

Chapter NR 323

FISH AND WILDLIFE HABITAT STRUCTURES IN NAVIGABLE WATERWAYS

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Note: Chapter NR 323 was repealed and recreated by emergency rule effective April 19, 2004; chapter NR 323 as it existed on April 30, 2005, was repealed and a new chapter NR 323 was created, Register April 2005 No. 592, effective May 1, 2005.

NR 323.01 Purpose. The purpose of this chapter is to establish reasonable procedures and limitations for exempt activities, general permits and individual permits for placement of fish and wildlife habitat structures in navigable waterways as regulated under s. 30.12 (1), (1g) (a), (c) and (d), (2m) and (3m) and 30.20 (1g) (b) 1. and 2., Stats., in order to protect the public rights and interest in the navigable, public waters of the state as defined in s. 30.10, Stats.

History: CR 04-064: cr. Register April 2005 No. 592, eff. 5-1-05.

NR 323.02 Applicability. This chapter applies to construction, placement and maintenance of fish and wildlife habitat structures regulated under ss. 30.12 (1), (1g) (a), (c) and (d), (2m) and (3m) and 30.20 (1g) (b) 1. and 2., Stats. Any person that intends to construct, place or maintain a fish or wildlife habitat structure in any navigable waterway shall comply with all applicable provisions of this chapter and any permit issued under this chapter.

History: CR 04-064: cr. Register April 2005 No. 592, eff. 5-1-05.

NR 323.03 Definitions. The following definitions apply to this chapter:

(1) "Area of special natural resource interest" has the meaning in s. 30.01 (1am), Stats., and as identified by the department in s. NR 1.05.

Note: "Area of special natural resource interest" means any of the following:

- (a) A state natural area designated or dedicated under ss. 23.27 to 23.29, Stats.
- (b) A surface water identified as a trout stream by the department in s. NR 1.02(7).
- (bm) A surface water identified as an outstanding or exceptional resource water under s. 281.15, Stats.
- (c) An area that possesses significant scientific value, as identified by the department in s. NR 1.05.

Information and lists can be obtained by contacting the department, or found on the department's website at www.dnr.wi.gov, under the topic "Waterway and Wetland Permits".

(2) "Bank cover" means a man-made structure composed of biological or inert materials designed to provide overhanging cover habitat for fish in streams.

(3) "Biological materials" means living or organic materials that are biodegradable such as native grasses, sedges, forbs, shrubs and trees; live stakes and posts; non-treated wood; jute netting; fiber rolls and mats; logs; and branches.

(4) "Department" means the department of natural resources.

(5) "Fish crib" means a man-made 3-dimensional habitat structure composed of biological or inert materials designed specifically to attract and concentrate fish.

(6) "Half-log" means a man-made structure composed of a log sawed lengthwise and anchored flat side down to the bottom of a lake or stream using steel rods for the purpose of providing habitat for fish.

(7) "Inert materials" means those materials that slowly degrade, such as chemically treated wood, stone, stainless and galvanized steel, plastics and synthetic polymers.

(8) "Navigable waterway" means any body of water with a defined bed and bank, which is navigable under the laws of the

state. In Wisconsin, a navigable body of water is capable of floating the lightest boat or skiff used for recreation or any other purpose on a regularly recurring basis.

Note: This incorporates the definition at s. 30.01 (4m) Stats., and current case law, which requires a watercourse to have a bed and banks, *Hoyt v. City of Hudson*, 27 Wis. 656 (1871), and requires a navigable waterway to float on a regularly recurring basis the lightest boat or skiff, *DeGayer & Co., Inc. v. DNR*, 70 Wis. 2d 936 (1975); *Village of Menomonee Falls v. DNR*, 140 Wis.2d 579 (Ct. App. 1987).

(9) "Nesting structure" or "wildlife habitat structure" means any structure or device constructed for the purpose of improving nesting habitat for wildlife, including birds, mammals, amphibians and reptiles. Nesting structures include but are not limited to wood duck houses and nesting platforms.

(10) "Ordinary high water mark" means the point on the bank or shore up to which the presence and action of water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation or other easily recognizable characteristic.

(11) "Riparian" means an owner of land abutting a navigable waterway.

(12) "Similar device" under s. 30.12 (1g) (c), Stats., means a man-made structure composed of biological or inert materials designed specifically for the purpose of providing habitat for fish, including but not limited to tree drops, half-logs and brush bundles.

(13) "Spawning reef" means an expanse of rock below the surface of the water used by fish for spawning.

(14) "Tree drop" means a man-made structure created by a tree placed into the water for the purpose of providing habitat for fish.

(15) "Wing deflector" means a man-made structure composed of biological or inert materials placed in streams to deflect stream flow and modify stream channels for the purpose of providing habitat for fish.

History: CR 04-064: cr. Register April 2005 No. 592, eff. 5-1-05.

NR 323.04 Fish habitat structures. (1) EXEMPTIONS.

(a) *Procedures.* Exemptions shall be processed according to the procedures in ch. NR 310.

(b) *Applicable activities.* A fish habitat structure that meets the standards in par. (c) and one of pars. (d) to (h) shall be exempt under s. 30.12 (1g) (c), Stats.

Note: Eligibility for an exemption or general permit does not automatically result in a federal permit or state water quality certification for fill in wetlands. Some projects involving minimal wetland fill may be eligible for authorization under a U.S. Army Corps of Engineers general permit which has already been granted state water quality certification [see non-reporting and 404 GP activities in the table at <http://www.mvp.usace.army.mil/docs/regulatory/WIMATRIX.htm>] or a general permit under s. 281.36(8), Stats. (under development) All other projects affecting wetlands will require individual water quality certification including public notice as required by s. 401, Federal Clean Water Act, and s. 281.36 (2), Stats., and carried out under chs. NR 103 and 299. For further instructions, see the department's website at www.dnr.wi.gov under the topic "Waterway and Wetland Permits."

(c) *General standards.* 1. The fish habitat structure may not be located in an area of special natural resource interest, or within a public rights feature as described in s. NR 1.06.

2. The fish habitat structure may be placed and maintained only by a riparian.

3. The fish habitat structure shall be placed entirely within the riparian's zone of interest, as determined by one of the methods

outlined in ch. NR 326. Certain habitat structures may be placed beyond the line of navigation where allowed by rule.

4. The fish habitat structure shall be placed solely for the purpose of improving fish habitat.

5. The riparian shall report the placement of the structure to the local department fisheries biologist within 30 days after placement. The report shall contain a description of the project and its purpose, the name of the waterway and a map showing where the structure was placed.

Note: A list of the local department fisheries biologists is available at department service centers and on the department's website at www.dnr.wi.gov under the program "Fisheries Management and Habitat Protection."

6. A deposit of sand, gravel or stone under s. 30.12 (1g) (a), Stats., may be associated with the placement of a fish habitat structure provided the deposit is limited to the area immediately underneath or within one foot of the structure and is less than 2 cubic yards.

7. Dredging under s. 30.20 (1g) (b) 1., Stats., is not allowed for the placement of a fish habitat structure.

8. 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 ripped 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/hps/stormwater/techstds.htm>.

9. Unless part of a permanent stormwater management system, all temporary erosion and sediment control practices shall be removed upon final site stabilization. Areas disturbed during construction or installation shall be restored.

10. To protect fish habitat during spawning seasons, no exempt activity may take place during the following time periods:

a. For trout streams identified under s. NR 1.02 (7) and perennial tributaries to those trout streams, September 15 through May 15.

b. For all waters not identified under subd. 10. a. and located south of state highway 29, March 15 through May 15.

c. For all waters not identified under subd. 10. a. and located north of state highway 29, April 1 through June 1.

(d) *Fish crib standards.* In addition to the standards in par. (c), fish cribs shall meet the following requirements:

1. Fish cribs shall have a minimum of 5 feet of water over the top of the structure. The depth and clearance of the fish cribs shall be based on the normal lowest water level condition during a calendar year.

2. Fish cribs shall be constructed of biological materials, with the exception of fastening and anchoring devices.

3. The dimensions of a fish crib shall be no larger than 8 feet tall by 8 feet long by 8 feet wide.

4. Fish cribs may not be placed within 100 feet of swimming beaches or swim rafts.

5. Fish cribs may not be located in soft sediment or muck that is greater than 12 inches in depth.

6. Fish cribs may not be placed where the bottom contour of the waterway exceeds a slope of 4-foot horizontal to one-foot vertical.

7. Fish cribs shall be adequately anchored to prevent movement.

(e) *Spawning reef standards.* In addition to the standards in par. (c), spawning reefs shall meet the following requirements:

1. Spawning reefs shall be constructed of an aggregate of clean, uncrushed gravel and rock from 2 to 8 inches in diameter, in a ratio of approximately 30% ranging from 2 to 4 inches in diameter and approximately 70% ranging from 4.1 to 8 inches in diameter.

2. Spawning reefs shall be placed in a linear form parallel to the shore.

3. Spawning reefs shall be no longer than 100 feet along the shoreline and no wider than 30 feet perpendicular to shore and may not be placed more than 100 feet from shore.

4. Spawning reefs shall be placed where water depths range from 0 to 5 feet.

5. Spawning reefs may not be placed where the bottom contour of the waterway exceeds a slope of 4-foot horizontal to one-foot vertical.

6. Spawning reefs may not be placed where the bottom substrate composition consists of less than 90% clean sand.

Note: Natural walleye spawning reefs generally consist of substrates 2-8 inches in diameter with rounded edges. Natural walleye spawning reefs are located adjacent to gently sloping shorelines in shallow water. Walleye spawning reefs require a moderate amount of wave action to keep the substrate clean of algae and provide adequate water circulation for incubating eggs. The requirement of 90% clean sand indicates a lack of spawning habitat, the appropriate wave action, and substrate capable of supporting the reef. If the water depth remains less than 5 feet and the bottom contour remains less than 10:1, a maximum location of 100 feet from shore is required to reduce navigation concerns.

7. Any person placing a spawning reef shall, within 30 days after placement, provide written notice to the president or chair of any lake association, property owners association or lake district. The notice shall include a description of the spawning reef and include a lake map identifying the exact location of the reef. The person is also responsible for posting a laminated copy of the same map, within 30 days after placement, at all public boat landings on the waterbody, where the reef is located, for a period of not less than one year.

(f) *Wing deflector standards.* In addition to the standards in par. (c), wing deflectors shall meet the following requirements:

1. Design and placement of wing deflectors shall follow the recommendations in *Guidelines for Management of Trout Stream Habitat in Wisconsin* by Ray J. White and Oscar M. Brynildson, Wisconsin Department of Natural Resources.

Note: Copies of these publications may be inspected by contacting the local department fisheries biologist or public library.

2. Wing deflectors may only be placed in navigable streams which are less than 5 feet wide, measured from ordinary high water mark to ordinary high water mark.

3. Wing deflectors may not extend more than 25% across the stream width.

(g) *Tree drops.* In addition to the standards in par. (c), tree drops shall meet the following requirements:

1. Tree drops may only be placed in lakes or flowages.

2. Tree drops shall consist of fresh cut live trees having a minimum diameter of 12 inches at the base.

3. Tree drops shall be securely anchored to the shore at intervals no less than 50 feet apart.

Note: Local zoning ordinances may place restrictions on cutting trees in the shoreland zone. The riparian is responsible for ensuring that their tree drop project is in compliance with any local zoning requirements.

(h) *Half-log structures.* In addition to the standards in par. (c), half log structures shall meet the following requirements:

1. Half-logs shall be constructed from green logs with a minimum diameter of 10 inches and spacers may not exceed 12 inches in height.

2. Half-logs shall be placed where the bottom substrate composition consists of sand or gravel, or both.

3. Half-logs may not be placed in water deeper than 5 feet.

4. Half-logs placed in lakes and flowages may not be located greater than 100 feet from shore or within 100 feet of a swim raft.

(i) *Permit required.* 1. Activities which do not meet the standards in par. (c) and either par. (d), (e), (f), (g) or (h), or are otherwise determined ineligible for an exemption by the department shall require a general permit or individual permit.

2. The department has the authority under s. 30.12 (1m), Stats., to require a permit in lieu of exemption.

(2) GENERAL PERMITS. (a) *Procedures.* 1. General permits shall be processed according to the procedures in ch. NR 310.

2. If the department determines that a proposal submitted under this section has the potential to impact an endangered or threatened species in accordance with s. 29.604, 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 one of the following:

a. The project avoids impacts to the endangered or threatened species in accordance with s. 29.604, Stats.

b. The project has received an incidental take authorization under s. 29.604, Stats.

3. If the applicant modifies the project plans to meet the requirements of subd. 2., the modified plans shall be submitted before the department may consider the application complete or issue a general permit.

(b) *Applicable activities.* A fish habitat structure that meets the standards in par. (c) shall be eligible for a general permit under ss. 30.12 (3) (br) and 30.206, Stats.

Note: Eligibility for an exemption or general permit does not automatically result in a federal permit or state water quality certification for fill in wetlands. Some projects involving minimal wetland fill may be eligible for authorization under a U.S. Army Corps of Engineers general permit which has already been granted state water quality certification [see non-reporting and 404 GP activities in the table at <http://www.mvp.usace.army.mil/docs/regulatory/WIMATRIX.htm>] or a general permit under s. 281.36(8), Stats. (under development) All other projects affecting wetlands will require individual water quality certification including public notice as required by s. 401, Federal Clean Water Act, and s. 281.36 (2), Stats., and carried out under chs. NR 103 and 299. For further instructions, see the department's website at www.dnr.wi.gov under the topic "Waterway and Wetland Permits."

(c) *General standards.* 1. A fish habitat structure may be authorized under a general permit if it meets all the requirements in sub. (1), except for sub.(1) (c) 1., and all the requirements of this paragraph.

2. 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>

3. Unless part of a permanent stormwater management system, all temporary erosion and sediment control practices shall be removed upon final site stabilization. Areas disturbed during construction or installation shall be restored.

4. To protect fish habitat during spawning seasons, no general permit activity may take place during the time period specified:

a. For trout streams identified under s. NR 1.02 (7) and perennial tributaries to those trout streams, September 15 through May 15.

b. For all waters not identified under subd. 4. a. and located south of state highway 29, March 15 through May 15.

c. For all waters not identified under subd. 4. a. and located north of state highway 29, April 1 through June 1.

d. The applicant may request that the requirements in subd. 4. a., b. or c. be waived by the department on a case-by-case basis, by submitting a written statement signed by the local department fisheries biologist, documenting consultation about the proposed project, and that the local department fisheries biologist has determined that the requirements of this paragraph are not necessary to protect fish spawning for the proposed project.

(d) *Individual permit required.* 1. Activities which do not meet the applicable standards in par. (c) shall require an individual permit.

2. The department has authority under s. 30.206 (3r), Stats., to require an individual permit in lieu of a general permit.

(3) INDIVIDUAL PERMITS. (a) *Procedures.* 1. Individual permits shall be processed according to the procedures in ch. NR 310.

2. If the department determines that a proposal submitted under this section has the potential to impact an endangered or threatened species in accordance with s. 29.604, Stats., the application shall be deemed incomplete. The department may not consider the application complete or issue an individual permit until the applicant submits documentation to demonstrate one of the following:

a. The project avoids impacts to the endangered or threatened species in accordance with s. 29.604, Stats.

b. The project has received an incidental take authorization under s. 29.604, Stats.

3. If the applicant modifies the project plans to meet the requirements of subd. 2., the modified plans shall be submitted before the department may consider the application complete or issue an individual permit.

(b) *Applicable activities.* A fish habitat structure which is not exempt under sub. (1) and is not authorized by a general permit under sub. (2) requires authorization by an individual permit pursuant to s. 30.12 (3m) (c), Stats.

(c) *Standards.* A fish habitat structure meeting the standards in s. 30.12 (3m), Stats., may be authorized under an individual permit.

(4) EXISTING PERMITS. A fish habitat structure which is authorized by an existing department permit shall continue to be authorized, provided the structure is maintained in compliance with all the conditions of the original permit. Any modifications to the structure that do not comply with the original permit conditions shall require a new individual permit and shall comply with all standards in this section.

History: CR 04-064: cr. Register April 2005 No. 592, eff. 5-1-05.

NR 323.05 Wildlife habitat structures. (1) EXEMPTIONS. (a) *Procedures.* Exemptions shall be processed according to the procedures in ch. NR 310.

(b) *Applicable activities.* A nesting structure that meets all the standards in par. (c) shall be exempt under s. 30.12 (1g) (d), Stats.

Note: Eligibility for an exemption or general permit does not automatically result in a federal permit or state water quality certification for fill in wetlands. Some projects involving minimal wetland fill may be eligible for authorization under a U.S. Army Corps of Engineers general permit which has already been granted state water quality certification [see non-reporting and 404 GP activities in the table at <http://www.mvp.usace.army.mil/docs/regulatory/WIMATRIX.htm>] or a general permit under s. 281.36(8), Stats. (under development) All other projects affecting wetlands will require individual water quality certification including public notice as required by s. 401, Federal Clean Water Act, and s. 281.36 (2), Stats., and carried out under chs. NR 103 and 299. For further instructions, see the department's website at www.dnr.wi.gov under the topic "Waterway and Wetland Permits."

(c) *General standards.* 1. The nesting structure may not be located in an area of special natural resource interest or in a public rights feature as described in s. NR 1.06.

2. The nesting structure may be placed and maintained only by a riparian.

3. The nesting structure shall be placed entirely within the riparian's zone of interest, as determined by one of the methods outlined in ch. NR 326.

4. The nesting structure shall be placed solely for the purpose of improving wildlife habitat.

5. A deposit of sand, gravel or stone under s. 30.12 (1g) (a), Stats., may be associated with the placement of a nesting structure provided the deposit is limited to the area underneath or within one foot of the structure and is less than 2 cubic yards.

6. Dredging under s. 30.20 (1g) (b) 1., Stats., is allowed for the placement of a nesting structure provided the dredging does not exceed 2 cubic yards.

7. The surface area of a nesting structure may not exceed 25 square feet.

8. Nesting structures shall be designed and constructed of unpainted wood or of materials that are non-gloss earthtone colors that blend into a natural shoreline setting during leaf-on condition.

9. 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 rippapped 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>

10. Unless part of a permanent stormwater management system, all temporary erosion and sediment control practices shall be removed upon final site stabilization. Areas disturbed during construction or installation shall be restored.

(d) *Permit required.* Activities which do not meet the standards in par. (c) or are determined ineligible for an exemption by the department shall require a general permit or individual permit.

(e) *Exceptions.* Wood duck houses and nesting platforms attached to or supported by existing trees in their natural condition are not regulated under ch. 30, Stats., or this chapter.

(2) GENERAL PERMITS. (a) *Procedures.* 1. General permits shall be processed according to the procedures in ch. NR 310.

2. If the department determines that a proposal submitted under this section has the potential to impact an endangered or threatened species in accordance with s. 29.604, 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 one of the following:

a. The project avoids impacts to the endangered or threatened species in accordance with s. 29.604, Stats.

b. The project has received an incidental take authorization under s. 29.604, Stats.

3. If the applicant modifies the project plans to meet the requirements of subd. 2., the modified plans shall be submitted before the department may consider the application complete or issue a general permit.

(b) *Applicable activities.* A wildlife habitat structure that meets the standards in par. (c) shall be eligible for a general permit under ss. 30.12 (3) (br) and 30.206, Stats.

Note: Eligibility for an exemption or general permit does not automatically result in a federal permit or state water quality certification for fill in wetlands. Some projects involving minimal wetland fill may be eligible for authorization under a U.S. Army Corps of Engineers general permit which has already been granted state water quality certification [see non-reporting and 404 GP activities in the table at <http://www.mvp.usace.army.mil/docs/regulatory/WIMATRIX.htm>] or a general permit under s. 281.36(8), Stats. (under development) All other projects affecting wetlands will require individual water quality certification including public notice as required by s. 401, Federal Clean Water Act, and s. 281.36 (2), Stats., and carried out under chs. NR 103 and 299. For further instructions, see the department's website at www.dnr.wi.gov under the topic "Waterway and Wetland Permits."

(c) *Standards.* 1. A wildlife habitat structure may be authorized under a general permit if it meets all the requirements in sub. (1) except for sub. (1) (c) 1., and all the requirements of this paragraph.

2. 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 rippapped 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>

3. Unless part of a permanent stormwater management system, all temporary erosion and sediment control practices shall be removed upon final site stabilization. Areas disturbed during construction or installation shall be restored.

(3) INDIVIDUAL PERMITS. (a) *Procedures.* 1. Individual permits shall be processed according to the procedures in ch. NR 310.

2. If the department determines that a proposal submitted under this section has the potential to impact an endangered or threatened species in accordance with s. 29.604, Stats., the application shall be deemed incomplete. The department may not consider the application complete or issue an individual permit until the applicant submits documentation to demonstrate one of the following:

a. The project avoids impacts to the endangered or threatened species in accordance with s. 29.604, Stats.

b. The project has received an incidental take authorization under s. 29.604, Stats.

3. If the applicant modifies the project plans to meet the requirements of subd. 2., the modified plans shall be submitted before the department may consider the application complete or issue an individual permit.

(b) *Applicable activities.* A wildlife habitat structure which is not exempt under sub. (1) and is not authorized by a general permit under sub. (2) requires authorization by an individual permit pursuant to s. 30.12 (3m) (c), Stats.

(c) *Standards.* A wildlife habitat structure meeting the standards in s. 30.12 (3m), Stats., may be authorized under an individual permit.

(4) EXISTING PERMITS. A wildlife habitat structure which is authorized by an existing department permit shall continue to be authorized, provided the structure is maintained in compliance with all the conditions of the original permit. Any modifications to the structure that do not comply with the original permit conditions shall require a new individual permit and shall comply with all standards in this section.

History: CR 04-064: cr. Register April 2005 No. 592, eff. 5-1-05.

NR 323.06 Enforcement. (1) Noncompliance with the provisions of ss. 30.12, 30.20 and 30.206, Stats., this chapter, or any conditions of an exemption, general permit or individual permit issued by the department, constitutes a violation and may result in a forfeiture, fine or imprisonment. The department may seek abatement under s. 30.294, Stats., for any activity in violation of ss. 30.12, 30.20 and 30.206, Stats.

(2) If the activity may be authorized by a general permit under s. 30.206, Stats., failure of an applicant to follow the procedural requirements may not, by itself, result in abatement of the activity.

(3) When an after-the-fact permit application has been filed with the department, the department shall follow the procedures in ch. NR 301 for violations.

(4) Any violation of these rules shall be treated as a violation of the statutes they interpret or are promulgated under.

(5) No person may place a fish or wildlife habitat structure in a navigable waterway if the activity is not eligible for an exemption, authorized by a general permit or individual permit issued under this chapter, or otherwise authorized under this chapter.

History: CR 04-064: cr. Register April 2005 No. 592, eff. 5-1-05.