



Wisconsin Legislative Council

RULES CLEARINGHOUSE

Scott Grosz
Clearinghouse Director

Anne Sappenfield
Legislative Council Director

Margit Kelley
Clearinghouse Assistant Director

CLEARINGHOUSE RULE 24-051

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Council Staff and the Legislative Reference Bureau, dated November 2020.]

1. Statutory Authority

a. In the rule analysis, in the recitation of statutory authority, add a citation to s. 30.12 (3m), Stats.

b. In SECTION 1 of the proposed rule, s. NR 320.035 (1) (a) 1. defines “similar conveyance” as that term is used in s. 30.133, Stats., as “any transfer in excess of two years”. Although this provision has existed in a departmental rule since 2002, the department should consider the impact of this definition. Under s. 30.133 (1), Stats., with some exceptions, a riparian may not grant by an easement or by a similar conveyance any riparian right to another person. This prohibition is not tempered by reference to the length of the easement or similar conveyance; any easement or similar conveyance, regardless of duration, is not allowed. Under the proposed rule, however, it appears that a riparian may convey a riparian right to another person **if** the conveyance is not a transfer in excess of two years. For example, under the proposed rule, would it be permissible for a riparian annually or biennially to sell or gift to a non-riparian the right to use a boat slip on the riparian’s pier? If so, would such a sale or gift be prohibited by the statute?

c. In SECTION 1 of the proposed rule, s. NR 320.04 (3) (e) provides an exemption for a small deposit of sand, gravel, or stone that is associated with the placement of a structure, provided that the deposit is limited to the area “immediately underneath or adjacent to” the structure. As referenced in the proposed rule, this exemption is based on a similar exemption in s. 30.12 (1g) (a), Stats. However, the exemption in the statute is arguably broader. It exempts a deposit that is “associated with” an exempt activity or project. The statute does not limit the exemption to a deposit that is “immediately underneath or adjacent to” a structure. Has the department considered whether it would be possible for a deposit that is associated with, but not immediately underneath or adjacent to, a structure to be exempt under the statute but not exempt under the rule?

d. In SECTION 1 of the proposed rule, s. NR 320.04 (8) (a) and (9) (a), provide that a pier or seasonal boat shelter, respectively, may be placed in an area of special natural resource interest. Was the word “not” inadvertently omitted after “may” in each paragraph? Under s. 30.12 (1g)

(intro.), Stats., the exemptions for placement of a structure apply only in an area **other than** an area of special natural resource interest. Is there another statute that authorizes the placement of a pier or seasonal boat shelter in an area of special natural resource interest?

e. In SECTION 1 of the proposed rule, s. NR 320.04 (8) (b) regulates the distance an exempt pier may extend into the water. It provides that a pier may not extend beyond the line of navigation, beyond the pierhead line, or beyond the length of the boat using the pier unless it can be demonstrated that the boat or boat hoists require a greater depth. Under s. 30.12 (1g) (f) 1. b., Stats., an exempt pier may extend no further than to a point where the water is three feet deep at summer low levels, or to a point where there is adequate depth for mooring or using a boat hoist or boat lift, **whichever is farther from the shoreline**. In light of this statute, the department should insert “whichever is farther from the shoreline” into this provision of the rule to ensure that the rule is consistent with the statute.

f. In SECTION 1 of the proposed rule, s. NR 320.04 (11) (d) provides that “no soil or similar fill material may be placed in a wetland or below the ordinary high water mark of any navigable waterway”. Is this prohibition based on s. 30.12 (1g) (jm) 5., Stats., which establishes a similar prohibition relating to riprap placement? If so, the department should consider removing par. (d) from sub. (11) because sub. (11) addresses biological shore erosion control structures and not riprap. If the department does not remove it, this prohibition should be qualified with a phrase like “except as permitted by ch. 30, Stats.” because soil or similar fill may be placed below the ordinary high-water mark in some circumstances under the statutes. For instance, placement of fill up to a bulkhead line is allowed under s. 30.11 (4), Stats.

2. Form, Style and Placement in Administrative Code

a. Throughout the proposed rule, bear in mind that the title to a unit of a rule is not part of the substance of the rule itself and that a title should not be used to impart any legally essential information. [s. 1.10 (2) (a) 1., Manual.] In the following instances, a title mentions an item that is not mentioned in the substance of the rule itself:

- (1) Section NR 320.02 (3) (swim rafts).
- (2) Section NR 320.06 (4) (a) (lakes and flowages).
- (3) Section NR 320.06 (4) (b) (streams and rivers).
- (4) Section NR 320.06 (4) (e) (wharves exceeding sizing and slip thresholds established in s. NR 320.04 (8)).
- (5) Section NR 320.06 (7) (solid piers).

b. Throughout the proposed rule, the terms “stream” and “river” are used numerous times (as they also are in ch. 30, Stats.). They also are used in tandem in a few locations in the rule, such as “river or stream” or “streams and rivers”. If there is not a substantive difference between the two terms, the department could consider selecting one of the terms and applying it consistently, perhaps in conjunction with a new definition clarifying that one term includes the other.

c. Throughout the proposed rule, consider using the singular form of a word when possible. [s. 1.05 (c), Manual.] In addition to being the generally preferred drafting style, this approach will improve syntax and clarity. For instance, consider s. NR 320.04 (6) (d) 1.: “Fish

cribs shall have a minimum of 5 feet of water over the top of the structure.”. This sentence uses both singular and plural in reference to the same provision.

d. In the introductory clause, insert “; and to” after “329”.

e. In the rule analysis, in the discussion of related statutes or rules, remove references to chs. NR 301, 304, and 310. Those chapters do not exist.

f. In SECTION 1 of the proposed rule, in s. NR 320.02 (1) (Note), the third sentence reads as follows: “The permittee shall assume all responsibility and liability for any direct or indirect damage caused or resulting from the presence of the bridge or culvert.”. This sentence could be interpreted as substantive if it either assigns responsibility and liability or dictates who must assume responsibility and liability. Notes may not include substantive requirements, are not part of the substantive rule, and do not have the effect of law. [s. 1.12 (1) (c), Manual.] Changing “shall assume all” to something like “may incur” would resolve the issue.

g. In SECTION 1 of the proposed rule, s. NR 320.02 (5) states that this chapter applies to certain structures in navigable waterways “unless regulated under another chapter”. Is it accurate that the department intends for ch. NR 320 to not apply to any structure that is regulated under another chapter?

h. In SECTION 1 of the proposed rule, in s. NR 320.03, consider the following comments relating to definitions:

- (1) In sub. (3), “bank” is defined as a soil slope rising less than 10 feet above the bed of a waterway. Should this definition specify which part of the bed is used for this measurement (e.g., the bank toe, the deepest part of the bed, etc.)? Also, if the waterway is greater than 10 feet deep, or if the soil slope rises more than 10 feet above the bed, does that waterway not have banks? If so, consider the implications for other provisions that depend upon the existence of a bank, such as the definition of “channel” in sub. (14).
- (2) In sub. (8), consider the following comments relating to the definition of “biological shore erosion control structure:”
 - (a) Change “means a structure” to “means a shore erosion control structure”.
 - (b) The note describes what is considered a permissible element of a certain project, and thus could be interpreted as substantive. Notes may not include substantive requirements, are not part of the substantive rule, and do not have the effect of law. [s. 1.12 (1) (c), Manual.] In addition, the note refers to “temporary breakwaters”, which is defined in sub. (74) but is not otherwise used in ch. NR 320. Thus, it appears that this note is sole cause for the creation of the “temporary breakwater” definition in sub. (74). If the term “temporary breakwater” will be moved into a substantive part of the rule, in response to this comment, it is acceptable to retain the definition in sub. (74). But if the term “temporary breakwater” will be used only as a note, the definition in sub. (74) should be moved also into a note.
- (3) In sub. (9), consider the following comments relating to the definition of “bluff”:

- (a) A “bluff” is defined, in part, as generally “higher than 10 feet”. From where is “higher than 10 feet” measured (e.g., the bed of the waterway, the ordinary high-water mark, etc.)?
 - (b) A “bluff” is defined, in part, as “generally” higher than 10 feet and high enough to contain complex, multiple layers of soil and groundwater. Does the word “generally” temper both the 10-foot height requirement and the complex, multiple layers requirement? For instance, if an edge and face of land closest to a body of water was more than 10 feet high, but lacked complex, multiple layers of soil and groundwater, would it be a bluff? Or if it was more than 10 feet high and had complex, multiple layers of soil but had no groundwater, would it be a bluff? If not, what is it? Note that a “bank” can be no more than 10 feet above the bed of a waterway under sub. (3), so it could not be a bank.
- (4) In sub. (13), is there a reason the definition of “bridge” in s. 30.01 (1g), Stats., is not used?
 - (5) In sub. (14), the definition of “channel” uses the term “water course”. This term is not defined and does not appear elsewhere in ch. NR 320 (or in ch. 30, Stats.). The department should consider clarifying that term or using a different term, such as stream (or river; see comment 2. b., above).
 - (6) In sub. (22), a “dry fire hydrant” is defined as a structure or device “in and adjacent” to a navigable waterway. Can a hydrant be both in and adjacent to a waterway? If not, should “and” in that phrase be changed to “or”?
 - (7) In sub. (26), the definition of “fish habitat structure” includes a “boulder placement”. Should that be changed to “boulder cluster”, which is a defined term? If not, should “boulder placement” be defined?
 - (8) In sub. (32), change “has a score” to “is”. This will achieve uniform phrasing with subs. (39) and (42).
 - (9) In sub. (33), omit the definitions of “highway” and “public highway”. Neither term is used in ch. NR 320.
 - (10) In sub. (34) (b) 1., consider changing “river channel” to “channel”. The latter is a defined term; the former is not.
 - (11) In sub. (35), the definition of “inert materials” includes “stone” among the materials that slowly degrade. However, in sub. (54), the definition of “permanent breakwater” includes “stone” among a list of non-degradable materials. Will listing stone as both slowly degradable and non-degradable cause any unintended negative consequences?
 - (12) In sub. (36) (b), the definition of “intake or outfall structure” specifies that rock riprap toe protection may not exceed two cubic yards. Would this limitation fit better in s. 320.04 (15), which contains standards for intake or outfall structures? For instance, a new s. NR 320.04 (15) (h) could state something like “an intake or outfall structure consisting of rock riprap toe protection may not exceed 2 cubic

yards” or “the portion of an intake or outfall structure consisting of rock riprap toe protection may not exceed 2 cubic yards”.

- (13) In sub. (43), consider changing “stream channel” to “channel”. The latter is a defined term; the former is not.
- (14) In sub. (46), should the definition of “nesting structure” or “wildlife habitat structure” make clear that it does not include a “fish habitat structure”, or would that latter term naturally be excluded from this definition? In addition, change “nesting structure” in par. (b) to “‘nesting structure’ or ‘wildlife habitat structure’” to match the format of par. (a), unless there is a reason to limit par. (b) to only nesting structures.
- (15) In sub. (59), omit the definition of “professionally engineered”. This term is not used in ch. NR 320. Instead, the rule could create a definition of “engineer”. This new term could replace inconsistent references in the proposed rule to engineers, such as “professional engineer licensed or certified to practice in the State of Wisconsin under ch. 443, Stats.” and “licensed professional engineer”. See ss. NR 320.06 (7) (a) (intro.) and 320.07 (3) (b).
- (16) In sub. (61) (c), replace “subsection 11” and “subsection 55” with “sub. (11)” and “sub. (55)”, respectively.
- (17) In sub. (63), “riparian” is defined as a type of owner. Throughout the proposed rule, references to “riparian owner” and “riparian owners” are redundant. They should be changed to “riparian” and “riparians”, respectively.
- (18) In sub. (64), “riprap” is defined as rocks placed on the bed “and” bank of a navigable waterway. This suggests that each rock must simultaneously rest on both the bed and the bank in order to qualify as riprap. Is this intended? If not, changing “and” to “or” may resolve the issue. In addition, such a change would align this definition with statutory references to riprap. See, for example, s. 30.12 (3) (a) 3g. and 3r., Stats., (“place riprap on the bed or bank of a navigable water”).
- (19) In sub. (73), both “swimming raft” and “swim raft” are defined by reference to the statutory definition of “swimming raft”. In the proposed rule, the term “swim raft” is used several times, but “swimming raft” is not. Variants of the same term or alternative terms can be included in a definition, but avoid doing so unless there is a distinct reason to have a rule use different variants in different places; the preferred method is to choose one term and use it throughout the rule. [s. 1.07 (1) (c), Manual.] Accordingly, the department could consider defining and using only the statutory term “swimming raft” throughout the chapter instead of injecting the new, non-statutory term “swim raft”.
- (20) In sub. (75), “temporary in-stream crossing” is defined in such a way that it could include a “ford”, as defined in sub. (28). Is this intended? If not, the definition should be modified to exclude a ford.
 - i. In SECTION 1 of the proposed rule, in s. NR 320.035 (1) (a) (intro.) and (2), consider changing “In” to something like “For purposes of”.

j. In SECTION 1 of the proposed rule, in s. NR 320.035 (1) (a) 1., remove the errant comma.

k. In SECTION 1 of the proposed rule, in s. NR 320.04, the second sentence of sub. (1) is nearly identical to sub. (3) (a). Is there a reason to repeat this provision?

l. In SECTION 1 of the proposed rule, in s. NR 320.04 (3), the paragraph numbering does not include a par. (i). Is this intentional?

m. In SECTION 1 of the proposed rule, in s. NR 320.04 (6), only some paragraphs have titles. Titles are not required for paragraphs within subsections, but if titles are used for any paragraph, they should be utilized in a consistent manner. [s. 1.10 (2) (a) 2., Manual.] In addition, the paragraph numbering does not include a par. (e). Is this intentional?

n. In SECTION 1 of the proposed rule, in s. NR 320.04 (6), several paragraphs begin with the phrase “In addition to the standards under subs. (3) and (6),”. This should probably be changed to “In addition to the standards under pars. (a) to (c) and sub. (3),” for two reasons. First, these paragraphs are within sub. (6), so there is no need to refer to sub. (6) by number. Second, the department probably does not intend to subject these paragraphs to **all** of the provisions of sub. (6). For instance, par. (d) creates standards for fish cribs. Presumably, a fish crib should not be subject to the standards for a spawning reef under par. (f).

o. In SECTION 1 of the proposed rule, s. NR 320.04 (6) (j) 5. (Note) defines the term “bank toe”. Notes may not include substantive requirements, are not part of the substantive rule, and do not have the effect of law. [s. 1.12 (1) (c), Manual.] Accordingly, this definition should be placed with other definitions in s. NR 320.03.

p. In SECTION 1 of the proposed rule, s. NR 320.04 (8) (intro.) purports to establish standards for piers, wharves, and docks. Consider the following comments:

(1) The remainder of this subsection does not mention wharves or docks. Is it supposed to establish standard for those?

(2) The term “dock” is not defined or explained. Is it distinguishable from a pier?

q. In SECTION 1 of the proposed rule, the department should examine whether s. NR 320.04 (12) (k) (Note 2) contains substantive requirements. It could be interpreted as regulating which erosion control techniques may be used and their maximum widths. Notes may not include substantive requirements, are not part of the substantive rule, and do not have the effect of law. [s. 1.12 (1) (c), Manual.] In addition, there are two subunits labeled par. (k).

r. In SECTION 1 of the proposed rule, the department should examine whether s. NR 320.04 (14) (f) (Note) contains substantive requirements. It could be interpreted as regulating the purposes for which a piling may and may not be used. Notes may not include substantive requirements, are not part of the substantive rule, and do not have the effect of law. [s. 1.12 (1) (c), Manual.]

s. In SECTION 1 of the proposed rule, in s. NR 320.06 (5), par. (a) is the only subunit that follows sub. (5) (intro.). An introduction should generally not be followed by a single subunit. [s. 1.11 (4), Manual.] If possible, move the material from par. (a) (intro.) into sub. (5) (intro.) and renumber subs. 1. to 7. as pars. (a) to (h). Also, as currently written, there are two subunits labeled subd. 6.

t. In SECTION 1 of the proposed rule, in s. NR 320.09 (2), the titles of each of pars. (a) to (d) should be italicized. [s. 1.10 (2) (b) 4., Manual.]

u. In SECTION 1 of the proposed rule, in s. NR 320.13, convert each paragraph to a subsection.

v. The proposed rule modifies procedures and standards for the issuance of permits and the granting of exemptions. Although the rule summary indicates that the department has already modified its practices to comply with current law, it could consider adding an initial applicability clause to identify at what point the revised rule applies to activities and applications in the process. For example, the clause could state: “This rule first applies to a general permit issued, an individual permit applied for, a structure or deposit placed, or an activity undertaken, on the effective date of this rule.”. [s. 1.03 (3), Manual.]

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

a. In SECTION 1 of the proposed rule, in s. NR 320.01, consider the following comments:

- (1) In sub. (2), consider adding a reference to s. 30.12 (3) (b), Stats. That provision regulates the placement of a net pen, which arguably constitutes a type of fish habitat structure.
- (2) In sub. (3), consider removing references to ss. 30.03, 30.14, 30.15, and 227.11, Stats. The first three provisions address enforcement under ch. 30, Stats., generally. The fourth provision addresses agency rulemaking authority, generally. None of them are specific to the regulation of piers, boat shelters, swim rafts, and similar structures.
- (3) In sub. (5):
 - (a) Consider adding references to s. 30.12 (1j) and (1k), Stats. They each seem relevant.
 - (b) Consider inserting a word like “other” or “miscellaneous” before “structures” in order to distinguish the structures addressed in sub. (5) from the structures addressed in the preceding subsections.

b. In SECTION 1 of the proposed rule, in s. NR 320.02 (3), consider removing references to ss. 30.03, 30.14, 30.15, and 227.11, Stats. The first three provisions address enforcement under ch. 30, Stats., generally. The fourth provision addresses agency rulemaking authority, generally. None of them are specific to the regulation of piers, boat shelters, swim rafts, and similar structures.

c. In SECTION 1 of the proposed rule, in s. NR 320.02 (5), consider adding a reference to s. 30.20 (1g) (b) 1., Stats.

d. In SECTION 1 of the proposed rule, in s. NR 320.03 (24), replace the reference to s. NR 320.13 with a reference to s. NR 320.11. The former section relates to enforcement, not erosion intensity.

e. In SECTION 1 of the proposed rule, in s. NR 320.04 (6) (b), change “paragraph (d) to (L)” to “pars. (d) to (L)”.

f. In SECTION 1 of the proposed rule, ss. NR 320.11 (3) (a) 3. and 320.12 (2) (a) 3. each refer to department supplied forms. Include a note in each location on where an applicant can find the forms. [s. 1.12 (3), Manual.]

g. In SECTION 1 of the proposed rule, in s. NR 320.13 (b), should a reference to s. 30.123, Stats., be added to the third list of statutory references?

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

a. Throughout the proposed rule, in definitions and in substantive provisions, the phrase “including, but not limited to” should be avoided because it has the same meaning as “including”. [s. 1.07 (3) (b) 2., Manual.]

b. Throughout the proposed rule, capitalize “Great Lakes” consistently.

c. In SECTION 1 of the proposed rule, in s. NR 320.03 (1) (Note), insert a space between “at” and “https”.

d. In SECTION 1 of the proposed rule, in s. NR 320.03 (69) (b), change “include” to “includes”.

e. In SECTION 1 of the proposed rule, in s. NR 320.03 (79), change the semi-colon to a colon and change each comma to a semi-colon.

f. In SECTION 1 of the proposed rule, in s. NR 320.04 (3) (h) 2. (Note), add closed quotation marks at the end of the sentence.

g. In SECTION 1 of the proposed rule, in s. NR 320.04 (4) (d), the department should consider whether the term “footprint” is clear. For instance, is the footprint the total area of the parts of the structure that rest on the bed of the water body, or the total area of the parts that rise above the surface of the water body? In either case, does it include parts of the structure that rest upon or rise above the shore? (Bear in mind that certain recreational structures are allowed to exceed 25 square feet of surface area above the water, such as the loading platform of a pier that does not exceed 200 square feet under s. 30. 12 (1g) (f) 2., Stats.).

h. In SECTION 1 of the proposed rule, in s. NR 320.04 (5), should the defined term “temporary in-stream crossing” be used in lieu of the undefined term “temporary stream crossing” in each instance?

i. In SECTION 1 of the proposed rule, s. NR 320.04 (5) (j) states that temporary stream crossings shall be installed and removed a single time. The meaning of “a single time” is not clear. Does this mean that once a particular crossing has been installed and removed, that crossing may not be installed at that location again? Could a different party install a different crossing at that location in the future?

j. In SECTION 1 of the proposed rule, in s. NR 320.04 (6) (c) (Note), insert a space between “at” and “https”.

k. In SECTION 1 of the proposed rule, in s. NR 320.04 (6) (f) 1., consider inserting a phrase like “into which a spawning reef is placed” after “waterbody” for clarity.

l. In SECTION 1 of the proposed rule, s. NR 320.04 (6) (f) 4. provides that a spawning reef may not be placed more than 100 feet from shore. Does this mean that the entire reef must be

within 100 feet of the shore, or rather that the landward edge of the reef must be within 100 feet of the shore?

m. In SECTION 1 of the proposed rule, s. NR 320.04 (6) (g) 2. provides that “wing deflectors may only be placed in navigable streams that are less than 5 feet wide, measured from bank to bank”. Consider the following questions regarding this provision:

- (1) May a wing deflector be placed in a stream that is not navigable?
- (2) Must the stream be less than five feet wide along its entire length, or only at the location where the wing deflector is placed?
- (3) Is measuring from “bank to bank” different than measuring the “bankfull width”? If not, use the latter term, which is defined and which is used in similar situations, such as in s. NR 320.04 (6) (L) 1.

n. In SECTION 1 of the proposed rule, s. NR 320.04 (6) (h) 1. refers to trees having a “minimum diameter of 8 inches at the base”. Is this the same measurement as a “basal diameter of at least 8 inches,” which is required under s. NR 320.04 (6) (j) 7.? If so, the rule should be consistent.

o. In SECTION 1 of the proposed rule, s. NR 320.04 (6) (i) 1. refers to “green logs”. This term should be defined or explained. For instance, is this the same as “live or recently live trees harvested within a year” as used in s. NR 320.04 (6) (h) 1.?

p. In SECTION 1 of the proposed rule, in s. NR 320.04 (6) (k) 5. (intro.), remove either “at least” or “or greater” to eliminate redundancy.

q. In SECTION 1 of the proposed rule, s. NR 320.04 (6) (L) 1. provides that boulder placements may only be installed in “wadable streams at least 10 feet in width as measured at bankfull width”. Consider the following questions regarding this provision:

- (1) Should “wadable” be defined or explained? Does it account for seasonal fluctuations? Further, does the wadable requirement apply to the entire stream, or only the location where a root wad is placed?
- (2) Must the stream be at least 10 feet wide along its entire length, or only at the location where the root wad is placed?

r. In SECTION 1 of the proposed rule, s. NR 320.04 (7) (c) requires that a nesting structure consist of unpainted wood or of materials that are non-gloss earth tone colors. It is not clear whether this would prohibit a nesting structure consisting of wood painted a non-gloss earth tone color.

s. In SECTION 1 of the proposed rule, in s. NR 320.04 (9) (j), consider changing “rooves” to the more standard “roofs”.

t. In SECTION 1 of the proposed rule, in the last sentence of s. NR 320.04 (9) (m), should “this subsection” be changed to “this paragraph”? If not, consider moving the final sentence of par. (m) into its own paragraph of sub. (9) so that it is more easily discovered.

u. In SECTION 1 of the proposed rule, s. NR 320.04 (10) (a) 2. begins by stating that “multiple culvert designs are not eligible under this exemption”. This is not clear. Does this mean

that the proponent of a culvert replacement project may not submit multiple, alternative designs for a given project?

v. In SECTION 1 of the proposed rule, s. NR 320.04 (10) (a) 7. states that “excepting emergencies, construction shall not take place during periods of high water to avoid flooding the construction site”. First, should “high water” be defined or otherwise explained? Would it be considered “high water” anytime that construction would cause flooding of the construction site? Conversely, would construction during low or normal water be allowed even if it caused flooding of the construction site? Second, is it possible for the proposed rule to establish parameters that will guide the department in deciding whether to issue an emergency exception?

w. In SECTION 1 of the proposed rule, s. NR 320.04 (10) (b) 2. states that “operating construction equipment on the bed of a stream or below the ordinary high water mark is prohibited”. This is not clear. Does this mean that the equipment may not sit in these locations while working, or that the equipment may not operate in these locations even if it is sitting upland?

x. In SECTION 1 of the proposed rule, in s. NR 320.05 (3) (intro.), change “is not materially” to “are not materially”.

y. In SECTION 1 of the proposed rule, in s. NR 320.06 (4) (e) 7., “riparian” is a typographical error. Should this be changed to “riparians”?

z. In SECTION 1 of the proposed rule, in s. NR 320.06 (4) (f) 1., replace the colon after “permit” with a comma.

aa. In SECTION 1 of the proposed rule, in s. NR 320.06 (7) (b) 3., insert a space between “10” and “feet”.

bb. In SECTION 1 of the proposed rule, in s. NR 320.06 (7) (b) 7., the meaning of “or other” is not clear. Should this be changed to “or other similar structure”?

cc. In SECTION 1 of the proposed rule, the second sentence of s. NR 320.07 (2) (a) states that “owners of riparian upland adjacent to, or flowed lands underlying, the structures shall be co-applicants if the public entity is not the riparian owner”. This should be modified for clarity in two respects. First, the meaning of “the structures” is not clear. Does that mean “the proposed breakwaters”? Second, it is not clear whether an owner may refuse to be a co-applicant with a public entity. If so, the second sentence could be changed to something like “If the public entity is not the riparian owner, the public entity may submit a permit application only if all owners of riparian upland adjacent to, and flowed lands underlying, the proposed breakwater consent to be co-applicants.”.

dd. In SECTION 1 of the proposed rule, in s. NR 320.07 (3) (a), the department may issue a permit if a “breakwater is determined by the department to be the best management practice to control shore erosion and preserve or restore aquatic habitat”. This raises two questions. First, must a breakwater control shore erosion **and** preserve or restore aquatic habitat? In other words, must the department reject a permit if a breakwater only controls shore erosion or only preserves or restores aquatic habitat? (Note that par. (c) refers to “the **purpose** specified in par. (a)”, suggesting that a permit must indeed achieve the singular purpose of both erosion control and habitat preservation or restoration.) Second, is it possible for the proposed rule to establish parameters to guide the department in its evaluation of what qualifies as the “best” management practice?

ee. In SECTION 1 of the proposed rule, in s. NR 320.07 (4) (intro.), the reference to “this subchapter” is erroneous. There are no subchapters in ch. NR 320.

ff. In SECTION 1 of the proposed rule, in s. NR 320.07 (4) (a) (intro.), remove the period after “breakwater.”.

gg. In SECTION 1 of the proposed rule, in s. NR 320.08 (3), the department should consider how pars. (a) and (b) will interact under various scenarios, given that all paragraphs must apply in order to satisfy sub. (3) (intro.). Under par. (a), the waterway must have little or no navigation use. Under par. (b), the waterway may not have navigational use, except by lightweight craft. If a waterway had a lot of navigation, but only by lightweight craft, presumably par. (b) would apply. But would that be considered to be little navigation use under par. (a)? At a minimum, the department should define or explain the terms “lightweight craft” and “little”.

hh. In SECTION 1 of the proposed rule, in s. NR 320.09 (1), should “method outlined in this subsection” be changed to “method outlined in this section”? Although it is not clear whether sub. (1) outlines any methods, sub. (2) outlines multiple methods. Also, the reference in sub. (2) (intro.) to “the method of apportionment under sub. (1)” does not make sense for the same reason.

ii. In SECTION 1 of the proposed rule, in s. NR 320.10 (1) (intro.), replace “crossing,” with “crossing;” in both places it appears.

jj. In SECTION 1 of the proposed rule, s. NR 320.10 (1) (intro.) states that “two measurements shall be taken, upstream and downstream of the crossing location”. Does this mean that a total of two measurements must be taken, one upstream and one downstream? If so, adding a phrase like “one each” before “upstream and downstream” would add clarity.

kk. In SECTION 1 of the proposed rule, s. NR 320.11 (2) (intro.) states that “when an applicant or the department believes that, as a result of site conditions, storm-wave height as calculated under sub. (1) may inaccurately predict the degree of erosion, the erosion intensity score may be calculated to determine erosion”. Does this mean that a belief by either the applicant or the department is sufficient to trigger the use of the erosion intensity score in lieu of the storm-wave height? What if the applicant believes it, but the department does not? Can the department still insist on using the storm-wave height? This should be clarified.

ll. In SECTION 1 of the proposed rule, in s. NR 320.11 (2) (Table 1), the row for “Aquatic Vegetation” refers to both “submerged vegetation” and “submergent vegetation”. Is this intentional? If so, the difference between the two terms should be explained. In addition, the second-to-last column of this row refers to a “lack” of vegetation, but footnote 3 refers to “absent” vegetation. Are these terms synonymous? If so, they should be harmonized.

mm. In SECTION 1 of the proposed rule, in s. NR 320.11 (2) (Table 1) (footnote 2), should “from the bank to the top of the bank lip” be changed to “from the bank toe to the top of the bank lip”? If not, specify where upon the bank this measurement should be taken.

nn. In SECTION 1 of the proposed rule, s. NR 320.11 (3) (a) 4., either remove the word “shall” or add missing words to correct the syntax.

oo. In SECTION 1 of the proposed rule, in s. NR 320.12 (intro.) (title), do not capitalize “assessment” or “rivers”.

pp. In SECTION 1 of the proposed rule, in s. NR 320.12 (1) (Table 1) (footnote 1), it is not necessary to recite the meaning of “ordinary high water mark”. This term is defined in s. NR 320.03 (49).

qq. In SECTION 1 of the proposed rule, in s. NR 320.12 (1) (Table 1), in the sixth row, avoid the use of the slashed alternative “stratification/bank layering” if possible. [s. 1.08 (1) (d), Manual.] If it is retained, harmonize this usage with the slashed alternative “bank layering/stratification” in footnote 3.

rr. In SECTION 1 of the proposed rule, in s. NR 320.12 (1) (Table 1), in the eighth row, “thalweg location” is described as “deepest part of the channel **and** the location of stream current”. However, footnote 6 describes “thalweg” as the “deepest part of the channel **or** the location of **fastest** current”. These two descriptions of thalweg should be harmonized.

ss. In SECTION 1 of the proposed rule, in s. NR 320.12 (1) (Table 1), in the eighth row, remove the hyphen from the word “opposite” in the second column.

tt. In SECTION 1 of the proposed rule, in s. NR 320.12 (1) (Table 1) (footnote 3), insert a space between “website” and “https”.