

**Emergency Rule NR 1.1016,
1.05, 1.06, and 1.07**

**Relating to Natural Resources Board
policies on protection and management of
public waters.**

Natural Resources – Affects Ch. NR 1

SECTION 1. NR 1.016 is created to read:

NR 1.016 Department responsibilities to conserve and enhance public waters. (1) The Natural Resources Board recognizes that the state of Wisconsin has an affirmative duty, under the public trust doctrine, which emanates from Article IX, Section I, of the Wisconsin Constitution, to protect and preserve the state's waters, which are one of Wisconsin's most important natural resources. The Wisconsin Supreme Court has admonished that, at the time of statehood, the state of Wisconsin "became a trustee of the people charged with the faithful execution of the trust created for their benefit." The Court further noted that the "wisdom of the policy which... carefully preserved to the people the full and free use of waters cannot be questioned, nor should it be limited by narrow construction." (*Diana Shooting Club v. Husting*, 156 Wis. 261(1914). The Wisconsin courts have noted that the state of Wisconsin must take into account the "potential ecological impacts" of projects in our navigable waters to carry out its "assigned duty as protector of the overall public trust in maintaining one of Wisconsin's most important natural resources. (See *Sterlingworth v. DNR*, 205 Wis. 2d 710(Ct. App.1996))

(2) In addition to the common law provisions requiring the state of Wisconsin to protect the ecology of our public trust waters, scientific research has demonstrated that the impacts of human manipulation of our shorelines and in water habitat are having significant impacts on our vital aquatic ecosystems. The department of natural resources participated actively in collaborative efforts with interest group leaders and scientists from across the state of Wisconsin to assess the status of Wisconsin's water resources during 2003 – The Year of Water. This collaborative effort resulted in a report of the Wisconsin Academy of Sciences, Arts and Letters entitled, "*Waters of Wisconsin: The Future of our Aquatic Ecosystems and Resources*". This report noted the critical importance of maintaining our lakes, rivers and streams, wetlands, and aquatic ecosystems and the biodiversity of our state's waters. (*Waters of WI* at pps. 12-20) It recognized that all actions affecting our waters have consequences and that these consequences accumulate over time, and, cumulatively, cannot be ignored. (*Waters of WI* at p. 63.) The report adopted a "Statement of Principles" that noted "the citizens of Wisconsin increasingly appreciate that the degradation of water bodies and watersheds, loss of aquatic biodiversity, and varied forms of water pollution pose serious threats to human health, the quality of life, a thriving economy, and vital aquatic ecosystems." The report noted that Wisconsin's "bounty of freshwater and the variety of its aquatic ecosystems are assets of global significance", which face diverse challenges to their integrity.... It was noted that "sustainability" of these resources "implies a commitment to protecting, managing, restoring, and using Wisconsin's waters in a manner that ensures the health of our aquatic ecosystems while securing their cultural, economic and public health benefits for future generations." (*Waters of WI* at pps. 92-93) The report noted "Management of Wisconsin's waters should strive to protect and where possible restore natural hydrologic functions, native biological diversity, and ecological integrity. (*Waters of WI* at p. 96). The conclusions and recommendations of the Waters of Wisconsin report are consistent with state and national research assessing the impacts of physical activities on our aquatic ecosystems.

Note: For a full copy of the *Waters of Wisconsin Report*, contact the Wisconsin Academy of Sciences, Arts and Letters, 1922 University Avenue, Madison, WI or go to their website at www.wisconsinacademy.org. For a survey of other research supporting the need to protect, see "The Construction, Aesthetics and Effects of Lakeshore Development: A Literature Review, by Sandy Engel and Jerry L. Pederson, Jr., Wisconsin Department of Natural Resources Research Report 177, December 1998.

(3) Recognizing that the legislature has delegated to the department of natural resources the authority to administer its surface water management programs, the Natural Resources Board directs the department to administer those programs in a manner consistent with its delegated authority under the statutes, the rules which it has promulgated, the common law public trust principles and the science relating to the management of our aquatic resources in order to assure the sustainability of our aquatic ecosystems.

(4) The Natural Resources Board recognizes that conservation of the extent and quality of public waters and the remaining aquatic habitat and natural features is critical to the future of hunting, fishing, recreation, tourism, economic development and the quality of life in Wisconsin.

(5) Recent legislative actions have modified and streamlined the regulatory processes under ch. 30, Stats., which is the primary mechanism for ensuring that physical alterations do not diminish the extent or nature of public rights in navigable waters. During the course of the deliberations in the adoption of these statutory modifications, the bill sponsors clearly stated their intent to provide exemptions for "very minor activities" and not to diminish the public trust protections of Wisconsin's waters. The bill's sponsors noted that, "Under the [Act], the DNR is **required** to consider public rights or interest when promulgating rules regarding the issuance of statewide general permits." The expressed intent of the Legislature, and of the Governor, was to "uphold the highest environmental standards."

(6) As trustee of public waters, the department shall conserve and enhance public rights established under the laws of this state in our navigable waters. These public rights include, but are not limited to, the right to navigate, hunt, fish, swim,

recreate, enjoy natural scenic beauty in clean water free of environmental pollution, and other rights as may be established by law in the future.

SECTION 2. NR 1.05 is created to read:

NR 1.05 Identification of areas of special natural resource interest. (1) To fulfill its affirmative duty to protect public trust waters, the department shall designate by rule areas of special natural resources interest as defined in s. 30.01(1am), Stats.

(2) Exemptions listed in ss. 30.12(1g)(a) to (km) and 30.20(1g)(b)1. and 2., Stats., do not apply in areas of special natural resource interest. General or individual permits are required.

Note: Activities not exempted in areas of special natural resource interest are deposits less than 2 cubic yards; seasonal structures other than piers or wharves; fish habitat structures; bird nesting platforms; boat shelters, hoists and lifts; piers or wharves meeting dimensional standards; dry hydrants; pilings; riprap repair or replacement; biological shore erosion control structures; intake or outfall structures; dredging to place or maintain an exempt structure; dredging without auxiliary power.

(3) Waters that can serve as benchmarks for assessing and guiding the conservation and management of all public waters shall be identified as possessing significant scientific value under s. 30.01(1am)(c), Stats. In identifying the waters, the department shall consider the presence of self-sustaining populations of native plants and animals, unique natural features, remnant areas of native biota, and water uses of statewide significance including research or education.

(4) The following waters are hereby determined to be areas of special natural resources interest as defined in s. 30.01(1am), Stats:

(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).

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

(d) Waters inhabited by any endangered, threatened, special concern species or unique ecological communities identified in the Natural Heritage Inventory.

(e) Wild rice waters as identified by the department and the Great Lakes Indian Fish and Wildlife Commission.

(f) Tributaries to and rivers connecting to inland lakes containing naturally-reproducing populations of sturgeon up to the first dam.

(g) Navigable waters having self-sustaining populations of walleye located in the ceded territory of the state where resource allocation rights are shared by sovereign tribes.

(h) Muskellunge waters of the state where the muskellunge population is entirely or partially sustained through natural reproduction (Category 0, Category 1 and Category 2 muskellunge waters).

(i) Waters in areas identified in a special area management plan (SAMP) or special wetland inventory study (SWIS) under s. NR 103.04.

Note: Special area management plans exist for the City of Superior, Douglas County and Chiwaukee Prairie, Kenosha County. A Special Wetland Inventory Study exists for the area bordering the bay of Green Bay.

(j) Waters in ecologically significant coastal wetlands along Lakes Michigan and Superior as identified in the Coastal Wetlands of Wisconsin (DNR-CMP project).

(k) Federal or state, under ss. 30.26 and 30.27, designated wild or scenic rivers.

(L) Perennial tributaries to surface waters identified as trout streams by the department under s. NR 1.02(7).

(5) The department shall maintain on its website and make available at its offices a consolidated list of areas of special natural resource interest along with all other waters designated under ss. NR 1.06 and 1.07 so that a person may readily determine the applicability of all exemptions or permit requirements under ch. 30, Stats.

Note: See the department's website at www.dnr.state.wi.us/org/water/fhp/waterway/index.shtml.

SECTION 3. NR 1.06 is created to read:

NR 1.06 Identification of public rights features. (1) To fulfill its affirmative duty to protect public trust waters, the department shall continually assess the state's public trust waters to identify locations of public rights features that require general or individual permit review in lieu of exemptions, or reasonable limitations on location to assure that the public's rights and interests under the public trust doctrine are protected, under ss. 30.12(1p)3. and (2m), 30.123(6m) and (6s), 30.20(1k)2. and (1m), 30.206(1c) and (3)(3r), Stats.

(2) Due to the potential significant adverse impacts of the activity on public rights features, exemptions listed in ss. 30.12(1g)(b) or (f), 30.123(6)(e) and 30.20(1g)(b)2., Stats., in locations where there are public rights features, except for piers and wharves as specifically provided in s. NR 326.08(1)(d). General or individual permits are required for those activities in locations of public rights features.

Note: Exemptions not allowed in locations of public rights features are: seasonal structures other than piers or wharves; piers or wharves meeting dimensional standards in s. 30.12(1g)(f), Stats., but not meeting standards under s. NR 326.08(1)(d), replacement culverts with inside diameter not more than 24 inches; dredging without auxiliary power.

(3) For those activities that may not be located where there are public rights features as defined in s. NR 1.06, a person may undertake an exempt activity after they have evaluated the site and determined that no public rights features as described under s. NR 1.06(4) may be affected by their activity.

(4) Public rights features include:

(a) Fish and wildlife habitat, including but not limited to spawning, nursery and feeding areas.

Note: Physical features constituting fish and wildlife habitat include stands of aquatic plants; riffles and pools in streams; undercut banks with overhanging vegetation or that are vegetated above; areas of lake or streambed where fish nests are visible; large woody cover.

(b) Physical features of lakes and streams that ensure protection of water quality.

Note: Physical features that protect water quality include stands of aquatic plants (that protect against erosion and so minimize sedimentation), natural streambed features such as riffles or boulders (that cause turbulent stream flow and so provide aeration).

(c) Reaches of bank, shore or bed that are predominantly natural in appearance (not man-made or artificial) or that screen man-made or artificial features.

Note: Such reaches include those with stands of vegetation that include intermixed trees, shrubs and grasses; stands of mature pines or other conifer species; bog fringe; bluffs rising from the water's edge; beds of emergent plants such as wild rice, wild celery, reeds, arrowhead.

(d) Navigation thoroughfares or areas traditionally used for navigation during recreational boating, angling, hunting or enjoyment of natural scenic beauty.

Note: Physical features indicative of navigation thoroughfares include shallow water areas typically used by wading anglers or areas frequently occupied by regularly repeated public uses such as water shows.

(5) The department shall base its identification of public rights features on factual information obtained from reputable sources, including but not limited to:

(a) Field surveys and inspections, including historical surveys for fish, wildlife, rare species, aquatic plants, geologic features or water quality.

(b) Surveys or plans from federal, state or local agencies.

(c) Factual documentation of features or use patterns from property owners, user groups or knowledgeable users on the waterbody.

(6) Procedure for identifying public rights features.

(a) After determining the locations of public rights features, the department shall give notice in the official state newspaper or other media the department selects in the area affected which is likely to inform the local residents.

(b) The department shall notify the county clerk of any county bordering the lake or reach of a stream and legislators whose districts include the affected public waters and the chairpersons of the committees of the legislature with jurisdiction for natural resources issues.

(c) The notice shall contain the location and description of the public rights features and the basis for its determination that the location contains public rights features. If a hearing is not requested in writing within 30 days after the mailing of the notice, the department may waive the hearing. Upon receipt of a request for a hearing, the department shall, not less than 10 days before the hearing, mail written notice thereof to each person notified under par. (a) or other media the department selects in the area affected which is likely to inform the local residents.

(d) At each hearing, the department shall take evidence offered by persons in support of or in opposition to the determination. If the department finds any location not properly classified, the location may not be identified as the location containing public rights features.

(7) Areas of special natural resource interest as determined in this chapter are determined to be locations of public rights features.

(8) The following locations are determined to contain public rights features:

(a) Sensitive areas designated under ch. NR 107.

(b) Lakes and streams specifically named in the Wisconsin Land Legacy Report, publication number LF-001-2004.

(9) The department shall maintain on its website and make available at its offices a consolidated list of waters with identified public rights features along with all other waters designated under s. NR 1.07 along with a visual guide to identification of public rights features to assist a person the applicability of all exemptions or permit requirements under ch. 30, Stats.

Note: See the department's website at www.dnr.state.wi.us/org/water/fhp/waterway/index.shtml.

SECTION 4. NR 1.07 is created to read:

NR 1.07 Identification of priority navigable waterways. (1) To fulfill its affirmative duty to protect public trust waters, the department shall designate priority navigable waterways as defined in s. 30.19(1b)(c), Stats.

(2) Rules promulgated under s. 30.19(1d), Stats., shall apply to priority navigable waterways.

(3) The following waters are hereby determined to be priority navigable waterways:

- (a) All areas of special natural resources interested as defined in s. NR 1.05.
- (b) Lakes less than 50 acres in size.
- (c) All locations containing public rights features as defined in s. NR 1.06.
- (4)** The department shall maintain on its website and make available at its offices a consolidated list of priority navigable waters so that a person may readily determine the applicability of all exemptions or permit requirements under ch. 30, Stats.

Note: See the department's website at www.dnr.state.wi.us/org/water/fhp/waterway/index.shtml.

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

The Wisconsin Natural Resources Board proposes an order to repeal Natural Resources Board Emergency Order FH-13-04(E) and create NR 1.05, 1.06 and 1.07 relating to Natural Resources Board policies on protection and management of public waters.

FH-59-04(E)

Summary Prepared by the Department of Natural Resources

Statutory Authority: ss. 30.01(1am), 30.12(1p)3. and (2m), 30.123(6m) and (6s), 30.20(1k)2. and (1m), 30.206(1c) and (3)(3r), 227.11(2) and 227.24, Stats.

Statutes interpreted: ss. 30.01(1am), 30.12(1p) and (2m), 30.123(6m) and (6s), 30.20(1k)2. and (1m), 30.206(1c) and (3)(3r), Stats.

Explanation of Agency Authority:

The Department has authority under ch. 30, Stats., to establish rules that identify areas possessing significant scientific value as "areas of special natural resource interest", to identify portions of navigable waterways containing sensitive fish and aquatic habitat as "priority navigable waterways", and to establish location standards for exemptions and general permits.

Related statute or rule:

The waters designations in this rule revision relate directly to regulation of activities in navigable waters under ch. 30, Stats., and the NR 300 series of rules.

Plain Language Analysis:

The purpose of this rule is to establish policy guiding the department's actions as a trustee of public waters and to set the process the department will follow when determining waters to be area of special natural resource interest, waters or portions thereof containing public rights features and priority navigable waters.

Federal Regulatory Analysis:

Any activity that results in a discharge (including deposits and structures) into "waters of the United States" is regulated by the U.S. Army Corps of Engineers (Corps) under section 404 of the Clean Water Act. An individual permit from the Corps is required, unless Wisconsin regulates the project in its entirety under ch. 30, Stats., in which case the project is authorized by the Corps under general permit GP-01-WI or GP-LOP-WI. Dredging or discharge into waters declared navigable under Section 10, Rivers and Harbors Act, 1899 is also regulated, and requires an individual permit from the Corps.

Comparison with Adjacent States:

Activity	Wisconsin	Illinois	Iowa	Michigan	Minnesota
Special waters designation	"Areas of special natural resource interest" and water having significant public trust values	Lake Michigan and 48 traditional Natural Navigable Waters, 10 additional artificial waters used by the public	State trust (owned) and must have public access. Protected Waters Area - one in state, regulates activities affecting contaminated aquifer	All waters of the state	Lake Superior, Trout Streams, Federal Scenic and wild rivers, designated spawning areas.

Summary of Factual Data and Analytical Methodologies:

The basis for all waters designations involves survey work for evaluating water quality, fisheries, aquatic habitat and other waterway features, using accepted scientific protocols and methodology that are established in technical journals and reflected in existing agency rules.

Analysis and Documents supporting determination of Small Business Effect: Any person placing a structure or making similar physical modifications to public navigable waters either qualifies for an exemption or must obtain a general or individual permit under state statute. To comply, small businesses follow the same requirements as other waterfront property owners: (1) make a self-determination of exemption using web-based tools provided by the department or describe their activity on an exemption determination request form; (2) complete a general permit application; or (3) complete an individual permit application. Schedules, application steps and compliance/reporting requirements are very basic for all applicants, and most projects can be planned and conducted by individuals with no specific professional background.

Anticipated Private Sector Costs: No significant fiscal effect on the private sector is anticipated.

Effect on Small Business: Small businesses who wish to conduct regulated activities on or near navigable waterways will be affected by the rule. Specific standards will provide clarity and consistency in the permitting process.

Agency Contact Person: Mary Ellen Vollbrecht, Mary.Vollbrecht@dnr.state.wi.us, (608) 264-8554

SECTION 1. Natural Resources Board Emergency Order No. FH-13-04(E) is repealed.

SECTION 2. NR 1.05 is created to read:

NR 1.05 Identification of areas of special natural resource interest. (1) To fulfill its affirmative duty to protect public trust waters, the department shall designate by rule areas of special natural resources interest as defined in s. 30.01(1am), Stats.

(2) Exemptions listed in ss. 30.12(1g)(a) to (km), 30.123 (6)(d) and (e) and 30.20(1g)(b)1. and 2., Stats., do not apply in areas of special natural resource interest. General or individual permits are required.

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

(3) The following waters are hereby determined to be areas of special natural resources interest as defined in s. 30.01(1am), Stats:

(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).

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

(d) Those portions of waters found to contain any endangered, threatened, special concern species or unique ecological communities identified in the Natural Heritage Inventory.

(e) Wild rice waters as identified by the department and the Great Lakes Indian Fish and Wildlife Commission.

(f) Waters in areas identified in a special area management plan (SAMP) or special wetland inventory study (SWIS) under s. NR 103.04.

Note: Special area management plans exist for the City of Superior, Douglas County and Chiwaukee Prairie, Kenosha County. A Special Wetland Inventory Study exists for the area bordering the bay of Green Bay.

(g) Waters in ecologically significant coastal wetlands along Lakes Michigan and Superior as identified in the Coastal Wetlands of Wisconsin (DNR-CMP project).

(h) Federal or state, under ss. 30.26 and 30.27, Stats., designated wild or scenic rivers.

(4) The department shall maintain on its website and make available at its offices a consolidated list of areas of special natural resource interest along with all other waters designated under ss. NR 1.06 and 1.07 so that a person may readily determine the applicability of all exemptions or permit requirements under ch. 30, Stats.

Note: See the department's website at www.dnr.state.wi.us/org/water/fhp/waterway/index.shtml.

(5) Waters shall be designated as areas of special natural resource interest only by the natural resources board by rule. The board shall consider recommendations for additions to the list of areas of special natural resources interest not more than once in any two-year period.

(6) The department shall report to the chairs of the standing natural resources committees of the legislature and to the co-chairs of the joint committee for review of administrative rules in January of each year the species of special concern that have been added or removed from the state's list and those bodies of water that are known to be impacted by the addition or removal of those species. This report may be included in an annual report on waterway and wetland permit program performance.

SECTION 3. NR 1.06 is created to read:

NR 1.06 Identification of public rights features. (1) To fulfill its affirmative duty to protect public trust waters, the department shall continually assess the state's public trust waters to identify locations of public rights features that require general or individual permit review in lieu of exemptions, or reasonable limitations on location to assure that the public's rights and interests under the public trust doctrine are protected, under ss. 30.12(1p)(a)3. and (2m), 30.123(6m) and (6s), 30.20(1k)(a)2. and (1m), 30.206(1c) and (3)(3r), Stats.

(2) Due to the potential significant adverse impacts of the activity on public rights features, exemptions listed in ss. 30.12(1g) (km)), 30.123(6)(e) and 30.20(1g)(b)2., Stats., are not allowed in locations where there are public rights features. General or individual permits are required for those activities in locations of public rights features.

Note: Exemptions not allowed in locations of public rights features are: replacement culverts with inside diameter not more than 24 inches; intake or outfall structures; dredging without auxiliary power. In locations of public rights features, piers exceeding the dimensional standards are unlikely to qualify for the exemption under s. 30.13, Stats.

(3) For those activities that are not allowed in locations where there are public rights features as identified in s. NR 1.06, a person may undertake an exempt activity after they have evaluated the site and determined that their activity is not in the location of a public rights feature as described under sub. (4) Note: Anyone undertaking a project in public waters is encouraged to seek a voluntary exemption determination as provided for in s. 30.12(2r), 30.123(6r) or 30.20(1r), Stats. A one-page form for requesting such a determination is available from department service centers and at the department's website at www.dnr.state.wi.us/org/water/fhp/waterway/index.shtml.

(4) Public rights features include:

(a) Fish and wildlife habitat, including but not limited to spawning, nursery and feeding areas.

Note: Physical features constituting fish and wildlife habitat include stands of aquatic plants; riffles and pools in streams; undercut banks with overhanging vegetation or that are vegetated above; areas of lake or streambed where fish nests are visible; large woody cover.

(b) Physical features of lakes and streams that ensure protection of water quality.

Note: Physical features that protect water quality include stands of aquatic plants (that protect against erosion and so minimize sedimentation), natural streambed features such as riffles or boulders (that cause turbulent stream flow and so provide aeration).

(c) Reaches of bank, shore or bed that are predominantly natural in appearance (not man-made or artificial) or that screen man-made or artificial features.

Note: Such reaches include those with stands of vegetation that include intermixed trees, shrubs and grasses; stands of mature pines or other conifer species; bog fringe; bluffs rising from the water's edge; beds of emergent plants such as wild rice, wild celery, reeds, arrowhead.

(d) Navigation thoroughfares or areas traditionally used for navigation during recreational boating, angling, hunting or enjoyment of natural scenic beauty.

Note: Physical features indicative of navigation thoroughfares include shallow water areas typically used by wading anglers or areas frequently occupied by regularly repeated public uses such as water shows.

(5) The department shall base its identification of public rights features on factual information obtained from reputable sources, including but not limited to:

(a) Field surveys and inspections, including historical surveys for fish, wildlife, rare species, aquatic plants, geologic features or water quality.

(b) Surveys or plans from federal, state or local agencies.

(c) Factual documentation of features or use patterns from property owners, user groups or knowledgeable users on the waterbody.

(6) Procedure for identifying public rights features.

(a) After determining the locations of public rights features, the department shall give notice in the official state newspaper or other media the department selects in the area affected which is likely to inform the local residents.

(b) The department shall notify the county clerk of any county bordering the lake or reach of a stream and legislators whose districts include the affected public waters and the chairpersons of the committees of the legislature with jurisdiction for natural resources issues.

(c) The notice shall contain the location and description of the public rights features and the basis for its determination that the location contains public rights features. If a hearing is not requested in writing within 30 days after the mailing of the notice, the department may waive the hearing. Upon receipt of a request for a hearing, the department shall, not less than 10 days before the hearing, mail written notice thereof to each person notified under par. (a) or other media the department selects in the area affected which is likely to inform the local residents.

(d) At each hearing, the department shall take evidence offered by persons in support of or in opposition to the determination. If the department finds any location not properly classified, the location may not be identified as the location containing public rights features.

(7) The department will conduct the process in sub. (6) not more than once in a 2-year period.

(8) The following locations are determined to contain public rights features:

(a) Sensitive areas designated under ch. NR 107.

(b) Lakes and streams specifically named in the Wisconsin Land Legacy Report, publication number LF-001-2004. Persons considering activities in these lakes and streams should consult the department before undertaking activities to determine whether they are in public rights features.

(9) The department shall maintain on its website and make available at its offices a consolidated list of waters with identified public rights features along with all other waters designated under s. NR 1.07 along with a visual guide to identification of public rights features to assist in determining the applicability of all exemptions or permit requirements under ch. 30, Stats.

Note: See the department's website at www.dnr.state.wi.us/org/water/fhp/waterway/index.shtml.

SECTION 4. NR 1.07 is created to read:

NR 1.07 Identification of priority navigable waterways. (1) To fulfill its affirmative duty to protect public trust waters, the department shall designate priority navigable waterways as defined in s. 30.19(1b)(c), Stats.

(2) Rules promulgated under s. 30.19(1d), Stats., shall apply to priority navigable waterways.

(3) The following waters are hereby determined to be priority navigable waterways:

(a) All areas of special natural resources interest as defined in s. NR 1.05.

(b) Lakes less than 50 acres in size.

(c) All locations containing public rights features as defined in s. NR 1.06.

(d) Tributaries to and rivers connecting to inland lakes containing naturally-reproducing populations of sturgeon up to the first dam.

(e) Navigable waters having self-sustaining populations of walleye located in the ceded territory of the state where resource allocation rights are shared by sovereign tribes.

(f) Muskellunge waters of the state where the muskellunge population is entirely or partially sustained through natural reproduction (Category 0, Category 1, and Category 2 muskellunge waters).

(g) Perennial tributaries to surface waters identified as trout streams by the department under s. NR 1.02(7).

(4) The department shall maintain on its website and make available at its offices a consolidated list of priority navigable waters so that a person may readily determine the applicability of all exemptions or permit requirements under ch. 30, Stats.

Note: See the department's website at www.dnr.state.wi.us/org/water/fhp/waterway/index.shtml.

SECTION 5. FINDING. The emergency rule procedure, pursuant to s. 227.24, Stats., is necessary and justified in establishing rules to protect the public health, safety and welfare. The Wisconsin Legislature recently enacted 2003 Wisconsin Act 118, to streamline the regulatory process for activities in public trust waters. The state has an affirmative duty to administer the new law in a manner consistent with the public trust responsibilities of the State of Wisconsin under Article IX, Section I of the Wisconsin Constitution.

2003 Act 118 identifies certain activities that may be undertaken in public trust waters exempt from a permit, or under a general permit. Certain activities may not be undertaken in waters that are defined as "areas of special natural resource interest" or at other locations where the activity would cause detrimental impacts on public rights and interests in navigable waters. Without emergency rules to aid in administering the new law, the following severe problems will occur:

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

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

SECTION 6. EFFECTIVE DATE. This rule shall take effect the day of publication in the official state newspaper.

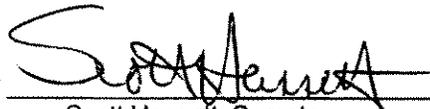
SECTION 7. BOARD ADOPTION. This rule was approved and adopted by the State of Wisconsin Natural Resources Board on August 16, 2004.

Dated at Madison, Wisconsin

8/17/04

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By


Scott Hassett, Secretary

(SEAL)

ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD
CREATING RULES

The Wisconsin Natural Resources Board proposes an order to repeal Emergency Natural Resources Board Order FH-13-04(E) and create NR-1.016, 1.05, 1.06 and 1.07 relating to Natural Resources Board policies on protection and management of public waters.

FH-13-04(E)

Summary Prepared by the Department of Natural Resources

Statutory Authority: ss. 30.01(1am), 30.12(1p)3. and (2m), 30.123(6m) and (6s), 30.20(1k)2. and (1m), 30.206(1c) and (3)(3r), 227.11(2) and 227.24, Stats.

Statutes interpreted: ss. 30.01(1am), 30.12(1p) and (2m), 30.123(6m) and (6s), 30.20(1k)2. and (1m), 30.206(1c) and (3)(3r), Stats.

The purpose of this rule is to establish policy guiding the department's actions as a trustee of public waters and to set the process the department will follow when determining waters to be area of special natural resource interest, waters or portions thereof containing public rights features and priority navigable waters.

Federal Regulatory Analysis

Any activity that results in a discharge (including deposits and structures) into "waters of the United States" is regulated by the U.S. Army Corps of Engineers (Corps) under section 404 of the Clean Water Act. An individual permit from the Corps is required, unless Wisconsin regulates the project in its entirety under ch. 30, Stats., in which case the project is authorized by the Corps under general permit GP-01-WI or GP-LOP-WI. Dredging or discharge into waters declared navigable under Section 10, Rivers and Harbors Act, 1899 is also regulated, and requires an individual permit from the Corps.

Analysis of Adjacent States

Activity	Wisconsin	Illinois	Iowa	Michigan	Minnesota
Special waters designation	"Areas of special natural resource interest" and water having significant public trust values	Lake Michigan and 48 traditional Natural Navigable Waters, 10 additional artificial waters used by the public	State trust (owned) and must have public access. Protected Waters Area. One in State, identified to regulate activities affecting contaminated aquifer	All waters of the state	Lake Superior, Trout Streams, Federal Scenic and wild rivers, designated spawning areas.

SECTION 1. Natural Resources Board Order FH-13-04(E) is repealed.

SECTION 1. NR 1.016 is created to read:

NR 1.016 Department responsibilities to conserve and enhance public waters. (1) The Natural Resources Board recognizes that the state of Wisconsin has an affirmative duty, under the public trust doctrine, which emanates from Article IX, Section I, of the Wisconsin Constitution, to protect and preserve the state's waters, which are one of Wisconsin's most important natural resources. The Wisconsin Supreme Court has admonished that, at the time of statehood, the state of Wisconsin "became a trustee of the people charged with the faithful execution of the trust created for their benefit." The Court further noted that the "wisdom of the policy which... carefully preserved to the people the full and free use of waters

cannot be questioned, nor should it be limited by narrow construction." (*Diana Shooting Club v. Husting*, 156 Wis. 261(1914). The Wisconsin courts have noted that the state of Wisconsin must take into account the "potential ecological impacts" of projects in our navigable waters to carry out its "assigned duty as protector of the overall public trust in maintaining one of Wisconsin's most important natural resources." (See *Sterlingworth v. DNR*, 205 Wis. 2d 710(Ct. App. 1996))

(2) In addition to the common law provisions requiring the state of Wisconsin to protect the ecology of our public trust waters, scientific research has demonstrated that the impacts of human manipulation of our shorelines and in water habitat are having significant impacts on our vital aquatic ecosystems. The department of natural resources participated actively in collaborative efforts with interest group leaders and scientists from across the state of Wisconsin to assess the status of Wisconsin's water resources during 2003—The Year of Water. This collaborative effort resulted in a report of the Wisconsin Academy of Sciences, Arts and Letters entitled, "*Waters of Wisconsin: The Future of our Aquatic Ecosystems and Resources*." This report noted the critical importance of maintaining our lakes, rivers and streams, wetlands, and aquatic ecosystems and the biodiversity of our state's waters. (*Waters of WI* at pps. 12-20) It recognized that all actions affecting our waters have consequences and that these consequences accumulate over time, and, cumulatively, cannot be ignored. (*Waters of WI* at p. 63.) The report adopted a "Statement of Principles" that noted "the citizens of Wisconsin increasingly appreciate that the degradation of water bodies and watersheds, loss of aquatic biodiversity, and varied forms of water pollution pose serious threats to human health, the quality of life, a thriving economy, and vital aquatic ecosystems." The report noted that Wisconsin's "bounty of freshwater and the variety of its aquatic ecosystems are assets of global significance", which face diverse challenges to their integrity.... It was noted that "sustainability" of these resources "implies a commitment to protecting, managing, restoring, and using Wisconsin's waters in a manner that ensures the health of our aquatic ecosystems while securing their cultural, economic and public health benefits for future generations." (*Waters of WI* at pps. 92-93) The report noted "Management of Wisconsin's waters should strive to protect and where possible restore natural hydrologic functions, native biological diversity, and ecological integrity." (*Waters of WI* at p. 96). The conclusions and recommendations of the Waters of Wisconsin report are consistent with state and national research assessing the impacts of physical activities on our aquatic ecosystems.

Note: For a full copy of the Waters of Wisconsin Report, contact the Wisconsin Academy of Sciences, Arts and Letters, 1922 University Avenue, Madison, WI or go to their website at www.wisconsinacademy.org. For a survey of other research supporting the need to protect, see "The Construction, Aesthetics and Effects of Lakeshore Development: A Literature Review, by Sandy Engel and Jerry L. Pederson, Jr., Wisconsin Department of Natural Resources Research Report 177, December 1998.

(3) Recognizing that the legislature has delegated to the department of natural resources the authority to administer its surface water management programs, the Natural Resources Board directs the department to administer those programs in a manner consistent with its delegated authority under the statutes, the rules which it has promulgated, the common law public trust principles and the science relating to the management of our aquatic resources in order to assure the sustainability of our aquatic ecosystems.

(4) The Natural Resources Board recognizes that conservation of the extent and quality of public waters and the remaining aquatic habitat and natural features is critical to the future of hunting, fishing, recreation, tourism, economic development and the quality of life in Wisconsin.

(5) Recent legislative actions have modified and streamlined the regulatory processes under ch. 30, Stats., which is the primary mechanism for ensuring that physical alterations do not diminish the extent or nature of public rights in navigable waters. During the course of the deliberations in the adoption of these statutory modifications, the bill sponsors clearly stated their intent to provide exemptions for "very minor activities" and not to diminish the public trust protections of Wisconsin's waters. The bill's sponsors noted that, "Under the [Act], the DNR is **required** to consider public rights or interest when promulgating rules regarding the issuance of statewide general permits." The expressed intent of the Legislature, and of the Governor, was to "uphold the highest environmental standards."

~~(6) As trustee of public waters, the department shall conserve and enhance public rights established under the laws of this state in our navigable waters. These public rights include, but are not limited to, the right to navigate, hunt, fish, swim, recreate, enjoy natural scenic beauty in clean water free of environmental pollution, and other rights as may be established by law in the future.~~

SECTION 2. NR 1.05 is created to read:

NR 1.05 Identification of areas of special natural resource interest. (1) To fulfill its affirmative duty to protect public trust waters, the department shall designate by rule areas of special natural resources interest as defined in s. 30.01(1am), Stats.

(2) Exemptions listed in ss. 30.12(1g)(a) to (km) and ~~30.123 (6)(d) and (e) and 30.20(1g)(b)1. and 2., Stats.,~~ do not apply in areas of special natural resource interest. General or individual permits are required.

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

~~(3) Waters that can serve as benchmarks for assessing and guiding the conservation and management of all public waters shall be identified as possessing significant scientific value under s. 30.01(1am)(c), Stats. In identifying the waters, the department shall consider the presence of self-sustaining populations of native plants and animals, unique natural features, remnant areas of native biota, and water uses of statewide significance including research or education.~~

~~(4)~~ (3) The following waters are hereby determined to be areas of special natural resources interest as defined in s. 30.01(1am), Stats:

- (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).
- (c) A surface water identified as an outstanding or exceptional resource water under s. 281.15, Stats.
- (d) Those portions of waters found to contain Waters inhabited by any endangered, threatened, special concern species or unique ecological communities identified in the Natural Heritage Inventory.
- (e) Wild rice waters as identified by the department and the Great Lakes Indian Fish and Wildlife Commission.
- ~~(f) Tributaries to and rivers connecting to inland lakes containing naturally reproducing populations of sturgeon up to the first dam.~~
- ~~(g) Navigable waters having self-sustaining populations of walleye located in the ceded territory of the state where resource allocation rights are shared by sovereign tribes.~~
- ~~(h) Muskellunge waters of the state where the muskellunge population is entirely or partially sustained through natural reproduction (Category 0, Category 1 and Category 2 muskellunge waters).~~

(i)(f) Waters in areas identified in a special area management plan (SAMP) or special wetland inventory study (SWIS) under s. NR 103.04.

Note: Special area management plans exist for the City of Superior, Douglas County and Chiwaukee Prairie, Kenosha County. A Special Wetland Inventory Study exists for the area bordering the bay of Green Bay.

(j)(g) Waters in ecologically significant coastal wetlands along Lakes Michigan and Superior as identified in the Coastal Wetlands of Wisconsin (DNR-CMP project).

(k)(h) Federal or state, under ss. 30.26 and 30.27, designated wild or scenic rivers.

(L) Perennial tributaries to surface waters identified as trout streams by the department under s. NR 1.02(7).

~~(5)~~ (4) The department shall maintain on its website and make available at its offices a consolidated list of areas of special natural resource interest along with all other waters designated under ss. NR 1.06 and 1.07 so that a person may readily determine the applicability of all exemptions or permit requirements under ch. 30, Stats.

Note: See the department's website at www.dnr.state.wi.us/org/water/fhp/waterway/index.shtml.

(5) Waters shall be designated as areas of special natural resource interest only by the Natural Resources Board by rule. The Board shall consider recommendations for additions to the list of areas of special natural resources interest not more than once in any two-year period.

(6) The department shall report to the chairs of the standing natural resources committees of the Legislature and to the co-chairs of the Joint Committee for Review of Administrative Rules in January of each year the species of special concern that have been added or removed from the State's list and those bodies of water that are known to be impacted by the addition or removal of such species. This report may be included in an annual report on waterway and wetland permit program performance.

SECTION 3. NR 1.06 is created to read:

NR 1.06 Identification of public rights features. (1) -To fulfill its affirmative duty to protect public trust waters, the department shall continually assess the state's public trust waters to identify locations of public rights features that require general or individual permit review in lieu of exemptions, or reasonable limitations on location to assure that the public's rights and interests under the public trust doctrine are protected, under ss. 30.12(1p)(a)3. and (2m), 30.123(6m) and (6s), 30.20(1k)(a)2. and (1m), 30.206(1c) and (3)(3r), Stats.

(2) -Due to the potential significant adverse impacts of the activity on public rights features, exemptions listed in ss. 30.12(1g)(b) or (f)(km)), 30.123(6)(e) and 30.20(1g)(b)2., Stats., are not allowed in locations where there are public rights features, except for piers and wharves as specifically provided in s. NR 326.08(1)(d). General or individual permits are required for those activities in locations of public rights features.

Note: Exemptions not allowed in locations of public rights features are: seasonal structures other than piers or wharves; piers or wharves meeting dimensional standards in s. 30.12(1g)(f), Stats., but not meeting standards under s. NR 326.08(1)(d); replacement culverts with inside diameter not more than 24 inches; intake or outfall structures; dredging without auxiliary power. In locations of public rights features, piers exceeding the dimensional standards are unlikely to qualify for the exemption under s. 30.13, Stats.

(3) For those activities that are not allowed may not be located in locations where there are public rights features as identified defined in s. NR 1.06, a person may undertake an exempt activity after they have evaluated the site and determined that their activity is not in the location of a ~~no~~ public rights features as described under s. NR 1.06(4). may be affected by their activity.

Note: Anyone undertaking a project in public waters is encouraged to seek a voluntary exemption determination as provided for in s. 30.12(2r), 30.123(6r) or 30.20(1r), Stats. A one-page form for requesting such a determination is available from department service centers and at the department's website at www.dnr.state.wi.us/org/water/fhp/waterway/index.shtml.

(4) Public rights features include:

(a) Fish and wildlife habitat, including but not limited to spawning, nursery and feeding areas.

Note: Physical features constituting fish and wildlife habitat include stands of aquatic plants; riffles and pools in streams; undercut banks with overhanging vegetation or that are vegetated above; areas of lake or streambed where fish nests are visible; large woody cover.

(b) Physical features of lakes and streams that ensure protection of water quality.

Note: Physical features that protect water quality include stands of aquatic plants (that protect against erosion and so minimize sedimentation), natural streambed features such as riffles or boulders (that cause turbulent stream flow and so provide aeration).

(c) Reaches of bank, shore or bed that are predominantly natural in appearance (not man-made or artificial) or that screen man-made or artificial features.

Note: Such reaches include those with stands of vegetation that include intermixed trees, shrubs and grasses; stands of mature pines or other conifer species; bog fringe; bluffs rising from the water's edge; beds of emergent plants such as wild rice, wild celery, reeds, arrowhead.

(d) Navigation thoroughfares or areas traditionally used for navigation during recreational boating, angling, hunting or enjoyment of natural scenic beauty.

Note: Physical features indicative of navigation thoroughfares include shallow water areas typically used by wading anglers or areas frequently occupied by regularly repeated public uses such as water shows.

(5) The department shall base its identification of public rights features on factual information obtained from reputable sources, including but not limited to:

(a) Field surveys and inspections, including historical surveys for fish, wildlife, rare species, aquatic plants, geologic features or water quality.

(b) Surveys or plans from federal, state or local agencies.

(c) Factual documentation of features or use patterns from property owners, user groups or knowledgeable users on the waterbody.

(6) Procedure for identifying public rights features.

(a) After determining the locations of public rights features, the department shall give notice in the official state newspaper or other media the department selects in the area affected which is likely to inform the local residents.

(b) The department shall notify the county clerk of any county bordering the lake or reach of a stream and legislators whose districts include the affected public waters and the chairpersons of the committees of the legislature with jurisdiction for natural resources issues.

(c) The notice shall contain the location and description of the public rights features and the basis for its determination that the location contains public rights features. If a hearing is not requested in writing within 30 days after the mailing of the notice, the department may waive the hearing. Upon receipt of a request for a hearing, the department shall, not less than 10 days before the hearing, mail written notice

thereof to each person notified under par. (a) or other media the department selects in the area affected which is likely to inform the local residents.

(d) At each hearing, the department shall take evidence offered by persons in support of or in opposition to the determination. If the department finds any location not properly classified, the location may not be identified as the location containing public rights features.

~~(7) Areas of special natural resource interest as determined in this chapter are determined to be locations of public rights features.~~

(7) The department will conduct the process in par. (6) not more than once in a two-year period.

(8) The following locations are determined to contain public rights features:

(a) Sensitive areas designated under ch. NR 107.

(b) Lakes and streams specifically named in the Wisconsin Land Legacy Report, publication number LF-001-2004. Persons considering activities in these lakes and streams should consult the department before undertaking activities to determine whether they are in public rights features.

(9) The department shall maintain on its website and make available at its offices a consolidated list of waters with identified public rights features along with all other waters designated under s. NR 1.07 along with a visual guide to identification of public rights features to assist a person in determining the applicability of all exemptions or permit requirements under ch. 30, Stats.

Note: See the department's website at www.dnr.state.wi.us/org/water/fhp/waterway/index.shtml.

SECTION 4. NR 1.07 is created to read:

NR 1.07 Identification of priority navigable waterways. (1) -To fulfill its affirmative duty to protect public trust waters, the department shall designate priority navigable waterways as defined in s. 30.19(1b)(c), Stats.

(2) Rules promulgated under s. 30.19(1d), Stats., shall apply to priority navigable waterways.

(3) The following waters are hereby determined to be priority navigable waterways:

(a) All areas of special natural resources ~~interested-~~ interest as defined in s. NR 1.05.

(b) Lakes less than 50 acres in size.

(c) -All locations containing public rights features as defined in s. NR 1.06.

(d) Tributaries to and rivers connecting to inland lakes containing naturally-reproducing populations of sturgeon up to the first dam.

(e) Navigable waters having self-sustaining populations of walleye located in the ceded territory of the state where resource allocation rights are shared by sovereign tribes.

(f) Muskellunge waters of the state where the muskellunge population is entirely or partially sustained through natural reproduction (Category 0, Category 1, and Category 2 muskellunge waters).

(g) Perennial tributaries to surface waters identified as trout streams by the department under s. NR 1.02(7).

(4) The department shall maintain on its website and make available at its offices a consolidated list of priority navigable waters so that a person may readily determine the applicability of all exemptions or permit requirements under ch. 30, Stats.

Note: See the department's website at www.dnr.state.wi.us/org/water/fhp/waterway/index.shtml.

SECTION 5. FINDING. The emergency rule procedure, pursuant to s. 227.24, Stats., is necessary and justified in establishing rules to protect the public health, safety and welfare. The Wisconsin Legislature recently enacted 2003 Wisconsin Act 118, to streamline the regulatory process for activities in public trust waters. The state has an affirmative duty to administer the new law in a manner consistent with the public trust responsibilities of the State of Wisconsin under Article IX, Section I of the Wisconsin Constitution.

2003 Act 118 identifies certain activities that may be undertaken in public trust waters exempt from a permit, or under a general permit. Certain activities may not be undertaken in waters that are defined as "areas of special natural resource interest" or at other locations where the activity would cause detrimental impacts on public rights and interests in navigable waters. Without emergency rules to aid in administering the new law, the following severe problems will occur:

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

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

SECTION 6. EFFECTIVE DATE. This rule shall take effect the day of publication in the official state newspaper.

SECTION 7. BOARD ADOPTION. This rule was approved and adopted by the State of Wisconsin Natural Resources Board on April 6, 2004 _____.

Dated at Madison, Wisconsin _____.

STATE OF WISCONSIN

DEPARTMENT OF NATURAL RESOURCES

By _____
Scott Hassett, Secretary

(SEAL)



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**JOINT COMMITTEE FOR
REVIEW OF ADMINISTRATIVE RULES**

Emergency Rule Extension Motion Form

July 21, 2004
State Capitol

#1
Moved by Leibham, Seconded by Kedzie

THAT, #2 1. The Joint Committee for Review of Administrative Rules modifies its June 24, 2004 motion relating to emergency rule ch. NR 1 by: (a) removing s. NR 1.016 for separate consideration and (b) providing that the suspension of emergency rule ch. NR 1, except for the provisions of s. NR 1.016, will take effect on August 18, 2004.

#1/2. The Joint Committee for Review of Administrative Rules, pursuant to s. 227.19 (4) (d) 1., 3., and 6. and 227.26 (2) (d), Stats., suspends s. NR 1.016.

COMMITTEE MEMBER	Motion #1			Motion #2		
	Aye	No	Absent	Ay	No	Abs.
1. Senator LEIBHAM	✓			✓		
2. Senator KEDZIE	✓			✓		
3. Senator LAZICH	✓			✓		
4. Senator ROBSON			✓			✓
5. Senator COGGS			✓			✓
6. Representative GROTHMAN	✓			✓		
7. Representative SERATTI	✓			✓		
8. Representative GUNDERSON	✓			✓		
9. Representative BLACK		✓		✓		
10. Representative HEBL	✓			✓		
Totals						

Motion Carried

Motion Failed

LAND LEGACY REPORT ISSUE

Vander Sanden, Patrick

From: Delaporte, Maggie
Sent: Monday, August 16, 2004 12:09 PM
To: Vander Sanden, Patrick
Subject: FW: Land Legacy Report - NR1

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

From: Larry Konopacki [mailto:lkonopacki@ANDERSONKENT.COM]
Sent: Monday, August 16, 2004 12:04 PM
To: Delaporte, Maggie
Cc: Paul Kent
Subject: Land Legacy Report - NR1

Dear Maggie,

Here is the background information you requested on Paul's comments about the Land Legacy Report:

First, here is Paul's suggestion regarding how to address the Land Legacy Report waters:

NR 1.06 Land Legacy Report:

I thought we had discussed this on several occasions and agreed that the report could be a "red flag" but not an automatic designation. We recognized that given the staff work that went into the report, that waters listed in the report are more likely than not to have areas with public rights features. We were however concerned about the breadth of the listing and the fact that the report was done with broader purposes than identifying public rights features. As drafted, the rule provides an automatic designation of any specifically named stream named in the report. In addition, it also incorporates the entire water rather than designated segments. I would suggest one of two solutions. One option would be to delete NR 1.06(8)(b) and add a note that says: "Lakes and streams specifically named in the Wisconsin Land Legacy Report, publication number LF-001-2004 are also likely to contain areas of public rights features. Persons considering activities in lakes and streams named in the Report should consult the Department before undertaking those activities." Another option would be to amend NR 1.06(8)(b) to read: "Those locations on lakes and streams specifically named in the Wisconsin Land Legacy Report, publication number LF-001-2004 that meet the criteria under NR 1.06(4)."

Here is the way the Department dealt with this in NR1:

(8) The following locations are determined to contain public rights features:

(a)

(b) Lakes and streams specifically named in the Wisconsin Land Legacy Report, publication number LF-001-2004. Persons considering activities in these lakes and streams should consult the department before undertaking activities to determine whether they are in public rights features.

As you can see, the Department's language does not refer to the Land

Legacy Report waters as only a red flag indicating possible Public Rights Features. As we discussed earlier, Paul does not think this needs to be changed for the emergency rule, but will seek changes to this section for the permanent rules.

Thank you, and good luck over the next few weeks! Our thoughts will be with you and Bob....

Larry Konopacki, law clerk

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JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

Motion Form

Moved by Leibham?, Seconded by Robson

THAT, Rescind July 21, 2004 motion (portion that
delayed suspension
1.05, 1.06, 1.07

COMMITTEE MEMBER	Aye	No	Absent
1. Senator LEIBHAM	✓		
2. Senator WELCH	✓		
3. Senator LAZICH	✓		
4. Senator ROBSON	✓		
5. Senator COGGS	✓		
6. Representative GROTHMAN	✓		
7. Representative SERATTI	✓		
8. Representative GUNDERSON	✓		
9. Representative BLACK	✓		
10. Representative HEBL	✓		
Totals			

Motion Carried

Motion Failed



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JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

Motion Form

Moved by Welch, Seconded by Grothman

THAT, The Joint Committee for Review of Administrative Rules, pursuant to
ss. 227.19(4)(d) 1., 3., and 6. and 227.26(2)(d), Stats., suspends
emergency rule ch. NR1 with suspension to take effect
on July 24, 2004.

COMMITTEE MEMBER	Aye	No	Absent
1. Senator LEIBHAM	✓		
2. Senator WELCH	✓		
3. Senator LAZICH	✓		
4. Senator ROBSON		✓	
5. Senator COGGS		✓	
6. Representative GROTHMAN	✓		
7. Representative SERATTI	✓		
8. Representative GUNDERSON	✓		
9. Representative MOLEPSKE		✓	
10. Representative HEBL		✓	
Totals	6	4	

Motion Carried

Motion Failed



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JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

August 20, 2004

The Honorable Alan Lasee
Senate President
State Capitol Building, Room 220 South
Madison, WI 53702

The Honorable John Gard
Assembly Speaker
State Capitol Building, Room 211 West
Madison, WI 53702

Dear President Lasee and Speaker Gard:

The Joint Committee for the Review of Administrative Rules met in Executive Session on August 18, 2004 and adopted the following motions:

Emergency Rule NR 1.016, 1.05, 1.06, and 1.07 **Relating to Natural Resources Board policies on protection and management of public waters.**

That, pursuant to s. 227 Stats., the Joint Committee for Review of Administrative Rules rescinds its motion of July 21, 2004.

Motion Carried 10 Ayes, 0 Noes

LRB 4639/2 & 4684/2 **Relating to the protection and management of the public waters of Wisconsin.**

That, pursuant to s. 227.19(5)(e), Stats., the Joint Committee for Review of Administrative Rules introduces LRB 4639/2 and 4684/2. Motion Carried 6 Ayes, 4 Noes

Pursuant to s. 227.24(2)(c) Stats, we are notifying the Secretary of State and the Revisor of Statutes of the Committee's action through copies of this letter.

Pursuant to s. 227.24(2)(c), stats., as treated by 1997 Wisconsin Act 185, please forward a copy of this notice to the chairperson of the standing committee in your respective house most likely to have jurisdiction over the Clearinghouse Rule corresponding to this emergency rule.

Sincerely,

Senator Joseph Leibham
Senate Co-Chair

Representative Glenn Grothman
Assembly Co-Chair

JKL:GSG:pv

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

The Wisconsin Natural Resources Board proposes an order to repeal Section 6 of Natural Resources Board Emergency Order FH-14-04(E), and create ch. NR 310 related to procedures for exemptions, general permits and individual permits for activities in navigable waterways.

FH-60-04(E)

Analysis Prepared by the Department of Natural Resources

Statutory Authority: ss. 30.12(1p); 30.123(6s); 30.20(1k), 30.206, 30.208, 30.209, 30.28, 30.291, 30.298, 227.11(2), 227.24, 281.22, 281.36 and 281.37, Stats.

Statutes Interpreted: ss. 30.10 to 30.27, 30.291, 31.02 to 31.38, 281.22, 281.36 and 281.37, Stats.

Explanation of Agency Authority:

The Department has authority under ch. 30, Stats., to clarify statutory procedures and timelines in administrative rule.

Related statute or rule:

These rules relate directly to regulation of activities in navigable waters under ch. 30, Stats., waters designations in ch. NR 1, and the NR 300 series of rules.

Plain Language Analysis:

This action creates a rule to establish procedures for processing exemptions, general permits, and individual permits, issuing public notices, and conducting hearings for individual permits as authorized under chapter 30, Stats.

NR 310 establishes specific procedures used for exemptions, general permits and individual permits. These processes were written to be in strict conformance with procedures and timelines established in Act 118. The most complex changes are in the public notice and hearing process that was significantly changed. Important changes include:

- Individual permits are required for all activities which are not exempt and not covered by a general permit. A 30 day public notice is now required for all individual permits.
- The applicant will be responsible for providing adequate written notice to all interested persons and publishing the public notice.
- A public hearing option is added before the Department's decision, which is then subject to an administrative hearing.

Federal Regulatory Analysis

The U.S. Army Corps of Engineers has comparable procedures for taking applications and making decisions on physical alterations to waters of the United States. A comparison of timelines is shown in the following table.

Time Limit	U.S. Army Corps of Engineers	Wisconsin DNR
Exemption determinations	Not applicable	15 calendar days
Completeness determination	15 calendar days (no limit on the number of times they can request additional information)	30 calendar days (one time request for additional information)
Issuance of public notice	15 calendar days	15 calendar days
Final decisions	90 calendar days from receipt of initial application if no exceptions* are involved	15 calendar days for exemption determinations
	150 calendar days from receipt of initial application if exceptions* are involved	30 calendar days for general permits
		105 calendar days from receipt of initial application for individual permits that do not include a public hearing
		150 calendar days from receipt of initial application for individual permits that include a public hearing

*Exceptions: Final decision not later than 60 days after receipt of a complete application UNLESS: Final decision is precluded as a matter of law or procedures required by law. The following laws require procedures such as state or other federal agency certifications, public hearings, Environmental Impact Statements, consultation, special studies, and testing which may prevent District Engineers from being able to decide certain applications within 60 days:

Clean Water Act; Coastal Zone Management Act; National Environmental Policy Act; National Historic Preservation Act; Preservation of Historical & Archaeological Data Act; Endangered Species Act; Wild & Scenic Rivers Act; Marine Protection; Research and Sanctuaries Act

Once the Corps of Engineers has enough information to make a decision, they need to do so even though other agencies which may have regulatory jurisdiction have not yet granted their authorizations, except where such authorizations are, by federal law, a prerequisite to making a decision, unless:

- The case must be referred to higher authority
- The comment period is extended
- A timely submittal of information or comments is not received from the applicant
- The processing is suspended at the request of the applicant
- Information needed by the District Engineer for a decision on the application cannot reasonably be obtained within the 60-day period

Comparison with Adjacent States

Minnesota, Michigan, Illinois and Iowa all have comparable procedures for taking applications and making decisions on physical alterations to surface waters. A comparison of timelines is shown in the following table.

Time Limit	Wisconsin	Illinois	Iowa	Michigan	Minnesota
Exemption determinations	15 calendar days	Not applicable	Not applicable	Not applicable	Not applicable
Completeness determinations	30 calendar days	No time limit	No time limit	No time limit	No time limit
Issuance of Public Notice	15 calendar days	Upon receipt of an application for an individual permit	No time limit		
Final decisions	15 calendar days for		No time limit		

	exemption determinations				
	30 calendar days for general permits		No time limit		
	105 calendar days from receipt of initial application for individual permits that do not include a public hearing	90 calendar days	No time limit	Normally acted upon within 60 days of completed application	30 days from receipt of water diversion applications only
	150 calendar days from receipt of initial application for individual permits that include a public hearing	150 calendar days	No time limit		

Summary of Factual Data and Analytical Methodologies: Not applicable.

Analysis and Documents supporting determination of Small Business Effect: Any person placing a structure or making similar physical modifications to public navigable waters either qualifies for an exemption or must obtain a general or individual permit under state statute. To comply, small businesses follow the same requirements as other waterfront property owners: (1) make a self-determination of exemption using web-based tools provided by the department or describe their activity on an exemption determination request form; (2) complete a general permit application; or (3) complete an individual permit application. Schedules, application steps and compliance/reporting requirements are very basic for all applicants, and most projects can be planned and conducted by individuals with no specific professional background.

Anticipated Private Sector Costs: No significant fiscal effect on the private sector is anticipated.

Effect on Small Business: Small businesses who wish to conduct regulated activities on or near navigable waterways will be affected by the rule. Specific procedures will provide clarity and consistency in the permitting process.

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SECTION 1. Section 6 of Natural Resources Board Emergency Order No. FH-14-04(E) is repealed.

SECTION 2. Chapter NR 310 is created to read:

**NR 310
PROCEDURES FOR EXEMPTIONS, GENERAL PERMITS, INDIVIDUAL PERMITS,
NOTICES, HEARINGS, AND ADMINISTRATIVE REVIEW**

**SUBCHAPTER I
GENERAL PROVISIONS**

NR 310.01 Purpose. This chapter establishes procedures for processing exemption determinations, general permits and individual permits for activities in navigable waterways, in order to provide consistent and efficient administration of the exemption and permit programs while assuring that the public trust in Wisconsin waterways is maintained.

NR 310.02 Applicability. This chapter applies to exemptions, general permits and individual permits regulated under subchs. I and II, ch. 30, Stats.

NR 310.03 Definitions. In this chapter:

(1) "Days" under this chapter means calendar days unless otherwise specified.

Note: See s. 990.001(4), Stats., for statutory standards on computing time.

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

(3) "General permit" means a permit issued by the department that categorically authorizes certain activities regulated under ss. 30.206 and 30.12(3), 30.12(7), 30.19(3r) and 30.20(1t), Stats.

(4) "Individual permit" means a permit issued by the department for a single project under specific applicable provisions of ch. 30, Stats., excluding s. 30.206, Stats. For purposes of this chapter, "individual permit" includes a contract issued under s. 30.20, Stats.

(5) "Navigable waterway" means any body of water with a defined bed and bank that is navigable under Wisconsin law. In Wisconsin a body of water is navigable if it is capable of floating on a regularly recurring basis the lightest boat or skiff used for recreation or any other purpose.

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

(7) "Surface waters" means all natural and artificial lakes and streams, except for artificial cooling lakes, agricultural or irrigation ponds, and facilities constructed for the treatment of wastewaters.

SUBCHAPTER II EXEMPTIONS

NR 310.04 Eligibility for exemptions. (1) To be exempt under s. 30.12(1g), 30.123(6)(d) or (e), or 30.20(1g), Stats., from the requirement to obtain a general or individual permit under ch. 30, Stats., an activity shall meet all standards for installation, construction and location in the statute authorizing the exemption and the rules promulgated under s. 30.12(1p), 30.123(6s) or 30.20(1k), Stats.

Note: Some locations are not eligible for exemptions or general permits, see ch. NR 1.

Note: The rules specifying standards for exempted activities are chs. NR 1, 320, 323, 326, 328, 329 and 345.

(2) For those activities which are not allowed in locations where there are public rights features as defined in s. NR 1.06, a person may only undertake an exempt activity after they have evaluated the site and determined that the structure or activity is not in the location of a public rights feature described in s. NR 1.06(4).

(3) Pursuant to ss. 30.12(2m), 30.123(6m), and 30.20(1m), Stats., the department may require a person engaged in or proposing an activity for which an exemption is available to obtain a general or individual permit.

NR 310.05 Exemption determination requests. (1) Any person may request a determination from the department under s. 30.12(2r), 30.123(6r) or 30.20(1r), Stats., as to whether an activity or location is exempt under s. 30.12(1g), 30.123(6)(d) or (e) or 30.20(1g), Stats.

(2) A person who seeks a department determination as to whether an activity or location is eligible for an exemption under sub. (1) shall submit a written request to the department. The request shall be submitted on a form provided by the department, by delivery methods specified by the department, and shall provide all the information requested on the form.

(3) If the person who requests the determination is the person proposing the activity, the request shall be submitted not less than 20 days before commencing the activity to allow time for mailing between the applicant and department.

Note: Federal or local permits may be required. Applicants are responsible for obtaining all necessary federal or local permits or approvals for their activity.

NR 310.06 Department procedures for processing exemption determination requests. (1) The department shall develop and maintain a form for requesting an exemption determination under s. NR 310.05, and provide a copy of the form to any person on request.

Note: Form 3500-107, "Chapter 30 Exemption Determination Request" is available at department service centers and on the department's website at www.dnr.wi.gov under the topic "Waterway and Wetland Permits."

(2) Upon receipt of an exemption determination request under s. NR 310.05, the department shall determine whether an activity or location qualifies for an exemption under s. 30.12(1g), 30.123(6)(d) or (e) or 30.20(1g), Stats., and the rules promulgated under the applicable statute.

(3) The date of receipt of an exemption determination request shall be the date the form is received at the department office specified on the form.

(4) If the exemption determination request does not meet all the requirements of s. NR 310.05(2), it shall be deemed incomplete. The department shall notify the requester that the activity is not exempt and shall describe the information that a new exemption determination request must include in order for the information to be complete.

(5) Where an exemption determination request is filed for an activity for which an exemption is not available under s. 30.12(1g), 30.123(6)(d) or (e) or 30.20(1g), Stats., the department shall notify the requester within 15 days of receipt that the activity is not eligible for an exemption, and of any provisions of ch. 30, Stats., that apply to the activity.

NR 310.07 Exemption determinations. (1) The department shall determine whether an activity is exempt under s. 30.12(1g), 30.123(6)(d) or (e) or 30.20(1g), Stats., based on whether it complies with this chapter, all standards in the statute that create the specific exemption and all standards in any rules promulgated under that statute.

(2) The department may inspect activity sites as necessary to determine whether the activity qualifies for an exemption, or whether a general or individual permit is required.

(3) In determining whether an activity is eligible for an exemption, the department may rely on information and data gathered by the department in a prior inspection of the activity site or the waterbody adjacent to the activity site. The department is not required to make a new site inspection in response to receipt of an exemption determination request form.

(4) Where a person who owns the property where an activity is or will be located files an exemption determination request, the department shall determine if the activity is exempt under sub. (1), notify the requester in writing within 15 days if it determines that an activity is not exempt, and inform the requester that a general or individual permit is required for the activity. The department also may notify a requester if it determines that an activity is exempt.

(5) Where a person who does not own the property where an activity is or will be located files an exemption determination request, the department shall determine if the activity is exempt under sub. (1) and notify the requester in writing of its determination. If the activity is not exempt, the department shall inform the requester that a general or individual permit is required for the activity. If the department seeks permission from the landowner to access the property, the department shall notify the landowner of both the exemption determination request and its exemption determination. If the department is not able to obtain

permission to access the property to inspect the site, and therefore unable to make a determination as to whether the activity is exempt, the department shall inform the requester of this fact. The department also may notify a requester if it determines that an activity is exempt.

(6) The department has provided notice of its exemption determination on the date the department mails the written determination to the person who requested the determination.

NR 310.08 Permits in lieu of exemptions. In making a determination under s. 30.12(2m), 30.123(6m) or 30.20(1m), Stats., that a general permit or individual permit is required in lieu of an exemption, the department may rely on information and data gathered by the department in a prior inspection of the activity site or waterbody adjacent to the activity site. The department is not required to make a new site inspection in response to receipt of an exemption determination request form.

SUBCHAPTER III GENERAL PERMITS

NR 310.09 Eligibility for general permits. (1) To be eligible for authorization under a general permit pursuant to ss. 30.206 and 30.12(3), 30.123(7), 30.19(3r), or 30.20(1t), Stats., an activity shall meet all standards for the general permit in the statute that authorized issuance of the general permit, the rules in this subchapter and the rules promulgated under the statute that authorized issuance of the general permit and s. 30.206, Stats.

Note: The rules specifying standards for regulated activities for which general permits are available are chs. NR 320, 323, 326, 328, 329, 341, 343 and 345.

(2) Pursuant to ss. 30.12(2m), 30.123(6m), 30.20(1m) and 30.206(3r), Stats., the department may require a person engaged in or proposing an activity for which general permit authorization is available to obtain an individual permit.

NR 310.10 General permit applications. (1) Any person may apply for a general permit from the department under ss 30.206 and 30.12(3), 30.123(7), 30.19(3r) or 30.20(1t), Stats.

(2) A person who seeks a general permit from the department under sub. (1) shall submit an application on a form provided by the department and shall provide all the information requested on the form and accompanying instructions.

Note: General permit application forms are available at department service centers and on the department's website at www.dnr.wi.gov under the topic "Waterway and Wetland Permits."

(3) A person filing an application under subs. (1) and (2) shall submit the application to the department not less than 35 days before commencing the activity to allow time for mailing between the applicant and department.

Note: Federal permits may also be required. Applications for general permits are joint applications for both state and federal permits. The applicant shall mail a duplicate copy of the completed general permit application form to the St. Paul district, U.S. army corps of engineers to seek federal authorization. Applicants are responsible for obtaining all necessary federal permits or approvals for their activity.

Note: Local land use or building permits may also be required. Applicants are responsible for obtaining all necessary local permits or approvals for their activity.

NR 310.11 Department procedures for processing general permits. (1) The department shall develop and maintain application forms for requesting authorization under a general permit under s. NR 310.10 and shall provide a copy of a form to any person upon request.

(2) Upon receipt of a general permit application under s. NR 310.10, the department shall determine whether the activity qualifies for a general permit under s. 30.12(3), 30.123(7) or 30.20(1t), Stats.

(3) The date of receipt of a general permit application shall be the date the application is received at the department office specified on the form or accompanying instructions.

(4) The department may investigate or visit a site to determine whether an activity meets the standards for a general permit or requires an individual permit under s. 30.206(3r), Stats.

(5) If the general permit application does not meet all the requirements of s. NR 310.10(2) it shall be deemed incomplete. Within 30 days of receipt, the department shall notify the applicant that the application is incomplete and shall describe the information that shall be submitted in order for the application to be complete.

(6) Where a general permit application is filed for an activity for which a general permit is not available under s. 30.12(3), 30.123(7), 30.19(3r) or 30.20(1t), Stats., the department shall notify the requester that the activity is not eligible for general permit, and of any provisions of ch. 30, Stats., that apply to the activity.

(7) The department may dismiss a general permit application without prejudice if the information needed to complete the application is not received within 30 days after the department notifies an applicant that its application is incomplete.

(8) If the department determines that an activity is not eligible for a general permit, the department shall notify the applicant in writing that the applicant may revise the project so that the activity is eligible for a general permit, withdraw the application or apply for an individual permit. In its notification, the department will inform the applicant of the reason for ineligibility, including where applicable a description of public rights features at the site, or of conditions specific to the site that require restrictions different than the general permit conditions in order to prevent significant adverse impacts to public rights and interests, environmental pollution as defined in s. 299.01(4), Stats., or material injury to the riparian rights of any riparian owner.

(9) If the department determines that an activity is eligible for a general permit, the department shall notify the applicant in writing.

(10) The department has provided notice of its determination under sub. (5), (7) or (8) on the date the department mails the written determination to the applicant.

NR 310.12 General permit decisions. (1) All activities proceeding under a general permit issued under s. 30.206, Stats., shall be subject to any requirements in ss. 30.12(3), 30.123(7), 30.19(3r), 30.20(1t), and 30.206, Stats., rules promulgated under those statutes, and all of the following conditions.

(a) The permittee shall maintain the project in good condition and in compliance with the terms and conditions of the permit, this chapter and s. 30.206, Stats.

(b) Upon reasonable notice, the permittee shall allow access to the project site during reasonable hours to any department employee who is investigating the project's construction, operation, maintenance or permit compliance.

(c) The permittee shall notify the department before starting construction and again not more than 5 days after the project is complete.

(d) The permittee shall complete the project on or before the expiration date established in the permit. If the project is not completed by the expiration date, the permittee shall submit to the department a written request for an extension prior to the expiration date of the permit. The request shall identify the requested extension date and the reason for the extension. The department may grant a permit extension

for good cause shown. The permittee may not begin or continue construction after the original permit expiration date unless the department grants a new permit or permit extension in writing.

(e) The permit does not authorize any work other than what is specifically described in the application and plans, and as modified by the conditions of the permit. A permittee shall obtain prior written approval of modifications from the department before modifying a project or amending permit conditions.

(f) The department may modify or revoke the permit if the project is not completed according to the terms of the permit or if the department subsequently determines the activity is detrimental to the public interest.

(g) The permittee shall post a copy of this permit at a conspicuous location on the project site visible from the waterway, beginning at least 5 days prior to construction and remaining at least 5 days after construction. The permittee shall also have a copy of the permit and approved plan available at the project site at all times until the project is complete.

(h) The permittee shall submit a series of photographs to the department within one week of completion of work on the site. The photographs shall be taken from different vantage points and depict all work authorized by the permit.

(2) Acceptance of a general permit and efforts to begin work on the activity authorized by the general permit signifies that the permittee has read, understood and agreed to follow all conditions of the general permit.

(3) The department shall retain continuing jurisdiction over any project permitted under this chapter and s. 30.206, Stats.

(4) The department shall monitor activities permitted under the general permit program and shall evaluate the need to repeal or amend this chapter or other chapters authorizing general permits for specific activities.

SUBCHAPTER IV INDIVIDUAL PERMITS, NOTICES, HEARINGS AND ADMINISTRATIVE REVIEW

NR 310.13 Eligibility for individual permits. To be eligible under subchs. I and II of ch. 30, Stats., for authorization under an individual permit, an activity shall meet all standards for the individual permit in the statute that authorized issuance of the individual permit, the rules in this chapter and the rules promulgated under the statute that authorized issuance of the individual permit.

Note: The rules specifying standards for regulated activities for which individual permits are available are the NR 300 series of Wisconsin Administrative Code.

NR 310.14 Individual permit applications. (1) GENERAL PROVISIONS. (a) Any person may apply for an individual permit from the department under subch. II, ch. 30, Stats.

(b) A person who seeks an individual permit from the department under this section shall submit an application on a form provided by the department and shall provide all the information requested on the form and accompanying instructions.

Note: Individual permit application forms are available at department service centers and on the department's website at www.dnr.wi.gov under the topic "Waterway and Wetland Permits."

Note: Federal permits may also be required. Applications for individual permits are joint applications for both state and federal permits. The applicant shall mail a duplicate copy of the completed individual permit application forms to the St. Paul district, U.S. army corps of engineers to seek federal authorization. Applicants are responsible for obtaining all necessary federal permits or approvals for their activity.

Note: Local land use or building permits may also be required. Applicants are responsible for obtaining all necessary local permits or approvals for their activity.

(c) An individual permit application is received by or submitted to the department on the date the application or additional information is received at the department office specified on the permit application form or accompanying instructions.

(d) Any additional information filed by an applicant to complete an individual permit application is received by or submitted to the department on the date the additional information is received at the department office where the additional information was requested to be submitted.

(e) The department has provided notice under this subchapter when it mails an applicant the initial determination of completeness, notice of complete application or notice of public hearing.

(2) INTERESTED AND POTENTIALLY INTERESTED MEMBERS OF THE PUBLIC (a) The following are determined to be interested and potentially interested members of the public under s. 30.208(3), Stats.:

1. The designated contact for all state, regional, and local watershed and waterway organizations for the waterway or waterways affected by the activity.

2. The clerk of the county and the town, village or city in which the activity is located.

3. Any person who submits to the department a written request for notification regarding a specific application or any general type of application. If the department receives requests for notification from persons who identify themselves as members of a specific organization, notice to an officer of the organization shall constitute notice to all organization members.

4. The adjacent riparian on each side of the property on which the activity is located.

(b) The department may identify additional interested members of the public for a specific individual permit application.

(c) The department shall provide to the applicant with the notice of complete application a list of the names and addresses of the persons it has identified under pars. (a) and (b).

(3) COMPLETENESS DETERMINATIONS. (a) In determining completeness under this subchapter, the department shall determine if an applicant submitted all required items of information necessary to evaluate the application. A determination that an application is complete does not determine whether the submitted information is accurate or sufficient to prove that the activity meets the standards to obtain an individual permit.

(b) The department may dismiss an individual permit application without prejudice if the information needed to complete the application is not received within 45 days after the department notifies an applicant that its application is incomplete.

(c) The department may dismiss an individual permit application without prejudice if the proof of publication required in sub. (9) is not received within 45 days after the department notifies an applicant that its application is complete.

(4) INITIAL DETERMINATION OF COMPLETENESS (APPLICATION DATE + 30 DAYS OR LESS). (a) Within 30 days after an individual permit application is submitted, the department shall initially determine whether the application is complete and notify the applicant as follows:

1. If the application is complete, the department shall notify the applicant in writing that the application is complete.

2. If the application is incomplete, the department shall notify the applicant in writing that the application is incomplete, identify all specific items of information needed to complete the application, and advise the applicant that the department may dismiss the application if the information needed to complete the application is not received within 45 days after the department provides notice that the application is incomplete.

(b) The department may not determine an application is complete unless the department determines that the applicant has provided all information necessary and any environmental assessment or environmental impact statement required under s. 1.11, Stats., and ch. NR 150.

NR 310.15 Notices and public comment. (1) NOTICE OF COMPLETE APPLICATION (INITIAL DETERMINATION OF COMPLETENESS DATE + 15 DAYS). (a) Within 15 days after the department provides an initial determination of completeness under s. NR 310.14(4)(a)1., the department shall send the applicant a notice of complete application. The notice shall contain all the information required under s. 30.208(5)(b), Stats.

(b) If the applicant requests a public hearing in its individual permit application, the department shall include a notice of public hearing with the notice provided in par. (a).

(c) The applicant shall publish the notice in par. (a) or (b) in the newspaper identified by the department in the notice.

(d) The applicant shall provide a copy of the notice to any person or group who requests a copy.

(e) If the notice contains a list of names and addresses identified under s. NR 310.14(2), the applicant shall provide a copy of the notice to each person on the list. The notice shall be provided to each person via US mail with return receipt requested or delivered in person.

(f) The applicant shall provide proof of notice publication to the department within 45 days after the department provides to the applicant the notice of complete application. The proof of publication shall be an affidavit from the newspaper certifying publication and documenting the date of publication.

(g) If the applicant is required to notify a list of persons in par. (e), the applicant shall provide proof of notification to the department within 45 days after the department provides to the applicant the notice of complete application. The proof of notification shall be copies of signed return receipts or other signed document verifying that the person received the notice in person.

(2) PUBLIC COMMENT PERIOD (NOTICE OF COMPLETE APPLICATION DATE + 30 DAYS, OR PUBLIC HEARING DATE + 10 DAYS). (a) Any person may submit written comments on an application to the address specified in the notice of complete application or notice of public hearing.

(b) Comments shall address facts relevant to whether an activity in an application will comply with the legal standards listed in the notice of complete application.

(c) The department shall consider all written public comments in evaluating an individual permit application.

(d) Comments are submitted on the date they are postmarked using U.S. mail or on the date they are hand-delivered to the address specified in the notice of complete application or notice of public hearing.

(3) NOTICE OF PUBLIC HEARING. (a) The department shall provide a notice of public hearing:

1. If an applicant requests a public hearing in their individual permit application.

2. If a person submits a written request for public hearing within 30 days after the date the department provided notice of complete application under sub. (1).

3. If the department determines within 30 days after the date the department provided notice of complete application under sub. (1) that there is a significant public interest in holding a public hearing.

(b) The notice of public hearing shall contain all the information required under s. 30.208(5)(b), Stats.

(c) The department shall provide the notice of public hearing required in par. (a)1. with the notice of complete application provided under sub. (1).

(d) The applicant shall publish the notice of public hearing in the newspaper identified by the department in the notice.

(e) The applicant shall provide a copy of the notice of public hearing to any person or group that requests a copy of the notice prior to the public hearing date.

(f) If the notice contains a list of names and addresses identified under s. NR 310.14(2), the applicant shall provide a copy of the notice to each person on the list. The notice shall be provided to each person via US mail with return receipt requested or delivered in person.

(g) The applicant shall provide proof of notice publication to the department within 45 days after the department provides to the applicant a notice of public hearing. The proof of publication shall be an affidavit from the newspaper certifying publication and documenting the date of publication.

(h) If the applicant is required to notify a list of persons in par. (f), the applicant shall provide proof of notification to the department within 45 days after the department provides to the applicant a notice of public hearing. The proof of notification shall be copies of signed return receipts, or other signed document verifying that the person received the notice in person.

NR 310.16 Public informational hearings. (1) FORM AND TIMELINESS OF REQUEST FOR PUBLIC HEARING. Any request for a public informational hearing shall comply with all the following requirements:

(a) A request shall be in writing and dated.

(b) A request shall be submitted to the address in the notice of complete application and postmarked no later than 30 days following the date the department provided notice of complete application.

(c) A request shall include the docket number or applicant name and specify the issues that the party desires to be addressed at the public informational hearing.

(d) The issues specified in the hearing request shall relate to the legal standards listed in the notice of complete application.

(2) LOCATION OF PUBLIC INFORMATIONAL HEARING. The department shall schedule the public informational hearing. The hearing shall be located in the vicinity of the property that is the subject of the individual permit application wherever possible and practicable.

(3) PARTICIPATION AT PUBLIC INFORMATIONAL HEARINGS. Any interested members of the public or representatives of government agencies may participate in a public informational hearing with respect to the issuance of the proposed permit subject to the procedures in sub. (5). Persons and government agencies participating need not be represented by legal counsel.

(4) CHANGES OR ADJOURNMENTS IN TIME OR PLACE OF HEARING. (a) Requests for changes in the time and place of a scheduled hearing will be granted only for good cause shown prior to any required newspaper publication of legal notice for the hearing.

(b) The hearing examiner may adjourn a hearing for good cause shown, to be reconvened at the discretion of the department on 10 days' notice or at a time certain on agreement of all persons present.

(5) CONDUCT OF PUBLIC INFORMATIONAL HEARINGS. (a) *Informational hearings.* Public informational hearings held pursuant to this subsection are not contested cases as defined in s. 227.01(3), Stats.

(b) *Hearing examiner.* Public informational hearings held pursuant to this subsection shall be conducted by a hearing examiner designated by the secretary or secretary's designee.

(c) *Procedure.* 1. The hearing examiner shall open the hearing by concisely stating the scope and purpose of the hearing and explaining the procedures to be used in the hearing. The hearing examiner shall explain how and to whom notice of the final decision granting or denying a permit will be provided and how a person may seek administrative or judicial review of the final decision.

2. Appearance slips shall be distributed to all persons attending the hearing and the hearing examiner shall ask all persons present to indicate on their appearance slips whether they intend to present an oral or written statement at the hearing.

3. Any person may direct informational or clarifying questions through the hearing examiner to a person making oral statements, but cross-examination may not be allowed at the hearing.

4. The hearing examiner may place time limits on individual oral statements to prevent undue repetition or insure that all persons wanting to make statements can do so in a reasonable period of time.

5. The hearing examiner, in the hearing examiner's discretion, may limit the number of representatives that may make oral statements on behalf of any individual or organized group.

6. When necessary to ensure maximum participation and adequately allot time for oral statements at hearing, the hearing examiner may schedule at set times for persons to make oral statements. Even if oral statements are scheduled, unscheduled oral or written statements also shall be allowed at hearing.

7. Any person submitting a written statement at hearing shall submit at least one legible copy to the hearing examiner.

8. Regardless of specific requirements of this paragraph, the hearing examiner may, in the hearing examiner's discretion, use any procedures necessary to insure that the hearing will be conducted in an orderly and expeditious manner, provided the measures are consistent with broad public participation in the hearing.

(d) *Contempt.* Loud, noisy, disruptive or contemptuous conduct at a hearing shall be grounds for exclusion from the hearing, at the discretion of the hearing examiner.

(6) RECORD OF PUBLIC PARTICIPATION. The department shall record public informational hearings electronically. The department may prepare a written report of public participation in the hearing.

NR 310.17 Individual permit decision. (1) **DECISION DATE** (PUBLIC HEARING DATE OR PUBLIC COMMENT PERIOD END DATE + 30 DAYS OR LESS). The department shall render a decision issuing, denying or modifying a permit or approving a contract within 30 days after the public hearing is held, or if no public hearing is held, within 30 days after the end of the public comment period.

(2) **STANDARDS AND INFORMATION.** The department shall consider all the following information in deciding whether to approve, modify or deny an individual permit application:

- (a) Applicable standards in statutes, rules and common law.
- (b) Plans and information provided by an applicant.
- (c) Information gathered during site investigations.
- (d) Written or oral provided during a public comment period or public hearing.
- (e) Statements or information provided by local, state and national government agencies.
- (f) Data or information found in natural resource inventories and plans, or maps collected by the department or others using commonly accepted methods.
- (g) Published scientific research.
- (h) Section 1.11, Stats., Wisconsin environmental policy act, and ch. NR 150.
- (i) Any other pertinent information.

(3) NOTICE OF DECISION. The department shall mail copies of its decision on an individual permit application to all of the following:

- (a) The applicant.
- (b) The city, town or village where the activity is located.
- (c) The county where the activity is located.
- (d) The United States army corps of engineers.
- (e) Any person who asks the department in writing for a copy of the final decision.

(4) EFFECT OF REQUEST FOR STAY ON PERMIT. (a) *Effect of request for stay on permit effective date.*

1. If a petition for administrative review contains a request for a stay, the individual permit for which a stay is requested shall take effect the day after the date the department denies the petition as provided under s. 30.209(f) and (fm), Stats.

2. If the department grants a petition for administrative review, the individual permit for which the petition has been granted shall take effect the day after any of the following occurs:

a. The hearing examiner assigned the case by the division of hearings and appeals lifts the stay because the hearing examiner has determined as provided in s. 30.209(2)(b), Stats., that continuation of the stay is not necessary to prevent significant adverse impacts or irreversible harm to the environment pending completion of the hearing.

b. The hearing examiner renders a decision approving, modifying or denying the individual permit.

(b) *Dates of decisions regarding permits, petitions for administrative review, and stays.* For purposes of this subsection, the department or hearing examiner has rendered a decision, granted or denied a petition for administrative review, or lifted a stay on the date that the department or examiner mails the applicant and the petitioner copies of the decision.

NR 310.18 Administrative review. (1) PETITION FOR ADMINISTRATIVE REVIEW AND REQUEST FOR STAY (PERMIT DECISION DATE + 30 DAYS). (a) Within 30 days after the department renders a decision under s. NR 310.17, any interested person may file with the department, and at the same time provide a copy to the

applicant of, a petition seeking administrative review of the decision. The petition also may request a stay of the activity pending an administrative hearing.

(b) The petition shall be in writing, shall be dated and shall be signed by the petitioner.

(c) The petition shall be submitted to the secretary of the department at the address provided in ch. NR 2.

(d) The petition shall include as an attachment a copy of the decision for which administrative review is sought.

(e) A petition for administrative review and any request for stay therein shall comply with the format and be filed in the manner provided by s. 30.209(1m), Stats., and ch. NR 2.

(f) A petition is filed on the date it is received by the secretary of the department at the address specified in ch. NR 2.

(g) A stay requested in a petition shall take effect upon filing of the petition and remain in effect until the department denies the petition under sub. (3) or a hearing examiner lifts the stay as provided by s. 30.209(2)(b), Stats.

(2) APPLICANT RESPONSE TO PETITION (PETITION RECEIPT DATE + 15 DAYS OR LESS) (a) Within 15 days after a petition is filed with the department, an applicant may file with the department, and at the same time shall provide to the petitioner seeking review, a response to the petition.

(b) A response to a petition shall comply with s. 30.209(1m)(e), Stats.

(c) A response to a petition is filed on the date it is received by the secretary of the department at the address specified in ch. NR 2.

(3) GRANT OR DENIAL OF ADMINISTRATIVE REVIEW PETITION (PETITION RECEIPT DATE + 30 DAYS OR LESS) (a) Within 30 days after the date that a petition is filed, the department shall grant or deny the petition in writing and, if the petition is denied, state the reasons for denial as provided in s. 30.209(1m)(f), Stats. Failure to dispose of the petition within 30 days is a denial.

(b) The department has granted or denied a petition under par. (a) when it mails a grant or denial to a petitioner.

(4) REFERRAL TO DIVISION OF HEARINGS AND APPEALS (PETITION GRANT DATE + 15 DAYS OR LESS) (a) Unless both the petitioner and applicant agree to an extension, the department shall refer the matter to the division of hearings and appeals within 15 days after granting the petition.

(b) The department has referred the matter under par. (a) when it mails to the division of hearings and appeals a hearing request form and copies of the permit application, the notice of completeness, the permit decision, the petition for administrative review, any petitioner's response to the petition, and the department letter granting the petition.

(5) NOTICE OF ADMINISTRATIVE HEARING. (a) At least 30 days before the date of the administrative hearing, the division of hearings and appeals shall notify the applicant as provided in par. (b).

(b) The division of hearings and appeals shall provide an applicant all the following:

1. A notice of administrative hearing that shall contain all the information required under s. 30.208(5)(b), Stats. The division of hearings and appeals may include any additional information that it deems necessary to provide adequate notice of an administrative hearing.

2. A letter accompanying the notice or notices that contains all the following:

a. A statement that an administrative hearing will be held and whether the applicant or an interested person requested the hearing.

b. A statement that the applicant must mail a copy of the notice to any person or group who asks for a copy and mail a copy via U.S. mail with return receipt requested to an enclosed list of persons that the department has determined are interested and potentially interested members of the public pursuant to s. 30.208(3), Stats., and s. NR 310.14(2).

c. A list of persons and groups that asked that a notice of hearing be mailed to them, a list of interested and potentially interested members of the public determined by the department under s. 30.208(3), Stats., and s. NR 310.14(2) and a statement that the applicant is required to mail a notice of hearing to any person or group that asks for the notice between now and the hearing date.

d. A statement that the applicant is required to publish the notice as a Class I notice under ch. 985, Stats., and provide the division an affidavit of publication to prove the notice was published. The name of the newspaper in which the notice must be published shall also be provided to the applicant.

e. A statement that the applicant is required to furnish the division return receipts of mailing to or signed affidavits of receipt of notice from all persons under subd. par. c.

f. A statement that the applicant or an authorized representative must appear at the hearing to present testimony or the hearing will be rescheduled or the application dismissed.

g. A statement that the hearing may be rescheduled or the application dismissed if the hearing examiner does not receive the information specified under subd. pars. d. and e. by the date requested by the hearing examiner.

h. A statement that if the application is dismissed, the applicant may resubmit an application for the individual permit.

(c) The division has provided the information in par. (b) when it mails an applicant the information.

(d) An applicant shall publish a notice provided under par. (b) as a class I notice under ch. 985, Stats., mail the notice or notices to all listed persons in par. (b)2.c., and provide to the division a copy of the notice, an affidavit of publication, and return receipts of mailing to or signed affidavits of receipt of notice from all persons under par. (b)2.c.

(e) The department has provided notice of an administrative hearing on the later of the date notice of hearing was published or mailed to all listed persons as required by par. (d).

(f) The division may reschedule a hearing or dismiss an application without hearing if the hearing examiner does not receive the information specified in par. (b)2. d. and e. by the date requested by the hearing examiner.

(g) If the application is dismissed, the applicant may resubmit an application for the individual permit.

(5) CONDUCT OF ADMINISTRATIVE HEARING. An administrative hearing shall be conducted in compliance with the requirements of ss. 30.209(2) and 227.42, Stats., and chs. NR 2 and HA 1.

(6) CONFLICTS OR OMISSIONS. In the event of conflicts between or omissions in the statutes and rules that govern requests for and conduct of administrative hearings, the applicable statutes and rules shall be applied in the following sequence:

(a) Section 30.209, Stats., shall apply notwithstanding any conflicting statutes or rules.

(b) Section 227.42, Stats., shall apply notwithstanding any conflicting statutes or rules except for s. 30.209, Stats., and shall apply to any issues not addressed by s. 30.209, Stats.

(c) Section NR 310.18 shall apply notwithstanding any conflicting statutes or rules except for ss. 30.209 and 227.42, Stats., and shall apply to any issues not addressed by s. 30.209 or 227.42, Stats.

(d) Chapter NR 2 shall apply notwithstanding any conflicting statutes or rules except for ss. 30.209 and 227.42, Stats., and s. NR 310.18, and shall apply to any issues not addressed by s. 30.209 or 227.42, Stats., and s. NR 310.18.

(e) Chapter HA 1 shall apply to any issues not addressed by s. 30.209 or 227.42, Stats., or s. NR 310.18 or ch. NR 2.

SECTION 3. FINDING. The emergency rule procedure, pursuant to s. 227.24, Stats., is necessary and justified in establishing rules to protect the public health, safety and welfare. The Wisconsin Legislature recently enacted 2003 Wisconsin Act 118, to streamline the regulatory process for activities in public trust waters. The state has an affirmative duty to administer the new law in a manner consistent with the public trust responsibilities of the State of Wisconsin under Article IX, Section I of the Wisconsin Constitution.

2003 Act 118 identifies certain activities that may be undertaken in public trust waters exempt from a permit, or under a general permit. Certain activities may not be undertaken in waters that are defined as "areas of special natural resource interest" or at other locations where the activity would cause detrimental impacts on public rights and interests in navigable waters. Without emergency rules to aid in administering the new law, the following severe problems will occur:

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

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

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

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

Dated at Madison, Wisconsin 8/17/04

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By Scott Hassett
Scott Hassett, Secretary

(SEAL)

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

The Wisconsin Natural Resources Board proposes an order to repeal ch. NR 322, amend ss. NR 300.01, 300.04(2), (3) and (4)(a) and (b) and 300.06(1) and create ss. NR 300.04(4)(d) to (g) and 300.05(3)(e) and ch. NR 310 related to timelines and procedures for exemptions, general permits and individual permits for activities in navigable waterways.

FH-14-04(E)

Analysis Prepared by the Department of Natural Resources

Statutory Authority: ss. 30.12(1p); 30.123(6s); 30.20(1k), 30.206, 30.208, 30.209, 30.28, 30.291, 30.298, 227.11(2), 227.24, 281.22, 281.36 and 281.37, Stats.

Statutes Interpreted: ss. 30.10 to 30.27, 30.291, 31.02 to 31.38, 281.22, 281.36 and 281.37, Stats.

Rule Analysis

This action amends rules requiring the Department to establish time limits and fees for waterway and wetland permit decisions to bring those rules into compliance with new statutory requirements, and creates a rule to establish procedures for processing exemptions, general permits, and individual permits, issuing public notices, and conducting hearings for individual permits as authorized under chapter 30, Stats.

The amendments to existing chapter NR300 establish timelines and fees for processing permits. 2003 Wisconsin Act 118 makes some significant changes to timeline requirements to reflect statutory changes. The important changes include:

- Department must determine whether an application is complete within 30 calendar days (was 60 days)
- Department must act on a general permit within 30 calendar days or the permit is presumptively approved (previously there were no general permits).
- Department must make a final determination on individual permits not requiring a public notice within 105 calendar days (was generally 120 days)
- Department must make a final determination on individual permits requiring a public notice within 150 calendar days (was generally 180 days).
- Department must make determinations on exemption requests that grant permission to inspect the property within 15 days or the exemptions is presumptively approved (previously there were not exemption determination requests).

A note is also added to this section to clarify that general permits are subject to a fee of \$50.

NR 310 establishes specific procedures used for exemptions, general permits and individual permits. These processes were written to be in strict conformance with procedures and timelines established in Act 118. The most complex changes are in the public notice and hearing process that was significantly changed. Important changes include:

- Individual permits are required for all activities which are not exempt and not covered by a general permit. A 30 day public notice is now required for all individual permits.
- The applicant will be responsible for providing adequate written notice to all interested persons and publishing the public notice.
- A public hearing option is added before the Department's decision, which is then subject to an administrative hearing.

Federal Regulatory Analysis

The U.S. Army Corps of Engineers has comparable procedures for taking applications and making decisions on physical alterations to waters of the United States. A comparison of timelines is shown in the following table.

Time Limit	U.S. Army Corps of Engineers	Wisconsin DNR
Exemption determinations	Not applicable	15 calendar days
Completeness determination	15 calendar days (no limit on the number of times they can request additional information)	30 calendar days (one time request for additional information)
Issuance of public notice	15 calendar days	15 calendar days
Final decisions	90 calendar days from receipt of initial application if no exceptions* are involved	15 calendar days for exemption determinations
	150 calendar days from receipt of initial application if exceptions* are involved	30 calendar days for general permits
		105 calendar days from receipt of initial application for individual permits that do not include a public hearing
		150 calendar days from receipt of initial application for individual permits that include a public hearing

*Exceptions: Final decision not later than 60 days after receipt of a complete application UNLESS: Final decision is precluded as a matter of law or procedures required by law. The following laws require procedures such as state or other federal agency certifications, public hearings, Environmental Impact Statements, consultation, special studies, and testing which may prevent District Engineers from being able to decide certain applications within 60 days:

Clean Water Act; Coastal Zone Management Act; National Environmental Policy Act; National Historic Preservation Act; Preservation of Historical & Archaeological Data Act; Endangered Species Act; Wild & Scenic Rivers Act; Marine Protection; Research and Sanctuaries Act

Once the Corps of Engineers has enough information to make a decision, they need to do so even though other agencies which may have regulatory jurisdiction have not yet granted their authorizations, except where such authorizations are, by federal law, a prerequisite to making a decision, unless:

- The case must be referred to higher authority
- The comment period is extended
- A timely submittal of information or comments is not received from the applicant
- The processing is suspended at the request of the applicant
- Information needed by the District Engineer for a decision on the application cannot reasonably be obtained within the 60-day period

Analysis of Adjacent States

Minnesota, Michigan, Illinois and Iowa all have comparable procedures for taking applications and making decision on physical alterations to surface waters. A comparison of timelines is shown in the following table.

Time Limit	Wisconsin	Illinois	Iowa	Michigan	Minnesota
Exemption determinations	15 calendar days	Not applicable	Not applicable	Not applicable	Not applicable
Completeness determinations	30 calendar days	No time limit	No time limit	No time limit	No time limit
Issuance of Public Notice	15 calendar days	Upon receipt of an application for an individual permit	No time limit		
Final decisions	15 calendar days for exemption		No time limit		

	determinations				
	30 calendar days for general permits		No time limit		
	105 calendar days from receipt of initial application for individual permits that do not include a public hearing	90 calendar days	No time limit	Normally acted upon within 60 days of completed application	30 days from receipt of water diversion applications only
	150 calendar days from receipt of initial application for individual permits that include a public hearing	150 calendar days	No time limit		

SECTION 1. NR 300.01 is amended to read:

NR 300.01 Purpose. This chapter is developed pursuant to ss. 30.28, 31.39, 281.22, 281.36 and 281.37, Stats., to establish procedures for charging basic and supplemental fees for permits, approvals, determinations and hearings for projects in navigable waters and wetlands and to establish time limits for permits, approvals and determinations for projects in navigable waters and wetlands.

SECTION 2. NR 300.04(2), (3) and (4)(a) and (b) are amended to read:

NR 300.04(2) For any permit, approval or determination made pursuant to ss. 30.10 to 30.27, 281.36 or 281.37, Stats., the department shall initially determine whether a complete application has been submitted and, no later than ~~60~~ 30 calendar days after the application is submitted, notify the applicant in writing about the initial determination of completeness. For any permit, approval or determination made pursuant to s. 281.37, Stats., the department shall initially determine whether a complete application has been submitted and, no later than 30 calendar days after the application is submitted, notify the applicant in writing about the initial determination of completeness. If the department determines that the application is incomplete, the notice shall state the reason for the determination and the specific items of information necessary to make the application complete. For any permit, approval or determination made pursuant to ss. 30.10 to 30.27 and ~~281.37~~ 281.36, Stats., the department may not demand items of information that are not specified in the notice as a condition for determining whether the application is complete unless both the department and the applicant agree or unless the applicant makes material additions or alterations to the project for which the application has been submitted. An application may not be considered complete until the requirements of the Wisconsin environmental policy act, s. 1.11, Stats., have been met and until all information necessary for associated permits, such as Wisconsin pollution discharge elimination permits under ch. 283, Stats., have been submitted to the department.

(3) For any permit, approval or determination made pursuant to ss. 31.02 to 31.38, 281.22 and ~~281.36~~ 281.37, Stats., the applicant shall submit as requested, at any time during the review process, additional information the department finds to be reasonably necessary for review of the application.

(4)(a) The department shall initially determine whether a complete application has been submitted and, no later than 30 calendar days after the application is submitted, notify the applicant in writing about the initial determination of completeness. For individual permits, the department shall provide to the applicant a notice of complete application within 15 calendar days after the department determines that the application is complete.

(b) For determinations made pursuant to ss. ~~30.10 to 30.27~~, 31.02 to 31.28, 281.22, 281.36 and 281.37, Stats., 120 calendar days.

SECTION 3. NR 300.04(4)(d) to (g) are created to read:

NR 300.04(4)(d) A person wishing to proceed with an activity that may be authorized by a general permit promulgated under s. 30.206, Stats., shall apply to the department, with written notification of the person's wish to proceed, not less than 30 calendar days before commencing the activity. If within 30 calendar days after a notification is received, the department does not inform the applicant that an individual permit is required, the activity will be considered to be authorized and the applicant may proceed without further notice.

(e) For determinations made for individual permits without a request for hearing pursuant to ss. 30.10 to 30.27, Stats., 105 calendar days.

(f) For determinations made for individual permits with a request for public hearing pursuant to ss. 30.10 to 30.27, Stats., 150 calendar days.

(g) For exemption determinations made pursuant to ss. 30.10 to 30.27, Stats., 15 calendar days.

SECTION 4. NR 300.05(3)(e) is created to read:

NR 300.05(3)(e) If an exemption determination request is not made according to the procedures in s. NR 310.05 or the exemption determination request does not give consent to inspect, the 15 calendar day time limit does not apply.

SECTION 5. NR 300.06(1) is amended to read:

NR 300.06 Fee processing. (1) FEE REQUIRED. The department shall charge a fee for permits or approvals. The permit or approval fee shall accompany the permit application or request for approval. Projects funded in whole or in part by any federal agency or state agency ~~or any permits issued under s. 30.12 (3) (a) 2, 2m, or 3, Stats.~~, are exempt from fees. Except for federal or state agency dam projects, any construction, alteration, change in operation, transfer or abandonment of a dam requires a fee pursuant to s. 31.39 (3), Stats.

Note: Fees for general permits will be set at \$50.

SECTION 6. Chapter NR 310 is created to read:

**NR 310
PROCEDURES FOR EXEMPTIONS, GENERAL PERMITS, INDIVIDUAL PERMITS,
NOTICES, HEARINGS, AND ADMINISTRATIVE REVIEW**

**SUBCHAPTER I
GENERAL PROVISIONS**

NR 310.01 Purpose. This chapter establishes procedures for processing exemption determinations, general permits and individual permits for activities in navigable waterways, in order to provide consistent and efficient administration of the exemption and permit programs while assuring that the public trust in Wisconsin waterways is maintained.

NR 310.02 Applicability. This chapter applies to exemptions, general permits and individual permits regulated under subchs. I and II, ch. 30, Stats.

NR 310.03 Definitions. In this chapter:

(1) "Days" under this chapter means calendar days unless otherwise specified.

Note: See s. 990.001(4), Stats., for statutory standards on computing time.

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

(3) "General permit" means a permit issued by the department that categorically authorizes certain activities regulated under ss. 30.206 and 30.12(3), 30.12(7), 30.19(3r) and 30.20(1t), Stats.

(4) "Individual permit" means a permit issued by the department for a single project under specific applicable provisions of ch. 30, Stats., excluding s. 30.206, Stats. For purposes of this chapter, "individual permit" includes a contract issued under s. 30.20, Stats.

(5) "Navigable waterway" means any body of water with a defined bed and bank that is navigable under Wisconsin law. In Wisconsin a body of water is navigable if it is capable of floating on a regularly recurring basis the lightest boat or skiff used for recreation or any other purpose.

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

(7) "Surface waters" means all natural and artificial lakes and streams, except for artificial cooling lakes, agricultural or irrigation ponds, and facilities constructed for the treatment of wastewaters.

SUBCHAPTER II EXEMPTIONS

NR 310.04 Eligibility for exemptions. (1) To be exempt under s. 30.12(1g), 30.123(6)(d) or (e), or 30.20(1g), Stats., from the requirement to obtain a general or individual permit under ch. 30, Stats., an activity shall meet all standards for installation, construction and location in the statute authorizing the exemption and the rules promulgated under s. 30.12(1p), 30.123(6s) or 30.20(1k), Stats.

Note: Some locations are not eligible for exemptions or general permits, see ch. NR 1.

Note: The rules specifying standards for exempted activities are chs. NR 1, 320, 323, 326, 328, 329 and 345.

(2) For those activities which may not be located where there are public rights features as defined in s. NR 1.06, a person may only undertake an exempt activity after they have evaluated the site and determined that no public rights features described in s. NR 1.06(4) may be affected by their activity.

(3) Pursuant to ss. 30.12(2m), 30.123(6m), and 30.20(1m), Stats., the department may require a person engaged in or proposing an activity for which an exemption is available to obtain a general or individual permit.

NR 310.05 Exemption determination requests. (1) Any person may request a determination from the department under s. 30.12(2r), 30.123(6r) or 30.20(1r), Stats., as to whether an activity or location is exempt under s. 30.12(1g), 30.123(6)(d) or (e) or 30.20(1g), Stats.

(2) A person who seeks a department determination as to whether an activity or location is eligible for an exemption under sub. (1) shall submit a written request to the department. The request shall be submitted on a form provided by the department, by delivery methods specified by the department, and shall provide all the information requested on the form.

(3) If the person who requests the determination is the person proposing the activity, the request shall be submitted not less than 20 days before commencing the activity to allow time for mailing between the applicant and department.

Note: Federal or local permits may be required. Applicants are responsible for obtaining all necessary federal or local permits or approvals for their activity.

NR 310.06 Department procedures for processing exemption determination requests. (1) The department shall develop and maintain a form for requesting an exemption determination under s. NR 310.05, and provide a copy of the form to any person on request.

Note: Form 3500-107, "Chapter 30 Exemption Determination Request" is available at department service centers and on the department's website at www.dnr.wi.gov under the topic "Waterway and Wetland Permits."

(2) Upon receipt of an exemption determination request under s. NR 310.05, the department shall determine whether an activity or location qualifies for an exemption under s. 30.12(1g), 30.123(6)(d) or (e) or 30.20(1g), Stats., and the rules promulgated under the applicable statute.

(3) The date of receipt of an exemption determination request shall be the date the form is received at the department office specified on the form.

(4) If the exemption determination request does not meet all the requirements of s. NR 310.05(2), it shall be deemed incomplete. The department shall notify the requester that the activity is not exempt and shall describe the information that a new exemption determination request must include in order for the information to be complete.

(5) Where an exemption determination request is filed for an activity for which an exemption is not available under s. 30.12(1g), 30.123(6)(d) or (e) or 30.20(1g), Stats., the department shall notify the requester within 15 days of receipt that the activity is not eligible for an exemption, and of any provisions of ch. 30, Stats., that apply to the activity.

NR 310.07 Exemption determinations. (1) The department shall determine whether an activity is exempt under s. 30.12(1g), 30.123(6)(d) or (e) or 30.20(1g), Stats., based on whether it complies with this chapter, all standards in the statute that create the specific exemption and all standards in any rules promulgated under that statute.

(2) The department may inspect activity sites as necessary to determine whether the activity qualifies for an exemption, or whether a general or individual permit is required.

(3) In determining whether an activity is eligible for an exemption, the department may rely on information and data gathered by the department in a prior inspection of the activity site or the waterbody adjacent to the activity site. The department is not required to make a new site inspection in response to receipt of an exemption determination request form.

(4) Where a person who owns the property where an activity is or will be located files an exemption determination request, the department shall determine if the activity is exempt under sub. (1), notify the requester in writing within 15 days if it determines that an activity is not exempt, and inform the requester that a general or individual permit is required for the activity. The department also may notify a requester if it determines that an activity is exempt.

(5) Where a person who does not own the property where an activity is or will be located files an exemption determination request, the department shall determine if the activity is exempt under sub. (1) and notify the requester in writing of its determination. If the activity is not exempt, the department shall inform the requester that a general or individual permit is required for the activity. If the department seeks permission from the landowner to access the property, the department shall notify the landowner of both the

exemption determination request and its exemption determination. If the department is not able to obtain permission to access the property to inspect the site, and therefore unable to make a determination as to whether the activity is exempt, the department shall inform the requester of this fact. The department also may notify a requester if it determines that an activity is exempt.

(6) The department has provided notice of its exemption determination on the date the department mails the written determination to the person who requested the determination.

NR 310.08 Permits in lieu of exemptions. In making a determination under s. 30.12(2m), 30.123(6m) or 30.20(1m), Stats., that a general permit or individual permit is required in lieu of an exemption, the department may rely on information and data gathered by the department in a prior inspection of the activity site or waterbody adjacent to the activity site. The department is not required to make a new site inspection in response to receipt of an exemption determination request form.

SUBCHAPTER III GENERAL PERMITS

NR 310.09 Eligibility for general permits. (1) To be eligible for authorization under a general permit pursuant to ss. 30.206 and 30.12(3), 30.123(7), 30.19(3r), or 30.20(1t), Stats., an activity shall meet all standards for the general permit in the statute that authorized issuance of the general permit, the rules in this subchapter and the rules promulgated under the statute that authorized issuance of the general permit and s. 30.206, Stats.

Note: The rules specifying standards for regulated activities for which general permits are available are chs. NR 320, 323, 326, 328, 329, 341, 343 and 345.

(2) Pursuant to ss. 30.12(2m), 30.123(6m), 30.20(1m) and 30.206(3r), Stats., the department may require a person engaged in or proposing an activity for which general permit authorization is available to obtain an individual permit.

NR 310.10 General permit applications. (1) Any person may apply for a general permit from the department under ss 30.206 and 30.12(3), 30.123(7), 30.19(3r) or 30.20(1t), Stats.

(2) A person who seeks a general permit from the department under sub. (1) shall submit an application on a form provided by the department and shall provide all the information requested on the form and accompanying instructions.

Note: General permit application forms are available at department service centers and on the department's website at www.dnr.wi.gov under the topic "Waterway and Wetland Permits."

(3) A person filing an application under subs. (1) and (2) shall submit the application to the department not less than 35 days before commencing the activity to allow time for mailing between the applicant and department.

Note: Federal permits may also be required. Applications for general permits are joint applications for both state and federal permits. The applicant shall mail a duplicate copy of the completed general permit application form to the St. Paul district, U.S. army corps of engineers to seek federal authorization. Applicants are responsible for obtaining all necessary federal permits or approvals for their activity.

Note: Local land use or building permits may also be required. Applicants are responsible for obtaining all necessary local permits or approvals for their activity.

NR 310.11 Department procedures for processing general permits. (1) The department shall develop and maintain application forms for requesting authorization under a general permit under s. NR 310.10 and shall provide a copy of a form to any person upon request.

(2) Upon receipt of a general permit application under s. NR 310.10, the department shall determine whether the activity qualifies for a general permit under s. 30.12(3), 30.123(7) or 30.20(1t), Stats.

(3) The date of receipt of a general permit application shall be the date the application is received at the department office specified on the form or accompanying instructions.

(4) The department may investigate or visit a site to determine whether an activity meets the standards for a general permit or requires an individual permit under s. 30.206(3r), Stats.

(5) If the general permit application does not meet all the requirements of s. NR 310.10(2) it shall be deemed incomplete. Within 30 days of receipt, the department shall notify the applicant that the application is incomplete and shall describe the information that shall be submitted in order for the application to be complete.

(6) Where a general permit application is filed for an activity for which a general permit is not available under s. 30.12(3), 30.123(7), 30.19(3r) or 30.20(1t), Stats., the department shall notify the requester that the activity is not eligible for general permit, and of any provisions of ch. 30, Stats., that apply to the activity.

(7) The department may dismiss a general permit application without prejudice if the information needed to complete the application is not received within 30 days after the department notifies an applicant that its application is incomplete.

(8) If the department determines that an activity is not eligible for a general permit, the department shall notify the applicant in writing that the applicant may withdraw their application, revise the project so that the activity is eligible for a general permit, or apply for an individual permit.

(9) If the department determines that an activity is eligible for a general permit, the department shall notify the applicant in writing.

(10) The department has provided notice of its determination under sub. (5), (7) or (8) on the date the department mails the written determination to the applicant.

NR 310.12 General permit decisions. (1) All activities proceeding under a general permit issued under s. 30.206, Stats., shall be subject to any requirements in ss. 30.12(3), 30.123(7), 30.19(3r), 30.20(1t), and 30.206, Stats., rules promulgated under those statutes, and all of the following conditions.

(a) The permittee shall maintain the project in good condition and in compliance with the terms and conditions of the permit, this chapter and s. 30.206, Stats.

(b) Upon reasonable notice, the permittee shall allow access to the project site during reasonable hours to any department employee who is investigating the project's construction, operation, maintenance or permit compliance.

(c) The permittee shall notify the department before starting construction and again not more than 5 days after the project is complete.

(d) The permittee shall complete the project on or before the expiration date established in the permit. If the project is not completed by the expiration date, the permittee shall submit to the department a written request for an extension prior to the expiration date of the permit. The request shall identify the requested extension date and the reason for the extension. The department may grant a permit extension for good cause shown. The permittee may not begin or continue construction after the original permit expiration date unless the department grants a new permit or permit extension in writing.