

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

The Wisconsin Natural Resources Board proposes an order to repeal NR 325.065 and 325.13; renumber NR 325.07(5), 325.10 and 325.11; renumber and amend NR 325.03(7), 325.08 and 325.12; amend NR 325.01, 325.06(1) and 325.07 (title), (1) and (5); repeal and recreate NR 325.09; and create NR 325.03(7), (9) and (10), 325.07(5) and (6) and 325.08 relating to boathouses and fixed houseboats in navigable waterways.

FH-41-04

Summary Prepared by the Department of Natural Resources

Statutory Authority: ss. 30.121 and 227.11(2), Stats.

Statutes interpreted: s. 30.121, Stats.

Explanation of Agency Authority:

The Department has authority under s. 30.121(6), Stats., to promulgate rules necessary to carry out regulation of boathouses and fixed houseboats. In ch. 30, Stats., “boathouse” means a structure used for the storage of watercraft and associated materials which has one or more walls or sides, and a “fixed houseboat” means a structure not actually used for navigation which extends beyond the ordinary high-water mark of a navigable waterway and is retained in place either by cables to the shoreline or by anchors or spudpoles attached to the bed of the waterway.

Related Statute or Rule:

The statutory provision for commercial boathouse exception references brownfields defined in s. 560.13(1)(a), Stats., and blighted areas defined in s. 66.1331(3)(a), Stats. The rule refers to “equalized assessed value” as determined by s. 70.32, Stats.

Plain Language Analysis:

The purpose of this rule revision is to modify the existing rule to reflect the exceptions. This rule revision establishes standards and clarifies procedures for obtaining certification of boathouse or fixed houseboat repair or eligibility for a statutory exception. This order makes some minor changes to existing ch. NR 325 to bring into accordance with the provisions of Act 118 allowing an exception to the limits on over-water boathouses for some commercial boat houses.

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 is generally more restrictive and their decision-making criteria are specific. Minnesota requires a permit for construction, reconstruction, relocation, removal, or repair of a boathouse. Permits are only granted if the boathouse is in an area of historic boathouse use, is approved by a resolution of the local government, and was located on public waters prior to January 1, 1997.

Michigan is generally less restrictive and their decision-making criteria are more subjective. A general permit is required for construction of a new boathouse, and the applicant is required to minimize the size, use and environmental impacts of the structure.

Illinois is generally less restrictive and their decision-making criteria are more subjective. A permit is required to place a structure over any state-owned land or water. Construction in the floodway of rivers, lakes and streams is also regulated.

Iowa is generally more restrictive, though their decision-making criteria are subjective. A Sovereign Lands Construction Permit from the Iowa Department of Natural Resources is required. The applicant must analyze the availability of alternatives and measures proposed to prevent, minimize or mitigate adverse impacts to natural resources or public use of the affected area.

Summary of Factual Data and Analytical Methodologies:

The existing rule uses “current equalized assessed value” as determined by s. 70.32, Stats., for determining the value of an existing fixed houseboat or boathouse. If the structure is not assessed, the fair market value is used as certified by a competent appraiser using standard real estate techniques.

Analysis and Documents Supporting Determination of Small Business Effect: Any person building, repairing or maintaining a boathouse or fixed houseboat in public navigable waters is required to obtain a certification from the Department. To comply, small businesses follow the same requirements as other waterfront property owners: complete an application form and submit information to describe their project and demonstrate that it complies with statutory and code requirements to receive a certification. 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: Any small businesses that own or wish to construct a boathouse or fixed houseboat will be affected by the rule. Specific standards will provide clarity and consistency in the certification process.

Agency Contact Person: Liesa Lehmann, lehmal@dnr.state.wi.us, (608) 266-2997

SECTION 1. NR 325.01 is amended to read:

NR 325.01 Purpose. These rules are promulgated pursuant to ss. 30.121 and 227.11(2)(a) and (b), Stats., in order to establish a valuation program for boathouses and fixed houseboats, to define terms used in s. 30.121, Stats., and other terms necessary to the administration of s. 30.121, Stats., and these rules, and to establish standards and procedures for certification of maintenance and repair costs, certification of eligibility for exceptions and procedures for the department to use in obtaining removal of abandoned boathouses and fixed houseboats, or boathouses or fixed houseboats which materially obstruct navigation.

SECTION 2. NR 325.03(7) is renumbered to (5k) and is amended to read:

NR 325.03 (5k) ~~“National, state or local historical landmark”~~ “Historic or cultural value” means a structure listed in or determined eligible for listing in the national registry of historical places or in a local municipal historical preservation ordinance by using procedures prescribed by the Wisconsin ~~state~~ historical society.

SECTION 3. NR 325.03 (7), (9) and (10) are created to read:

NR 325.03 (7) “Navigable waterway” means any body of water with defined bed and banks, 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).

(9) "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.

(10) "Tributary of Lake Michigan or Lake Superior" means a named river that flows directly into Lake Michigan or Lake Superior.

SECTION 4. NR 325.06 is amended to read:

NR 325.06 Repair and maintenance cost. (1) Owners of boathouses or fixed houseboats shall obtain a certification from the department that all needed repair and maintenance costs total less than 50% of the current ~~valuation~~ value of the structure prior to performance of the maintenance ~~of~~ repairs.

~~(2) If all needed repair and maintenance costs total less than 10% of the current value, the owner does not need to apply to the department for a certification pursuant to this chapter. However, any such owner shall maintain a record of the current value at the time of repair and the costs of all needed repairs and maintenance and shall submit such records to the department upon request.~~

SECTION 5. NR 325.065 is repealed.

SECTION 6. NR 325.07 (title) and (1) is amended to read:

NR 325.07 (title) Certification procedure for repair and maintenance. (1) Except as provided for in s. NR 325.06 (2), owners of boathouses or fixed houseboats wishing to perform maintenance or repairs shall request certification that all required maintenance and repairs do not exceed 50% of the current value. The request for certification shall be made to the department ~~district director of the district within which the boathouse or fixed houseboat is located~~ and shall contain the information set forth in ss. NR 325.05 and ~~325.08~~ 325.09(1) and (2).

SECTION 7. NR 325.07 (5) is renumbered to (7).

SECTION 8. NR 325.07 (5) and (6) are created to read:

NR 325.07(5) Where an existing boathouse or fixed houseboat is owned by a non-riparian, the application for certification shall be made by the riparian owner of the property where the boathouse or fixed houseboat is located, provided the transfer of riparian rights is in compliance with s. 30.133, Stats.

(6) The department certification shall contain a requirement that the owner of the boathouse or fixed houseboat record the certification with the register of deeds for the municipality where the boathouse is located, and that the owner submit an affidavit showing proof of recording prior to commencing repairs.

SECTION 9. NR 325.08 is renumbered to NR 325.10, and as renumbered is amended to read:

NR 325.10 (title) Maintenance and repair cost certification Certification information. (1) REQUIRED INFORMATION. Plans or photographs with a locational For certification requests filed pursuant to

s. NR 325.07, an application form including plans, photographs and a location sketch shall be prepared by the applicant submitted to the department showing the following information for use by the department.

Note: Application forms are available at department service centers and on the department's website at www.dnr.wi.gov under the topic "Waterway and Wetland Permits."

(a) Location. ~~The waterway upon which the boathouse or fixed houseboat is located, the legal description of the adjacent property and directions to the site shall be provided.~~ The location of the boathouse or fixed houseboat, including the name of the waterway, property address, fire number (if different), legal description, and directions to the property.

(b) (title) Owner or lessee. ~~The owner or lessee's name, mailing address, fire number (if available) and telephone number shall be provided~~ of the owner of the boathouse or fixed houseboat.

(c) Prior work. Information to identify prior repair and maintenance work on a boathouse or fixed houseboat, and to allow the department to identify certifications issued for prior work. This information may include receipts from purchase of materials or payment of contractors, copies of past department certifications, or a list of the first and last names of all prior owners of the boathouse or fixed houseboat, back to 1979.

~~(e)~~ (d) Features. Information about the following features and their state of repair shall be provided as a part of the required certification information:

1. Boathouses.
 - a. Foundations.
 - b. Structural framework.
 - c. Siding.
 - d. Roofing.
 - e. Presence and description of living quarters, if any.
2. Fixed houseboats.
 - a. Devices used to secure the fixed houseboat to the bank or bed.
 - b. Floatation devices.
 - c. Superstructure framework.
 - d. Siding.
 - e. Roof.
 - f. Presence and description of living quarters, if any.

(2) STATEMENT OF MAINTENANCE OR REPAIRS. ~~The~~ For certification requests filed pursuant to s. NR 325.07, the applicant shall provide a statement of all needed maintenance or repair items regardless of whether the maintenance or repair will be done within one year of the statement. An estimate of labor and material cost associated with those items shall be submitted. Estimates may be prepared by the applicant or by a contractor or contractors representing the applicant. Volunteer labor shall be valued at the prevailing minimum wage rate. Donated or re-used material shall be valued at the prevailing market rate.

(3) CERTIFICATION OF EXCEPTION. For certification requests filed to seek an exception pursuant to s. NR 325.08, an application form including plans, photographs and a location sketch shall be submitted showing the following information:

(a) Location. The location of the boathouse or fixed houseboat, including the name of the waterway, property address, fire number (if different), legal description and directions to the property.

(b) Owner. The name, mailing address and telephone number of the owner of the boathouse or fixed houseboat.

(d) Historic or cultural value. For applications to request an exception under s. 30.121(3g), Stats., documentation to demonstrate that the boathouse or fixed houseboat has historic or cultural value.

(e) Single-story boathouse. For applications to request an exception under s. 30.121(3m), Stats., documentation to demonstrate that the waterway enlargement has been authorized by the department, and that the project meets the standards in s. 30.121(3m), Stats.

(f) Damaged boathouse. For applications to request an exception under s. 30.121(3r), Stats., documentation to demonstrate that the project meets the standards in s. 30.121(3r), Stats., and s. NR 325.09.

(g) Commercial boathouse. For applications to request an exception under s. 30.121(3w), Stats., documentation to demonstrate that the project meets the standards in s. 30.121(3w), Stats., and s. NR 325.09.

SECTION 10. NR 325.08 is created to read:

NR 325.08 Certification procedure for exceptions. (1) Owners wishing to repair or maintain a boathouse or fixed houseboat pursuant to s. 30.121(3g), Stats., construct, repair or maintain a single-story boathouse pursuant to s. 30.121(3m), Stats., repair or reconstruct a boathouse pursuant to s. 30.121(3r), Stats., or construct, repair or maintain a boathouse pursuant to s. 30.121(3w), Stats., shall request certification that the proposed activity is eligible for an exception. The request for certification shall be made to the department and contain the information in ss. NR 325.09 and 325.10.

(2) The department shall review the information submitted by the applicant for certification, and shall inspect the boathouse or fixed houseboat or the site of the proposed boathouse.

(3) The department shall within 60 days issue a certification as requested, if the department determines that the proposed activity is eligible for a statutory exception.

(4) The department shall within 60 days deny certification if the department determines that the proposed activity does not meet the requirements of s. 30.121, Stats., and this chapter to be eligible for an exception. Any owner denied certification may review the denial pursuant to s. 227.42, Stats.

SECTION 11. NR 325.09 is repealed and recreated to read:

NR 325.09 Standards. (1) MAINTENANCE. In addition to the requirements of s. 30.121(3), Stats., repair and maintenance of existing boathouses and fixed houseboats shall meet all of the following conditions:

(a) Repair and maintenance is limited to the 3-dimensional envelope of the existing boathouse or fixed houseboat. No expansion of the boathouse or fixed houseboat in any direction is allowed. Application of a new or replacement layer of roofing or siding that does not increase the usable space within the boathouse or fixed houseboat may not be considered expansion.

(b) Repair and maintenance may not include any change in roof pitch or addition of decks, walkways, railings or other architectural features.

(c) Decks, walkways, railings or piers that are permanently attached to the boathouse or fixed boathouse shall be considered part of the boathouse or fixed houseboat, and shall be subject to the repair limitations of s. 30.121(3), Stats.

(2) DAMAGED BOATHOUSE. In addition to the requirements of s. 30.121(3r), Stats., repair or reconstruction of a damaged boathouse shall meet all of the following conditions to be eligible for an exception:

(a) The boathouse owner shall demonstrate that the boathouse was damaged by violent wind, vandalism or fire. Documentation shall include photographs that depict the boathouse before and after the damage.

(b) The boathouse owner shall demonstrate that the damage occurred after January 1, 1984.

(c) Repair and reconstruction is limited to the specific wall, or roof, or permanently attached deck, walkway, railing or pier that was damaged. Any other proposed work on the boathouse that is not related to specific damage caused under pars. (a) and (b) is subject to the limitations of s. 30.121(3), Stats., the procedures of s. NR 325.07 and the standards in sub. (1).

(3) COMMERCIAL BOATHOUSE. A commercial boathouse shall meet all the requirements of s. 30.121(3w), Stats. to be eligible for an exception.

Note: Section 30.121(3w), Stats., provides that a person a person may construct, repair, or maintain a boathouse if all of the following apply:

(a) The boathouse is used exclusively for commercial purposes.

(b) The boathouse is located on land zoned exclusively for commercial or industrial purposes or the boathouse is located on a brownfield, as defined in s. 560.13 (1) (a), Stats., or in a blighted area, as defined in s. 66.1331 (3) (a), Stats.

(c) The boathouse is located within a harbor that is being operated as a commercial enterprise or is located on a river that is a tributary of Lake Michigan or Lake Superior.

(d) The person has been issued any applicable individual permits under this subchapter and is in compliance with any applicable general permitting requirements under this subchapter.

SECTION 12. NR 325.10 and 325.11 are renumbered to NR 325.11 and 325.12, respectively.

SECTION 13. NR 325.12 is renumbered to NR 325.13, and as renumbered is amended to read:

NR 325.13 (title) ~~Removal procedure for disrepaired or obstructing boathouses or fixed houseboats. Enforcement.~~ (1) Upon complaint or upon its own motion, the department shall may order the removal of boathouses or fixed houseboats which materially obstruct navigation or are in a major state of disrepair pursuant to the provisions of s. 30.03(4)(a), Stats. Forfeitures and abatement for violations of s. 30.121, Stats., and this chapter may also be prosecuted by the department pursuant to the provisions of ss. 23.50, 23.79 and 30.03 (2), Stats.

(2) Noncompliance with the provisions of s. 30.121, Stats., this chapter or any conditions of a certification issued by the department, constitutes a violation and may result in a forfeiture. The department may seek abatement of any activity in violation of s. 30.121, Stats.

(3) When an after-the-fact 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 repair, maintain or construct a boathouse or fixed houseboat in a navigable waterway if the activity is not eligible for a certification or otherwise authorized under this chapter.

SECTION 14. NR 325.13 is repealed.

SECTION 15. 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 16. 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)