



(FORM UPDATED: 08/11/2010)

## WISCONSIN STATE LEGISLATURE ... PUBLIC HEARING - COMMITTEE RECORDS

### 2005-06

(session year)

### Senate

(Assembly, Senate or Joint)

## Committee on Natural Resources and Transportation...

### COMMITTEE NOTICES ...

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

### INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

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

**Senate**

**Record of Committee Proceedings**

**Committee on Natural Resources and Transportation**

**Clearinghouse Rule 05-019**

Relating to expanding eligibility for harbor assistance program grants to private owners of harbor facilities.

Submitted by Department of Transportation.

April 27, 2005            Referred to Committee on Natural Resources and Transportation.

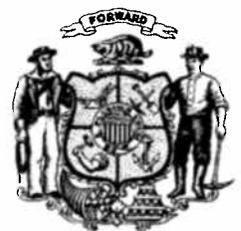
May 27, 2005            No action taken.

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Matt Phillips  
Committee Clerk



# WISCONSIN STATE LEGISLATURE





## Wisconsin Department of Transportation

www.dot.wisconsin.gov

Jim Doyle  
Governor

Frank J. Busalacchi  
Secretary

Office of General Counsel  
4802 Sheboygan Ave., Rm. 115B  
P O Box 7910  
Madison, WI 53707-7910

Telephone: 608-266-8810  
FAX: 608-267-6734  
E-mail: ogc.exec@dot.state.wi.us

The Honorable Senator Neal Kedzie  
Chairman, Senate Transportation Committee  
Room 313 South  
State Capitol  
Madison, Wisconsin 53707

April 27, 2005

The Honorable Representative John Ainsworth  
Chairman, Assembly Transportation Committee  
Room 309 North, State Capitol  
Madison, Wisconsin 53702

RE: Proposed Administrative Rule **TRANS 28**  
Notification of Legislative Standing Committees  
**CLEARINGHOUSE RULE 05-019**

Dear Senator Leibham and Representative Ainsworth:

In accordance with the Department of Transportation's efforts to keep you informed of its ongoing rule making actions, enclosed is a courtesy copy of Final Draft rule **Trans 28**, relating to **expanding eligibility for Harbor Assistance Program grants to private owners of harbor facilities**, which is being submitted to the Legislature for committee review.

Sincerely,

A handwritten signature in cursive script that reads "Julie A. Johnson".

Julie A. Johnson  
Paralegal

JAJ/dim

Enclosure

cc: Ron Adams  
Larry Kieck

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**CR 05-019**

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The Wisconsin Department of Transportation proposes an order to amend TRANS 28.02(5), (8) and (11), 28.03, 28.04(2), 28.05(1)(b)2.d. to f., (2)(e) and (g), 28.06(1), 28.07(1) and (3), 28.08(2)(intro.), (a), (c), (4)(b) and (5)(intro.), 28.09(2)(a)3., 6. and 7., (e), (3) and (4), and 28.10, relating to expanding eligibility for Harbor Assistance Program grants to private owners of harbor facilities

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**REPORT OF THE DEPARTMENT OF TRANSPORTATION  
ON THE FINAL RULE DRAFT**

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This report is submitted to the presiding officers of the Senate and Assembly for referral to the appropriate standing committees. The report consists of the following parts:

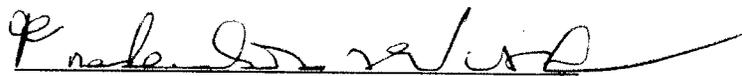
Part 1--Analysis prepared by the Department of Transportation.

Part 2--Rule text in final draft form.

Part 3--Recommendations of the Legislative Council.

Part 4--Analysis prepared pursuant to the provisions of s. 227.19(3), Stats.

Submitted by:



FREDERICK G. WISNER  
Assistant General Counsel  
Office of General Counsel  
Department of Transportation  
Room 115-B, Hill Farms State  
Transportation Building  
P. O. Box 7910  
Madison, WI 53707-7910  
(608) 266-7256

## PART 1

### Analysis Prepared by the Wisconsin Department of Transportation

**Statutes interpreted:** s. 85.095, Stats., including s. 85.095(1)(a), (1)(am) and (5), Stats., as amended or created by 2003 Wis. Act 208

**Statutory authority:** ss. 85.16(1), 85.095 and 227.11(2), Stats.

**Explanation of agency authority:** The Wisconsin Department of Transportation administers the Wisconsin Harbor Assistance Program, pursuant to s. 85.095, Stats. Chapter Trans 28 prescribes the administrative policies and procedures for implementing the Harbor Assistance Program authorized by s. 85.095, Stats.

**Related statute or rule:** There are no related statutes or rules other than those listed above.

**Plain Language Analysis:** 2003 Wisconsin Act 208 amended s. 85.095, Stats., providing eligibility to private owners of commercial harbor facilities to make a direct grant application to the Wisconsin Department of Transportation's Harbor Assistance Program (HAP) rather than through a public harbor authority under a lease-back arrangement. Applications are solicited semi-annually from Wisconsin's commercial ports to present infrastructure improvement projects for consideration and possible funding by the HAP. The grant applications are reviewed for responsiveness to the requirements of ch. Trans 28, Wis. Adm. Code. They are then ranked and scored by the program's Harbor Advisory Council (HAC), which is comprised of representatives from prescribed constituencies. The HAC, upon due consideration, makes recommendations to the Secretary of the Department of Transportation as to which application(s) should be funded. These recommendations are then forwarded to the Governor for his consideration. The announcement of a grant award is made through the Governor's office.

**Summary of, and Preliminary Comparison with, Existing or Proposed Federal Regulation:** There are no comparable federal laws or regulations.

#### **Comparison with Rules in Adjacent States:**

**Michigan:** Harbor assistance in Michigan takes the form of operating and capital assistance to port authorities that oversee ferryboat operations. The capital assistance is found in a marine capital line item and is limited to \$800,000 per year.

**Minnesota:** Minnesota created a Port Development Assistance Program in 1996. It is similar to Wisconsin's HAP in that it mixes bonding authority with state dollars to fund infrastructure improvement projects.

**Illinois:** None

**Iowa:** None

**Summary of Factual Data and Analytical Methodologies Used and How the Related Findings Support the Regulatory Approach Chosen:** No data or analytical methodology was employed in considering this proposed rule making.

**Effect on Small Business and, If Applicable, Any Analysis and Supporting Documentation Used to Determine Effect on Small Businesses:** This proposed rule should not impact small businesses.

**Fiscal Effect and Anticipated Costs Incurred by Private Sector:** The Department estimates that there will be no fiscal impact on the liabilities or revenues of any county, city, village, town, school district, vocational, technical and adult education district, sewerage district, or federally-recognized tribes or bands. The Department estimates that there will be no fiscal impact on state revenues or private sector liabilities.

**Agency Contact Person:** Copies of the proposed rule may be obtained, without cost, by writing to Larry Kieck, Department of Transportation, Bureau of Rails and Harbors, Room 701, P. O. Box 7914, Madison, WI 53707-7914. You may also contact Mr. Kieck by phone at (608) 267-9319 or via e-mail: [lawrence.kieck@dot.state.wi.us](mailto:lawrence.kieck@dot.state.wi.us). Alternative formats of the rule are available upon request.

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**PART 2**  
**TEXT OF PROPOSED RULE**

**SECTION 1.** Trans 28.02(5), (8) and (11) are amended to read:

Trans 28.02(5) "Dock wall" means any ~~publicly owned~~ bulkhead, pier or shoreline development used as a commercial transportation facility.

(8) "~~Eligible applicants~~" means a county, municipality, town or agency thereof or a board of harbor commissioners organized under s. 30.37 applicant" has the meaning given in s. 85.095(1)(a), Stats.

(11) "Project priority list" means a ranking by the department, assisted by an advisory council as described in s. Trans 28.06(3), of various eligible applicant-proposed harbor improvement projects in the rank order in which the department proposes to fund the various projects.

**SECTION 2.** Trans 28.03 is amended to read:

**Trans 28.03 Harbor assistance program objective.** The objective of the harbor assistance program is to assist the eligible applicants applicant to provide necessary water access and to maintain or improve the economically effective commodity movement capabilities of Wisconsin's harbors on the Great Lakes or the Mississippi River system.

**SECTION 3.** Trans 28.04(2) is amended to read:

Trans 28.04(2) LOCATION. Eligible projects shall be located only in Great Lakes or Mississippi River system harbors where vessels take on or discharge a combined total of more than 1,000 tons of commercial cargo per year; where commercial, naval or recreational vessels are built; where passenger or vehicle-carrying ferry service connects the Wisconsin communities along the Great Lakes and Mississippi River, or connects the Wisconsin mainland with other states, Canadian provinces or populated islands in Wisconsin or where commercial fishing vessels unload fish. The U.S. army corps of engineers' annual tonnage figures shall be the basis for the tonnage determination; where tonnage figures are not available, ~~an~~ the eligible applicant shall provide tonnage figures based on auditable records.

**SECTION 4.** Trans 28.05(1)(b)2.d. to f., and (2)(e) and (g) are amended to read:

Trans 28.05(1)(b)2.d. New project development of a ~~publicly owned~~ commercial transportation facility, where the development involves dredging, dredged material disposal and dockwall construction.

e. Maintenance of a ~~publicly owned~~ commercial transportation facility other than maintenance described in subd. 2. a., b. or c.

f. New project development of a ~~publicly owned~~ commercial transportation facility other than that development described in subd. 2.d.

(2)(e) The project is speculative; that is, the eligible applicant for a new project development has no firm financial commitment from a potential lessee or operator that ensures future, productive use of the work performed under the project.

(g) The eligible applicant has not met the program planning requirements under s. Trans 28.10.

**SECTION 5.** Trans 28.06(1) is amended to read:

Trans 28.06(1) The department shall annually establish deadlines for filing harbor assistance project applications and shall give appropriate notice of the deadlines. Notice shall be by mail, sent to ~~the clerks of all municipalities having jurisdiction over commercial harbors on the Great Lakes, and on the Mississippi River~~ every eligible applicant that has met the planning requirements under s. Trans 28.10. The department shall issue notice of the grant awards within 180 days after an application deadline. No grant funds may be committed to an eligible applicant until a grant agreement is negotiated and signed by the department and the eligible applicant.

**SECTION 6.** Trans 28.07(1) and (3) are amended to read:

(1) In accordance with s. 85.095(2)(a), Stats., the state share of project costs may not exceed 80% of the eligible costs incurred by the eligible applicant for the harbor assistance project.

(3) For projects with federal funding, other than those projects funded in part by the U.S. army corps of engineers as described in sub. (2), the state share may not

exceed 80% of the non-federal share of project costs; furthermore, the minimum ~~local~~ eligible applicant share shall be no less than 10% of project costs.

**SECTION 7.** Trans 28.08(2)(intro.), (a) and (c), (4)(b) and (5)(intro.) are amended to read:

(2)(intro.) The types and amounts of costs eligible for state assistance shall be negotiated in developing a grant agreement. Eligible costs may include final engineering, construction, and dredging costs and other costs agreed to by the department and the eligible applicant. The following items, however, are not eligible for reimbursement:

(a) ~~Applicant's~~ Eligible applicant's general grant administration costs;

(c) Interest on money borrowed by the eligible applicant or interest charged to the applicant for late payment of project costs.

(4)(b) Provide evidence of performance and payment bonds, satisfying all applicable requirements of ss. 30.32 and 779.14, Stats., for the full amount of any and all construction contracts let by the eligible applicant in connection with the project.

(5)(intro.) In the grant agreement, the department shall require repayment of grant funds advanced to an eligible applicant if:

**SECTION 8.** Trans 28.09(2)(a)3., 6. and 7., (e), (3) and (4) are amended to read:

Trans 28.09(2)(a)3. A statement that the eligible applicant will accept responsibility for operation and maintenance of the proposed project after completion of the work funded.

6. A statement that the eligible applicant agrees to provide the department, in a timely manner, additional analysis or documentation supporting the application, whenever the department considers it necessary during the application review process.

7. A statement that the eligible applicant agrees to provide required matching funds up to a stated maximum at the time and in the manner specified in the grant agreement.

(e) An estimate of the eligible applicant's annual revenues from the project if completed, or of revenues lost if the project is not completed, and an estimate of the annual costs necessary to maintain the project property.

(3) If an eligible applicant fails to supply required information or supplies erroneous information, the department may disapprove the application.

(4) ~~Applicants~~ The eligible applicant shall submit ~~applications~~ an application to the department by August 1 in order to receive primary consideration for funding during the following calendar year. If funds are available, applications may be submitted by March 15, 1985, and by February 1 of each year thereafter, for funding in the same calendar year. The department may waive the requirements in this subsection for emergency repair projects.

**SECTION 9.** Trans 28.10 is amended to read:

**Trans 28.10 Planning requirement.** No grant may be made under s. 85.095, Stats., and this chapter, unless the eligible applicant provides the department a description of the harbor projects for which the applicant may request state assistance under s. 85.095, Stats., or federal aid, or both, during the next 3 years. The description

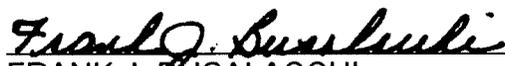
shall be submitted prior to April 1 preceding the fiscal year in which the applicant seeks aid under this chapter. The department may waive this planning requirement.

**(END OF RULE TEXT)**

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**Effective Date.** This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22(2)(intro.), Stats.

Signed at Madison, Wisconsin, this 26<sup>th</sup> day of April, 2005.



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FRANK J. BUSALACCHI

Secretary

Wisconsin Department of Transportation



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**WISCONSIN LEGISLATIVE COUNCIL  
RULES CLEARINGHOUSE**

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**Ronald Sklansky**  
*Clearinghouse Director*

**Terry C. Anderson**  
*Legislative Council Director*

**Richard Sweet**  
*Clearinghouse Assistant Director*

**Laura D. Rose**  
*Legislative Council Deputy Director*

**PART 3  
CLEARINGHOUSE REPORT TO AGENCY**

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

**CLEARINGHOUSE RULE 05-019**

AN ORDER to amend TRANS 28.02 (5), (8) and (11), 28.03, 28.04 (2), 28.05 (1) (b) 2. d. to f. and (2) (e) and (g), 28.06 (1), 28.07 (1) and (3), 28.08 (2) (intro.), (a) and (c), (4) (b) and (5) (intro.), 28.09 (2) (a) 3., 6. and 7. (e), (3) and (4) and 28.10, relating to expanding eligibility for harbor assistance program grants to private owners of harbor facilities.

Submitted by **DEPARTMENT OF TRANSPORTATION**

03-01-2005 RECEIVED BY LEGISLATIVE COUNCIL.

03-29-2005 REPORT SENT TO AGENCY.

RS:PGC

**LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT**

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

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]  
Comment Attached YES  NO
2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]  
Comment Attached YES  NO
3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]  
Comment Attached YES  NO
4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS [s. 227.15 (2) (e)]  
Comment Attached YES  NO
5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]  
Comment Attached YES  NO
6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL REGULATIONS [s. 227.15 (2) (g)]  
Comment Attached YES  NO
7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]  
Comment Attached YES  NO



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## WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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**Ronald Sklansky**  
*Clearinghouse Director*

**Richard Sweet**  
*Clearinghouse Assistant Director*

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*Legislative Council Director*

**Laura D. Rose**  
*Legislative Council Deputy Director*

### CLEARINGHOUSE RULE 05-019

#### Comments

**[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated January 2005.]**

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

- a. The preface to the rule text should follow the format presented in s. 1.02 (2), Manual, including the provision of an email address for the agency contact person.
- b. In the first sentence of the analysis, the word “a” should be inserted before the word “direct.”

**PART 4**  
CR 05-019

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ANALYSIS OF FINAL DRAFT OF TRANS 28

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(a) **Basis and Purpose of Rule.** 2003 Wisconsin Act 208 amended s. 85.095, Stats., providing eligibility to private owners of commercial harbor facilities to make direct grant application to the Wisconsin Department of Transportation's Harbor Assistance Program (HAP) rather than through a public harbor authority under a lease-back arrangement. Applications are solicited semi-annually from Wisconsin's commercial ports to present infrastructure improvement projects for consideration and possible funding by the HAP. The grant applications are reviewed for responsiveness to the requirements of ch. Trans 28. They are then ranked and scored by the program's Harbor Advisory Council (HAC), which is comprised of representatives from prescribed constituencies. The HAC, upon due consideration, makes recommendations to the Secretary of the Department of Transportation as to which application(s) should be funded. These recommendations are then forwarded to the Governor for his consideration. The announcement of a grant award is made through the Governor's office.

(b) **Modifications as a Result of Testimony at Public Hearing.** The first public hearing was held in Milwaukee on April 6, 2002 and the second hearing was held in Madison on April 7, 2005. No modifications were made to the proposed rule as a result of testimony at the hearing.

(c) **List of Persons who Appeared or Registered at Public Hearing.** No one appeared or registered at either of the hearings.

(d) **Summary of Public Comments and Agency Response to those Comments:** Written comments were received from the following persons:

**Dean R. Haen**, Green Bay Port Manager and President of the Wisconsin Commercial Ports Association (WCPA), 2561 S. Broadway, Green Bay, WI 54304. The Port of Green Bay and WCPA comments take issue with statutory changes to s. 85.095, Stats., which provide eligibility for private owners of commercial harbor facilities to make a direct grant application to the Wisconsin Harbor Assistance Program (HAP) so long as the facility is held open for public use for 10 years or more following completion of the improvement or project for which reimbursement is provided under the HAP. The port of Green Bay and WCPA also state that various port communities will be experiencing negative fiscal impacts, including the Port of Green Bay.

**John Fisher**, President, City of LaCrosse Harbor Commission, City Hall, LaCrosse, WI 54601. The City voted to not endorse the change to ch. Trans 28. There is simply too much of a backlog of public projects to allow private entities to be eligible for these scarce resources.

**Agency Response:** The City of La Crosse, WCPA and the Port of Green Bay submitted their thoughts on the rule change. All raised the argument that this change would increase competition for already scarce funds. It should be noted that the privately owned commercial harbor facilities have always been eligible for HAP funding, although be it through a sale and lease-back arrangement with the public harbor authority. The Port of Green Bay went on to note that its budget would take a hit because the revenue generated from the lease back arrangements accounts for 30% of their operating revenues. Taking the private commercial harbor facility off the tax rolls, and funding part of its operating budget through a lease back, suggests that part of the funding for the Port of Green Bay's operating budget comes from the same source, just under different accounting procedures. This reallocation of funding would presumably cancel out or at least minimize any negative fiscal impact.

Nothing in the statute or rule precludes the Port of Green Bay or any other public port or harbor authority from continuing to work with their harbor community. They can continue to offer their services to the private facility owners in the areas of grant application and administration. They can continue to set up sale and lease-back arrangements with the private facility owners. Of course, such efforts may have to be more aggressive because the private owners are no longer required to go through the public Port authority to apply for HAP funding as a result of the amendments made to s. 85.095, Stats., by 2003 Wis. Act 208.

The statutory change has been in place for the better part of a year, and while the WCPA may still take issue with the change, it is part of the HAP authorizing statute. The purpose of the rule change is intended to bring ch. Trans 28 into conformity with the amendments made to s. 85.095, Stats., by 2003 Wis. Act 208.

WCPA commented that there will be a negative fiscal impact experienced by the public entities that have always been eligible to participate in HAP. Its comment raises the lingering issue that HAP has been historically unable to meet the needs of the old pool of applicants; and now, with a potential expanded list of applicants, the competition for the funds will be even greater. While this may be true, the HAP has always been a competitive program in which no one is guaranteed a grant in any given cycle.

Actually, the change to s. 85.095, Stats., and ch. Trans 28 may in fact bring a fiscal benefit to the public entities. No longer will they be required to expend the administrative time and overhead in the preparation of HAP applications for private entities. Their staff time and resources can be directed to other uses. Also, the property of the private owner will not have to go through the process of sale and lease back. This will keep the property in private hands and on the tax rolls, and most likely generate revenues for the public entity greater than the token lease charges that the old arrangements usually featured.

**Lawrence E. Sullivan**, Harbor Engineer, Port of Milwaukee (via e-mail). The Port of Milwaukee objects and disagrees with the proposed rule. It feels is (sic) does not interpret 2003 Wis. Act 208. Act 203 (sic) provides "...department may award a grant

...to a privately owned harbor facility only if the harbor facility is to be held open for public use for at least 10 years...". The Port of Milwaukee suggests that these terms must be defined by the rule, and at the very least, publication of a public tariff should be required. It feels that the rule, as proposed, will create endless lawsuits. The Port of Milwaukee also states that certain various port communities will be experiencing negative fiscal impacts.

**Agency Response:** The concerns raised by the Port of Milwaukee over the definition of the terms of a private facility being held open to public access are already addressed in the statute and the existing language of the rule. Section Trans 28.08 specifically provides for the use of the grant agreement entered into between the grantee and WisDOT as the vehicle for defining the terms of the approved project. All successful applicants for HAP funds are required, through contract language, to hold the facility benefiting from the receipt of those funds open to public access for a specified period of time. By failing to satisfy this or other requirements in the grant contract, an applicant is required to repay grant funds advanced to the applicant.

The issue of a public tariff for use of a harbor facility raised by the Port of Milwaukee is a local matter. There is no requirement in the statute or rule requiring fees to be charged for use of a harbor facility.

The point made by the Port of Milwaukee concerning lawsuits is speculative and unclear. Seeing that all HAP projects have to hold their facilities open to public access, as defined in the grant agreement, it is unlikely that there would be any increase in litigation related to grants awarded to privately held harbor facility projects.

As for the Port of Milwaukee's comment that certain various port communities will be experiencing negative fiscal impacts, see WisDOT's response to the comments of WCPA and the Port of Green Bay above.

**James M. Ruffolo**, Executive Vice President/COO, Shipbuilders of Wisconsin, Inc., d/b/a Burger Boat Company wrote in support of the proposed rule. He agrees with and supports the legislation that allows private sector projects to be eligible for WisDOT Harbor Assistance Program funding for capital improvements. The HAP can help them compete in the USA and Global markets they serve. He believes that with the addition of the public sector projects to the program, the total program budget will get more attention and will expand to allow the additional funding. He does not agree with statements that this proposed rule making will create a negative situation. He believes the statutory change will give even more credibility to the numerous projects which must be handled so that we can continue to have a strong waterways infrastructure. He believes the program will seek and eventually receive the additional funds that may be required to meet the current public needs, as well as all of the private sector projects as stated in the 3-year statement of intentions. He also agrees that there will be no negative fiscal impacts.

(e) **Explanation of any Changes Made to the Plain Language Analysis or Fiscal Estimate:** No changes were made other than in response to the Legislative Council comment regarding proper format of the plain language analysis.

(f) **Response to Legislative Council Recommendations.** The Legislative Council report contained two comments, both of which have been addressed.

(g) **Final Regulatory Flexibility Analysis.** This proposed rule should not impact small businesses.