

Report From Agency

REPORT TO LEGISLATURE

NR 345, Wis. Adm. Code
General permits for dredging in Great Lakes navigable waterways

Board Order No. WT-41-07
Clearinghouse Rule No. 07-112

Basis and Purpose of the Proposed Rule

Under the direction of ss. 30.20(1t)(b) and 30.206, Stats., the Department is proposing rule that would create two new general permits for dredging. The two general permits include authorization for the operation of a motor vehicle on the beds of “outlying waters” to remove algae, mussels, dead fish and similar large public nuisance deposits; and for the removal and control of emergency non-native and invasive plants on exposed lake bed.

Waterfront property owners desire to remove unwanted public nuisance deposits and invasive plants in an efficient manner. Currently, lakefront property owners are only allowed to remove public nuisance deposits by hand as existing statutes preclude them from using mechanized removal methods without a permit. Similarly, lakefront owners are only allowed to remove invasive plants below the ordinary high water mark by hand cutting using non-vehicle means (e.g., weed whacker or non-riding lawn mower). As the volume of public nuisance deposits and invasive plants vegetating exposed lakebed increases, property owners can’t realistically remove these unwanted deposits or invasive plants by hand. For nuisance deposits, the key to successful clean-up is vigilance in removing the algal mats as soon as they wash ashore.

The operation of motor vehicles and removal or disturbance of materials on the beds of navigable waterways (also known as dredging) is regulated by ch. 30, Stats., and ch. NR 345, Wis. Adm. Code. The statutes and current rule allows lakefront property owners to apply for an individual permit to use mechanized methods to remove nuisance deposits, or other invasive or unwanted vegetation. However, individual permits require a \$500 application fee and a 30-day public comment period before the permit can be issued.

Considering the changing lakeshore due to decreased water levels and the abundance of invasive species, the Department proposed to revise ch. NR 345 to create two new general permits. The general permits would permit lakefront property owners on the beds of “outlying” navigable waters to remove public nuisance deposits and invasive vegetation on exposed lakebed more efficiently while complying with general permit conditions created to protect the public interest in the lakebed. The general permit has a \$50 application fee and is processed in 30 days.

Summary of Public Comments

Public comments were made regarding the meaning of motorized vehicle and clarification was asked for regarding the application of other provisions. A detailed response to comments is attached.

Modifications Made

Section NR 345.04(2)(c)9. was changed to be consistent with the format in other rules. Section NR 345.04(2)(im) was changed to add 2 standards – that the project area to which this general permit applies shall be under the same ownership as the applicant and that equipment used shall be low ground pressure equipment.

Appearances at the Public Hearing

January 15, 2008 – Waukesha – no appearances

January 16, 2008 – Green Bay

In support – none

In opposition – none

As interest may appear:

Diane Baumgart, The Country Today, 144 Arthur Street, Kaukauna, WI 54130

January 17, 2008 – Video conference in Ashland, Marinette and Superior

In support – none

In opposition – none

As interest may appear:

Bryan Peth, N1870 Shore Drive, Marinette, WI 54143

Amy Adrihan, Wis. Dept. of Transportation, 1701 North 4th Street, Superior, WI 54880

Marc C. Rogaczewski, Town & Country Tree Service, 1826 Lewis Street, Marinette, WI 54143

Ed Sedor, Chair, Town of Peshtigo, W1360 Autumn Wood, Marinette, WI 54143

Chuck Boyle, P.O. Box 233, Marinette, WI 54143

Bob Fraik, N2467 Shore Drive, Marinette, WI 54143

Changes to Rule Analysis and Fiscal Estimate

The rule analysis was amended to reflect the modifications made to the rule.

For the fiscal estimate, the increased revenue to the State increased from \$1,900 to \$3,300 based on an assumption of more general permits being requested.

Response to Legislative Council Rules Clearinghouse Report

The recommendations were accepted.

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 operating motor vehicles and/or removing or disturbing materials on the beds of public navigable waters 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 operating motor vehicles and/or removing or disturbing materials on the beds of public navigable waters 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 the 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.

RESPONSE TO COMMENTS

Comments Regarding Rule

Comment #1: Of concern is the use of the term "motorized vehicle" in connection with the general permit. We feel that this further confuses what is or is not allowed on the lakebed as we already have problems with pickup trucks, ATCS, snowmobiles and dirt bikes traversing the exposed lakebed.

Response #1: State law prohibits the operation a motor vehicle in or on any navigable water or the exposed bed of navigable waters. In order to be consistent with the language found in state statutes (e.g., s. 30.29, Wis Stats.) we have decided to keep the current term "motor vehicle" since it is already defined, and that definition includes the types of vehicles the rule was intended to include.

Comment #2: The rule should address standards for the removal of the cut Phragmites clippings.

Response #2: In order to be eligible for a general permit, projects must meet all of the general permit standards in addition to the specific activity standards. The current general permit standards already include the requirements for disposal of dredged material (any material removed from the lakebed). We feel that these requirements are sufficient and therefore did not add any additional requirements to the specific activity standards pertaining to aquatic plant removal.

Comment #3. The rule should outline specific standards for what constitutes "low ground pressure equipment" and "rutting"

Response #3. We have chosen to give examples of what low ground pressure equipment is (e.g., wide-tire vehicles, and tracked equipment), instead of listing specific standards. We determined that it is not feasible to come up with a list, since the standards for low ground pressure equipment are variable and new innovations and information on how to minimize impacts of ground disturbance caused by tires are constantly being discovered. The most important thing we feel is to minimize impact, so we opted to define a rutting standard, so regardless of what low ground pressure equipment an operator uses, the level of ground disturbance that is acceptable is defined.

Questions About Rule

Question #1. Please explain what types of vehicles are included in "motor vehicles".

Answer #1. The term "motor vehicle" is defined in s. 30.29, Stats. However, the rule revision currently proposes a standard that minimizes rutting and therefore restricts motor vehicles to low ground pressure equipment, such as a wide-tire vehicle or tracked equipment.

Question #2. Are there any testing requirements for the removed material?

Answer #2. The proposed rule changes only change items 7 and 9 under SECTION 5. NR 345.04(2)(c). The testing requirements are not being changed and therefore are not reflected in the proposal. If you are interested the testing requirements for NR 345 you can find them under NR 345.04(2)(c) item #1 < <http://www.legis.state.wi.us/rsb/code/nr/nr345.pdf> >

Question #3. Can any bottom material be removed beside the algae, zebra mussels, invasive plants, dead fish and other public nuisances? For example, silt, sand, clay, other organics?

Answer #3. No, in the proposed rule definitions there is a note for the definition of "plant and animal nuisance deposit" that says "Plant and animal nuisance deposit" does not include the natural deposition of the native lakebed material like sand, cobble, silt, detritus, and other organic material.

Question #4. Is there a limit of cubic yards that can be removed?

Answer #4. Yes, for the general permit that deals with the nuisance deposit removal, the removal is limited to "less than 3000 cubic yards".

Question #5. I assume all removed material still must go to "upland disposal".

Answer #5. Yes, since we do not propose to change this, it is not seen in the rule proposal. You can locate this requirement for general permits in the existing rule under NR 345.04(2)(c) item #3 <
<http://www.legis.state.wi.us/rsb/code/nr/nr345.pdf> >