

Report From Agency

REPORT TO LEGISLATURE

NR 320, 323, 328, 329, 341, 343 and 345, Wis. Adm. Code
General permit criteria requiring decontamination of equipment
for invasive species and viruses

Board Order No. WT-33-07
Clearinghouse Rule No. 07-094

Basis and Purpose of the Proposed Rule

Considering the existing, new and yet to be determined threats of invasive species and viruses, the Department proposes to revise chs. NR 320, 323, 328, 329, 341, 343 and 345, Wis. Adm. Code, to create a new exemption and general permit standard to ensure that these invaders are not moving from one waterbody to another through equipment used in projects authorized by waterway (ch. 30.) permits.

The proposed rule establishes exemption and general permit standards for activities that would otherwise require an individual permit condition to which the same condition would apply. These new standards would ensure that waterfront property owners exercising exemptions or general permits will take the necessary precautions to prevent the spread of invasive species and viruses by decontaminating their equipment used during construction activities in and near waterways.

There are currently no requirements in the rules setting eligibility standards for waterway project for decontamination of equipment to remove invasive species and viruses. By promulgating new exemption and general permit standards for equipment decontamination, the Department will be able to help ensure that the spread of invasive species and viruses are controlled to the fullest possible extent and that the resulting economic and ecological impacts of these invasive species and viruses to the resource are avoided. The new exemption and general permit standard proposed requires any person conducting an exempt or general permit activity to either inspect and remove aquatic plants, animals and mud from equipment; drain all water from equipment, including but not limited to tracked vehicles, barges, boats, silt or turbidity curtain, hoses, sheet pile and pumps; and dispose of aquatic plants and animals in the trash and never release or transfer aquatic plants, animals or water from one waterbody to another or to wash equipment with hot (>212°F – steam clean) or high pressure water or allow equipment to dry thoroughly for 5 days or rinse with a chlorine solution or follow the Department's most recent decontamination protocols.

Summary of Public Comments

The majority of the public comments related to the requirement that hot or high pressure water be used to clean equipment for all construction projects. A completed summary of all comments is attached.

Modifications Made

The rule has been restructured so that the requirement for hot or high pressure water to be used to clean equipment for all construction projects now includes 4 options, only one of which is required. Having options will allow the operator to choose the one that best fits the situation or location that they are working in. The has also been modified to require the disinfection before and after use OR prior to use within another waterbody. This wording modification allows equipment to be transported to an easier to clean location or a safe place to begin the drying period or decontamination methods, while still ensuring that invasive species and viruses are not transported from one waterbody to another.

Appearances at the Public Hearing

November 12, 2007 – Green Bay – no appearances

November 16, 2007 – Madison

In support – none

In opposition – none

As interest may appear:

Joan Kozisek, American Transmission Company, 2 Fen Oak Court, Madison, WI 53718

John Garvin, American Transmission Company, 2 Fen Oak Court, Madison, WI 53718

Changes to Rule Analysis and Fiscal Estimate

The analysis has been modified to reflect the changes to the rule. The fiscal estimate has been modified to give clearer direction on the anticipated public and private sector costs.

Response to Legislative Council Rules Clearinghouse Report

The recommendations were accepted, except that the language proposed in Comment 5.b. has been modified to reflect the current drafting style that rules cannot go below the subdivision paragraph level.

Final Regulatory Flexibility Analysis

A. Describe the compliance and/or reporting requirements imposed on small business and whether they can be made less stringent.

State statute requires that any person engaged in activities in navigable waters under NR 320, NR 323, NR 328, NR 329, NR 341, NR 343, and NR 345 either qualify for an exemption or obtain a general or individual permit. Small businesses would need to do several activities to comply: (1) make a self-determination of exemption using web-based tools provided by the department or describe their activity on an exemption determination request form; (2) complete a general permit application; (3) complete an individual permit application. Permit applications are based on the business' construction plans and site features.

B. Describe the schedules or deadlines for compliance or reporting and whether these schedules/deadlines can be made less stringent for small business.

Any person engaged in activities in navigable waters under NR 320, NR 323, NR 328, NR 329, NR 341, NR 343, and NR 345 will either qualify for an exemption or need to obtain a general or individual permit. If a business seeks an exemption determination, the request must be made 20 days before the planned start date. Applications for general permits must be made 35 days prior to planned start date. For an individual permit, a public notice and 30-day comment period is required. Interested parties may request a public informational hearing, which could extend the permit review period another 45 days. Permit applicants are generally asked to return requested information within 30 days of receiving the department's request. Once a permit is received, a permittee must notify the department in advance of starting construction, and photographs of finished projects are required for some activities. These schedules and deadlines are very basic for all applicants. A separate schedule or requirements for small businesses would likely make the system more confusing for small businesses, rather than simplifying. With less information the department may not be able to make determinations, resulting in unanticipated follow-up and potential delays.

C. Can compliance or reporting requirements for small business be consolidated or simplified?

The compliance and reporting requirements are very basic for all applicants. Separate compliance and reporting requirements for small businesses would likely make the system more confusing for small

businesses, rather than simplifying. With less information the department may not be able to make determinations, resulting in unanticipated follow-up and potential delays.

D. Can performance standards be established for small businesses in lieu of design or operational standards?

Small businesses can design to meet general permit standards, or the individual permit process allows more latitude.

E. Can small businesses be exempted from any or all requirements of the rule?

Other than the exemptions provided for all projects, small businesses cannot be exempted. A small business activity in a lake or stream has the same impact as the same activity conducted by a larger business or an individual. To preserve habitat, natural scenic beauty and water quality in our state's waterways, anyone conducting a project in public waters must meet the performance standards.

F. Initial Regulatory Flexibility Analysis

1. Describe the type of small business that will be affected by the rule.

Small businesses affected by this rule will include contractors, developers, consultants, builders public utility companies, and municipalities who provide plans, design or engage in projects along public navigable waterways which may include any of the activities listed in NR 320, NR 323, NR 328, NR 329, NR 341, NR 343, and NR 345

2. Briefly explain reporting, bookkeeping and other procedures required for compliance with the rule.

The person responsible for a project in or along a lake or stream must develop plans and occasionally conduct some analyses, submit an application, and observe the site and equipment during construction. For some activities, photographs of the completed project are required.

3. Describe the type of professional skills necessary for compliance with the rule.

Map reading, basic computer use, mathematics (to determine chemical concentrations), etc. are the skills needed to comply with these rules. While it may be helpful or efficient, hiring a consulting firm is not necessary to comply with these requirements. Many projects are planned and conducted by individuals with no professional background. If the site has particularly challenging features, then professional ecological or engineering expertise may be helpful.

RESPONSE TO COMMENTS

NR 320, NR 323, NR 328, NR 329, NR 341, NR 343, and NR 345- creation of new exemption and general permit standards for the de-contamination of all equipment prior to use and after use for controlling the spread of invasive species and viruses.

Comments and Questions Regarding Rule

COMMENT 1 - "Item "d" as currently proposed is an unreasonable requirement for all construction projects...Requiring hot or high pressure water to clean equipment in remote locations would be difficult and costly if required prior to the equipment being moved from each stream.

RESPONSE 1 – We have restructured the rule so item "d" lists 4 options, only 1 of which are required. Having options will allow the operator to choose the one that best fits the situation or location that they are working in. We have also rule modified the rule language to require the disinfection before and after use OR prior to use within another waterbody. This wording modification allows equipment to be transported to an easier to clean location or a safe place to begin the drying period or decontamination methods, while still ensuring that invasive species and viruses are not transported from one waterbody to another.

COMMENT 2- We recommend that item "d" and the requirement to disinfect equipment with hot or high pressure water be moved as a sub-item under item "e". This change would specify that the more stringent requirements for disinfection would only be required when there is a known infestation in the water affected by a project.

RESPONSE 2- We have decided to remove item "e" and have restructured item "d" to lists 4 options, only 1 of which are required, as a result, this change alleviates the confusion of having disinfection requirements that are different for different water bodies.

COMMENT3 - We request that the DNR consider an additional cleaning option that will allow the use of a disinfecting solution instead of hot or pressurized water or a five day drying period.

RESPONSE 3- We agree and have added a disinfecting solution cleaning option as item 3 under the restructured item "d".

COMMENT 4- We recommend that the language:

"The following steps shall be taken every time you move your equipment to avoid transporting invasive species and viruses"

be changed to:

*"The following steps shall be taken **before the equipment is used within another waterbody** to avoid transporting invasive species and viruses"*

We believe that this wording accomplishes the same goals, however allows a contractor to remove their equipment from a customer's residence to their own storage yard before the disinfecting or drying period begins.

RESPONSE 4

The rule language was modified to require the disinfection before and after use OR prior to use within another waterbody. This wording modification allows equipment can be transported to an easier to clean location or a safe place to begin the drying period, while still ensuring that invasive species and viruses are not transported from one waterbody to another.

COMMENT 5- The scope of the proposed rule is not clear... We recommend that the lack of clarity could be resolved by separating 1) routine actions that are to be preformed as preventive measures when moving boats and other equipment from one waterway to another, and 2) more extensive actions requiring specialized equipment or techniques to be preformed based on site specific conditions, including extent and type of invasive species infestation, magnitude of project waterway disturbance, etc.

RESPONSE 5- We have restructured the rule so items a-c outline the routine actions and item “d” lists 4 more extensive options, only 1 of which are required. Having options will allow the operator to choose the one that best fits the situation or location that they are working in. In addition, this change alleviates the confusion of having disinfection requirements that are different for different water bodies.

COMMENT 6- If we are applying for a general permit (for which these new rules will apply) do the proposed decontamination standards apply only to the specific location for which the exemption or general permit applies or the whole project? Many of our projects are linear in nature, and may involve multiple wetlands and waterways, not all of which require exemptions or general permits under Chapter 30.

RESPONSE 6- The decontamination procedures proposed for general permits issued under NR 310 only apply to that activity for which the general permit was issued under. For aspects of utility projects that do not require exemptions or general permits under Chapter 30, the Department’s Office of Energy expects that utilities will be implementing their own best construction practices for invasive species for those aspects of the project.

COMMENT 7- If we are applying for a utility permit under s. 30.025 do the proposed decontamination standards apply to the activities for which the utility permit was issued for?

RESPONSE 7- Since the proposed rule changes affect only general permit and exemption standards, the proposed decontamination standards do not apply to utility permits issued under s. 30.025. However, since utility permits are similar to individual permits that the Department issues, the utility permit itself may have conditions that require invasive species and viruses decontamination plan that is developed for that particular project.

COMMENT 8- Many construction and maintenance locations are remote and are not easily accessed from roads... the transportation and use of equipment to provide decontamination spraying could cause additional impacts to sensitive environments, such as greater traffic impacts... offsite decontamination may require us to containerize our decontamination fluids to ensure it does not reach other wetlands or waterways or cause hazardous or messy situations for landowners.

RESPONSE 8- We have restructured the rule so item “d” lists 4 options, only 1 of which are required. Having options will allow the operator to choose the one that best fits the situation or location that they are working in. We have also rule modified the rule language to require the disinfection before and after use OR prior to use within another waterbody. This wording modification allows equipment can be transported to an easier to clean location or a safe place to begin the drying period or decontamination methods instead of bringing additional equipment onsite, while still ensuring that invasive species and viruses are not transported from one waterbody to another. When decontaminating offsite, the options outlined in the proposed rule require low concentrations of chemicals or no chemicals at all. Therefore there is no need to containerize the decontamination wash off fluid. In addition, once the fluids reach the ground the concentrations are low enough that any organic material present will render the chemical inert.

COMMENT 9- Due to the linear nature of our projects no equipment is dedicated to any one site but rather ritually moves from one location to the next and therefore would trigger the decontamination requirements. Utilizing a five-day standby period to allow the equipment to dry may be costly and incur unacceptable delays. Currently, equipment resources are not available to support drying of equipment for five consecutive days.

RESPONSE 9- We have restructured the rule so item “d” lists 4 options, only 1 of which are required. Having options will allow the operator to choose the one that best fits the situation or location that they are working in

COMMENT 10- Requiring equipment to be washed with hot or high pressure water may lead to safety hazards and damaged equipment during freezing conditions (icy ground, frozen equipment).

RESPONSE 10- We have modified the language so that washing with water is not a requirement, but an option. There are now other options that are available that will not contribute to safety concerns (icy ground) or damaged equipment during freezing conditions. For example, one option the proposed rule identifies is the use of steam to clean equipment. Steam cleaning will not freeze equipment and contribute to icy ground (no water to drip off and freeze) and actually has been used in some cases to de-ice equipment. Other options involve the use of chlorine or other chemical solutions where the freezing point is below the freezing point of water and in most cases are double digits below zero degrees Fahrenheit.

COMMENT 11- Work during frozen conditions that does not disturb the soils or cause the liquefaction of frozen waters should be considered an appropriate method of reducing or eliminating the spread of invasive species and viruses.

RESPONSE 11-Doing construction activities during frozen conditions alone will not and cannot guarantee stopping the spread of invasive species and viruses for a variety of reasons. It is hard to predict if frozen soils will not be disturbed since the depth of soil freezing during the winter depends on a variety of factors. These factors include how cold the air temperature gets, how long the air temperature stays below freezing, how clear the sky is (clear skies allow the ground to cool more rapidly as energy is lost from the ground radiatively), and whether there is snow cover (and how deep it is) or not since long cold spells with no snow cover can cause the ground to freeze to a greater depth. So at any given time the ground could be frozen anywhere from 3 feet deep to only a few inches. This means that tracked vehicles and other equipment that disturb the soil as little as a few inches are at risk of spreading invasive species even during the winter months. In addition, most invasive viruses can persist in a frozen state and do not die in frozen conditions. Additionally many types of invasive plants have seeds that withstand freezing, only to become viable again when the weather gets warmer, and some invasive plants are related to evergreens and do not have a winter dormancy. In order to ensure that invasive species and viruses are not being spread from one place to another, disinfection is needed.

COMMENT 12- Decontamination procedures should apply only to equipment or parts of equipment that come into contact with wetlands or waterways. Equipment entering a wetland or waterway that does not touch the wetland or waterway does not present a risk of spreading invasive species. A barrier method that provides separation from the impacted waters or soils so that equipment does not contact them should be considered an appropriate protection so long as the barrier is either disposed of or decontaminated according to the procedures prior to re-use in another wetland or waterway.

RESPONSE 12- Unfortunately all it takes is one micro-sized spore, one DNA-sized virus, or one microscopic invertebrate, that can persist in a drop of water to spread an invasive species. Even though to the equipment operator it may appear that only one part of the equipment is in contact with the waterway, here can be no guarantee that other parts of the equipment have not been contaminated. Since these decontamination standards are part of general permits that are for a variety of activities to only way to have a consistent way of ensuring that invasive species and viruses are not being spread from one place to another, disinfection is needed.

Comments on Rule Notes

COMMENT 1- The Note after sub (e) of the proposed rule does not provide adequate direction for a reader to find the Disinfection Protocols or the list of VHS Affected Waterways on the DNR website. The Note should either provide a direct link to "Disinfection Protocols," or send the reader to a VHS-specific page where "Disinfection Protocols" and a list of "VHS Affected Waterways" can be easily found.

RESPONSE 1- The note does not provide the direct link to the disinfection protocols or the affected waterway list documents, but rather the web page that the disinfection protocols can be found. Since the web is dynamic and web addresses change frequently, to ensure that the reader will not be faced with a broken link and not know where to find the necessary information, we feel that a better long term solution

is to provide a way for the reader to find the web page that the protocols and affected wasters list can be found. In addition we have changed the language of the note to reflect the location on the DNR website that deals with all invasive species and viruses and not just VHSv therefore we can ensure that the information will always be easy to find, especially if VHSv mutates and is no longer viable or affects fauna populations.

COMMENT 2- We also recommend re-naming the disinfection protocol document to clarify that the reader has in fact found "Invasive / VHS Disinfection Protocols." The current title, "Boat and Equipment Disinfection Protocol – 2007" is unclear and does not directly relate to invasive species and VHS decontamination.

RESPONSE 2- We have renamed the disinfection protocols document that is currently online to be titled: "*Equipment Disinfection Protocols: Invasive Species and Viruses- 2007*". We feel that this title adequately describes what the document contents are.

Comments on Fiscal Note and Scope of Rule

COMMENT 1- The Green Sheet summary explains that the new standards will ensure that waterfront property owners take the proper precautions to avoid spreading invasive species through construction projects and other water uses... If, as we believe to be the case, the proposed rule revisions are intended to impact a much larger set of actors and a broader array of activities on navigable waterways, the Summary is misleading and should be revised to make that clear... A more in-depth analysis should be conducted of anticipated public and private sector costs that may be incurred because of the proposed rule revisions.

RESPONSE 1- The Green Sheet summary has been modified to reflect all types of projects and affected parties and the fiscal analysis summary on the board order and the fiscal estimate worksheet analysis summary have been modified to give clearer direction on the anticipated public and private sector costs.

Comments Regarding Legal Authority to Incorporate Invasive Species Requirements into Chapter 30 Administrative Rules

COMMENT #1- We question whether DNR has the requisite legal authority to incorporate these invasive species and virus requirements into the Chapter 30 administrative rule...The cited provisions of Chapter 30 only provide authority to regulate the specified activities and make no mention of and provide no authority for the incorporation of regulatory controls over invasive species or viruses into those rules...There is no language in Wis. Stat. Ch. 30 that authorizes the Department to adopt rules to address invasive species or viruses with respect to Chapter 30-related activities...We question the Department's authority to proceed with the proposed rule revisions.

RESPONSE #1- The cited provisions of Chapter 30 in Board Order WT-33-07 include the authorities for exemptions and general permits for the various activities covered by the rule changes. The board order also cites s. 30.206. Wis. Stats. 30.206(1)(c) states that:

"To ensure that the cumulative adverse environmental impact of the activities authorized by a general permit is insignificant and that the issuance of the general permit will not injure public rights or interests, cause environmental pollution, as defined in s. 299.01 (4), or result in material injury to the rights of any riparian owner, the department may impose any of the following conditions on the permit:

1. Construction and design requirements that are consistent with the purpose of the activity authorized under the permit.

This portion of the statute gives the department the authority to create construction requirements to ensure that the environmental impact of activities does not "injure public rights or interests." The terms "public rights and interests" have long been interpreted to include the protection of flora and fauna and the conditions necessary for their continued survival. The proposed rule changes are construction requirements that address the decontamination of construction equipment used for the project to prevent the spread of invasive species and viruses which would be detrimental to existing flora and fauna and will

injure public rights. It has been well documented that aquatic invasive species and viruses that have been introduced into Wisconsin's public waterways and threaten the ecological integrity and economic future of our water resources. The impacts from these invaders to the ecosystem and economy are real. Invasive mussel species clog water intake pipes costing millions of dollars annually in maintenance costs. Aquatic invasive species compete with native species for food and habitat. Aquatic invasive viruses can damage crucial fauna populations, including sport fishing populations. Because there are no natural predators to keep them in check, they have a distinct advantage over native species. In many cases, their population explodes after just a few short years and they can dramatically alter the ecosystem. Once in the system, it is almost impossible to eliminate these invaders. The best strategy is to prevent the introduction of new invasive species to Wisconsin and at the same time prevent the spread of invasive species and viruses that are already in the state.