

ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD
AMENDING AND CREATING RULES

The Wisconsin Natural Resources Board proposes an order to amend NR 345.04(2)(a)3., (b), (c)(intro.) and 9. and (j)1.; and to create NR 345.03(10g), (10r), (12m) and (13m), 345.04(2)(a)2m.,(im) and (ir) relating to general permits for dredging in Great Lakes navigable waterways.

WT-41-07

Summary Prepared by the Department of Natural Resources

Statutory Authority: ss. 30.20(1), (1t) and (2), 30.206 and 227.11(2), Stats.

Statutes Interpreted: ss. 30.20(1), (1g), (1m), (1t) and (2) and 30.206, Stats. and Section 44.40, Stats.

Explanation of Agency Authority:

The Department has authority under ss. 30.20 and 30.206, Stats., to promulgate rules to establish general permits.

Related statute or rule:

These rules relate directly to regulation of activities in navigable waters under ch. 30, Stats., waters designations in ch. NR 1, and the NR 300 series of rules.

Plain Language Analysis:

The purpose of this rule revision is to modify the existing rule to establish new general permits with appropriate conditions. This rule revision establishes standards for projects to be eligible for a general permit for dredging including operation of a motor vehicle, on the beds of the Great Lakes to remove algae, mussels, dead fish and similar large plant and animal nuisance deposits and to remove and control emergent invasive aquatic plants. The proposed rule establishes general permits for activities that would otherwise require individual permits. The rule revision also removes riprap as an option for soil stabilization when topsoil is exposed during a dredging activity.

Federal Regulatory Analysis:

Any activity that results in a discharge (including deposits and structures) into “waters of the United States” is regulated by the U.S. Army Corps of Engineers (Corps) under section 404 of the Clean Water Act. An Individual Permit from the Corps is required, unless Wisconsin regulates the project in its entirety under ch. 30, Stats., in which case the project is authorized by the Corps under general permits GP-01-WI or GP-LOP-WI. Dredging or discharge into waters declared navigable under Section 10, Rivers and Harbors Act, 1899 is also regulated, and requires an Individual Permit from the Corps.

Comparison with Adjacent States:

Minnesota – Individual permit required (joint application with Corps). Exempts dredging in water courses with total drainage area of less than 5 square miles and not trout water. Prohibits dredging in number of cases including where dredging would not provide an effective solution to the problem. Similar information requirements and permit conditions to Wisconsin’s.

Michigan – Individual dredging permit required for all dredging from inland lakes and streams from MDEQ (Section 404 program has been assumed by state, so state permit serves as federal permit); individual permit dredging permit required from MDNR and Corps for dredging from Great Lakes waters and connecting waterways.

Iowa – Individual permit (joint application with Corps) required for all dredging projects in Iowa waters. Similar information requirements. Standard Corps permit conditions.

Illinois – Individual permit required to dredge from navigable waters. Disposal may require separate permit from Illinois EPA. Separate dredging permit required from Corps in navigable waters of the U.S.

Summary of Factual Data and Analytical Methodologies: Substantial published scientific literature on the effects on fish, wildlife and water quality during and after physical alterations to lake and streambeds is the basis for the rule parameters. In addition, data on actual field conditions during and after such alterations from department files is applied.

Analysis and Documents Supporting Determination of Small Business Effect: Any person placing a structure or making similar physical modifications to public navigable waters either qualifies for an exemption or must obtain a general or individual permit under state statute. To comply, small businesses follow the same requirements as other waterfront property owners: (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; or (3) complete an individual permit application. Schedules, application steps and compliance/reporting requirements are very basic for all applicants, and most projects can be planned and conducted by individuals with no specific professional background.

Anticipated Private Sector Costs: No significant fiscal effect on the private sector is anticipated.

Effect on Small Business: Dredging contractors, marinas and other waterfront businesses who wish to conduct dredging activities will be affected by the rule. Specific standards will provide clarity and consistency in the permitting process.

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SECTION 1. NR 345.03 (10g), (10r) and (13m) are created to read:

NR 345.03 (10g) "Outlying waters" has the meaning in s. 29.001 (63), Stats.

(10r) "Plant and animal nuisance deposit" means a recent and natural deposit within the swash zone of a waterway of mussels, dead fish, Cladophora or similar natural, biological-based material caused by wave action in a quantity that is causing an annoyance, damage, or health issue to the public or waterway.

Note: "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.

(12m) "Rutting" is defined as an elongated depression caused by wheels or tracks of machinery, equipment or other vehicles and is 6 inches deep or more.

(13m) "Swash zone" as defined by the United States Army Corps of Engineers Coastal Engineering Manual, means the zone of wave action on the beach, which moves as water levels vary, extending from the limit of run-down to the limit of run-up.

Note: The "swash zone" does not typically include areas that are stabilized with vegetation. The United States Army Corps of Engineers Coastal Engineering Manual can be found at: <http://www.usace.army.mil/publications/eng-manuals/>

SECTION 2. NR 345.04 (2)(a)2m. is created to read:

NR 345.04(2)(a)2m. If the department determines that the dredging proposal submitted under this section has the potential to impact an archaeological site or historic structure in accordance with s. 44.40, Stats., the application shall be deemed incomplete. The department may not consider the application complete or issue a general permit until the applicant submits documentation to demonstrate that the dredging project avoids impacts to the archaeological site or historic structure, or completes and documents requested investigations of archaeological sites or historic structures in accordance with s.

44.40, Stats. Reports of completed archaeological or historic structures investigations for projects are subject to departmental and Wisconsin Historical Society review and approval in advance of permit issuance.

SECTION 3. NR 345.04(2)(a)3. is amended to read:

NR 345.04(2)(a)3. If the applicant modifies their dredging project plans to meet the requirements of subd. 2. or 2m., the modified plans shall be submitted before the department can consider the application complete or issue a general permit.

SECTION 4. NR 345.04 (2) (b) is amended to read:

NR 345.04(2)(b) *Applicable activities*. Dredging that meets all of the standards in pars. (c) and either (d), (f), (h), ~~or~~ (i), (im) or (ir) is eligible for a general permit under ss. 30.20 (1t) (b) and 30.206, Stats. Dredging that meets all of the standards in pars. (c) and either (e) or (g) is eligible for a general permit under ss. 30.20 (1t) (a) and (am) and 30.206, Stats.

SECTION 5. NR 345.04(2)(c)(intro.), 7. and 9. are amended to read:

NR 345.04(2)(c) *General permit standards*. (intro.) In order to be eligible for a general permit, projects must meet all of the general permit standards in par. (c) in the addition to the specific activity standards in par. (d), ~~or~~ (e), (im) or (ir).

7. Erosion control measures shall meet or exceed the technical standards for erosion control approved by the department under subch. V of ch. NR 151. Any area where topsoil is exposed during construction shall be immediately seeded and mulched ~~or riprapped~~ to stabilize disturbed areas and prevent soils from being eroded and washed into the waterway.

Note: These standards can be found at the following website:
<http://dnr.wi.gov/org/water/wm/nps/stormwater/techstds.htm>

9. All equipment used for the project shall be de-contaminated following the most current protocols for invasive and exotic viruses and species prior to use and after use. All equipment that comes in contact with infested waters, including but not limited to tracked vehicles, barges, boats, silt or turbidity curtain, sheet pile and pumps shall be thoroughly disinfected. To the extent practicable, equipment and gear used on outlying waters should not be used in inland lakes and rivers.

Note: The most current decontamination protocols can be found on the department's website at dnr.wi.gov under the topic "Waterway and Wetlands"

SECTION 6. NR 345.04(2)(im) is created to read:

NR 345.04(2)(im) *Standards for removal of plant and animal nuisance deposits*. All of the following are standards for removal of plant and animal nuisance deposits.

1. The removal shall only be located in outlying waters.

2. This general permit is for the one time removal of the plant and animal nuisance deposit. Only 3 general permits for plant and animal nuisance deposits may be issued for any area of a waterbody on an annual basis. For the general permit requirements listed under s. NR 345.05(2)(im), an area of a waterbody is the geographical location of the project as indicated on the general permit application form.

Note: General permit application forms are available at department service centers and on the department website at <http://dnr.wi.gov> under the topic "Waterway and Wetland Permits".

3. The project area to which this general permit applies shall be under the same ownership as the applicant.

4. The removal may not be located where there are public rights features as described in s. NR 1.06 or in waters in ecologically significant coastal wetlands along Lakes Michigan and Superior as identified in the Coastal Wetlands of Wisconsin (DNR-CMP project).

Note: The Coastal Wetlands of Wisconsin's Great Lakes can be found at the following website <http://dnr.wi.gov/org/land/er/nhi/projects/> under the topic "Coastal Wetlands".

5. The removal shall only be located within the swash zone of the waterway.

6. The removal is limited to the plant and animal nuisance deposit only. The removal of material other than plant and animal nuisance deposits should be limited to the extent practicable and may not exceed a de minimus amount.

Note: The material may contain trash which should be removed along with the plant and animal nuisance deposit.

7. The total amount of material removed shall be less than 3000 cubic yards.

8. This general permit does not authorize the redistribution of native lakebed material which includes sand, cobble, silt, detritus, and other organic material or the placement of additional sand/stone, etc.

9. Equipment used shall be designed to skim only the plant and animal nuisance deposit off of the native lakebed. The equipment shall be used in a manner that minimizes the impacts to the native lakebed and surrounding vegetation.

10. Equipment used shall be low ground pressure equipment, including wide-tire vehicles, and tracked equipment, to minimize rutting. The equipment shall remove the material along a path parallel to the shore within the swash zone. Equipment operation shall cease when rutting occurs. Any rutting of the lakebed shall be immediately restored by the operator of the vehicle.

Note: The depth of the rut is measured from the original lakebed surface to the bottom of the depression. If individual lug depressions are visible, the depth would be measured to the lesser of the two depths (e.g., the top of the lug). Measurements are not cumulative.

11. If the removed material will be disposed of by landspreading, the material shall be incorporated into the soil by plowing or disking within 24 hours.

12. Unless using a developed boat launch, equipment used in the removal shall access the swash zone along one path perpendicular to the shore. The chosen route shall minimize the impact to the shoreline and vegetated lakebed.

SECTION 7. NR 345.04(2)(ir) is created to read:

NR 345.04(2)(ir) *Standards for using motor vehicles for the management of non-native and invasive plant species growing on the exposed lakebed of outlying waters.* All of the following are standards for using motor vehicles, as defined in s. 30.29, Stats., for the management of non-native and invasive emergent plant species growing on exposed lakebed.

1. The project shall be located on the exposed lakebed of outlying waters.

2. The project shall be conducted when the exposed lakebed is dry.

3. The project area to which this general permit applies shall be under the same ownership as the applicant.

4. The use of the motor vehicle is for the purpose of controlling emergent invasive or nonnative aquatic plant species as designated by the department under s. 23.24. Stats., and s. NR 109.07.

5. The use of the motor vehicle is for mowing or spreading herbicide in conformance with a written invasive or nonnative aquatic plant species control plan approved by the department.

Note: An invasive or nonnative aquatic plant species control plan, as required under s. NR 109.04 (3) and described in s. NR 109.09, must contain the following items: a description of the existing condition including the types of plants present and their abundance; a strategy for the control of the invasive or nonnative aquatic plant species; a plan for the re-establishment of the native plant community; and a monitoring plan to assess the success or failure of the control plan.

6. For projects requiring a permit under ch. NR 107 or 109, before the department can consider the application complete or issue a general permit under this section, the applicant shall submit documentation to demonstrate that a permit under ch. NR 107 or 109 has been applied for.

Note: The chemical treatment of aquatic plants may require a permit under ch. NR 107 and physical removal of aquatic plants may require a permit under ch. NR 109.

7. The motor vehicle may only be operated in the specific area that is detailed in the approved invasive species control plan or permit. This permit does not authorize the operation of any motor vehicle in areas outside of those designated in the approved plan or permit.

8. Equipment used shall be low ground pressure equipment, including wide-tire vehicles, and tracked equipment, to minimize rutting. Equipment operation shall cease when rutting occurs. Any rutting of the lakebed shall be immediately restored by the operator of the vehicle.

Note: The depth of the rut is measured from the original lakebed surface to the bottom of the depression. If individual lug depressions are visible, the depth would be measured to the lesser of the 2 depths (e.g., the top of the lug). Measurements are not cumulative.

9. The motor vehicle shall be used in a manner that minimizes the impacts to the native lakebed material and any surrounding native vegetation.

10. To minimize impacts to small animals and native plants and to prevent soil disruption and rhizome spread, the mowing deck shall be set no lower than 4 inches above the ground when operating equipment.

11. To protect wildlife habitat during nesting seasons, the use of a motor vehicle to control emergent invasive or nonnative aquatic plant species may only occur between August 1st and March 15th of the subsequent year.

12. The applicant may request that the requirement in subd. 11. be waived by the department on a case-by-case basis, by submitting a written statement signed by the local department wildlife biologist, documenting consultation about the proposed control plan, and that the local department wildlife biologist has determined that the requirements of subd. 11. are not necessary to protect wildlife habitat during the nesting season for the proposed project.

SECTION 8. NR 345.04(2)(j)1. is amended to read:

NR 345.04(2)(j) *Individual permit or contract required.* 1. Activities which do not meet the standards in par. (c) and either (d), (e), (f), (g), (h), (i), (im), (ir) or (j) shall require an individual permit or contract.

SECTION 9. EFFECTIVE DATE. This rule shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22(2)(intro.), Stats.

SECTION 10. BOARD ADOPTION. This rule was approved and adopted by the State of Wisconsin Natural Resources Board on March 26, 2008..

Dated at Madison, Wisconsin _____.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

(SEAL)

By _____
Matthew J. Frank, Secretary