

Chapter NR 117

WISCONSIN'S CITY AND VILLAGE SHORELAND-WETLAND PROTECTION PROGRAM

NR 117.01 Purpose.
NR 117.02 Applicability.
NR 117.03 Definitions.

NR 117.05 Shoreland-wetland protection standards.
NR 117.06 Department duties.

NR 117.01 Purpose. The purpose of this chapter is to establish minimum standards for city and village shoreland-wetland zoning ordinances to accomplish the shoreland protection objectives of s. 281.31, Stats. Cities and villages are required by ss. 62.231 and 61.351, Stats., to adopt shoreland-wetland zoning ordinances within 6 months after receipt of final wetland inventory maps, which have been prepared by the department under s. 23.32, Stats.

History: Cr. Register, November, 1983, No. 335, eff. 12-1-83; correction made under s. 13.93 (2m) (b) 7., Stats., Register, October, 1999, No. 526.

NR 117.02 Applicability. (1) The provisions of this chapter are applicable to the adoption, administration and enforcement of city and village shoreland-wetland zoning ordinances adopted under ss. 62.231 and 61.351, Stats. Unless specifically exempted by law, all cities and villages, towns, counties and, when s. 13.48 (13), Stats., applies, state agencies are required to comply with, and obtain all necessary permits, under local shoreland-wetland zoning ordinances.

(2) If a city or village ordinance adopted under s. 62.23, 61.35 or 87.30, Stats., affecting wetlands in a shoreland area is more restrictive than an ordinance enacted under s. 62.231 or 61.351, Stats., affecting the same lands, it continues to be effective in all respects to the extent of the greater restrictions, but not otherwise.

History: Cr. Register, November, 1983, No. 335, eff. 12-1-83.

NR 117.03 Definitions. For the purpose of this chapter:

(1) "City planning agency" means a city plan commission created under s. 62.23 (1), Stats., a board of public land commissioners created under s. 27.11, Stats., or a committee of the city council which acts on matters pertaining to city planning.

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

(3) "Environmental control facility" means any facility, temporary or permanent, which is reasonably expected to abate, reduce or aid in the prevention, measurement, control or monitoring of noise, air or water pollutants, solid waste and thermal, radiation or other pollutants, including facilities installed principally to supplement or to replace existing property or equipment not meeting or allegedly not meeting acceptable pollution control standards or which are to be supplemented or replaced by other pollution control facilities.

(4) "Farm drainage ditch" means any artificial channel which drains water from lands which are currently used for agricultural purposes.

(5) "Floodplain" means the land which has been or may be covered by flood water during the "regional flood," as that term is defined in s. NR 116.03. The floodplain includes the floodway and the flood fringe.

(6) "High-water mark" means the mark left by water at its highest level.

(7) "Navigable water" or "navigable waters," as defined in s. 281.31 (2) (d), Stats., means Lake Superior, Lake Michigan, all

natural inland lakes within this state and all streams, ponds, sloughs, flowages and other waters within the territorial limits of this state, including the Wisconsin portion of boundary waters, which are navigable under the laws of this state. Notwithstanding any other provision of law or administrative rule, a shoreland zoning ordinance required under s. 59.692, Stats., and this chapter or a wetland zoning ordinance required under s. 61.351 or 62.231, Stats., and this chapter does not apply to lands adjacent to farm drainage ditches if:

(a) Such lands are not adjacent to a natural navigable stream or river;

(b) Those parts of the drainage ditches adjacent to these lands were nonnavigable streams before ditching; and

(c) Such lands are maintained in nonstructural agricultural use.

Note: In *Muench v. Public Service Commission*, 261 Wis. 492 (1952), the Wisconsin Supreme Court held that a stream is navigable in fact if it is capable of floating any boat, skiff or canoe of the shallowest draft used for recreational purposes. In *DeGayner and Co., Inc. v. Department of Natural Resources*, 70 Wis.2d 936 (1975), the court also held that a stream need not be navigable in its normal or natural condition to be navigable in fact. The DeGayner opinion indicates that it is proper to consider artificial conditions, such as beaver dams, where such conditions have existed long enough to make a stream useful as a highway for recreation or commerce, and to consider ordinarily recurring seasonal fluctuations, such as spring floods, in determining the navigability of a stream.

(8) "Ordinary high-water mark" means the point on the bank or shore up to which the presence and action of surface water is so continuous as to leave a distinctive mark such as by erosion, destruction or prevention of terrestrial vegetation, predominance of aquatic vegetation, or other easily recognized characteristics.

Note: Where the bank or shore of any particular place is of such character that it is difficult or impossible to ascertain where the point of ordinary high-water mark is, recourse may be had to the opposite bank of a stream or to other places on the shore of a lake or flowage to determine whether a given stage of water is above or below the ordinary high-water mark.

(9) "Shorelands", as defined in s. 59.692 (1) (b), Stats., means the area within the following distances from the ordinary high-water mark of navigable waters, as defined in s. 281.31 (2) (d), Stats.:

(a) One thousand feet from a lake, pond or flowage. If the navigable water is a glacial pothole lake, this distance shall be measured from the high-water mark of the lake.

Note: The water level in a glacial pothole lake may remain above the "ordinary high-water mark" several years after flooding, resulting in a "high-water mark" which is above the "ordinary high-water mark." However, there would be no practical difference between the "high-water mark" of a glacial pothole lake and the "ordinary high-water mark" of a glacial pothole lake where the effects of such flooding are no longer evident.

(b) Three hundred feet from a river or a stream or to the landward side of the floodplain, whichever distance is greater.

(10) "Special exception (conditional use)" means a use which is permitted by a zoning ordinance provided that certain conditions specified in the ordinance are met and that a permit is granted by the board of appeals or, where appropriate, the city or village planning agency or governing body.

(11) "Village planning agency" means a village planning commission created under ss. 61.35 and 62.23 (1), Stats., or a

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committee of the village board which acts on matters pertaining to village planning.

(12) “Wetland”, as defined in s. 23.32 (1), Stats., means an area where water is at, near or above the land surface long enough to be capable of supporting aquatic or hydrophytic vegetation and which has soils indicative of wet conditions.

History: Cr. Register, November, 1983, No. 335, eff. 12-1-83; correction in (9) made under s. 13.93 (2m) (b) 7., Stats., Register, September, 1995, No. 477; corrections in (7) and (9) made under s. 13.93 (2m) (b) 1. and 7., Stats., Register, October, 1999, No. 526.

NR 117.05 Shoreland-wetland protection standards. (1) ESTABLISHMENT OF SHORELAND-WETLAND ZONING REGULATIONS. (a) *City and village review of preliminary wetland inventory maps.* Before the department prepares final Wisconsin wetlands inventory maps:

1. The department shall transmit to the appropriate city or village officials copies of preliminary wetland inventory maps for that city or village.

2. The city or village shall have 90 days to review the preliminary maps unless the review period is extended by written approval of the department, but in no case shall the review period extend for more than 180 days.

3. The city or village may hold a public hearing to solicit public comments on the preliminary maps. Notice of the time and place of the hearing shall be published as a class I notice under ch. 985, Stats.

4. On or before the last day of the review period, the city or village shall return the preliminary maps to the department. If city or village officials believe that the preliminary maps are inaccurate, discrepancies shall be noted on the maps with an accompanying narrative explaining the problem areas.

5. The department shall schedule a meeting with city or village officials within 30 days of the return of the preliminary maps if the city or village has indicated that it believes that there are inaccuracies on the preliminary maps.

6. After meeting with city or village officials to discuss apparent map inaccuracies, the department shall, at department expense, consult available soil survey maps and conduct on-site inspections, if appropriate, in order to evaluate the city or village recommendations, and shall then prepare, adopt and deliver to the city or village the final wetland inventory maps for that city or village.

7. The adoption of a final wetland inventory map is a final decision of the department and may be reviewed as provided in ch. 227, Stats.

(b) *City and village adoption of shoreland-wetland zoning regulations.* 1. Except as provided in subd. 2. or 3., each city and village shall adopt an ordinance or an amendment to an existing ordinance or zoning code which creates a shoreland-wetland zoning district for all wetlands of 5 acres or more, and all portions of wetlands of 5 acres or more, which are shown on the final wetland inventory maps and which are located in shorelands within the incorporated area of the city or village. Such ordinance or amendment shall be adopted within 6 months after receipt of the final wetland inventory maps prepared by the department which cover that city or village. Cities and villages have the option of zoning any wetlands within their incorporated area, including wetlands which are less than 5 acres in size, except those wetlands described in subd. 2.

2. Subdivision 1. is not applicable to:

a. Any wetlands which are filled, prior to the date on which the city or village receives applicable final wetland inventory maps, in a manner that affects their wetland characteristics to the

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extent that the area would no longer meet the definition of wetland in s. NR 117.03; or

b. Any wetlands between the ordinary high-water mark and a bulkhead line established prior to May 7, 1982, under s. 30.11, Stats., that are located on the landward side of the bulkhead line.

3. Subdivision 1. is not applicable to any wetlands which the city or village rezones at the time that shoreland-wetland zoning regulations are initially adopted, if the city or village and the department have determined that such rezoning will have no significant adverse impact upon the wetland functions listed in sub. (4) (d). The provisions of sub. (4) (d) to (h) are applicable to such rezoning. In order to rezone certain mapped wetlands at the time that shoreland-wetland zoning regulations are initially adopted, the city or village shall publish a separate class II notice and hold a separate public hearing on the proposed rezoning in conjunction with the public hearing on the adoption of the shoreland-wetland zoning ordinance, or amendment to an existing ordinance or zoning code, which is required by subd. 1.

4. A public hearing shall be held on the ordinance or amendment to an existing ordinance or zoning code, which creates a shoreland-wetland zoning district, as required by s. 62.23 (7) (d) 2., Stats. The appropriate district office of the department shall be provided with a copy of the proposed shoreland-wetland ordinance or amendment, and with written notice of the public hearing, at least 10 days prior to such hearing.

(2) PERMITTED USES IN SHORELAND-WETLAND ZONING DISTRICTS. Within shoreland-wetland zoning districts, cities and villages may permit, prohibit, or authorize as a special exception (conditional use) the following uses subject to the provisions of chs. 30 and 31, Stats., and other local ordinances and state and federal laws, if applicable:

(a) Hiking, fishing, trapping, hunting, swimming, snowmobiling and boating.

(b) The harvesting of wild crops, such as marsh hay, ferns, moss, wild rice, berries, tree fruits and tree seeds, in a manner that is not injurious to the natural reproduction of such crops and that does not involve filling, flooding, draining, dredging, ditching, tiling or excavating.

(c) The practice of silviculture, including the planting, thinning and harvesting of timber, provided that no filling, flooding, draining, dredging, ditching, tiling or excavating is done except as required for:

1. Temporary water level stabilization measures to alleviate abnormally wet or dry conditions which would have an adverse impact on the conduct of silvicultural activities if not corrected; or

2. The construction and maintenance of roads necessary to conduct silvicultural activities, as permitted under par. (k).

Note: Local units of government, in the development and application of ordinances which apply to shoreland areas, must consider other programs of statewide interest and other state regulations affecting the lands to be regulated, e.g., regulations and management practices applicable to state and county forests and lands entered under the forest cropland and woodland tax law programs.

(d) The pasturing of livestock and the construction and maintenance of fences, provided that no filling, flooding, draining, dredging, ditching, tiling or excavating is done, except limited filling and excavating necessary for the construction and maintenance of fences.

(e) The cultivation of agricultural crops if cultivation can be accomplished without filling, flooding, or artificial drainage of the wetland through ditching, tiling, dredging or excavating except for:

1. Flooding, dike and dam construction, and ditching for the purpose of growing and harvesting cranberries;

2. The maintenance and repair of existing farm drainage

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planning agency, and a public hearing shall be held as required by s. 62.23 (7) (d) 2., Stats. The appropriate district office of the department shall be provided with written notice of the public hearing at least 10 days prior to such hearing.

(d) In order to ensure that the shoreland protection objectives in s. 281.31, Stats., will be accomplished by the city or village shoreland-wetland zoning ordinance or amendment, a city or village may not rezone a wetland in a shoreland-wetland zoning district, or any portion thereof, if the proposed rezoning may result in a significant adverse impact upon any of the following:

1. Storm and floodwater storage capacity;
2. Maintenance of dry season stream flow or the discharge of groundwater to a wetland, the recharge of groundwater from a wetland to another area or the flow of groundwater through a wetland;
3. Filtering or storage of sediments, nutrients, heavy metals or organic compounds that would otherwise drain into navigable waters;
4. Shoreline protection against soil erosion;
5. Fish spawning, breeding, nursery or feeding grounds;
6. Wildlife habitat; or
7. Areas of special recreational, scenic or scientific interest, including scarce wetland types and habitat of endangered species.

(e) If the department determines that the proposed rezoning may have a significant adverse impact upon any of the criteria listed in par. (d), the department shall notify city or village officials of its determination either prior to or during the public hearing held on the proposed amendment.

(f) The appropriate district office of the department shall be provided with:

1. A copy of the recommendations and report, if any, of the city or village planning agency on the proposed text or map amendment within 10 days after the submission of those recommendations to the city council or village board; and
2. Written notice of the city council's or village board's action on the proposed text or map amendment within 10 days after the action is taken.

(g) If the city council or village board approves the proposed amendment and the department determines, after review as required by s. NR 117.06 (2) (b), that the city or village shoreland-wetland zoning ordinance if so amended will no longer comply with requirements of s. 62.231 or 61.351, Stats., and this chapter, the department shall, after notice and hearing, adopt a complying ordinance for the city or village under s. 62.231 (6) or 61.351 (6), Stats.

(h) If the department has notified the city or village planning agency that a proposed amendment may have a significant adverse impact upon any of the criteria listed in par. (d), that proposed amendment, if approved by the city council or village board, may not become effective until more than 30 days have elapsed since written notice of the city council or village board approval was mailed to the department, as required by par. (f). If within the 30 day period, the department notifies the city council or village board that the department intends to adopt a superseding shoreland-wetland zoning ordinance for the city or village under s. 62.231 (6) or 61.351 (6), Stats., the proposed amendment may not become effective until the ordinance adoption procedure under s. 62.231 (6) or 61.351 (6), Stats., is completed or otherwise terminated.

(5) NONCONFORMING STRUCTURES AND USES. (a) Notwithstanding s. 62.23 (7) (h), Stats., an ordinance or amendment adopted under s. 61.351, Stats., may not prohibit the repair, reconstruction, renovation, remodeling or expansion of a legal non-

conforming structure, or environmental control facility related to a legal nonconforming structure, in existence on the effective date of the shoreland-wetland zoning ordinance or amendment.

(b) Notwithstanding s. 62.23 (7) (h), Stats., an ordinance or amendment adopted under s. 62.231, Stats., may not prohibit the repair, reconstruction, renovation, remodeling or expansion of a legal nonconforming structure in existence on the effective date of the shoreland-wetland zoning ordinance or amendment, or of any environmental control facility in existence on May 7, 1982 related to that structure. Section 62.23 (7) (h), Stats., shall apply to any environmental control facility that was not in existence on May 7, 1982, but which was in existence on the effective date of the shoreland-wetland zoning ordinance or amendment.

(c) Every shoreland-wetland ordinance or amendment adopted under s. 62.231 or 61.351, Stats., and this chapter shall provide that:

1. If a nonconforming use or the use of a nonconforming structure is discontinued for a period of 12 months, any future use of the property or structure shall conform to the requirements of the ordinance or amendment; and
2. Any legal nonconforming use of property which does not involve the use of a structure and which exists at the time of the adoption or amendment of an ordinance adopted under s. 62.231 or 61.351, Stats., and this chapter may be continued although such use does not conform with the provisions of the ordinance. However, such nonconforming use may not be extended.

(d) The maintenance and repair of nonconforming boathouses which extend beyond the ordinary high-water mark of any navigable waters shall be required to comply with s. 30.121, Stats.

(6) ADOPTION OF ADMINISTRATIVE AND ENFORCEMENT PROVISIONS. Every shoreland-wetland zoning ordinance or zoning code containing shoreland-wetland zoning regulations adopted under s. 62.231 or 61.351, Stats., shall provide for:

- (a) The appointment of a new administrator, or the designation of an existing official, and such additional staff as the workload may require, to administer the shoreland-wetland zoning regulations.
- (b) The creation of a board of appeals under s. 62.23 (7) (e), Stats.
- (c) A system for the issuance of land use or building permits for all new construction, reconstruction, structural alteration or moving of buildings and structures, and for other types of development, including the construction and reconstruction of roads. A copy of all applications shall be required to be filed in the office of the zoning administrator.
- (d) Regular inspection of permitted work in progress to insure conformity of the finished building, structure or other development with the terms of the ordinance or zoning code.

(e) Maintenance of a record of all proceedings before the board of appeals and the city or village planning agency, including, at a minimum, minutes of the proceedings, copies of all exhibits and records of all official actions.

(f) Written notice to the appropriate district office of the department at least 10 days prior to hearings on proposed special exception (conditional use) permits which are required by the city or village under sub. (2) in a shoreland-wetland zoning district, appeals for map or text interpretations of shoreland-wetland zoning provisions, and map or text amendments to the shoreland-wetland zoning regulations.

(g) Submission to the appropriate district office of the department of copies of decisions on special exception (conditional use) permits in a shoreland-wetland district, appeals for map or text interpretations of shoreland-wetland zoning provisions, and

map or text amendments to the shoreland-wetland zoning regulations within 10 days after the decision is made.

(h) Mapped zoning district boundaries and the recording, on an official copy of such map, of all district boundary amendments.

(i) The establishment of appropriate penalties for violations of various provisions of the shoreland-wetland zoning ordinance or amendment to an existing ordinance or zoning code, including forfeitures. The shoreland-wetland zoning ordinance or amendment to an existing ordinance or zoning code shall be enforceable by the city or village, or any adjacent or neighboring property owner who is or would be specially damaged by the violation, by the use of injunctions to prevent or abate violations, as provided for in s. 62.23 (7) (f) 2., Stats.

(j) The prosecution of violations of the shoreland-wetland zoning ordinance or amendment to an existing ordinance or zoning code.

History: Cr. Register, November, 1983, No. 335, eff. 12-1-83; correction in (4) (d) made under s. 13.93 (2m) (b) 7., Stats., Register, October, 1999, No. 526.

NR 117.06 Department duties. (1) ASSISTANCE TO CITIES AND VILLAGES. To the full extent of its available resources, the department shall provide advice and assistance to cities and villages in the development, adoption, administration and enforcement of shoreland-wetland zoning ordinances and amendments to existing ordinances or zoning codes, seeking the highest practicable degree of uniformity consistent with the shoreland protection objectives in s. 281.31, Stats. As a part of this effort, the department shall prepare model shoreland-wetland zoning ordinances which cities and villages may use in meeting the requirements of ss. 62.231 and 61.351, Stats., and this chapter.

(2) REVIEW AND APPROVAL OF SHORELAND-WETLAND ZONING ORDINANCES. (a) Compliance with requirements of s. 62.231 or 61.351, Stats., will be determined by the department by comparing the shoreland-wetland zoning regulations which have been adopted by a city or village with the minimum standards for shoreland-wetland zoning regulations contained in s. NR 117.05. The department shall issue a certificate of compliance when a

city or village has, in the opinion of the department, complied with s. 62.231 or 61.351, Stats., and this chapter.

(b) The department shall review all proposed amendments to shoreland-wetland zoning regulations under s. NR 117.05 (4) (e), to ensure that an ordinance or zoning code which is amended as proposed will retain its status of compliance with s. 62.231 or 61.351, Stats., and this chapter.

(3) DETERMINATION OF NONCOMPLIANCE. Cities and villages which do not have shoreland-wetland zoning regulations in effect within 6 months after receipt of final wetland inventory maps for that city or village shall be deemed to be in noncompliance with s. 62.231 or 61.351, Stats., and this chapter. Cities and villages which have shoreland-wetland zoning regulations that do not meet the minimum standards contained in s. NR 117.05 shall also be deemed to be in noncompliance with the requirements of s. 62.231 or 61.351, Stats., and this chapter. If a city or village fails to adopt an ordinance or modify its existing ordinance or zoning code to meet the minimum standards in s. NR 117.05 within 6 months after receipt of final wetland inventory maps for that city or village, the department shall adopt an ordinance or amendment to an existing ordinance or zoning code for the city or village after notice and hearing under s. 62.231 or 61.351, Stats. All costs for such action by the department shall be borne by the noncomplying city or village.

(4) MONITORING. (a) It is the responsibility of the department to:

1. Monitor the administration and enforcement of city and village shoreland-wetland zoning regulations in order to fulfill the state's role as trustee of navigable waters.

2. The department shall periodically reevaluate city and village shoreland-wetland zoning regulations to ascertain continuing compliance with s. NR 117.05. Every city and village shall keep its shoreland-wetland zoning regulations current, effective and enforceable to retain its status of compliance.

(b) The department may initiate enforcement under s. 87.30 (2), Stats., if it finds that a city or village has not adequately enforced its shoreland-wetland zoning regulations.

History: Cr. Register, November, 1983, No. 335, eff. 12-1-83; correction in (1) made under s. 13.93 (2m) (b) 7., Stats., Register, October, 1999, No. 526.