal Estimate

Bill Summary: This rule codifies the findings of a Department study on shoreline protection measures as required under s. 30.2035, Stats., to prevent adverse effects caused during and after shore protection construction activities and to achieve consistency in the application of navigable water laws for the construction of shore protection structures.

Fiscal Estimate:

State Costs:

Subchapter I: The Department anticipates no net increase in costs associated with administering Subchapter I of these proposed rules, only a shift in workload resulting from: 1) less workload associated with long-form permit decisions (site analysis, permit decisions, and contested case hearings); and 2) an offsetting increase in the workload associated with short form review, technical assistance, and application of the rule.

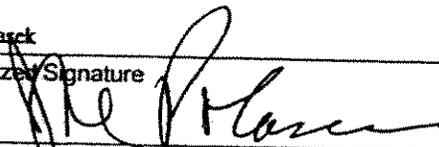
Subchapter II: The Department anticipates no more than one municipal breakwater permit per year as authorized under Subchapter II of these proposed rules. The workload associated with municipal breakwater permit and plan review is estimated to be 100 hours per permit. The annual salary-related costs associated with this permitting and plan review are estimated @ \$30 per hour for 100 hours, or \$3000 annually. The Department will absorb this workload in its current budget.

Local Costs (Subchapter II only):

Local government costs are permissive only. Currently local units of government do not have the opportunity to place permanent breakwaters on the beds of lakes and flowages through a Department permitting process. Permits for offshore breakwaters may be issued to municipalities for placement in the following water bodies: Lake Koshkonong, Petenwell flowage, Castle Rock lake, Big Eau Pleine reservoir, Lake Nokomis – Rice River reservoir, Lake DuBay, Beaver Dam lake, Lake Buttes des Morts, Lake Poygan, Lake Winneconne, and Lake Winnebago.

Long-Range Fiscal Implications

None.

Prepared By:	Telephone No.	Agency
Joe Polasek	266-2794	Department of Natural Resources
Authorized Signature	Telephone No.	Date (mm/dd/ccyy)
	266-2794	07/31/2001

Fiscal Estimate — 2001 Session

Page 2 Assumptions Narrative
Continued

LRB Number	Amendment Number if Applicable
Bill Number	Administrative Rule Number NR 328

Assumptions Used in Arriving at Fiscal Estimate – Continued

These listed waters are generally typified by the following conditions – impounded; 5000 acres and larger; extensive water level fluctuation; high shoreline recession rates; and historic loss of shoreline vegetation. As stated above, the Department anticipates no more than one municipal breakwater permit per year, statewide.

There are no direct fees or costs to local municipalities associated with processing permits. Local municipalities' permissive costs (planning, engineering services) to implement breakwater projects and comply with the administrative rule will vary widely. For purposes of this fiscal note, the Department assumes that local governments applying for municipal breakwater permits have developed management plans. The Department estimates that, on average, a local government would invest up to 300 hours to develop the proposed NR 328 permit application information. Assuming that the local government's costs are \$30 per hour, it would incur up to \$9000 in costs related to the permit application.

Fiscal Estimate Worksheet — 2001 Session
 Detailed Estimate of Annual Fiscal Effect

- Original Updated
 Corrected Supplemental

LRB Number	Amendment Number if Applicable
Bill Number	Administrative Rule Number NR 328

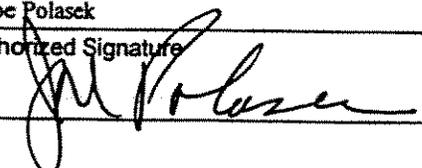
Subject
 Ch. NR 328 Standards for Shore Erosion Control in Navigable Lakes and Impoundments

One-time Costs or Revenue Impacts for State and/or Local Government (do not include in annualized fiscal effect):

Annualized Costs:		Annualized Fiscal Impact on State Funds from:	
		Increased Costs	Decreased Costs
A. State Costs by Category			
State Operations — Salaries and Fringes		\$ 3,000	\$ -
(FTE Position Changes)		(FTE)	(FTE)
State Operations — Other Costs			-
Local Assistance			-
Aids to Individuals or Organizations			-
Total State Costs by Category		\$ -	\$ -
B. State Costs by Source of Funds			
GPR		\$ 3,000	\$ -
FED			-
PRO/PRS			-
SEG/SEG-S			-
State Revenues	Complete this only when proposal will increase or decrease state revenues (e.g., tax increase, decrease in license fee, etc.)	Increased Revenue	Decreased Revenue
GPR Taxes		\$ -	\$ -
GPR Earned			-
FED			-
PRO/PRS			-
SEG/SEG-S			-
Total State Revenues		\$ -	\$ -

Net Annualized Fiscal Impact

	State	Local
Net Change in Costs	\$ 3,000	\$ 9,000
Net Change in Revenues	\$ -	\$ -

Prepared By: Joe Polasek	Telephone No. 266-194	Agency Department of Natural Resources
Authorized Signature 	Telephone No. 266-2794	Date (mm/dd/ccyy) 07/31/2001



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

Ronald Sklansky
Clearinghouse Director

Terry C. Anderson
Legislative Council Director

Richard Sweet
Clearinghouse Assistant Director

Laura D. Rose
Legislative Council Deputy Director

CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

CLEARINGHOUSE RULE 01-103

AN ORDER to create chapter NR 328, relating to department standards for erosion control in lakes and impoundments.

Submitted by **DEPARTMENT OF NATURAL RESOURCES**

- 09-10-01 RECEIVED BY LEGISLATIVE COUNCIL.
- 10-05-01 REPORT SENT TO AGENCY.

RS:DLL;jal;ksm

LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

Comment Attached YES NO

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

Comment Attached YES NO

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

Comment Attached YES NO

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS [s. 227.15 (2) (e)]

Comment Attached YES NO

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

Comment Attached YES NO

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL REGULATIONS [s. 227.15 (2) (g)]

Comment Attached YES NO

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

Comment Attached YES NO



WISCONSIN LEGISLATIVE COUNCIL

RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 01-103

Comments

[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]

2. Form, Style and Placement in Administrative Code

a. The one-sentence analysis of the rule does nothing more than identify the subject of the rule. It does not analyze, or even summarize, the rule. This can hardly be said to comply with the requirement of s. 227.14 (2), Stats., for a plain language analysis.

b. Section NR 328.01 is all explanatory, background information. It does not create substantive requirements, which is the kind of material usually placed in rules. This material would be more appropriately put in a guidance document for distribution to permit applicants. Alternatively, it could be put in notes to the rule or recast as departmental findings to support the specific provisions of the rule.

c. The rule frequently fails to make a complete statement of what it is intending, leaving a portion of its meaning to be inferred from context or from titles (which are not legally enforceable parts of the rule). For example, s. NR 328.02 (1) should make clear that s. 30.12 (2) and (3) (a) 3., Stats., allow the Department of Natural Resources (DNR) to issue a permit *for the placement of materials or structures on the bed of a navigable water*. That same subsection should also make clear that the purpose of that subchapter is to *establish standards for the granting of such permits* to avoid adverse effects, among other things. Section NR 328.05 (1) should specify what the alternative shore protection measures that it refers to are alternatives to, while s. NR 328.05 (2) should clearly state what should not be allowed to intrude into a waterway beyond the extent necessary to provide a sound foundation. Sections NR 328.08 and 328.23 are also deficient. For examples of good drafting, see s. NR 328.09 (2) and (3).

d. The rule frequently fails to use the active voice, resulting in unnecessary ambiguity. To the extent practical, rule provisions should be written in a form such as "X shall do Y" or "X may do Y." For example, the first sentence of s. NR 328.06 should read something like the following: "A riparian property owner who proposes to install shore erosion control shall submit an application to the department on a form provided by the department." Again, for examples of good drafting, see s. NR 328.09 (2) and (3).

e. Section NR 328.07 is particularly ambiguous as a result of both implying information that is not stated explicitly and using the passive voice. It should be reformatted to explicitly state that the department may approve permits for erosion control structures at the specified sites only using the specified techniques and the specified permitting processes. To achieve the greatest clarity, it may be necessary to further subdivide this section, for example, by creating separate subsections distinguishing techniques allowed at a low-energy site under a short-form permit from those allowed at a low-energy site under a long-form permit.

f. Definitions created in the rule often include substantive or descriptive material that should be placed in a substantive provision of the rule or in a note. For example, this comment applies to everything except the first sentences in the definitions of "biological erosion control," "permanent breakwater," "revetement," "temporary breakwater" and "vegetated armoring," and most of the definition of "integrated toe protection."

g. To separate substance from definition, the definition of "predicted storm-wave height" should be reduced to "the wave height estimated under s. NR 328.____." A substantive provision should be created to specify how to calculate the predicted storm wave height. (Note that the journal articles referred to in the definition should be properly incorporated by reference, if references to them are retained in the rule.)

h. A narrative text should be devised to describe slopes rather than the insiders' shorthand of "1H:2V" as used in s. NR 328.04 (3) and elsewhere in the rule.

i. The definition of "bulkhead" should read: "a vertical structure that is installed parallel to the shore to prevent the sliding or slumping of the land and to protect the adjacent upland from wave action." Any discussion of what bulkheads are commonly constructed of should be omitted or placed in a note. Note that this term is generally understood and so this definition most likely is not necessary.

j. *Webster's Third New International Dictionary, Unabridged*, defines "fetch" as: "4. the distance over open water or land over which the wind blows <...> specif.: the distance traversed by waves without obstruction (as when caused by steady winds)." This leads to two observations. First, since "fetch" means a distance, the term "fetch length" is redundant. Second, with this perfectly serviceable dictionary definition, there is no need to define the term in the rule.

k. Two other terms with standard dictionary definitions that do not need defining in the rule are "revetement" and "riprap."

l. The definition of "fetch length" uses the term "shore protection point of interest" and the definitions of "high energy site," "low energy site," and "moderate energy site" use the term "shore protection site." These terms are undefined and inconsistent with each other. Since subsequent provisions use the simpler term "site," it is suggested that the definitions use the simpler term, as well.

m. In s. NR 328.04 (18), the phrase "Hard armor" should be replaced by the defined term "Hard armored."

n. Section NR 328.07 (4) (b) 2. should not be given a title, since other comparable subunits of that subsection and paragraph are not given titles. Further, since the material in sub. (4) (b) does not grammatically lead into subds. 1. and 2., this material should be renumbered as subd. 1., and subds. 1. and 2. should be renumbered as subds. 2. and 3.

o. Section NR 328.07 (4) (b) 2. contains a great deal of information and many specific requirements, compressed into very little text. This warrants expansion into a paragraph or even subsection of its own, with appropriate subdivisions.

p. Table 1, actually a worksheet, should be given a title and some descriptive information indicating what it is and how it is used. The single reference to it in s. NR 328.07 (4) (b) 1. does not seem sufficient.

q. Since s. NR 328.08 has only one subsection, s. NR 328.08 (1) (intro.) should be renumbered s. NR 328.08 (intro.), the paragraphs renumbered as subsections and the remaining subunits should be renumbered accordingly.

r. Section NR 328.08 (1) (b) (intro.) should end with the phrase "including all of the following:". Also, the material beginning with "including fish and wildlife habitat," should be incorporated into the list that follows that introduction.

s. Section NR 328.08 (1) (b) 5. (intro.) should end with the phrase "including all of the following:".

t. The second sentences of s. NR 328.08 (1) (b) 2., 4., and 5. c. should be placed in notes.

u. Section NR 328.08 (1) (b) 5. c. should begin with a phrase such as: "Potential for impacts on." However, the words "potential for" do not seem necessary for this subdivision paragraph or for the other subdivision paragraphs in that subdivision.

v. In s. NR 328.08 (1) (c) 2., the notation "i.e." should be replaced with the phrase "such as" and the notation "etc." should be replaced with an appropriate catchall description.

w. It appears that s. NR 328.08 (1) (c) 12. and 13. should be numbered s. NR 328.08 (1) (d) and (e). [But see comment 2. q., above.]

x. The substance of s. NR 328.10 should be combined with s. NR 328.03, since both address applicability. Also, in the third sentence of this provision, the first occurrence of the word "of" should be "or"; in the last sentence, "enforce" should be replaced by "in force."

y. A breakwater is a structure, not the placement of material; the definition in s. NR 328.22 (1) should be rewritten to reflect this. However, again, is this definition for a commonly understood term necessary? Is the definition of "structure" necessary?

z. Section NR 328.23 (intro.) should end with the phrase, "all of the following apply:". [See also s. NR 328.24 (intro.)]

4. Adequacy of References to Related Statutes, Rules and Forms

a. A copy of the form required under s. NR 328.06 should be provided with the rule.

b. The cross-reference in s. NR 328.07 (intro.) is incorrect. Presumably, it should refer to sub. (4).

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

a. In s. NR 328.01 (3), the use of the notation "/" should be replaced by the word "or" in the last sentence. In sub. (4), the fifth sentence should conclude with the word "settings" and the new sixth sentence should begin with the word "Therefore,".

b. The term "hard armored" is an adjective, while the term "hard armoring" is a noun. These terms cannot have the same meaning, as s. NR 328.04 (8) suggests. Also, what are "mechanical components" of an erosion control structure? This implies a machine-like aspect of the structure--is this what is intended?

c. "Integrated toe management" is a noun but s. NR 328.04 (10) defines it as if it were a verb. If this definition is retained, it should be rewritten.

d. In s. NR 328.04 (12) and (13), "1.0 feet" should be replaced by "1.0 foot." Also, the rule does not specifically assign a definition to a situation in which wave height is exactly one foot or exactly 2.3 feet.

e. In ss. NR 328.04 (23) and 328.05 (1), the word "a" should be replaced by the word "an" before the words "offshore" and "erosion," respectively.

f. Section NR 328.07 (4) (a) 2. applies only to sites with a slope of exactly 1:2. Should this be a slope of 1:2 *or greater*?

g. As written, s. NR 328.07 (4) (b) (intro.) allows either the applicant or DNR to invoke the exceptions that follow. It would appear that DNR could not overcome the applicant's belief that the exception should apply. Is this the intended effect? Also, the phrase "as a result of unique site conditions" should be set off by commas.

h. In s. NR 328.07 (4) (b) 1., the symbols meaning greater than and less than should be replaced by the words. Also, the phrases "in the low energy category," "in the moderate energy category," and "in the high energy category" should be replaced by the phrases "listed in sub. (1)," "listed in sub. (2)," and "listed in sub. (3)," respectively.

i. In s. NR 328.22 (5), why is the definition of the term "structure" different from the definition of the same term in s. NR 328.04 (22)?

From
Paul Cunningham
DWR

Appendix A Summary of Hearing Comment

Madison Hearing, October 15, 2001

Attendance

2 Persons

Position Summary

As interest may appear: 1

In support: 0

In opposition: 1

Oral Comments/Testimony

None

Stevens Point Hearing, October 16, 2001

Attendance

3 Persons

Position Summary

As interest may appear: 2

In support: 1

In opposition: 0

Oral Comments/Testimony

Mark Anderson, Resources Coordinator representing Consolidated Water Power Company, Wisconsin Rapids. In Support of NR328, many benefits can be derived within larger flowages. Affords opportunities they've never had in the past.

Oshkosh Hearing, October 17, 2001

Attendance

9 persons

Position Summary

As interest may appear: 4

In support: 2

In opposition: 3

Oral Comments/Testimony

John Bodnar, Corporation Counsel, representing Winnebago County Land and Water Conservation Department. Concern with 328.1, 328.23 328.24. Permits for breakwaters may only be issued to municipalities. Breakwaters would remain under public control and ownership. Regulations place responsibility and liability on the municipality. County would become owner, liability, maintenance issues will ultimately limit the involvement of the county. Structures don't necessarily serve any purpose to the municipality involved and it's unlikely that the Winnebago County would sponsor permits unless they're county projects to begin with. Regulations may have opposite effect and limit involvement of the municipality. If the structures are at the time build are under public ownership they are public works projects and will require that the municipality go through public bidding laws and prevailing wage rates set by the Department of Workforce Development.

Jeff Christensen, Project Coordinator representing Radtke Contractors, Inc. Encourages the passage of NR 328 Subchapter 2; however, remove the requirements for municipal liability exposure, ownership, and navigational marking. Instead, place the responsibility for these items on the shoulders of the State, where it belongs. Jeff has installed offshore permanent breakwaters and seen benefits accrue from them. Properly installed structures protect the shoreline and/or wetlands, and allow for the re-establishment of wetland vegetation. These structures are privately funded by conservation minded citizens, willing to invest private dollars to curb erosion, and protect and re-establish wetlands. To foster this partnership, the clause in Subchapter 2 dealing with municipalities assuming the liability for these structures has to be removed. Therefore, if the rule is approved in its present format, the effect is to eliminate any permit applications for these structures. The State has already set a precedent for assuming responsibility for structures placed on private river or lakebed. The Terrells Island Project, Boom bay Breakwater, and Nelsons Point Breakwater are examples of this.

Pete Van Airsdale, Director Winnebago County Land and Water Conservation Department, speaking on behalf of Winnebago Conservation Committee and Winnebago County Land and Water Conservation Department. Concerned about extensive loss of wetlands throughout the Winnebago System. Understands need for an administrative rule such as NR328. Supports concepts outlined in the rule, especially as they relate to the use of 'breakwaters' as an effective best management practice. Breakwaters provide greater flexibility in preventing shoreline erosion while protecting the transition zone, resulting in the widespread reestablishment of emergent plants in areas that, in the past, have been relegated to barren mud flats. Concerns over language contained in NR328.24 'Conditions of Permits'. Rule states that, a municipality would be required to assume ownership and/or control of the rock structures and *take all necessary steps to ensure the safety of navigation in the vicinity of the breakwater*. Unlikely that Winnebago County would allow itself to be placed in such an exposed and extensive position of liability by assuming ownership, control, or acting as a co-applicant on those projects. Recommends the Department of Natural Resources, that the Department itself (delegated jurisdiction over the 'waters of the state'), on behalf of the State of Wisconsin, assume ownership and/or control of the 'breakwaters', and work cooperatively with the riparian owners as co-applicant for those resource protection and enhancement.

Dick Koerner, Neenah.

Agree that offshore structures are beneficial to fish and wildlife and protect shoreline erosion. County and local DNR should work together to determine whether riprap or offshore breakwaters are most appropriate at a site. State should be held liable for any claims related to navigation. Liability burden shouldn't be placed on local municipality.

Dan Rudebeck, Habitat Coordinator representing Lake Poygan Sportsmen Club. The Lake Poygan Sportsman's Club finds rule unacceptable, and request changes. Realistically, however, none of them will ever happen, if this rule is adopted as written. Therefore, we request that this rule be amended to require the involved municipalities approve of the project, and that the liability issues be placed on the same footing with other parts of the public watershed. DNR should partner up for the good of the system, if not possible do not place road blocks to habitat work.

Written Comments

Brady & Debbie Johnston, representing Johnston Pile Driving, Omro. Done breakwater projects for private customers who have been working with the Winnebago Land and Water Department in helping to finance these projects. Private landowners have invested large amounts of money to protect their wetlands and shorelines. In NR 328.21 it is stated that municipalities may be issued permits for breakwaters. We believe NR 328 should also include public entities. Individual landowners should have the right to protect their property without having the structure under public ownership or control. Breakwater should be under private control and ownership. Landowners want to protect what was originally theirs and what they are paying taxes on. Currently working with a landowner who has wanted to create a breakwater to protect an island which is located close to the mouth of the Fox River. He did not get financial help thru the Winnebago Land and Water Department, but decided to finance the project completely by himself. This individual has been waiting for the moratorium to be completed, to see if his project will be approved with the DNR. Individual wants to save the existing island from future erosion. The property owner should have the right to protect the land and water for future generations.

Doug Sackett, Beaver Dam Lake Association. Believes breakwaters is a great idea. Lake association has discussed many times. Concern that lake has to be over 5,000 acres. Beaver Dam Lake is 6,600 acres, so we meet the criteria. Lake size limit is higher than it has to be. Doesn't think it is a good use of grant funds to be working on stabilizing the shorelines of mill ponds, but time has come to lower this limit substantially and make this means of protecting shorelines available to a bigger percent of the lake communities.

Rudy Winther, Chairman, Lake Puckaway Protection and Rehabilitation District. Disappointed that Lake Puckaway was omitted from the list of lakes that can receive permits for in-lake breakwaters. Puckaway is one of the essential upper Fox River chain of impoundments that meets all of the elements that typify the sort of lake that can benefit immensely from breakwaters. As you know, the DNR and our Lake District partnered the floating breakwater project which produced impressive benefits in terms of aquatic vegetation and improved water clarity. After just two seasons, the bay known as Bluebill Bay was heavily vegetated. When the breakwater was removed, the vegetation quickly disappeared. Request to add Lake Puckaway to the list of lakes under NR 328.21 Applicability.

Roger Ploeger, Lake Sinissippi Improvement District, Hustiford. Lake Sinissippi is a 2,854 acre impoundment of the Rock River. The lake has experienced loss of wetlands near the northern and western shores. Shoreline erosion is significant along peninsulas, islands and the exposed southern and eastern shores. The use of permanent breakwaters envisioned in Subchapter II of NR 328 provide exciting possibilities for erosion control and restoration of aquatic and wildlife habitat. However, under the criterion Lake Sinissippi would not qualify. Request to reconsider the criterion so Lake Sinissippi would also qualify.

Bernard Coerper, Stevens Point. Three concerns with the rule: 1) No requirement for the riparian owner to be a co-applicant with the municipality; 2) Rule does not address the effects of a offshore breakwater on "down stream properties". The proposed rule does not give any down stream riparian owner recourse if the breakwater has a negative effect on his property; and 3). The rule does not allow attachment of any ancillary structures. This is a serious restriction that would deter any riparian owner from joining with a municipality as a co-applicant. This restriction would not allow the riparian owner their rights of access.

Phillip Keillor, University of Wisconsin-Sea Grant 1. The note under NR 328.21 Applicability. The note is incomplete and inconsistent with your explanation in the Notice of Public Hearing. It would be better to say: "The listed waters are generally typified by the following conditions: artificially-impounded; 5000 acres and larger, extensive water level fluctuation; high rate of wetland loss from erosion." The intent of Subchapter II seems to be protection of wetland from high erosion rates, not protection of upland with high shoreline erosion rates and high loss of shoreline vegetation resulting from erosion. 2. Section NR 328.22 Definitions. Item (1) is an incomplete definition that fits something as simple as a row of rocks located three or more feet offshore. Here's a simple definition that seems more appropriate: "A breakwater is a structure protecting a shore area from waves." (adapted from USACE, 2001). To that modest definition you might add "linear" and/or "usually shore-parallel" if you wish. The distance offshore depends upon the purpose of the structure, the characteristics of local sediments and local wave conditions. A breakwater just three feet offshore would probably and quickly become a "revetment" as sediment filled in behind it. I don't understand the definition of "comprehensive plan". Why wouldn't the comprehensive plan relate simply to the site to be protected and adjoining properties that might be affected? The stated definition seems to relate to the water body as a whole. Perhaps the state wants both a site plan and a water body plan? I also suggest that you change Item (5) to read: "Structure means anything made by people, having shape, form, and utility, either permanently or temporarily attached to or extending above the ground and/or below ground level." A buried revetment, underwater "reef" breakwater, or buried beach sill are a few examples of below-ground and below-water structures. 3. NR 328.23 Standards. Item (1) seems adequate because the stated function is both erosion control and aquatic habitat preservation or restoration, not simply shore erosion control. I suggest that you add another item: "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." 4. NR 328.24. Conditions of permits. All stated items are important. Is the state also concerned about adverse effects on adjacent properties? As stated in General Comment No. 2, island breakwaters often cause a salient (spit) or tombolo of sediment to form in the "wave shadow" between the structure and the shore where there is ample sediment moving alongshore. It's possible that formation of a tombolo would starve beaches downdrift of the protected wetland. To maintain longshore transport of sediment while protecting the wetland from erosion, the breakwater must be designed with the appropriate length and distance offshore for the design wave conditions. (Another reason to require a qualified professional engineer to design the structure.)