

# 05hr\_SC-NRT\_CRule\_Misc\_pt01



DETAILS: JOINT PUBLIC HEARING OF SENATE COMMITTEE ON NATURAL RESOURCES AND TRANSPORTATION AND ASSEMBLY COMMITTEE ON NATURAL RESOURCES. THE HEARING WAS HELD ON WEDNESDAY, FEBRUARY 23, 2005 ON THE EFFECTS OF IMPLEMENTATION OF 2003 WISCONSIN ACT 118 ON CHAPTER 30 ADMINISTRATIVE RULES.

(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**

February 25, 2005

**MOTION**

**Requests for Modification to Rules**

The Senate Committee on Natural Resources and Transportation, pursuant to s. 227.19 (4) (b) 2., Stats., requests the Department of Natural Resources to consider the following modifications to Clearinghouse Rule 02-099, relating to department standards for erosion control of inland lakes and impoundments:

1. Add a sentence at the end of s. NR 328.04 (4) (c), as follows:

NR 328.04 (4) (c) Vegetation shall be plant species that are native to the area of Wisconsin where the project is located. Vegetative treatments shall be installed according to Natural Resources Conservation Service Conservation Practice Standard Code 580 (Streambank and Shoreline Protection) or the Natural Resources Conservation Service Engineer's Handbook.

2. Add the following at the end of s. NR 328.05 (5) (b):

NR 328.05 (5) (b) The project site is a moderate or high energy site; or a low energy site where the bank-edge recession described in s. NR 328.08 (3) is equal to or greater than 0.5 feet per year and the applicant can show a biological erosion control structure was previously placed according to the standards in s. NR 328.04 (3) and (4).

**Note:** NR 328.08(3) requires that the time between separate measurements shall equal or exceed 3 months during the open-water season.

**Note:** The applicant will satisfy the "equal to or greater than 0.5 feet per year" requirement by demonstrating that the bank-edge recession is equal to or greater than 1.5 inches per 3 months during the open-water season.

The Senate Committee on Natural Resources and Transportation, pursuant to s. 227.19 (4) (b) 2., Stats., requests the Department of Natural Resources to consider the following modifications to Clearinghouse Rule 04-066, relating to natural resources board policies on protection and management of public waters:

1. Modify the note following s. NR 1.05 (2) as follows:

**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; 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. ~~Piers meeting the dimensional standards in s. 30.12, Stats., are exempt in areas of special natural resource interest under s. 30.13, Stats., unless 30.12 (2m), Stats., applies.~~ However, new and existing piers may be exempt in areas of special natural resource interest under s. 30.13, Stats., as set forth in ch. NR 326.

2. Delete the "and" between "30.12 (1g)" and "(km)" in s. NR 1.06 (2).
3. Modify the note following s. NR 1.06 (2) as follows:

**Note:** Exemptions not allowed in locations of public rights features are: intake or outfall structures other than dry hydrants; replacement culverts with inside diameter not more than 24 inches; dredging without auxiliary power. ~~In locations of public rights features, piers exceeding the dimensional standards in s. 30.12, Stats., are unlikely to qualify for the exemption under s. 30.13, Stats.~~ However, new and existing piers may be exempt in areas with public rights features under s. 30.13, Stats., as set forth in ch. NR 326.

The Senate Committee on Natural Resources and Transportation requests the department to inform the chairperson whether it agrees to consider these modifications in a letter addressed to the chairperson and received by the chairperson no later than 4:30 p.m., March 2, 2005.

*VOTE ON MOTION:*

YES

NO

Signed: Roger Breske

Date: 02/28/2005

February 25, 2005

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**Note:** NR 328.08(3) requires that the time between separate measurements shall equal or exceed 3 months during the open-water season.

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Date: 02/28/2005



February 25, 2005

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**VOTE ON MOTION:**

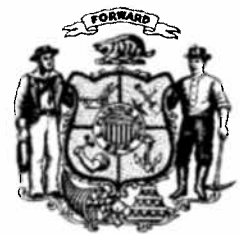
YES   
 NO

Signed: Don Hepner  
 Date: 2/26/05





# WISCONSIN STATE LEGISLATURE



February 25, 2005

**MOTION**

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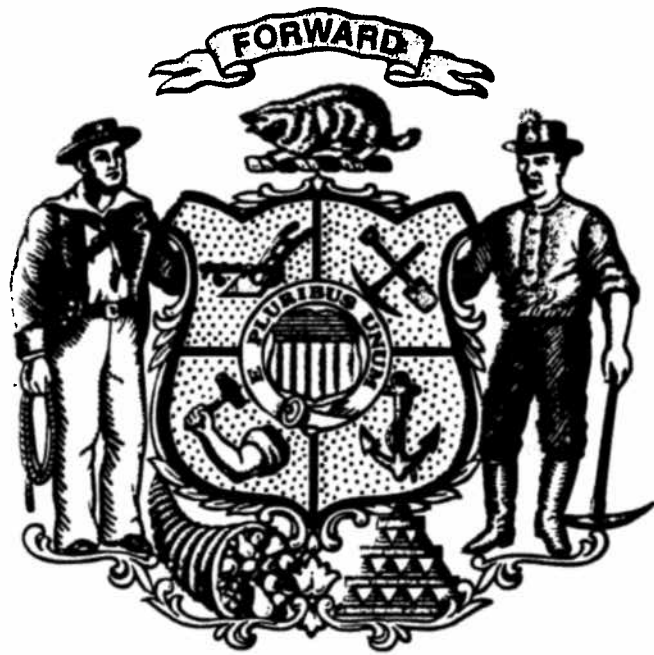
VOTE ON MOTION:

YES

NO

Signed: 

Date: 2/28/2005



February 25, 2005

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*VOTE ON MOTION:*

YES   X  

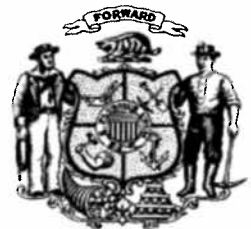
NO       

Signed:   Deb Wuch  

Date:   2/28/05



# WISCONSIN STATE LEGISLATURE



**Stolzenberg, John**

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**From:** Johnson, Dan (Legislature)  
**Sent:** Friday, February 11, 2005 1:20 PM  
**Subject:** Senate/Assembly Natural Resources Committee Hearing

11/11/05  
pue'd



P20050223\_1.doc

*Senate/Assembly*

## JOINT PUBLIC HEARING

### Senate Committee on Natural Resources and Transportation Assembly Committee on Natural Resources

The committees will hold a joint public hearing on the following items at the time specified below:

Wednesday, February 23, 2005  
10:00 AM  
412 East

*\*These rules all relate to 2003 WI Act 118, the Job Creation Act*

- ✓ **Clearinghouse Rule 02-099 (NR 328) Rip RAP**  
Relating to: department standards for erosion control of inland lakes and impoundments.
- ✓ **Clearinghouse Rule 04-062 (NR 329)**  
Relating to: miscellaneous structures in navigable waterways.
- ✓ **Clearinghouse Rule 04-063 (NR 325)**  
Relating to: boathouses and fixed houseboats in navigable waterways.
- ✓ **Clearinghouse Rule 04-064 (NR 323)**  
Relating to: fish and wildlife habitat structures in navigable waterways.
- ✓ **Clearinghouse Rule 04-065 (NR 300 and 310)**  
Relating to: timelines and procedures for exemptions, general permits, and individual permits for activities in navigable waters.
- ✓ **Clearinghouse Rule 04-066 (NR 1) AREAS OF SPECIAL NATURAL RESOURCE INTEREST (ASNR 1)**  
Relating to: natural resources board policies on protection and management of public waters.
- ✓ **Clearinghouse Rule 04-084 (NR 320)**  
Relating to: the regulation of bridges and culverts in or over navigable waterways.



✓ **Clearinghouse Rule 04-085 (NR 341)**  
Relating to: regulation of grading on the bank of a navigable waterway.

✓ **Clearinghouse Rule 04-086 (NR 343)**  
Relating to: regulation of construction, dredging, and enlargement of an artificial water body.

✓ **Clearinghouse Rule 04-087 (NR 345)**  
Relating to: dredging in navigable waterways.

*The committees may enter into Executive Session following the public hearing on any item listed.*

Representative Scott Gunderson  
Assembly Committee Chair

Senator Neal Kedzie  
Senate Committee Chair

*Hearing notice published:  
Friday February 11, 2005  
1:10 p.m.*

**Senate Natural Resources and Transportation Committee  
Assembly Natural Resources  
Joint Public Hearing  
412 East, State Capitol  
February 23, 2005 10:00**

**Agenda**

**1. Call of the Role**

**2. Agenda**

**Clearinghouse Rule 02-099 (NR 328)**

Relating to: department standards for erosion control of inland lakes and impoundments.

**Clearinghouse Rule 04-062 (NR 329)**

Relating to: miscellaneous structures in navigable waterways.

**Clearinghouse Rule 04-063 (NR 325)**

Relating to: boathouses and fixed houseboats in navigable waterways.

**Clearinghouse Rule 04-064 (NR 323)**

Relating to: fish and wildlife habitat structures in navigable waterways.

**Clearinghouse Rule 04-065 (NR 300 and 310)**

Relating to: timelines and procedures for exemptions, general permits, and individual permits for activities in navigable waters.

**Clearinghouse Rule 04-066 (NR 1)**

Relating to: natural resources board policies on protection and management of public waters.

**Clearinghouse Rule 04-084 (NR 320)**

Relating to: the regulation of bridges and culverts in or over navigable waterways.

**Clearinghouse Rule 04-085 (NR 341)**

Relating to: regulation of grading on the bank of a navigable waterway.

**Clearinghouse Rule 04-086 (NR 343)**

Relating to: regulation of construction, dredging, and enlargement of an artificial water body.

**Clearinghouse Rule 04-087 (NR 345)**

Relating to: dredging in navigable waterways.

## **ANNOUNCEMENTS**

You may speak before the committee or simply register your vote on the hearing slips. Be sure to fill out the slips and hand it to the Page.

WE WILL BE ACCEPTING TESTIMONY ON THESE RULES EN MASSE. FOR EXAMPLE, IF YOU WOULD LIKE TO SPEAK TO ALL TEN RULES, YOU MAY DO SO AT ONE TIME. OR, PERHAPS JUST SPEAKING TO A FEW, SAME RULE APPLIES.

WE ARE TRYING TO AVOID PEOPLE HAVING TO APPEAR, THEN SIT DOWN, THEN APPEAR AGAIN LATER. I HOPE THIS IS CLEAR AND WILL OFFER ENOUGH TIME FOR ALL TO SPEAK AND FOR MEMBERS TO ASK QUESTIONS.

PLEASE INDICATE THE SPECIFIC RULE NUMBER OR NUMBERS ON THE SLIP. USE THE BACK OF THE SLIP IF NECESSARY.

## ISSUES

### NR 328: RIP RAP

PROPERTY OWNERS WILL NOT BE ABLE TO ADEQUATELY PROTECT THEIR PROPERTY FROM EROSION, PARTICULARLY ON LOW ENERGY LAKES

- MUST SCORE BETWEEN 40-48 POINTS ON THE EI MODEL <sup>(LOW)</sup>
- NO MORE THAN 6 INCHES OF EROSION PER YEAR — ~~LOW~~ ENERGY LAKES
- *SMALL LAKES — IP PROCESS 1.5" EROSION / 3 mos. open the*

### NR 1: MANAGEMENT OF PUBLIC WATERS

WATERS DESIGNATIONS — HOW WILL THEY BE REGULATED?

- AREAS OF SPECIAL NATURAL RESOURCE INTEREST (ASNRI)
- PUBLIC RIGHTS FEATURES
  1. ARE THESE TERMS TOO VAGUE?
  2. HOW WILL IT BE ENFORCED ON THE GROUND AND OUTSIDE THE PURVUE OF THE LEGISLATURE?
  3. IF THE INTENT OF THE JOB CREATION ACT WAS TO STREAMLINE THE PERMIT PROCESS, HOW CAN WE BE SURE THAT INTENT IS BEING UPHELD IF RELATIVELY VAGUE TERMS LIKE ASNRI AND "PUBLIC RIGHTS FEATURES" ARE SERVING AS THE MEASURING STICK FOR REGULATION?

### NR 323: FISH AND WILDLIFE HABITAT STRUCTURES

- REP. DAN MEYER BROUGHT FORTH AN ISSUE RELATING TO FISH CRIBS. DNR HAS SPOKEN WITH THE MEYER OFFICE BUT APPARENTLY THIS ISSUED HAS YET TO BE RESOLVED.
- THESE FISH CRIBS, UNDER THE RULE, MUST BE CONSTRUCTED OF BIOLOGICAL MATERIAL, HOWEVER REP. MEYER HAS A CONSTITUENT WHO MAKES THESE OUT OF PLASTIC.
- (SEE REP. MEYER LETTER OF 2/15/05 FOR SUGGESTED CHANGES)



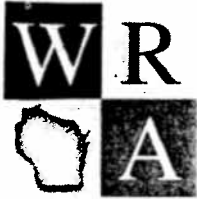
Motion on Implementation of Act 118  
Natural Resources Board, December 8, 2004

The Natural Resources Board acting at its December 8, 2004 meeting in Madison directs the Department to report to the Natural Resources Board no later than January, 2006 on the implementation of Act 118. The report should cover all aspects of implementation but should specifically address the following issues:

- Number and type of permits and exemption determinations issued, the average time taken to process them, and performance in meeting permit deadlines.
- Use of the waters designations including extent and nature of waters added to the Areas of Special Natural Resource Interest, Public Rights Features or Priority Navigable Waters lists, and accessibility of list or maps as required by rule.
- Performance of the new public hearing and individual permit process including number of hearings held, number of objections registered, number of individual permits issued with delayed effective dates, and number of contested case hearings.
- Number and circumstances of general permits required in lieu of exemptions and individual permits required in lieu of a general permit.
- Adverse effects of exempt or general permit activities on habitat, natural features, water quality or navigation
- Results of a compliance monitoring program based on inspections of at least a sample of known exempted activities, and general and individual permits.
- Efficiency of permitting complex projects with multiple permitted activities including number of such projects, average number of permitted activities and number of applicants who voluntarily requested a combined permit.
- Experience with making grading jurisdiction determinations using slope measurements and the number of projects requesting the voluntary distance stipulation.
- Experience with applicants requesting fish spawning window waivers.
- Additional activities that could be more efficiently permitted using general permits.
- Alternative processes for general permit development.
- Experiences with making wetland water quality determinations on general permits including estimates of total wetland loss.

The Department shall establish an advisory group consisting of interested stakeholders who will provide recommendations to the Department and Natural Resources Board on implementation issues to be evaluated and any needed changes to administrative rules or operating procedures. Members of the advisory board should include at least representatives from the Wisconsin Wildlife Federation, River Alliance, Wisconsin Association of Lakes, Wisconsin Builders Association, Wisconsin Realtors Association, Assembly Natural Resources Committee, Senate Environment Committee and other interested parties as determined by the Secretary.





WISCONSIN REALTORS\* ASSOCIATION  
4801 Forest Run Road, Suite 201  
Madison, WI 53704-7337  
608-241-2047 800-279-1972  
Fax: 608-241-2901  
E-mail: [wra@wra.org](mailto:wra@wra.org)  
Web site: <http://www.wra.org>

Kitty Jedwabny, CRB, CRS, Chairman  
E-mail: [kjedwabny@coldwellhomes.com](mailto:kjedwabny@coldwellhomes.com)

William Malkasian, CAE, President  
E-mail: [wem@wra.org](mailto:wem@wra.org)

January 12, 2005

Secretary Scott Hassett  
Wisconsin Department of Natural Resources  
1 S. Webster Street  
Madison, WI 53707

Dear Secretary Hassett,

Thank you for meeting with Tom Larson and I to discuss the concerns of the Wisconsin REALTORS Association (WRA) related to the Ch. 30 administrative rules (NR 1, NR 326 and NR 328) and proposed changes to NR 115. We feel that the meeting was productive and we hope that we will be able to work together to address these concerns in an expeditious and satisfactory manner.

As we discussed, some of our concerns have a more immediate need of being addressed than others due to where the related rules are in the rulemaking process. Because NR 1 and NR 328 have been approved by the Natural Resources Board and have been submitted to the legislature for review, they are a more immediate priority. More time remains to address the concerns related to NR 326 and NR 115, as final drafts of these rules have yet to be completed.

#### NR 1 & NR 326

We have attached a memo highlighting our specific concerns with respect to NR 1 and NR 328. Our primary concerns related to NR 1 are what we believe to be a lack of adequate public input and oversight by elected officials prior to (a) the identification of some "areas of special natural resources interest" waters and waters with "public rights features," and (b) the use of these waters for regulatory purposes. While we are worried about the possible use of these waters for regulatory purposes in future administrative rules, our most immediate concern is their impact on NR 326.

In an effort to expedite the rulemaking process, we would be willing to remove our concerns related to NR 1 if we received adequate written assurances from Governor Doyle's administration that our concerns will be addressed in NR 326. Specifically, we would like to receive written assurances that the administration (a) supports our two primary objectives (as outlined below) for all pier regulations and (b) will direct the department to make the necessary changes to NR 326 so that the rule is consistent with these objectives. Without these assurances, we cannot be certain that our concerns will be adequately addressed.

WRA Objective #1 -- Grandfather all existing piers that were not in violation of pier regulations that were in effect at the time of pier placement.

WRA Objective #2 -- All property owners should be guaranteed the right to place a pier. They may have to place it in a particular location or, for example, design it in a way to minimize impacts to fish spawning areas, but they must be able to place a pier.



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Secretary Scott Hassett  
Page 2

**NR 328**

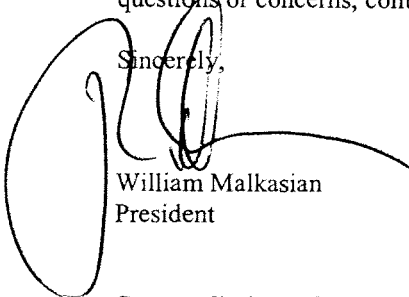
With respect to NR 328, we are concerned that the rule (a) prevents property owners from being able to adequately protect their property from erosion (especially on low energy lakes) and (b) has not been subject to adequate review and comments by affected property owners (the last public hearing on the rule was over two years ago and the rule has been modified since that time). We strongly encourage the department to withdraw the rule and send it out to public hearing so that property owners can adequately assess the impacts of the rule on their property and provide the department with necessary feedback.

As we discussed during our meeting on January 10<sup>th</sup>, one of the primary objectives of the WRA is to protect the interests of homeowners and property owners throughout the state. Among other things, property owners have a strong interest in maintaining high property values, and preserving the ability to use and enjoy their property. Strong environmental regulations play an important role to maintaining property values, especially in waterfront areas. However, sometimes regulations can go too far and begin to have an adverse impact on value, use and enjoyment of property. We believe that various provisions in NR1 and NR 328, as currently drafted, would have an adverse impact on the value and use of waterfront property and, therefore, we must oppose the proposed rules in their current form.

We have identified a few ways in which our concerns can be addressed and would be willing to consider other possible solutions. We are willing to work with the department to resolve these concerns prior to the consideration of these rules by the Wisconsin Legislature. However, if we are unable to resolve these concerns in a manner that is satisfactory to both parties, the WRA will attempt to have our concerns addressed by the appropriate legislative standing committees.

Please let us know if you are interested in working with us to resolve these concerns. If you have any questions or concerns, contact Tom Larson or myself at (608) 241-2047.

Sincerely,



William Malkasian  
President

Cc Todd Ambs, Department of Natural Resources  
Patrick Henderson, Deputy Legislative Director



## Chapter 30 Administrative Rules Remaining Concerns

### NR 1.05 – Areas of Special Natural Resources

1. NR 1.05(4)(a) – “special concern species” and “unique ecological communities”
  - a. No public notice, hearings, or opportunity for comments before species are placed on these lists
  - b. These species have not been used for regulatory purposes in Wisconsin or other states
  - c. DNR notifies legislature and counties in January of each year, but AFTER waters where these species are located have been identified and used for regulatory purposes (See NR 1.05)(5)(a) and NR 1.05(7))

### NR 1.06 – Public Rights Features

1. NR 1.06(4) – **The definition of “public rights features” is EXTREMELY broad.** The broad definition provides DNR with unlimited discretion to designate PRFs and stop economic development projects or require property owners to apply for an individual permit
  - a. Fish and wildlife habitat (NR 1.06(4)(a))
    - i. Would seemingly cover most waters and lands. What section of water is not a fish or wildlife (includes aquatic plants) habitat?
  - b. Physical features of lakes and streams that ensure protection of water quality (NR 1.06(4)(b))
    - i. Includes aquatic plants and boulders
  - c. Areas that are “predominantly natural in appearance” (NR 1.06(4)(c))
    - i. Would seemingly include any undeveloped areas
  - d. Areas that “screen man-made or artificial features” (NR 1.06(4)(c))
    - i. Would seemingly cover any areas with trees or bushes
2. NR 1.06(8) – **“Public rights features” are not required to be identified on DNR website BEFORE used for regulatory purposes.** Property owners, therefore, will not be able to independently determine whether their property contains PRFs. Without independent prior knowledge of PRFs on or near their property, property owners will be more likely be in noncompliance with the regulations which will subject them to possible DNR enforcement actions.

- a. This provision is not clear whether an area can be considered a "public rights feature" if it is not identified on the DNR's website.

## NR 326 – Pier Rules

### 1. **WRA Concern #1 – The proposed pier rules fail to grandfather all existing piers that were in compliance with the pier regulations that were in effect at the time of pier placement.**

- a. **Existing piers wider than 6 feet will need an individual permit. (See NR 326.08(1)(c)(6) and NR 326.08(2)(c)(4))** Note - an existing pier may be eligible for a general permit if it is (a) not wider than 8-ft; (b) located in Walworth County; and (c) placed on rock-filled cribs.
- b. **Existing piers that extend beyond a 3-foot water depth or beyond what is necessary to moor a boat, whichever is greater, will need a general or individual permit. (See NR 325.08(1)(c)(5)) (See also definition of "line of navigation", NR 326.03(9))** (Note -- an existing pier will qualify for a general permit only if it was placed prior to January 1, 1998 and has been placed 5 out of the last 6 years -- See NR 326.08(2)(c)(1))

➤ **Comments** -- As drafted, this provision says that the pier can only be long enough to moor "a" boat. It is not clear how this provision will be interpreted. If the pier is designed to accommodate multiple boats and users and some of the boats are in water deeper than others, these piers "may" be required to obtain a permit.

### c. **As drafted, only piers that are configured in an "L" or "T" shape are exempt from the permitting requirements. (See NR 326.08(1)(c)(6))**

➤ The DNR maintains otherwise, but this is not what the rule says. Section NR 326.08(1)(c) outlines the specific criteria one must meet in order to be exempt from the permitting requirements. Provision (6) in this section deals with pier size and shape and states that "the pier or wharf may be configured in an 'L' or 'T' shape." Despite DNR's contentions, no other section of the rule says that an "I" shape pier is allowed or any other configuration is allowed. While the section uses the word "may", no other configurations or shapes are mentioned anywhere else in the rule. Compare this provision to section NR 326.08(2)(c)(4), which specifies the configuration and shape requirements for a general permit. In this section, the provision "the pier or wharf may be configured in an 'L' or 'T' shape" is missing. The other language in this section is substantially similar to the dimension/shape language in NR 326.08(1)(c)(6). By including the provision in the exemption section and not including it in the general permit section, one can only conclude that you must have a pier with this shape in order to be exempt.

- This is likely a drafting oversight that will be corrected in the next draft, but I think it is important to recognize how the DNR has handled this publicly -- denying that this is what the rule says. This is exactly why people don't trust them.

**d. Piers with a loading platform at the end of the pier that exceeds 120 sq. ft. are not exempt and, thus, must obtain either a general or individual permit. (See NR 326.08(1)(c)(6))**

- Piers with a loading platform that is up to 200 sq. ft. are eligible for a general permit. (See NR 326.08(1)(c)(4)) Piers with a loading platform that is greater than 200 sq. ft. require an individual permit.

**e. Property owners are allowed (a) 2 boat slips, if they have less than 50 feet of shoreline frontage, (b) 3 boat slips, if they have a full 50 feet of shoreline frontage, and (c) 1 additional boat slip for each additional 50 feet of shoreline frontage. (See NR 326.08(1)(c)(7))**

- Existing piers that exceed these standards are not exempt and thus are eligible for a general or individual permit. (See NR 326.08(2)(c) -- the # of boat slips is not one of the criteria for obtaining a general permit) New piers that exceed these standards require an individual permit. (See NR 326.08(2)(f))

**f. Existing and new boat hoists may be placed in areas with "public rights features" only after receiving an individual permit. (See NR 326.09(1)(c)(2) and NR 326.09(2)(b) (Note -- boat hoists are not "permanent boat shelters" and thus do not qualify for a general permit))**

- The term "public rights feature" is incredibly broad, covering areas that are "predominantly natural in appearance" or that "screen man-made or artificial features." (See NR 1.06(4)(c)) In other words, if a property owner has an undeveloped lot or a developed lot with considerable trees and shrubs, he/she may have "public rights features" on his/her property, which will subject the property owner to a higher level of DNR scrutiny before a permit is issued. This is an extremely vague provision that could give the DNR unlimited discretion to regulate the placement of piers.
- It is not clear why are existing piers in areas with "public rights features" exempt from the permitting requirements, but not existing boat hoists.

**g. Newer, existing piers do not qualify for general permits. (See NR 326.02(1)(c)(1))**

# of  
Years

- To qualify for a general permit, an existing pier must (1) have been placed before January 1, 1998, (2) have been placed at least 5 of the last 6 years thereafter, and (3) not expanded or relocated since January 1, 1998. The property owner must be able to prove that the existing pier meets these requirements. Existing piers that do not meet these requirements must obtain an individual permit.

**2. WRA Concern #2 – The proposed pier rules do not recognize and protect the fundamental right of waterfront property owners to place a pier.**

**a. New piers located in waters designated as "areas of special natural resource interest" do not qualify for an exemption and thus must obtain a general or individual permit. (See NR 326.08(c)(2))**

- "Areas of special natural resource interest" includes over 7,000 water bodies or sections of water bodies throughout Wisconsin. Waters can be added or subtracted from the list of "areas of special natural resource interest" by DNR staff, without public notice, public hearings, or approval by elected officials. (See NR 1.05(3)(d) – "special concern species" and "unique ecological communities" are determined by the Natural Heritage Inventory (a group of "scientists" are not directly accountable to the public, nor are they required to hold public hearings or issue public notice prior to adding/removing species from this list.)
- The DNR has significant discretionary authority to grant individual permits. The individual permitting process lacks specific, objective criteria and thus property owners have cannot be reasonably certain that they will actually receive an individual permit.

**b. All new piers located in areas with "public rights features" do not qualify for an exemption or a general permit and thus must obtain an individual permit. (See NR 326.08(1)(c)(3) and NR 326.08(2)(b), (c), (d) and (e))**

- See comments above.

**3. Other Concerns – New permanent boat shelters are not allowed in undeveloped areas. (NR 326.09(2)(c)(5))**

- Permanent boat shelters are allowed only where there are at least 5 contiguous riparian properties (including the applicant's property) which each have a residential structure located within 500 feet of the proposed permanent boat shelter. Permanent boat shelters, in some cases, may be better for the environment than seasonal boat shelters because they do not disrupt the sediment each year when they are installed and removed.

## NR 328 – Riprap rules

- a. No public hearings held on this rule.
  - Last public hearing held on this rule took place approximately 2 years ago and the public expressed a significant number of concerns. This rule has been modified, but will continue to impact a great number of property owners and thus should be subject to statewide public scrutiny.
- b. Prohibits riprap on “low energy” lakes
  - Low energy lakes include almost all lakes less than 400 square acres
  - Low energy lakes make up 50-75% of Wisconsin’s waterways.
  - Presumption – low energy lakes are not eligible for an individual permit, unless you
    - Score between 40-48 pts on EI model
    - Stake out property and prove 6 inches of erosion per year
- c. The rule is very complicated and will require property owners to hire expensive consultants to get through the permitting process, determine EI scores, and defend their rights.





State Representative

**Dan Meyer**

Member: Joint Committee on Finance

February 15, 2005

Sen. Neal Kedzie  
313 South  
State Capitol  
Madison, WI 53707

Rep. Scott Gunderson  
7 West  
State Capitol  
Madison, WI 53708

Dear Sen. Kedzie & Rep. Gunderson:

I am writing regarding a concern that I have with the DNR's proposed Clearinghouse Rule 04-064 (NR 323).

Recently, I was contacted by a manufacturer in my district, who has done extensive research on the construction of fish cribs. He has worked with a company previously located in Wisconsin that use to manufacture fish cribs made of plastic materials and would like to expand his business in the Rhinelander area to include such a product line.

The concern brought to my attention by Mr. Rick Brusco of Great Lakes Plastics is that under the DNR's proposed Clearinghouse Rule 04-064 (NR 323) the rule is not clear, contradicts itself in parts and is actually stricter than current law. Mr. Brusco was upset when he discovered the DNR's proposed rule, because he believed that the Jobs Creation Act was suppose to reduce the bureaucratic permit processing of the DNR.

Mr. Brusco's concern is that under the rule it defines a "fish crib" as a man-made 3-dimensional habitat structure composed of biological or inert materials designed specifically to attract and concentrate fish. The rule goes on to define "inert materials" as those materials that slowly degrade, such as chemically treated wood, stone, stainless and galvanized steel, plastics and synthetic polymers.



It is not until further buried in the rule does the rule say "Fish cribs shall be constructed of biological materials, with the exception of fastening and anchoring devices."

I have contacted the DNR with regards to this proposal. To date, they have not been able to provide with me a reason (other than a concern that if the water is clear and you can look down to the bottom of a lake a fish crib made of plastic materials may not look as attractive as one made of biological materials) as to why the language exists in the rule.

I have worked with Mark Patrosky of the Legislative Council to come up with some potential language that would address Mr. Brusos concerns. I have attached that language for your information.

If you have any questions or need any additional information please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Dan Meyer", with a large, sweeping flourish at the end.

Rep. Dan Meyer  
State Assembly  
34<sup>th</sup> Assembly District

Cc: Rick Brusos

December 21, 2004

Bill---

Here is the draft of the NR 323 rule that was approved by the DNR board at the December meeting. The provision on fish cribs that limits fish cribs to biological materials is on page 5---I have circled it.

As with many legal drafting issues, there are different ways that this provision of the rule could be redrafted in order to allow for fish crib construction out of recycled plastic. Here are the possibilities that come to mind:

Delete NR 323.04 (1) (d) 2. With this change, the rule will have no restrictions on the allowable materials for fish cribs.

Amend the rule: "Fish cribs may be constructed of biological or inert materials." This would allow use of any inert materials. The definition in the rule of "inert materials" includes "chemically treated wood, stone, stainless and galvanized steel, plastics and synthetic polymers."

Amend the rule: "Fish cribs shall be constructed of biological materials, with the exception of fastening and anchoring devices, or of recycled plastic with fastening and anchoring devices made of other materials." This adds recycled plastic to the current rule. It should be determined with certainty that the proposed plastic fish crib is made entirely of recycled plastic, and not a mix of recycled and nonrecycled plastic. If it might include nonrecycled plastic, the language in the proposed amendment could delete "recycled."

Let me know if I can do anything more on this issue.

Mark Patronsky



From the Office of Pam LaBine

Forest County Zoning  
200 East Madison Street  
Crandon, Wisconsin 54520  
715-478-3893

February 22, 2005

To: Scott Gunderson  
Chairman of the Joint Assembly/Natural Resources Committee

Re: Hearing 2/23/05 Rules Relating to Act 118

Representative Gunderson,

This letter is to address emergency rule NR 1 (NR Board Policies) and NR 341 (Grading on the bank of a navigable waterway).

Attached to this fax are letters from the DNR enforcing NR 314 and my letters to Jeff Mursau, the DNR and the pertinent web pages in response. My concern for the landowner is hopefully apparent.

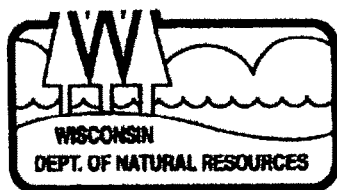
What I'd like to point out from Forest County's perspective is that we have these areas under ordinance. Our shores are well vegetated and the soils are deep and well drained. Who's job are we talking about here? If the County has these areas under control and a new layer of administration is applied, it's the County that will end up relinquishing permit moneys and control to the DNR. There are no, new jobs in this rule nor any new protections. NR 341 is just another layer of unnecessary administration. My job will now be to assist landowners in determining the status of their lands in relation to DNR rules, on the county budget. Please convince your committee members that this rule is unnecessary.

NR 1 is also of great concern. This statement negates the 100 years of good stewardship that Forest County has and will continue to practice. We best understand our soils and water and how they are used to work for the good of the community and the environment. It is very difficult for a water specialist, trained in the southern part of the state, to understand that the northeastern part of the state is a "regenerated ecosystem". We grew this! We built this! Most of our landscapes were altered in the early 1900's. We are very flattered that everyone thinks of our land and shore scapes as natural. We are distressed that our stewardship is negated and control granted to a department that cares so little for our community. Please convince your committee that NR 1.016 is unnecessary.

Sincerely,



Pam LaBine, Administrator



## STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES

Jim Doyle, Governor  
 Scott Hassett, Secretary  
 John Gozdzialski, Regional Director

Northern Region Headquarters  
 107 Sutliff Ave.  
 Rhinelander, Wisconsin 54501-3349  
 Telephone 715-365-8900  
 FAX 715-365-8932  
 TTY Access via relay - 711

January 31, 2005

Mr. Steven Motiff  
 7940 Timberline Road  
 Oconto Falls, WI 54154

INF-NO-2005-21005UG

Subject: Grading and Wetland Filling on Mainline Lake, Town of Alvin, Forest County

Dear Mr. Motiff:

In May of 2004, while on routine wildlife management flights, our local wildlife manager noticed recent grading and possible wetland filling at a residence on the north side of Mainline Lake. This is also described as in the SW ¼, SE ¼, Section 28, T40N, R14E, at Fire Number 14901 Fry Road, Town of Alvin, Forest County.

Grading over 10,00 square feet on the bank of navigable waters requires a permit from the Department under Section 30.19(1g)(c), Wisconsin Statutes. Additionally, since Mainline Lake is less than 50 acres in size the bank extends 300 feet from the ordinary high water mark on 10% slope, as per Section NR 341.035(1)(b), Wisconsin Administrative Code.

Filling of wetland requires a permit from the US Army Corps of Engineers and water quality certification from the DNR.

The Department has no record of permits or water quality certification for this activity.

To help determine if any violations have occurred, I need to inspect the site. Please contact me and let me know if in fact there has been any recent construction activity on your property. Also, please let me know if and when you would be willing to accompany me on an inspection of the site.

If you have any questions, please feel free to contact me at any time. My phone number is (715) 365-8991, or you may write to me at the address shown above.

Sincerely,

James Grafelman  
 Water Management Specialist

Cc: Mike O'Keefe, US Army Corps of Engineers  
 Conservation Warden Rick Koch  
 Pam Labine, Forest County Zoning Administrator

Forest County Zoning  
200 East Madison Street  
Crandon, Wisconsin 54520  
715-478-3893

To: Jeffrey Mursau  
Room 18 North  
State Capitol  
Madison, Wisconsin 53708

Re: Enclosed Letters, DNR

Jeff,

Congratulations on your win in the 36<sup>th</sup>. Now it's time to tackle the big stuff. Unfortunately every issue is big.

One of our landowners received a letter from the DNR for unauthorized grading and filling. We're not worried about any action taken in this instance but I am worried how we are going to identify the places described in the grading rule. I printed off the web page for grading and still couldn't figure out what my responsibility to the Department is. The *Designated waters search* doesn't work. Trying to figure out if you are greater or less than ten (10) percent grade is something a professional must do. Trying to figure out the instructions on this web site is something a professional should try.

10,000 square feet is approximately 50 by 200 feet. A road, home site and sanitary will bring a landowner past this point. Instructions in my ordinance indicate I must wait for all DNR permits to be issued before issuing any County permits. Unless I visit the site myself and put my judgment on the line with the landowner, we could be waiting half the season depending on the backlog of permits.

Is there an environmental reason for this requirement? Ten feet of rise over 100 feet in length is minute in the scope of landscapes here in the northwoods. I checked with the Forestry office to see if we could differentiate the ten feet in slope on a topographical map. Not possible for permitting purposes. If we can't figure this out in the office with the mapping available, how is the DNR supposed to figure this out without a site visit?

Something needs to be changed with this emergency rule. Getting rid of it would be our preference. The DNR already is at one acre for a grading permit on all areas. This is 1/4 of that requirement and overlaps the regulations the County has in place for such activities.

Please keep me informed when these rules are being discussed.

Sincerely,

  
Pam LaBine 2/7/05

Copy To: Representative Glen Grothman

Forest County Zoning  
200 East Madison Street  
Crandon, Wisconsin 54520  
715-478-3893

To: Jim Grafleman  
107 Sutliff Ave.  
Rhineland, Wisconsin 54501

Re: Steven Motiff INF-No-2005-21005UG

Mr. Grafleman,

I am in receipt of your letter to Steven Motiff dated January 31<sup>st</sup>, 2005. It is unfortunate that you did not contact this office immediately after the alleged violation occurred so that I could inform you that we knew about this situation. This is not a case of willfully filling a wetland or grading without a permit.

Mr. Motiff's home on Mainline Lake burnt down in the spring of 2004. Because this forty is surrounded by National Forest, the Forest Service plowed the perimeter to protect their property from fire. After the fire, Mr. Motiff called this office to check on the sanitary and was informed that the system in use was home made and did not meet any of the criteria for an acceptable system. He then removed that system and installed another, hooking it to a smaller building he currently uses as shelter until the new cabin is built.

After the fire, Mr. Motiff had to repair the damage done by the Forest Service and the septic installer and remove debris from the foundation so that only clean fill would go into the hole. He bulldozed the foundation shut, harrowed the plow furrows, reseeded and mulched.

This letter is unsettling as it implies the Department must be notified, inspect, and permit building sites that in totality exceed 10,000 square feet, on lands with greater than 10% grade and upwards of 300 feet by certain waters. Forest County landowners need to know when and where these conditions occur. The website is not adequate. Step two (2) is unanswerable. I cannot issue permits to construct driveways, homes and sanitary systems until the appropriate DNR permits are issued. Identifying these locations will be nearly impossible. I respectfully ask that, at the least, you provide maps for our landowners and myself to reference as we are being asked "to determine" the need for a permit.

Sincerely,

Pam LaBine 2/7/05

Copy to: Steve Motiff, Tom Jerow DNR, Jeffrey Mursau



**Waterway and Wetland Permits**

- What's New
- Proposed Rules
- Public Hearings
- Workshops
- Permit Process Today
- Emergency Rules Today
- Current News
- Annual Report

**Activities**

- Aquatic Plant Control
- Aquatic Plant Barrier
- Beaver Damage
- Boathouse Repair
- Boat Ramp (Landings)
- Boat Shelter
- Bridges
- Buoys (Moorings and Markers)
- Culverts
- Dams
- Dredging
- Dry Hydrants
- Fish Habitat
- Fords
- Grading
- Irrigation
- Lake Levels
- Misc. Structures
- Nonmetallic Mining
- Pea Gravel Blanket
- Piers, Docks, Wharves
- Pilings
- Ponds
- Shoreline Erosion Control
- Stream Realignment
- Swimming Rafts
- Unity Waterway Crossing
- Water Ski Platforms
- Wetlands

**Grading**

**Question:** I want to grade, fill, remove or disturb soil on waterfront property. Do I need to obtain a permit and/or pay a fee?

**Answer:** A general permit or individual permit is required for any project that physically disturbs more than 10,000 square feet on the bank of a navigable waterway. Disturbances include the addition, removal, or redistribution of soil.

Grading permits are not required for construction or repair of public highways, agricultural use, or projects in Milwaukee County.

The "Bank" is defined in Section 30.19, Wis. Stats. ([Exit DNR](#)), and Emergency Rule NR 341 ([117KB](#)). The bank is different depending on the type of waterway where the project is located.

For a Priority Navigable Waterway (which include Trout streams, Outstanding or Exceptional Resource Waters, Lakes less than 50 acres, and other waters identified in Emergency Rule NR 1.07 ([109KB](#))) the bank is the greater of:

- the land surface that extends 300 feet from the ordinary high water mark of any navigable waterway; or
- the land surface extending landward from the ordinary high water mark to the point where the slope is less than 10%;

For a Non-priority Navigable Waterway, the bank is the greater of:

- the land surface that extends 75 feet from the ordinary high water mark of any navigable waterway; or
- the land surface extending landward from the ordinary high water mark to the point where the slope is less than 12%;

Follow the steps below before starting your project.

**Step 1:** Determine if your waterway has a special designation that might affect the exemption or permit requirements.

Visit the search page below, enter the information about your waterway, and record any designations that it may have.

- Designated Waters Search (will not come up for this lake)

**Step 2:** Determine if your project will involve at least 10,000 square feet of grading on the "bank."

**Step 3:** Determine if your project qualifies for a General Permit.

Two General Permits are available for Grading: one for projects with less than one acre of grading, and a second for projects grading one acre or more. Key requirements include stormwater and erosion control plans, protective buffers for lakes, streams and wetlands, a maximum 5-foot elevation change within the bank, and a limit to sites where the bank is less than 20% before or after the grading.



Review the permit conditions found in the application materials in Step 4 to see if your project will qualify. If your project will not meet the conditions of a General Permit, you'll need to apply for an Individual Permit. Grading projects on waters in a state natural area, federal or state wild river, or Outstanding and Exceptional Resource rivers must apply for an Individual Permit.

#### Step 4: Apply for a General Permit.

To apply for a General Permit, open and print BOTH the applicable instructions and General Permit application form found below.

- [Grading Less than One Acre Application Instructions](#) (PDF 282KB)
- [Grading One Acre or More Application Instructions](#) (PDF 43KB)
- [General Permit Application \(#3500-108\)](#) (PDF 40KB)

Submit the completed application materials and \$50 fee for each general permit to the location identified on the form. If your project will not meet the conditions of a General Permit, you'll need to apply for an Individual Permit.

#### Step 5: Apply for an Individual Permit.

To apply for an individual Permit, open and print BOTH of the following files:

- [Grading Individual Permit Application \(#3500-53C\)](#) (PDF 79KB)
- [Fee Sheet \(#3500-053A\)](#) (PDF 16KB)

Send the completed application materials, along with the fee and fee sheet, to the [Water Management Specialist](#) covering the county where your project is located. For more information about how your application is reviewed, see our web page on the [Permit Process](#).

**Laws:** Applicable statutes and codes include [Section 30.19, Wis. Stats.](#) (PDF [Exit DNR](#)) and [Emergency Rule NR 341](#) (PDF 116KB).

Local permits and U.S. Army Corps of Engineers regulations may also apply. We advise you to contact your local zoning office and your regional U.S. Army Corps of Engineers office ([Exit DNR](#)).

**PDF Files:** Please note that links marked with the PDF (PDF) icon will require the [Adobe Acrobat Reader](#) for viewing.

You can [download](#) the Reader for free from Adobe.

[Back to Top](#)  
Last Revised: Saturday May 22 2004



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*"Dedicated to the Conservation of  
Wisconsin's Wetland and Wildlife Resources"*

WISCONSIN WATERFOWL ASSOCIATION, INC.  
614 W. Capitol Drive  
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(262) 369-6309  
(262) 369-7813 (Fax)  
[www.wiswaterfowl.org](http://www.wiswaterfowl.org)

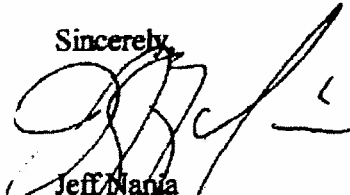
2-22-2005

Dear Committee Member,

I ask you support the proposed permanent rules being adopted under Act 118. The rules have been proposed after hundreds of hours of work by Technical Advisory Groups, and several public hearings. The groups working on this issue represented a broad spectrum of interests and came up with a good product.

I have heard many times, that the intent of Act 118 was not to negatively impact our natural resources but to develop reasonable rules that will allow economic development to occur while protecting our environment. These rules are a good compromise and if for no other reason than out of respect for the leaders in business and conservation that devoted so much to this effort they should be adopted.

Sincerely,



Jeff Maria  
Executive Director



Testimony of Todd Ambs, Water Division Administrator,  
Wisconsin Department of Natural Resources  
On permanent rules for Act 118  
Before a Joint Hearing of the Senate Natural Resources and Transportation Committee  
and the Assembly Natural Resources Committee  
February 23, 2005

Good morning Senator Kedzie, Representative Gunderson and members of the committees.

As I begin I am reminded of the promise that I made to the Natural Resources Board, to members of the legislature and to the general public when we first submitted the emergency rules for act 118 to the natural resources board last April. The promise was three-fold:

Speed and consistency – we believed that the rules would effectively eliminate half of the individual permits that we issued each year – from an average of 5000 a year to less than 2500.

Easy to understand – we hoped that the rules would help to make the process much easier to understand and would put much of the decision making into the hands of the applicant and entrust them with some personal responsibility to be good stewards of our water resources.

Public waters protection – the rules would also achieve the goal that everyone wanted. To maintain standards that make it possible for all of us to remain proud of our heritage of treating the public waters of our state as “common highways”, “held in trust for all of the people of this state.”

I am happy to tell you today that I believe that we have achieved each of these goals and that the permanent rule package before you today will enable us to be even more effective and efficient as we work toward those goals.

There are three things that we would like to do today.

Explain just how we have achieved these successes with the emergency rule package last year.

We then want to provide an overview of the permanent rules package and answer any questions that you might have.

Then finally, we would like to note several safeguards that we have built into this system, including most importantly, an adaptive management approach where we will work with stakeholders over the next year to monitor several areas of the rule package. We hope to gain more on-the-ground information and adjust the rules where necessary after another year of experience working with the rules.

The emergency rules have been in place since May of last year as you know. The first set of rules was put in place last spring and the second set were adopted last August.

So what did we learn from the experience?

We learned that we could achieve the dual goals set by both the legislature and the governor when this legislation passed – to achieve regulatory reform while protecting our public waterways.

Just under 50 percent of the projects undertaken for Wisconsin lakes and rivers in 2004 were either exempt from permitting or qualified to receive a permit in less than 30 days. That reduction is significant evidence of DNR's commitment to and success in meeting one of the goals of Act 118. In fact, by the end of the year, with folks learning the rules, exemptions – the most streamlined process of all – had increased to an estimated 16% of all activity. Thirty percent of all permits were general permits. We made decisions on exemptions as required in 15 days – and beat the 30-day general permit decision deadline, making those eligibility decisions in an average of 14 days.

The temporary rules allowed DNR to meet the second, equally important goal of Act 118 – maintaining Wisconsin's longtime commitment to protect public lakes and streams. Our constitution requires that protection. Our \$12 billion tourism economy, our environment, our property values, the tax base they support and our lifestyle depend on it.

We learned that we could find a way to draft general permits for most activities conducted in and around waterways. To date we have 30 general permits in place, more than twice what is required by statute and we plan to have a few more. These permits insure consistency and also reserve the scrutiny of an individual permit process to those projects where significant damage can and is done to our public waters if done improperly.

We learned that we could do a better job of reviewing all permits under this program and have built in better predictability and consistency to our permitting decisions.

We learned a lot from two site visit audits that we conducted of our program – one last summer and one last fall. This review enabled us to assess how well people were complying with the various types of permits and revealed some interesting trends.

There was a 100% compliance rate on exemptions. These are projects where the applicant asked for an exemption determination request that we have to respond to in fifteen days. This shows that these rules are easy to understand and can be complied with throughout the state.

We also had a high compliance rate for general permits and individual permits – approximately 75%. And it is worth noting that the most common noncompliance is construction site erosion control.

Put another way, these site visit audits provide strong evidence that the rules provide the specifics necessary to protect our lakes and streams – waters held in trust for all of our citizens to enjoy.

That is a point that we shouldn't overlook. Activities in this rules package can and do have an adverse impact on habitat, navigation and our fisheries if done improperly. And since

these activities occur by the thousands each year and the effects of doing them improperly are often permanent, the need to do them right the first time is underscored.

All of these safeguards help to provide the proper balance between streamlining the process and protecting the resource.

We still have more to learn:

When we got together last fall we were pleased to hear from a variety of stakeholders that there were no major problems with the temporary rules. Where there was a better fix available, those concerns that were identified were addressed and we have a package before you that is supported by all of the stakeholders.

The only exception to that is in one area of NR 328, the so-called riprap rule, where we have agreed that a modification is needed to make the rule a bit easier to administer and to understand.

That is not to say that the stakeholders, or we believe, that these rules are perfect.

There were a number of concerns expressed from all quarters about what might happen in the future.

Concerns from the regulated community about future implementation challenges.

Concern from the conservation community about how some of the provisions will protect the resource over the long term.

Concerns from our staff about the workability of some provisions from a staffing perspective.

In each case though those concerns were about potential issues in the future and no one had a better solution today.

So we collectively decided that the best way to handle those issues was to use an adaptive management approach.

We asked the Natural Resources Board to direct us, and they did, to work with stakeholders over the next year on a number of issues. We will then review those topics a year from now with the benefit of another twelve months of data, and come back to the Board with a report and any suggestions for improvements in the rules package.

I am quite pleased with this approach because I believe that it acknowledges the complexity of the task set out by this new law and puts a mechanism in place to adapt the rules as we have more concrete information.

Before I turn the rest of this presentation over to staff I want to take this opportunity to thank all of the staff for the tremendous work that literally dozens of people did over the last twelve months to make this new law work.

Staff from all over the state pitched in. Many staff helped to draft, and redraft, and redraft, many of these rules – often on short notice – and often under a great deal of pressure.

As you are well aware, it frequently takes two to three years to draft one rule in our agency. This law passed last February and we had a package of over a dozen emergency rules done and to the board in eight weeks. It was a tremendous achievement and we have significantly improved the product before you here today over the last ten months.

Finally, I think that it is important that we remind ourselves why we are here.

15,000 lakes, 57,000 miles of streams, 5.3 million acres of wetlands, 1100 miles of great lakes shoreline.

We are a state woven from a fabric drenched in water.

Water is essential to our quality of life.

Water is critical to our economy. In fact, our three biggest industries – agriculture, forest products and our \$12 billion tourism industry – depend on clean, good quality water.

And of course water is essential to the well being of all of our natural resources.

One of the most important threads running through this fabric is the public trust doctrine.

The doctrine, as you well know, says that our navigable waters are held in trust for all of the people of this state.

Put another way, in Wisconsin our constitution and over 150 years of case law underscores a principle that holds that we treat the waters of Wisconsin as if they belong to everyone.

That is a tough thing to do. Because everyone has competing uses.

The waters do not belong to the builders or the realtors.

They don't belong to anglers.

They don't belong to folks who just like to walk along side of them.

The waters of Wisconsin belong to us all.

Act 118 challenges us to apply those principles in a new way. The act tells us that the policy makers of this state believe that we need to strike a better balance that reforms the regulatory process for protecting these waters while maintaining the same level of environmental protection.

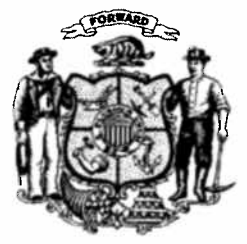
The only way to accomplish that goal is to adopt permanent rules that set clear parameters for how we are to implement this new approach.



The rules before you are the result of a year of experience with this new law. They are not perfect but they are much improved from the first set of rules that the Natural Resources Board sent over to you last spring. In addition, we have a review process in place so that we can adaptively manage these rules as we gain more insight and experience.

Now i would like to turn this testimony over to Mary Ellen Vollbrecht, the Section Chief for our Rivers, Habitat Protection and Waterway Regulation Section, to outline some of the specifics of the package.

Thank you.





TO: Senator Neal Kedzie, Chairman, Senate Committee on Natural Resources  
Representative Scott Gunderson, Chairman, Assembly Committee on Natural Resources

FROM: Paul G. Kent on behalf of Wisconsin Builders Association and Riparian Owners and Marine Contractors Association, Inc.

DATE: February 23, 2005

RE: Chapter 30 Rules Relating to 2003 Wis. Act 118

I am writing on behalf of the Wisconsin Builders Association and the Riparian Owners and Marine Contractors Association. As you know, we were involved in both the debates over the Chapter 30 provisions of 2003 Act 118 and the rule packages prepared by DNR in response to those provisions. When these rules were before the Natural Resources Board in December of last year, we submitted detailed comments, a copy of which is attached and incorporated by reference. We continue to stand by those comments.

Our comments can be summarized by stating that while we have a number of significant concerns with the rules, we are willing to support them at this time based on two key understandings. First, we need experience with the rules and need to evaluate how the rules perform in the field. Based on that evaluation, the stakeholders will need to be reconvened and adjustments will need to be made. It is our understanding that the DNR has committed to this review process. We all hope that our fears will not be realized and any adjustments will be minor. But no one should be surprised if there are significant issues that need to be addressed a year from now.

Second, we also agreed that the Department's limited resources are better spent moving the Chapter 30 program forward, rather than making additional fine tunings of the existing rules at this time. For example, for the Builders, it is essential that the Department move forward on further integration of the various grading permits. For the Marine Contractors, it is essential that the Department move forward with a riprap general permit for river systems. We cannot emphasize too strongly the need to move forward in these and related areas, and we are concerned more progress has not yet been made. Nevertheless, we expect that with the adoption of these rules, additional general permits and permit coordination will move forward.

We have appreciated the opportunity to work with the Legislature, the DNR and other stakeholders in bringing the reforms to the Chapter 30 program to this point. We hope we will be able to continue to move forward as we gain experience with this program.

cc: Jerry Deschane, Wisconsin Builders Association  
Jeff Christensen, ROMCA

**Comments of the Wisconsin Builders Association  
And the Riparian Owners and Marine Contractors Association**

**Regarding the Chapter 30 Rule Packages to Implement Act 118**

**December 3, 2004**

**Introduction**

We have been working with other stakeholders and the DNR in developing rules over the past nine months that implement the changes to Chapter 30. In general, the current rule package is an improvement over the original emergency rules and should provide a workable framework for streamlining the permit process while protecting environmental standards. The development of permit and exemption standards in these rules should also provide consistency and accountability that had largely been lacking in this program prior to Act 118. We are particularly encouraged with the development of a significant number of general permits and the fact that they were promulgated ahead of the legislative deadline and covered areas beyond the minimum legislative mandates. We encourage the Department to identify other areas in which general permits may be appropriate.

Nevertheless, we have a number of areas where we are concerned about how the Department will implement these rules. Those areas are outlined in this memo. This list should not be viewed as an exhaustive list. Undoubtedly, other issues will arise as implementation proceeds.

We believe that the time has come for all of us to gain experience with this new system and learn what areas need additional work. Therefore, while we are willing to have these rule packages move forward, our support for these rules is conditioned on the commitment of the Department to reassemble a stakeholder group at the end of the next construction season to evaluate how the system has worked and recommend any needed changes. We are not advocating additional substantive changes at this time by the Natural Resources Board or by the Legislature.

**Concerns with NR 1**

**1. NR 1.016 Preamble**

We do not believe that the preamble correctly sets forth the balance of interests required under the public trust doctrine and is not necessary for the implementation of this rule. This is however primarily a matter for the Legislature.

**2. NR 1.05 Waters Designation**

We do not believe that the Legislature intended that a significant number of waters be excluded from eligibility for exemptions. This was the message sent by JCRAR earlier

this year. We have agreed to this modified list on the assumption that the waters designated under the "significant scientific value" category will, in fact, be a limited number of waters.

We remain concerned with the inclusion of waters identified in the natural heritage inventory (NHI). Our concern arises out of several factors. First, unlike the process for designating threatened or endangered (T/E) species, the process for adding NHI waters is not subject to public hearing, Natural Resources Board approval or legislative review. Second, there is a statutory framework for protecting T/E species under Wis. Stat. § 29.602. That process does not include NHI species. Finally, we are concerned about the number of waters that will be affected by the NHI list. It is our understanding that the NHI list will double the number of species. Depending on how it is implemented, this list could affect a large number of water bodies and large areas such as Lake Mendota and Lake Winnebago. However, it is also our understanding that the intent of the rule is to be more limited in scope and only impact those areas where NHI species are known to exist within those water bodies. The implementation of this provision will be a critical issue.

### **3. NR 1.06 Public Rights Features**

From the outset we were concerned with the creation of this non-statutory concept and the breadth of the definition of public rights features. We generally agree that if there is a sensitive area such as a fish spawning bed, that a chapter 30 activity should attempt to avoid adverse impacts to that feature. Unfortunately, the term public rights feature is extremely broad and applies to much more than spawning areas. Public rights features include "fish and wildlife habitat," "areas predominantly natural in appearance" and "features that protect water quality." Depending on how this section is applied, it could encompass most of the waters of the state. We have been told that these terms will not be interpreted that broadly, but we remain concerned about the breadth of the rule language and the extent to which this language will be used to thwart the use of exemptions and general permits. Certainly, to the extent that these areas are mapped under the process set forth in NR 1.06, our concern is lessened. Unfortunately, that is not the case because public rights features are not confined to mapped areas. As a result, this remains a key concern.

Part of the implementation of this provision, like NR 1.05, will require better clarity on the DNR web page. For example, currently, any water body on the Land Legacy Report is listed in its entirety as a PRF water. This is not what NR 1.06 provides. There needs to be some clarification that Land Legacy waters are only a red flag and that for other PRF waters only portions of the waterbody are affected..

### **Concerns With NR 310 – Permit Procedures**

#### **1. Timeframes for individual permits**

A key purpose of Act 118 was to ensure that individual permits will be processed within specified timeframes. Each step of the process has deadlines. We have heard reports that in some cases these deadlines have not been followed. Compliance with these deadlines is

essential. We avoided presumptive approval language in the bill on the basis that deadlines will be met.

## **2. Effective date for individual permits**

There was substantial discussion concerning the need for a delayed effective date for individual permits. We argued that a delayed effective date was not warranted and was not consistent with legislative intent or other DNR programs. The current rule establishes a procedure providing for a delayed effective date only where an objection is received during the public hearing or comment period. We were advised that this situation would not occur more than 20 times per year out of 5000 permits. If so, our concern is lessened. A more frequent use of this provision will be problematic. This needs monitoring.

## **3. Permit Coordination**

Although not currently set forth in NR 310, we discussed the situation where a single project is subject to various chapter 30 requirements – exempt activities, general permits and/or individual permits. We need to ensure that a coordinated process is developed to address these situations.

### **Common Permit Provisions**

#### **1. Threatened and Endangered Species Language**

Each of the general permits now contains language that was originally developed in the context of the grading general permit. The language is tied to the requirements in Wis. Stat. § 29.604. Unfortunately, we are already receiving comments that some DNR staff are interpreting this language to say that if a project is within a mile radius of a documented T/E species, the burden is on the applicant to demonstrate that the species is absent before the project can proceed. Section 29.604 does not authorize that kind of presumption and it only protects against actual taking of species, not ancillary impacts to habitat. We trust that the implementation of this language will conform to the statutory requirements and not be used as a mechanism for thwarting the use of general or individual permits.

#### **2. Wetland Water Quality Certification**

It is our understanding that the Department will be seeking a general water quality certification for minor wetland fills associated with general permits. We need to ensure that there is also coordinated process for wetland water quality certification where the fill exceeds the proposed *di minimis* amounts.

### **Concerns With NR 320 -- Bridges and Culverts**

#### **1. Technical Standards**

The culvert sections of this rule have undergone substantial technical revision from the emergency rule. Preliminary analysis suggests that the new technical requirements will

still comport with the intent of the statutorily provided exemptions and general permits. However, we will need to evaluate field experience to determine if that is in fact the case.

## **2. Application of Public Rights Features**

This is one of several areas where the implementation of public rights' features language will need to be monitored. It affects exemptions and general permits.

### **Concerns With NR 328 – Shoreline Protection**

This rule is the finalization of a rule that had its origins pre-Act 118. While the current rule is a significant improvement over the previous draft, numerous issues remain of concern.

#### **1. Determination of Erosion Potential**

This rule restricts the type of erosion control methods that can be employed based on two key methods – a wind wave model and an erosion intensity index. The result is that, for sites deemed to be low energy, riprap and other structural erosion control methods generally are not allowed. We do not believe that either of these erosion potential models accurately takes into account erosion potential nor do we believe that there is sufficient empirical data from the field to justify the use of these models as regulatory tools at this time. We do know that there are sites with severe erosion that score out as low energy sites under the rule. The rule now provides “escape values” to address so-called “low energy sites” to allow the rule to go forward. It will be critical for the Department to gather information on how these models correspond to real site conditions so any necessary rule changes can be made.

#### **2. Individual Permits for Riprap**

Through out the rule process, the Department has attempted to include a provision to prohibit riprap on any low energy sites. The current draft provides a range of low energy sites for which individual permits can be granted. This is one of the critical escape valves. If the Department implements this rule in a fashion that denies these permits, we will have a *de facto* ban rather than a *de jure* ban on riprap for low energy sites. That will not be acceptable.

#### **3. Technical Standards**

During the negotiation process, we have articulated a number of technical concerns, particularly requirements for vegetation above the ordinary high water mark. We were concerned that for some sites, existing conditions make re-vegetation impossible. It will be important that appropriate discretion be exercised in such cases.

#### **4. Additional Sub-chapters**

The Department has indicated that it is proceeding to develop comparable rules for rivers

and the Great Lakes. It will be important to have stakeholder input into these sub-chapters through a technical advisory committee and to develop field data from these sites.

### **Concerns on NR 341 – Grading**

#### **1. Scope of Grading Jurisdiction**

This is an issue that arises out of the provisions of NR 341 and NR 1.07. The legislative intent was for most sites to be subjected to the 75 feet and 12% slope requirements. The broad list of waters under NR 1.07 subjects a significant number of sites to the 300 feet and 10% slope requirement. We will need to monitor how many sites are effected by the NR 1.07 list.

#### **2. Permit Coordination**

We still need to proceed with enhanced coordination between 30.19 and other erosion control provisions. The Department has committed to a resolution by March 2005. This has been a key factor in our agreement to move forward.

### **Concerns With NR 343 -- Ponds**

#### **1. Temporary Ponds**

In the last draft, the need for a permit for temporary ponds was clarified. Nevertheless, we remain concerned that the limitations on the location of these ponds within a 100 feet of public rights features may ultimately be counterproductive to effective erosion control.

#### **2. Permanent Ponds**

Again, the restriction on permanent pond location relative to public rights features may be problematic depending on how broadly the public rights feature language is construed. The clarification under NR 329 for outlet structures removes the ASNRI concern but the public rights features limitations remains. Ultimately, we should look at ways of consolidating the permits needed by a pond into a single permit.

### **Other Rules**

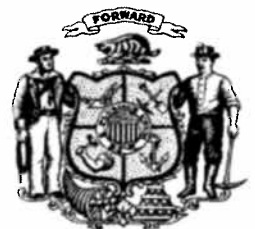
We have not provided significant comment on other rule packages during this process because they are of less direct concern to our members. These rules include NR 323, NR 325, NR 329 and NR 345. NR 326, of course, has had its own process and we defer to and support the stakeholder group draft on those provisions. Clearly, the NR 1 issues noted above will be of concern in the implementation of NR 326.

Our lack of other comments should not be viewed as a waiver of any arguments or concerns that we might have as the rule implementation process moves forward.





# WISCONSIN STATE LEGISLATURE





## WISCONSIN LEGISLATURE

P.O. BOX 8952 • MADISON, WI 53708

February 23, 2005

Chairmen Kedzie and Gunderson  
Members, Senate Committee on Natural Resources & Transportation  
and Assembly Committee on Natural Resources  
Joint Hearing, Room 412 East  
State Capitol

Dear Chairmen Kedzie, Gunderson, and Committee Members:

Thank you for providing this opportunity to comment on Clearinghouse Rule 04-066 and Clearinghouse Rule 04-084. While I support much of what these rule packages propose, the rules should allow the replacement of existing culverts on tributaries to trout streams under a general permit.

I agree with the concept of creating general permits as an alternative to individual permits for certain projects on navigable waters. I also agree with the concept of requiring a more extensive review of site conditions before a permit is issued in sensitive natural areas like trout streams.

I do not agree that the replacement of small culverts on small, non-trout streams endangers trout streams. The primary function of tributaries to trout streams is to supply cold water. Properly installed culverts, or even less-than-perfect culverts, should not impound so much water on the upstream side that it has time to warm-up.

I do not agree that allowing general permits for culverts on tributaries will block the passage of trout that are migrating to spawning areas in the headwaters. If trout do physically inhabit a stream at times, then those streams are normally already listed as trout streams by the DNR and protected. Even streams that are so small that they only support trout occasionally are listed as trout streams.

*Page 2, February 23, 2005*

The general permit conditions established in the proposed NR 320 do establish standards that assure culverts are installed properly and that the DNR has recourse if they are not functioning. The rules even require that culverts be installed so that 25% is below bed in order to allow fish and wildlife passage.

There are almost no parts of this rule package that provide permit streamlining for people in my district. Most of our water is listed in the trout book or is tributary to trout water. But I do believe that tributaries to our trout streams are sufficiently protected under the general permit. I hope that you will ask the DNR to reconsider this provision of their proposed rules.

Sincerely,

A handwritten signature in cursive script that reads "Lee Nerison".

Lee Nerison  
State Representative  
96<sup>th</sup> Assembly District