

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

The Wisconsin Natural Resources Board proposes an order to repeal NR 340.02(18) and (20) and to create ch. NR 343 related to regulation of construction, dredging, and enlargement of an artificial water body.

FH-45-04

Summary Prepared by the Department of Natural Resources

Statutory Authority: ss. 30.19(1g)(a) and (am), (1m), (3r)(a)1. and 4., 30.206 and 227.11(2), Stats.

Statutes Interpreted: ss. 30.19(1g)(a) and (am), (1m), (3r)(a)1. and 30.206, Stats..

Explanation of Agency Authority: The Department has authority under ss. 30.19 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 is to establish general permits with appropriate conditions, and to establish standards for projects that may be authorized under a general or an individual permit.

This rule establishes criteria defining those activities needing a permit for the construction, dredging and enlargement of an artificial water body. This rule recognizes artificial water bodies constructed for the purpose of meeting the performance standards under ch. NR 151 and allows such artificial water bodies to be eligible for a general permit under this chapter with several design standards. This rule also specifies permit requirements necessary to protect public health, safety, welfare, rights and interest and to protect riparian landowner's rights and property.

Two definitions from NR 340 are repealed to reflect statutory changes.

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 chapter 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 – Minnesota regulates ponds in wetlands if they are replacement ponds governed under the Wetland Conservation Act. The counties issue the permit, with involvement from the Board of Water and Soil Resources. They also administer the stormwater permit for construction sites of one or more acres, which would cover some pond construction outside of wetlands for erosion control. Because their permitting is limited to wetlands they are less protective for public trust concerns. If the site were one or more acres then they would meet the same stormwater requirements as Wisconsin for erosion control.

Michigan – The soil erosion permit that covers one or more acres and any construction within 500 feet will cover ponds within 500 feet of a navigable stream. If the pond is connected below the ordinary high-water mark or if it connects within 500 feet because of groundwater connections, then they also have jurisdiction. There are additional requirements for placement of dredge material if the pond is located in a wetland. Because of permit consolidation at the state level, the applicant can complete one form that will

go to the three different agencies potentially involved in permitting. Where possible, permit coverage is combined. Michigan's permitting of ponds is fairly comparable to Wisconsin's.

Iowa – Iowa has permits for construction in a floodplain, for larger drainage areas, that they administer jointly with the Corps of Engineers. The pond must be connected. There may also be a requirement for a dam permit if the pond is built up rather than excavated. Unconnected ponds are not regulated. Pond permits are consolidated at the state level to cover construction, wetland and floodplain jurisdiction. Because unconnected ponds are not regulated, the protection is less in Iowa than in Wisconsin.

Illinois – While the state regulates activities in the floodway, there are no specific rules to govern ponds unless they require dams. Floodways are mapped or if unmapped, the field staff makes the determination. There is no specific recognition for wetland construction. Illinois does administer the Federal Phase II construction permit program and may capture ponds of one or more acres for erosion control. Illinois is less protective than Wisconsin.

Summary of Factual Data and Analytical Methodologies: Standard hydrologic and hydraulic methods are the basis for standards related to pond discharge. Substantial published scientific literature on fish and wildlife response to riparian zone conditions is the basis for the buffer and connection requirements. Substantial published scientific literature on wetland restoration is the basis for the standards in ch. NR 353 incorporated by reference.

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: Building contractors, developers of waterfront property and their technical consultants, businesses which construct and utilize ponds, and other waterfront businesses will be affected by the rule revisions. Specific standards will provide clarity and consistency in the permitting process.

Agency Contact Person: Mary Anne Lowndes, MaryAnne.Lowndes@dnr.state.wi.us, (608) 261-6420

SECTION 1. NR 340.02(18) and (20) are repealed.

SECTION 2. Chapter NR 343 is created to read:

Chapter NR 343
Ponds and Artificial Waterways

NR 343.01 Purpose. The purpose of this chapter is to establish criteria defining those activities needing a permit for a pond or artificial water body as required by s. 30.19(1g)(a) and (am), Stats.; and to specify permit requirements necessary to protect public health, safety, welfare, rights and interest and to protect riparian landowner's rights and property for pond sites regulated under this chapter.

NR 343.02 Applicability. (1) POND OR ARTIFICIAL WATER BODY SITES. This chapter applies to activities regulated under s. 30.19(1g)(a) and (am), Stats. An application to construct, dredge or enlarge

any part of a pond or artificial water body shall be filed with the department pursuant to ch. NR 310 by any person for any artificial water body that either:

(a) Connects with a navigable waterway.

(b) Is located within 500 feet of the ordinary high water mark of an existing navigable waterway.

Note: This includes a stormwater management pond that does not discharge into a navigable waterway except as a result of storm events.

(2) COMPLIANCE. Any person responsible for the site regulated by this chapter shall comply with all applicable provisions of this chapter and the appropriate permit issued pursuant to this chapter.

(3) EXEMPTIONS. This chapter does not apply to any of the following:

(a) The construction or repair of any public highway where public highway has the meaning given for highway in s. 340.01(22), Stats.

(b) Any agricultural use of land.

(c) An activity that affects a navigable inland lake that is located wholly or partly in any county having a population of 750,000 or more.

(d) Any activity that affects a portion of Lake Michigan, Lake Superior or a navigable stream that is located within a county having a population of 750,000 or more.

(e) Any work required to maintain the original dimensions of an enlargement of an artificial water body done pursuant to a permit or legislative authorization under s. 30.19 (1g)(a) or (am), Stats., provided appropriate erosion control practices are implemented and maintained and dredge spoils are disposed of in an appropriate manner and location.

(f) An infiltration device designed to meet the performance standards of s. NR 151.12(5)(c) or to meet an equivalent local ordinance that requires volume reduction and is not located in a wetland or existing navigable waterway.

Note: The landowner of a site exempt under par. (c) or (d) is still required to submit a notice of intent under subch. III of ch. NR 216 for land disturbing construction activity of one or more acres.

(g) A sediment trap draining a maximum of 5 acres and designed to meet the performance standards of s. NR 151.11(6) or to meet an equivalent local ordinance and is not located in a wetland or existing navigable waterway.

(h) A temporary sediment basin or stormwater management pond designed to meet the performance standards of s. NR 151.11(6) or to meet an equivalent local ordinance where the crest of the berm of the basin is more than 35 feet from the ordinary high water mark and no portion of the basin is within 100 feet of the location of any public rights feature as described in s. NR 1.06.

Note: Nonmetallic mining projects shall be processed under ch. NR 340 and shall meet all the standards in ch. NR 340 not ch. NR 343.

NR 343.03 Definitions. For the purposes of this chapter, the following definitions are applicable:

(1) "Agricultural use of land" means planting, growing, cultivating and harvesting of crops for human or livestock consumption, pasturing or yarding of livestock, sod farms and beekeeping.

Note: This definition is equivalent to the definition in s. 30.40(1), Stats., and differs from the definition in ss. NR 151.002(2) and 216.42(2) only in that beekeeping is included and tree nurseries are not included.

(2) "Artificial water body" means a proposed or existing body of water that does not have a history of being a lake or stream or of being part of a lake or stream.

(3) "Connects with a navigable waterway" means any artificial waterbody that is attached by means of enlargement or by a natural or artificial channel or drainage course, or an open or closed conduit, any of which tend to confine and direct flow into the existing navigable waterway.

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

(5) "Grading" means the physical disturbance of the bank by the addition, removal or redistribution of soil.

(6) "Land disturbing construction activity" means any man-made alteration of the land surface resulting in a disturbance to soil or existing vegetative or non-vegetative soil cover that may result in stormwater runoff and lead to increased soil erosion and movement of sediment into waters of the state. Land disturbing construction activity includes clearing and grubbing, demolition, excavating, pit trench dewatering, filling and grading activities.

(7) "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, *DeGayner & Co., Inc. v. DNR*, 70 Wis. 2d 936 (1975); *Village of Menomonee Falls v. DNR*, 140 Wis. 2d 579 (Ct. App. 1987).

(8) "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.

(9) "Storm event" means any amount of precipitation equal to or greater than 0.01 inches with a minimum time between storms of 6 hours.

(10) "Stormwater" means runoff from precipitation including rain, snow, ice melt or similar water that moves on the land surface via sheet or channelized flow.

(11) "Stormwater management pond" means any temporary or permanent artificial water body designed to specifications generally accepted to reduce the water quantity or water quality impacts of stormwater and to hold water for any period of time. This does not include facilities to which this chapter is not applicable as listed in s. 343.02(3)(f), (g) and (h).

NR 343.04 Pond or artificial water body application. All of the following information shall be submitted for a pond or artificial water body application:

(1) OWNERSHIP. A copy of the deed, lease, land contract or other document showing ownership of the project site.

(2) PHOTOS. Photographs that clearly show the existing project area with a size reference.

(3) PERMISSION. Permission from landowners for department staff to enter the site.

(4) PLANS. Plan drawing sheet, including at least one typical cross-section detail.

(5) DESCRIPTION. A narrative description of the pond or artificial water body proposal describing:

- (a) What the project is.
- (b) Methods, materials and equipment to be used.
- (c) A construction schedule and sequence of work.
- (d) Erosion control plan in accordance with s. NR 216.46.
- (e) Site map in accordance with s. NR 343.05(2).

NR 343.05 Erosion control plan requirements. (1) SITE-SPECIFIC PLAN. Any person required to submit an application for a pond or artificial water body under this chapter shall develop a site specific erosion control plan in accordance with s. NR 216.46(1) to (4).

(2) SITE MAP REQUIREMENTS. Each pond or artificial water body site map shall include all of the following:

- (a) Existing topography and drainage patterns, roads, waterways and floodplain boundaries.
- (b) Location, description and elevation of a reference benchmark.
- (c) Horizontal and vertical scale and north arrow.
- (d) Approximate identification of the ordinary high water mark.
- (e) Area between the project site and the water body to be left undisturbed.
- (f) Boundaries of the construction site, including the area of land disturbing construction activity.
- (g) Drainage patterns and approximate slopes anticipated after grading activities, including the existing and proposed slope of the bank and the water level of the existing waterway.
- (h) Area of soil disturbance in square feet.
- (i) Volume of earth to be added or removed in cubic yards.
- (j) Location of any disposal area for dredged or excavated materials.
- (k) Location of major structural and non-structural controls identified in the erosion control plan.
- (L) Location of areas where stabilization practices will be employed.
- (m) Areas that will be vegetated following land disturbing construction activities.
- (n) Area and location of wetland acreage on the pond or artificial water body site and locations where stormwater is discharged to a surface water or wetland within one-quarter mile downstream of the pond or artificial water body site.
- (o) Areas used for infiltration of post-construction stormwater runoff.
- (p) An alphanumeric or equivalent coordinate system for the entire construction site.

Note: Many of the requirements for a grading project site map are identical to the construction site map requirements of s. NR 216.46. A site map prepared to meet the requirements of s. NR 216.46 will need to add the information requested in pars (b) to (e), (i) and (j).

(3) EROSION AND SEDIMENT CONTROL BEST MANAGEMENT PRACTICES. The erosion control plan shall include a description of appropriate erosion and sediment control best management practices that will be installed and maintained at the pond or artificial water body site to prevent pollutants from reaching waters of the state. The erosion control plan shall clearly describe the appropriate erosion and sediment control best management practices for each major land disturbing construction activity and the timing during the period of land disturbing construction activity that the erosion and sediment control best management practices will be implemented. The erosion and sediment control best management practices shall be designed in accordance with s. NR 216.46(6).

(4) EROSION AND SEDIMENT CONTROL TECHNICAL STANDARDS. (a) 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>

(b) 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 removal shall be restored.

NR 343.06 Construction site inspections and maintenance. Any person required to submit an application for a pond or artificial water body under this chapter shall follow the reporting and monitoring requirements in s. NR 216.48(4).

NR 343.07 General permit. (1) PROCEDURES. (a) General permits shall be processed according to the procedures in subch. III of ch. NR 310.

(b) If the department determines that a pond or artificial water body application 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 until the applicant submits documentation to demonstrate one of the following:

1. The pond or artificial water body project avoids impacts to the endangered or threatened species in accordance with s. 29.604, Stats.

2. The pond or artificial water body project has received an incidental take authorization under s. 29.604, Stats.

(c) If the applicant modifies the pond or artificial waterbody project plans to meet the requirements of par. (b), the modified plans shall be submitted before the department may consider the application complete or authorized under a general permit.

(2) APPLICABLE ACTIVITIES. A pond or artificial water body project that meets the standards in sub. (3) shall be eligible for general permit coverage under ss. 30.19(1r)(a)1. and (b) and 30.206, Stats.

(3) GENERAL PERMIT STANDARDS The department may issue a general permit for the construction, dredging or enlargement of any part of a pond or artificial water body that meets all of the standards in par. (a) and either par. (b), (c) or (d) as follows:

(a) *Standards for all pond construction under general permits.* 1. The site shall meet the construction site performance standards of s. NR 151.11 for land disturbing construction activities for non-transportation projects and s. NR 151.23 for transportation projects.

2. The pond or artificial water body is designed in accordance with best management practices required for stormwater discharge permits under ch. NR 216, or to meet a local ordinance for stormwater management.

3. The pond or artificial water body may not be associated with any metallic or non-metallic mining project.

(b) *Wildlife pond.* The purpose of the pond or artificial water body shall be wetland conservation as determined under ch. NR 353 and all standards for construction of the ponds in ch. NR 353.04 and 353.05 will be met.

(c) *Landscape pond.* The pond or artificial water body does not connect with a navigable waterway and shall meet all of the following:

1. 'Separation distance.' No portion of the berm or pond may be any closer than 35 feet from the ordinary high water mark of any navigable waterway or within 100 feet of the location of any public rights feature as described in s. NR 1.06.

2. 'Plan.' The pond is not part of a stormwater management plan.

3. 'Wetland.' The pond or artificial water body is not constructed, dredged or enlarged in a wetland.

4. 'Floodplain.' The pond or artificial water body is not constructed, dredged or enlarged in the regulated floodplain.

Note: The applicant will need to acquire a stocking permit to place fish in any landscape pond.

5. 'Excavated material.' Any excavated material is not temporarily or permanently placed in a wetland, floodplain or below the ordinary high water mark of a navigable waterway and is disposed of in an upland location.

Note: The vegetation planted in areas adjacent to or disturbed during pond construction should not include department regulated invasive plants such as purple loosestrife.

(d) *Stormwater pond.* The pond or artificial water body is a stormwater management pond that does not discharge into a navigable waterway except as a result of a storm event and shall meet all of the following:

1. 'Separation distance.' a. The crest of the berm of the pond or artificial water body may be no closer than 35 feet from the ordinary high water mark.

b. No portion of the pond or artificial water body may be within 100 feet of the location of any public rights feature as described in s. NR 1.06.

c. This separation distance does not include the outlet structure for the pond. An outfall below the ordinary high water mark shall comply with ch. NR 329.

2. 'Wetlands.' The pond or artificial water body may not be constructed, dredged or enlarged in a wetland.

3. 'Thermal.' The pond or artificial water body may not be designed to have a permanent pool of water that discharges to a trout stream or its upstream tributaries.

4. 'Hydraulic connection.' The pond may not be subject to inflow from the navigable waterway up to the 10-year 24-hour rainfall event.

5. 'Stable outlet.' The pond shall have a stable (non-erosive) connection to the navigable waterway.

6. 'Fish.' Fish may not be reared in the stormwater pond.

7. 'Entrapment.' The pond or artificial water body shall be designed to prevent fish entrapment.

8. 'Vegetation.' The permanent vegetation planted in areas adjacent to or disturbed during pond construction may not be department regulated invasive plant species.

9. 'Excavated material.' Any excavated material may not be temporarily or permanently placed in a wetland, floodplain or below the ordinary high water mark of a navigable waterway and shall be disposed of in an upland location.

(4) IMPLEMENTATION OF CONDITIONS OF THE GENERAL PERMIT. Any person receiving coverage under a general permit for a pond or artificial water body shall implement the conditions of ss. NR 343.04 to 343.06 and this section.

(5) INDIVIDUAL PERMIT REQUIRED. (a) Activities which are not exempt under s. NR 343.02(3) or do not meet the standards in sub. (3) for a general permit issued by the department shall require an individual permit.

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

NR 343.08 Individual permits. (1) PROCEDURES. (a) Individual permits shall be processed according to the procedures in subch. IV of ch. NR 310.

(b) If the department determines that a pond or artificial water body application 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 until the applicant submits documentation to demonstrate one of the following:

1. The pond or artificial water body project avoids impacts to the endangered or threatened species in accordance with s. 29.604, Stats.

2. The pond or artificial water body project has received an incidental take authorization under s. 29.604, Stats.

(c) If the applicant modifies the pond or artificial waterbody project plans to meet the requirements of par. (b), the modified plans shall be submitted before the department may consider the application complete or issue an individual permit.

(2) APPLICABLE ACTIVITIES. A pond or artificial waterway project which is not authorized by a general permit under s. NR 343.07 requires authorization by an individual permit pursuant to s. 30.19(4), Stats.

(3) PONDS AND ARTIFICIAL WATERWAY STANDARDS. Ponds or artificial waterways meeting the standards in s. 30.19(4)(c), Stats., may be authorized under an individual permit.

NR 343.09 Requirement for public access. A permit issued under this chapter to construct a pond or artificial waterbody and to connect it to a navigable waterway shall require that the navigable portion of the pond or artificial waterbody be a public waterway if the connecting portion is navigable.

NR 343.10 Enforcement. (1) Noncompliance with the provisions of ss. 30.19 and 30.206, Stats., this chapter, or any conditions of a general permit or individual permit issued by the department, constitutes a violation and may result in a forfeiture. The department may seek abatement under s. 30.294, Stats., for any activity in violation of ss. 30.19 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 construct, dredge or enlarge any part of a pond or artificial water body that connects with or is within 500 feet of 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.

SECTION 3. 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 4. BOARD ADOPTION. This rule was approved and adopted by the State of Wisconsin Natural Resources Board on December 8, 2004.

Dated at Madison, Wisconsin _____.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By _____
Scott Hassett, Secretary

(SEAL)