

CR 05-058

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

The Wisconsin Natural Resources Board proposes an order to: repeal NR 115.03 (12), NR 115.05 (1) and (2); to repeal and recreate NR 115.01; to renumber NR 115.03 (1) and NR 115.05 (5); to renumber and amend NR 115.05 (3), (4) and (6); to amend NR 115 (title), NR 115.02, NR 115.03 (intro), NR 115.05 (title), NR 115.06 (2) and (3); and to create NR 115.03 (1d), (1p), (1t), (3m), (4g), (4r), and (7m), NR 115.04 and NR 115.05 (4) (hm); relating to minimum standards for county shoreland ordinances.

WT-28-04

Analysis prepared by the Department of Natural Resources

Statutory authority: Sections 59.692, 227.11 (2) (a), and 281.31, Stats.

Statutes interpreted: Sections 59.69, 59.692, 59.694 and 281.31, Stats.

Plain Language Rule Analysis:

Background

Growing public awareness and concern for controlling water pollution led to enactment of the Federal Water Pollution Control Act Amendments of 1972. As amended in 1977, this law became commonly known as the Clean Water Act. The Act established the basic structure for regulating discharges of pollutants into the waters of the United States. Here in Wisconsin, our foresight in protecting navigable waters far exceeded that of the federal government. In response to human impacts on public waters, the Wisconsin Legislature on August 1, 1966, passed the Water Resources Act (as created by Chapter 614, Laws of 1965) that articulated the purpose and direction for shoreland ordinances: "To aid in the fulfillment of the state's role as trustee of its navigable waters and to promote public health, safety, convenience, and general welfare."

Wisconsin's Water Resources Act utilized a novel approach toward comprehensive pollution control by supplementing state-level regulation of direct polluters (industries and municipal treatment plants) with county-administered shoreland ordinances, sanitary codes, and subdivision regulations to control indirect pollution sources. The basic premise was to establish practical minimum standards and workable regulations in an area where there had been little experience. This act was also very important specifically for shoreland protection because the requirement to enact shoreland ordinances has been interpreted to be part of the active public trust duty of the state of Wisconsin, which requires the state to protect navigable waters not only for navigation, but also to protect and preserve those waters for fishing, recreation and scenic beauty.

Authority

The proposed amendments to ch. NR 115 are intended to allow a county more flexibility in how they regulate land use in shorelands, and to give shoreland property owners more land use options, while still protecting the public interest in navigable waters and adjacent shorelands. Section 281.31(6), Stats., provides: "Within the purpose of sub. (1), the department shall prepare and provide to municipalities general recommended standards and criteria for navigable water protection regulations and their administration." Section 59.692(1m), Stats., provides that each county shall zone by ordinance all shorelands in its unincorporated area. Section 59.692 (1) (c), Stats., defines "shoreland zoning standard" to mean "a standard for ordinances enacted under this section that is promulgated as a rule by the department." Section 227.11(2)(a), Stats., gives the Department the authority to promulgate rules interpreting the provisions of any statute enforced or administered by the agency.

Revision Rationale

In response to the increasing impacts on public waters from adjacent shoreland development, the amount and intensity of development today in comparison to 40 years ago and the resulting pressures on our public resources from private land owners and water recreationalists alike, the state launched a broad-based effort to update the shoreland protection standards originally promulgated in 1968. NR 115 was created to protect water quality, fish and wildlife habitat and scenic beauty along navigable lakes and rivers by establishing statewide minimum standards including lot sizes, building setbacks from the water's edge, and limits on tree removal. Controlling the density of development along the waters and creating a buffer around them was the best management practice of the time. After 40 years, the way in which we develop the land and the associated pressures on the resource has drastically changed. Instead of small summer cottages, waterfront owners are building year-round, much larger homes. The lots that were created years ago may not be capable of handling the increased stress without compromising the integrity of the very resource that draws our attention in the first place. Change is needed to clarify and update standards, provide flexibility for property owners, offset development impacts to better protect the water resources, and simplify implementation of standards through local shoreland ordinances.

Revision Process

The revision package is based on concepts developed, negotiated and compromised by a very diverse and well-represented advisory committee. The dedication and determination of these individuals proves how important our water resources and adjacent shorelands are in the state.

These amendments are the result of over 5 years of work by this group and numerous opportunities for public comment. The Department held 8 public hearings in July and August of 2007, 11 public hearings in July and August of 2005 and 8 listening sessions in the fall and winter of 2003. All venues were an opportunity for the public to review and comment on the draft proposals generated together by the Department and the Advisory Committee.

Listening sessions were added as an additional step in the traditional rule revision process because the Department recognized this issue needed special consideration and debate in an open, informative, honest and participatory forum. Over 850 people attended eight listening sessions that were held around Wisconsin in November and December 2003.

As a requirement, public hearings are held to generate public comment. The Department held two rounds of public hearings in 2005 and 2007, totaling 19 public hearings around the state. Over 1,000 people attended the hearings in 2005 and during the public comment period over 50,000 comments were collected from nearly 12,000 individuals. 2007 public comment period yielded approximately 9,000 comments from about 2,400 individuals. A 2005 public hearing comment summary and 2007 response to comment document can be found as attachments to the Environmental Assessment provided for this rule revision.

In addition to both rounds of public hearings and listening sessions, the Bureau of Watershed Management staff has kept a list of interested parties by e-mail and hard mail to provide timely updates to those interested in the process and allow those parties an opportunity to comment on newly generated materials including draft code language.

Four main themes emerged from the public comments regarding NR 115 revisions:

- Keep the regulations simple,
- Make the regulations enforceable,
- Protect our water resources, and
- Provide communities the flexibility to determine how to best administer the minimum standards.

Major provisions and new requirements

Major provisions of the proposal include changes to vegetation management in the first 35-foot and changes to regulation of structures within the shoreland setback. New requirements include establishment of impervious surface standards, and the removal of the 50% rule for nonconforming structures. The new standards will allow counties to regulate a structure based on its impact to the

resource, not how the structure was built. Finally, mitigation requirements are added to the code to help balance the flexibility provided in this chapter.

Federal Regulatory Analysis:

There is no specific existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule.

State Regulatory Analysis:

Wisconsin's Shoreland Management Program is a partnership between state and local government that requires development near navigable lakes and streams to meet statewide minimum standards. Each Wisconsin county has shoreland ordinance provisions that protect water resource values: water quality, recreation and navigation, fish and wildlife habitat, and natural scenic beauty. County ordinances must have standards that meet or exceed the minimum state standards contained in Chapter NR 115, Wisconsin Administrative Code. The shoreland provisions include:

- setbacks for structures from waterways
- minimum lot sizes
- controls on removing shoreland vegetation
- standards for land disturbance activities
- protection of wetlands
- restrictions on improvements to nonconforming structures

Current development trends continue to pose major challenges to the shoreland program. As new development occurs, long continuous sections of natural shorelines are broken into small fragmented patches. This reduces the availability and quality of habitat needed by shoreline-dependent species, such as loons, eagles, osprey, and many amphibian species, particularly in northern Wisconsin. Along highly developed shorelines, preserving even small amounts of near-shore and fringe wetland habitat becomes critical for maintaining natural reproduction of fish populations. As smaller seasonal cabins are replaced with larger four-season homes, concerns over the size of lots and carrying capacity of the land arise. In addition, development in areas typically considered undevelopable, and second and third tier development, are now problems that the shoreland program did not predict nearly 40 years ago.

Much has changed in the way we develop waterfront property and the demands we place upon our developed areas. Changes in this program will equip the county with the tools and techniques needed to protect these valuable resource areas while allowing reasonable development to continue for the foreseeable future.

State Comparison:

Minnesota

The State of Minnesota has a shoreland program that is also currently in the process of being revised. The Minnesota DNR, on their website, states that an increase in development pressure around lakes and rivers has raised concerns about water quality and impacts on lake use therefore resulting in the need to review current shoreland minimum standards in the state. Minnesota bases their shoreland program on statewide classification of all surface waters based on size and shape, amount and type of existing development, road and service accessibility, existing natural character of the water and other parameters. Waterbodies are classified as natural environment lakes, recreational development lakes, general development lakes, remote river segments and forested rivers. Each class has specific standards associated with the shoreland ordinance including building setbacks, lot sizes and widths, bluff impact zones, slope requirements and others. The states differ on where the shoreline setback is measured from and how the Ordinary High Water Mark is determined. In practice, this difference may result in reduced shoreline setbacks in Minnesota when compared to standards in Wisconsin. The states also have somewhat different standards in treatment of nonconforming structures.

Michigan

The State of Michigan has a wild and scenic rivers protection program to provide special protection to designated rivers. This program is managed very similar to other wild and scenic river protection

programs nationwide. The protection standards are outlined in Natural River Zoning Rule 281 which outlines standards for river setbacks, minimum lot widths, special vegetation management standards, and nonconforming structure improvements. Additional activities that may have potential impacts to the public trust, riparian rights, or may impair or destroy the waters or other natural resources of the state, including inland lakes and streams, the Great Lakes, wetlands, and groundwater, are regulated by the Department of Environmental Quality.

Illinois

The State of Illinois regulates inland waters through an administrative code detailing conservation measures for public waters. The purpose of the program is to protect the public's interests, rights, safety and welfare in the State's public bodies of water. More specifically, construction is regulated to prevent obstruction to, or interference with, the navigability of any public body of water; encroachment on any public body of water; and impairment of the rights, interests or uses of the public in any public body of water or in the natural resources thereof.

Indiana

The state of Indiana also regulates lake-side construction activities and provides standards for the activities along and within public freshwater lakes. The state also has standards for nonconforming uses and nuisances including the removal of a lawful nonconforming use if the structure or facility affects public safety, natural resources, natural scenic beauty or the water level of a public freshwater lake.

Iowa

The state of Iowa has an integrated watershed management program, surface water regulation program which includes motor regulations and slow-no-wake areas to reduce shore erosion and a new (January 12, 2005) invasive species program to help safeguard the biological integrity of the lakes and river systems in Iowa. However, Iowa does not have a specific program for shoreland management or shoreland ordinance requirements. Most of Iowa's environmental programs are directly mandated by the federal government and required components of Environmental Protection or Federal Emergency Management Agency programs.

Summary of Factual Data:

This rule revision was the result of scientific analysis, literature summaries, advisory committee meetings, listening sessions, extensive public comments and formal public hearings that spanned over six years. This was a collaborative and comprehensive effort that began by collecting and evaluating data on local experiences administering the existing rule, as well as newer scientific information relevant to the impacts of shoreland development.

The evaluation process identified some key problem areas concerning application of the existing shoreland standards and regulatory consistency. Confusion and misunderstandings have resulted from unclear, subjective language, and inconsistent application of ordinance standards. Landowners and local governments have been frustrated in applying and interpreting the shoreland regulations. The proposed ch. NR 115 has been developed to clarify the standards and provide more flexibility in the application of land use standards and restrictions that will allow reasonable improvement of private properties, while still protecting Wisconsin's waters.

A 1997 Department study "Effectiveness of Shoreland Zoning Standards to Meet Statutory Objectives: A Literature Review with Policy Implications" showed that existing shoreland standards were not adequately achieving the statutory objectives of the program to protect critical fish and wildlife habitat, natural scenic beauty, and water quality of lakes and streams. Scientific studies during the 1990's found that fish and insect populations and water quality decline dramatically when watershed impervious surfaces reach 8-12%. A northern Wisconsin study found significant declines in populations of green frogs and key bird species on developed shorelines. When purchasing waterfront property, people inherently value clean water, plentiful wildlife and scenic vistas. A study in Maine found that waterfront property values would decline by 5% with a three-foot decline in lake water clarity. More details on these and other supporting studies are provided in the Environmental Assessment for this rule revision.

Effect on Small Businesses:

Small businesses are not expected to be significantly impacted by the proposed rule changes. Lot size and setback requirements have been imposed on businesses within the shoreland zone since the inception of the program back in the late 1960s. Commercial development has never been, and is not in this proposal, singled out as a different use. New impervious surface standards and mitigation requirements will apply to small business just like a any other development. Safeguards have been put into place to guarantee the amount of mitigation that would be required on large-scale projects, which may prove beneficial for some small businesses. Standards contained in this rule may limit some facility expansion based on location; however, other modifications in the rule will help in allowing current facilities to maintain and update current structures without limitations now imposed on the cost of those modifications. The rule requires local units of government to adopt shoreland ordinances based on these rules. The local units of government will enforce the local ordinances.

Anticipated Costs Incurred by the Private Sector:

Submission of an application for a permit under the local ordinances will result in costs to the applicant to provide the needed background information. The application costs will vary by individual permit application depending on the type of project undertaken and the level of detailed information needed to provide local authorities sufficient background information to make a determination. This rule will require mitigation in some situations. Mitigation costs will be incurred for vegetative plantings, developing rain gardens or other runoff controls and other types of practices that may be needed and determined by the local zoning office.

Agency contact person: Gregg Breese (608) 261-6430 gregg.breese@wisconsin.gov

SECTION 1. Chapter NR 115 (title) is amended to read:

WISCONSIN'S SHORELAND ~~MANAGEMENT~~ PROTECTION PROGRAM

SECTION 2. NR 115.01 is repealed and recreated to read:

NR 115.01 Purpose. Section 281.31, Stats., provides that shoreland subdivision and zoning regulations shall: "further the maintenance of safe and healthful conditions; prevent and control water pollution; protect spawning grounds, fish and aquatic life; control building sites, placement of structure and land uses and reserve shore cover and natural beauty." Section 59.692, Stats., requires counties to effect the purposes of s. 281.31, Stats., and to promote the public health, safety and general welfare by adopting zoning regulations for the protection of all shorelands in unincorporated areas that meet shoreland zoning standards promulgated by the department. The purpose of this chapter is to establish minimum shoreland zoning standards for ordinances enacted under s. 59.692, Stats. for the purposes specified in s. 281.31(1), Stats., and to limit the direct and cumulative impacts of shoreland development on water quality; near-shore aquatic, wetland and upland wildlife habitat; and natural scenic beauty. Nothing in this rule shall be construed to limit the authority of a county to enact more restrictive shoreland zoning standards under s. 59.69 Stats. or 59.692 Stats. to effect the purposes of 281.31 Stats.

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SECTION 3. NR 115.02 is amended to read:

NR 115.02 Applicability. The provisions of this chapter ~~are applicable~~ apply to county regulation of the use and development of unincorporated shoreland areas, ~~and to annexed or incorporated areas except as provided in s. 59.692(7), Stats.~~ Unless specifically exempted by law, all cities, 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 ordinances. The construction, reconstruction, maintenance ~~and or~~ repair of state highways and bridges, carried out under the direction and supervision of the Wisconsin department of transportation ~~are is~~ not subject to local shoreland zoning ordinances, if s. 30.2022 (1), Stats., applies.

Note: Under section 59.692(7), Stats., areas annexed after May 7, 1982 and areas incorporated after April 30, 1994 are generally subject to the shoreland zoning ordinances in effect on the date of annexation or incorporation.

SECTION 4. NR 115.03 (intro.) is amended to read:

NR 115.03 Definitions. For the purpose of this chapter:

SECTION 5. NR 115.03 (1) is renumbered as NR 115.03 (1h).

SECTION 6. NR 115.03 (1d), (1p), (1t), (3m), (4g), (4r), and (7m) are created to read:

NR 115.03 (1d) "Access and viewing corridor" means a strip of vegetated land that allows safe pedestrian access to the shore through the vegetative buffer zone.

(1p) "Building envelope" means the three dimensional space within which a structure is built.

(3m) "Existing development pattern" means that principal structures exist within 250 feet of a proposed principal structure in both directions along the shoreline.

(4g) "Impervious surface" means an area that releases as runoff all or a majority of the precipitation that falls on it. "Impervious surface" excludes frozen soil but includes rooftops, sidewalks, driveways, parking lots, and streets unless specifically designed, constructed, and maintained to be pervious.

(4r) "Mitigation" means balancing measures that are designed, implemented and function to restore natural functions and values that are otherwise lost through development and human activities.

(7m) "Routine maintenance of vegetation" means normally accepted horticultural practices that do not result in the loss of any layer of existing vegetation and do not require earth disturbance.

SECTION 7. NR 115.03 (12) is repealed.

SECTION 8. NR 115.04 is created to read:

NR 115.04 Shoreland-wetlands. (1) ESTABLISHMENT OF SHORELAND-WETLAND ZONING DISTRICTS. Counties shall adopt shoreland ordinances that include zoning regulations for shoreland-wetland zoning districts.

(2) AMENDMENT OF SHORELAND-WETLAND MAPS AND ZONING DISTRICTS. (a) County review of wetland inventory map amendments. After the department amends final Wisconsin wetland inventory maps:

1. The department shall transmit to the county zoning agency designated under s. 59.69 (2) (a), Stats., digital files or paper copies of amended wetland inventory maps for that county.

2. If the county believes that the amended maps are inaccurate, within 30 days of receiving the amended maps the county shall note discrepancies on the maps with an accompanying narrative explaining the amended problem areas and return a copy of the notated map and narrative to the department.

3. The department shall, at department expense, consult available soil survey maps and conduct on-site inspections, if appropriate, in order to evaluate the county recommendations, and shall then prepare final amended Wisconsin wetland inventory maps for that county.

Note: As of 1985 all counties adopted official wetland zoning maps and amendments occur as accuracy increases.

(b) County amendment of shoreland-wetland maps and zoning districts. 1. Within 6 months after receipt of final amended Wisconsin wetland inventory maps for that county from the department, a county shall zone all shorelands designated as wetlands on the amended Wisconsin wetland inventory maps in a shoreland-wetland zoning district. If a county fails to zone all shoreland-wetlands within this 6 month period, s. NR 115.06 (3) (b) shall apply.

2. Ordinance text and map amendments creating or amending shoreland-wetland zoning districts shall be referred to the county zoning agency for public hearing as required by s. 59.69 (5) (e) 2., Stats.

Note: Where an apparent discrepancy exists between a shoreland-wetland district shown on an amended map and actual field conditions, the county shall contact the department to determine if the amended map is in error. If the department determines that a particular area was incorrectly mapped as wetland or meets the wetland definition but was not shown as wetland on the map, the county shall have the authority to immediately grant or deny a shoreland zoning permit in accordance with the applicable regulations based on the department determination as to whether the area is wetland. In order to correct wetland mapping errors on the official zoning map, an official map amendment must be initiated within a reasonable period of time, not to exceed one year following the determination.

3. At least 10 days prior to the public hearing, the county shall provide the appropriate regional office of the department with a copy of the proposed text and map amendments and with written notice of the public hearing.

(c) *Amendment of shoreland-wetland zoning districts.* 1. Official ordinance amendments are required for any proposed change in shoreland-wetland zoning. Such amendments shall be made in accordance with provisions of s. 59.69 (5) (e), Stats. Official amendments to the ordinance text shall be made promptly. Provided the ordinance text is promptly amended, a county may amend its official map within a reasonable period of time not to exceed one year following the change in shoreland-wetland zoning.

2. The county clerk shall submit a copy of every proposed amendment to a shoreland-wetland zoning district to the appropriate regional office of the department within 5 days of the filing of such proposed amendment with the clerk.

3. All proposed text and map amendments to shoreland-wetland zoning districts shall be referred to the county zoning agency for a public notice and hearing as required by s. 59.69 (5) (e) 2., Stats. The appropriate regional office of the department shall be provided with written notice of the public hearing at least 10 days prior to such hearing.

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

- a. Storm and flood water storage capacity;
- b. 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;
- c. Filtering or storage of sediments, nutrients, heavy metals or organic compounds that would otherwise drain into navigable waters;
- d. Shoreline protection against soil erosion;
- e. Fish spawning, breeding, nursery or feeding grounds;
- f. Wildlife habitat; or
- g. Areas of special recreational, scenic or scientific interest, including scarce wetland types.

5. If the department determines that the proposed rezoning may have a significant adverse impact upon any of the criteria listed in subd. 4., the department shall notify the county zoning agency of its determination either prior to or during the public hearing held on the proposed amendment.

6. As soon as possible after holding a public hearing, the county zoning agency shall submit its written findings and recommendations to the county board. Said findings shall outline the reason for the agency's recommendations. After receipt of the county zoning agency's findings and recommendations, the board may approve or disapprove of the proposed amendment.

7. The appropriate regional office of the department shall be provided with all of the following:

- a. A copy of the county zoning agency's findings and recommendations on the proposed amendment within 10 days after the submission of those findings and recommendations to the county board;
- b. Written notice of the board's decision on the proposed amendment within 10 days after it is issued.

8. If the county board approves of the proposed amendment and the department determines, after review as required by s. NR 115.06 (2) (c), that the county shoreland zoning ordinance if so amended would no longer comply with the requirements of s. 59.692, Stats., and this chapter, the department shall, after notice and hearing, adopt a complying ordinance for the county, under s. 59.692 (6), Stats.

9. If the department has notified the county zoning agency that a proposed amendment may have a significant adverse impact upon any of the criteria listed in subd. 4., that proposed amendment, if approved by the county board, shall not become effective until more than 30 days have elapsed since written notice of the county board's approval was mailed to the department, as required by subd. 7. If within the 30-day period the department notifies the county board that the department intends to adopt a superseding shoreland zoning ordinance for the county under s. 59.692 (6), Stats., the proposed amendment shall not become effective while the ordinance adoption procedure is proceeding, but shall have its effect stayed until the s. 59.692 (6), Stats., procedure is completed or otherwise terminated.

(3) PERMITTED USES IN SHORELAND-WETLAND ZONING DISTRICTS. Within shoreland-wetland zoning districts, counties shall permit the following uses subject to the general requirements of s. NR 115.05, the provisions of chs. 30 and 31, Stats., and other state and federal laws, if applicable:

(a) Hiking, fishing, trapping, hunting, swimming 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 to construct and maintain roads which are necessary to conduct silviculture activities, which cannot as a practical matter be located outside the wetland, and which are designed and constructed to minimize the adverse impact upon the natural functions of the wetland, or except as required for 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.

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, i.e. regulations and management practices applicable to state and county forests and lands entered under the forest cropland and managed forest land 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.

(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 that flooding, dike and dam construction, and ditching shall be allowed for the purpose of growing and harvesting cranberries. The maintenance and repair of existing drainage systems (such as ditching and tiling) shall be permitted. The construction and maintenance of roads shall be permitted if the roads are necessary for agricultural cultivation, cannot as a practical matter be located outside the wetland, and are designed and constructed to minimize the adverse impact upon the natural functions of the wetland.

(f) The construction and maintenance of duck blinds provided that no filling, flooding, draining, dredging, ditching, tiling or excavating is done.

(g) The construction and maintenance of nonresidential structures, not to exceed 500 square feet, used solely in conjunction with the raising of waterfowl, minnows, or other wetland or aquatic animals, or used solely for some other purpose which is compatible with wetland preservation if the structure cannot as a practical matter be located outside the wetland, provided that no filling, flooding, draining, dredging, ditching, tiling or excavating is done.

(h) The construction and maintenance of piers, docks and walkways, including those built on pilings, provided that no filling, flooding, dredging, draining, ditching, tiling or excavating is done.

(i) The establishment and development of public and private parks and recreation areas, boat access sites, natural and outdoor education areas, historic and scientific areas, wildlife refuges, game preserves and private wildlife habitat areas, provided that no filling is done and that any private wildlife habitat area is used exclusively for that purpose. The owner or operator of a new private recreation or wildlife area to be located in a shoreland-wetland zoning district shall be required to notify the county zoning agency of the proposed project before beginning construction. Ditching, excavating, dredging, dike and dam construction shall be allowed in wildlife refuges, game preserves, and private wildlife habitat areas for the purpose of improving wildlife habitat or to otherwise enhance wetland values.

(j) The construction and maintenance of electric, gas, telephone water and sewer transmission and distribution lines, and related facilities, by public utilities and cooperative associations organized for the purpose of producing or furnishing heat, light, power or water to their members, which cannot as a practical matter be located outside the wetland, provided that any filling, excavating, ditching or draining

necessary for such construction or maintenance is done in a manner designed to minimize flooding and other adverse impacts upon the natural functions of the wetland.

Note: Major electrical generating facilities and high-voltage transmission lines that have obtained a certificate of public convenience and necessity under s. 196.491, Stats., are not subject to the requirements of local ordinances.

(k) The construction and maintenance of railroad lines which cannot as a practical matter be located outside the wetland, provided that any filling, excavating, ditching or draining necessary for the construction or maintenance is done in a manner designed to minimize flooding and other adverse impacts upon the natural functions of the wetland.

(L) The maintenance, repair, replacement, and reconstruction of existing town and county highways and bridges.

(4) PROHIBITED USES IN SHORELAND-WETLAND ZONING DISTRICTS. Any use not permitted in sub. (3) is prohibited in a shoreland-wetland zoning district unless the wetland or portion thereof is rezoned by amendment of the county shoreland zoning ordinance in accordance with s. 59.69 (5) (e), Stats., and the procedures outlined in sub. (2) (c).

SECTION 9. NR 115.05 (title) is amended to read:

NR 115.05 Shoreland regulation standards and criteria. Minimum Zoning Standards for Shorelands.

SECTION 10. NR 115.05 (1) and (2) are repealed.

SECTION 11. NR 115.05 (3) is renumbered to NR 115.05 (1) and as renumbered is amended to read:

NR 115.05 (1) ESTABLISHMENT OF SHORELAND ZONING REGULATIONS FOR SHORELAND AREAS STANDARDS. The shoreland zoning ordinance adopted by each county shall ~~provide sufficient~~ sufficiently control of the use of shorelands to afford the protection of water quality as specified in chs. NR 102 and 103. At a minimum, the ordinance shall include all of the following provisions:

(a) *Minimum lot sizes.* Minimum lot sizes in the shoreland area shall be established to afford protection against danger to health, safety and welfare, and protection against pollution of the adjacent body of water.

1. 'Sewered lots.' Lots served by public sanitary sewer shall have a minimum average width of 65 feet and a minimum area of 10,000 square feet.

2. 'Unsewered lots.' Lots not served by public sanitary sewer shall have a minimum average width of 100 feet and a minimum area of 20,000 square feet.

3. 'Substandard lots.' A legally created lot or parcel that met minimum area and minimum average width requirements when created, but does not meet current lot size requirements, may be used as a building site if all of the following apply:

a. The substandard lot or parcel was never reconfigured or combined with another lot or parcel by plat, survey, or consolidation by the owner into one property tax parcel.

b. The substandard lot or parcel has never been developed with one or more of its structures placed partly upon an adjacent lot or parcel.

c. The substandard lot or parcel is developed to comply with all other ordinance requirements.

4. 'Planned Unit Development.' A non-riparian lot may be created which does not meet the requirements of subd. 1. if the county has approved and recorded a plat or certified survey map including that lot within a planned unit development, if the planned unit development contains at least 2 acres or 200 feet of frontage, and if the reduced non-riparian lot sizes are allowed in exchange for larger shoreland buffers and setbacks on those lots adjacent to navigable waters that are proportional to and offset the impacts of the reduced lots on habitat, water quality and natural scenic beauty.

(b) *Building setbacks.* Permitted building setbacks shall be established to conform to health, safety and welfare requirements, preserve natural beauty, reduce flood hazards and avoid water pollution. 1. 'Shoreland setback.' ~~Unless an existing development pattern exists, Except where exempt under subd. 1m.,~~ a setback of 75 feet from the ordinary high-water mark of ~~an adjacent body of water any~~

navigable waters to the nearest part of a building or structure shall be required for all buildings and structures, except piers, boat hoists and boathouses. Where an existing development pattern exists, the shoreland setback for a proposed principal structure may be reduced to the average shoreland setback of the principal structure on each adjacent lot, but the shoreland setback may not be reduced to less than 35 feet from the ordinary high-water mark of any navigable waters.

Note: A property owner may seek a variance to a dimensional standard of the county ordinance and a county board of adjustment may review the request pursuant to s. 59.694(7)(c), Stats.

1m. 'Exempt structures.' All of the following structures are exempt from the shoreland setback standards in subd. 1.:

a. Boathouses located entirely above the ordinary high-water mark and entirely within the access and viewing corridor that do not contain plumbing and are not used for human habitation.

Note: This chapter does not prohibit repair and maintenance of boathouses located above the ordinary high-water mark.

b. Open sided and screened structures such as gazebos, decks, patios and screen houses in the shoreland setback area that satisfy the requirements in s. 59.692 (1v), Stats.

c. Fishing rafts that are authorized on the Wolf river and Mississippi river under s. 30.126, Stats.

d. Broadcast signal receivers, including satellite dishes or antennas that are one meter or less in diameter and satellite earth station antennas that are 2 meters or less in diameter.

e. Utility transmission and distribution lines, poles, towers, water towers, pumping stations, well pumphouse covers, private on-site wastewater treatment systems that comply with ch. Comm 83, and other utility structures that have no feasible alternative location outside of the minimum setback and that employ best management practices to infiltrate or otherwise control storm water runoff from the structure.

f. Walkways, stairways or rail systems that are necessary to provide pedestrian access to the shoreline and are a maximum of 60-inches in width.

2. 'Floodplain structures.' Buildings and structures to be constructed or placed in a flood plain shall be required to comply with any applicable flood plain zoning ordinance.

3. 'Boathouses.' The use of boathouses for human habitation and the construction or placing of boathouses beyond the ordinary high-water mark of any navigable waters shall be prohibited.

(c) ~~Trees and shrubby vegetation.~~ The cutting of trees and shrubby shall be regulated to protect natural scenic beauty, fish and wildlife habitat, and water quality, control erosion, and reduce the flow of effluents, sediments and nutrients from the shoreland area. a county shall regulate removal of vegetation in shoreland areas, consistent with the following:

1. In the strip of land 35 feet wide inland from the ordinary high water mark, no more than 30 feet in any 100 feet shall be clear-cut. The county shall establish ordinance standards that consider sound forestry and soil conservation practices and the effect of vegetation removal on water quality, including soil erosion, and the flow of effluents, sediments and nutrients.

Note: In developing and applying ordinances which apply to shoreland areas, local units of government must consider other applicable law and programs affecting the lands to be regulated, e.g., law and management practices that apply to state and county forests and lands entered under forest cropland and managed forest land programs, and ss. 59.692(2)(a) and 59.69(4)(a), Stats.

2. In shoreland areas more than 35 feet inland, trees and shrub cutting shall be governed by consideration of the effect on water quality and consideration of sound forestry practices and soil conservation practices.

3. ~~The tree and shrubby regulations required by this paragraph shall not apply to the removal of dead, diseased or dying trees or shrubby.~~ To protect water quality, fish and wildlife habitat and natural scenic beauty, and to promote preservation and restoration of native vegetation, the county ordinance shall designate land that extends from the ordinary high water mark to a minimum of 35 feet inland as a vegetative buffer zone and prohibit removal of vegetation in the vegetative buffer zone except as follows:

a. The county may allow routine maintenance of vegetation.

b. The county may allow removal of trees and shrubs in the vegetative buffer zone to create access and viewing corridors, provided that the combined width of all access and viewing corridors on a riparian lot or parcel may not exceed the lesser of 30 percent of the shoreline frontage or 200 feet.

c. The county may allow removal of trees and shrubs in the vegetative buffer zone on a parcel with 10 or more acres of forested land consistent with "generally accepted forestry management practices" as defined in section NR 1.25(2)(b), Wis. Adm. Code, and described in Department publication "Wisconsin Forest Management Guidelines" (publication FR-226), provided that vegetation removal be consistent with these practices.

d. The county may allow removal of vegetation within the vegetative buffer zone to manage exotic or invasive species, damaged vegetation, vegetation that must be removed to control disease, or vegetation creating an imminent safety hazard, provided that any vegetation removed under the permit be replaced by replanting in the same area as soon as practicable.

Note: Information regarding native plants, shoreland and habitat management is available from the University of Wisconsin-Extension publications website: <http://clean-water.uwex.edu/pubs/index.htm>.

e. The county may authorize by permit additional vegetation management activities in the vegetative buffer zone. The permit issued under this subd. par. shall require that all management activities comply with detailed plans approved by the county and designed to control erosion by limiting sedimentation into the waterbody, to improve the plant community by replanting in the same area, and to maintain and monitor the newly restored area. The permit also shall require an enforceable restriction to preserve the newly restored area.

(d) *Filling, grading, lagooning, dredging, ditching and excavating.* Filling, grading, lagooning, dredging, ditching and excavating may be permitted only in accordance with the provisions of ~~sub. (2)~~ NR 115.04, the requirements of ch. 30, Stats., and other state and federal laws where applicable, and only if done in a manner designed to minimize erosion, sedimentation and impairment of fish and wildlife habitat and natural scenic beauty.

(e) *Impervious surfaces.* Counties shall establish impervious surface standards to protect water quality and fish and wildlife habitat and protect against pollution of navigable waters. County impervious surface standards shall apply to the construction, reconstruction, expansion, replacement or relocation of any impervious surface within 300 feet of the ordinary high-water mark of any navigable waterway, and shall require all of the following:

1. 'Calculation of percentage of impervious surface.' Percentage of impervious surface shall be calculated by dividing the surface area of existing and proposed impervious surfaces on the portion of a lot or parcel that is within 300 feet of the ordinary high-water mark by the total surface area of that portion of the lot or parcel that is within 300 feet of the ordinary high-water mark, and multiplied by 100.

2. 'Impervious surface standard.' A county may allow up to 15% impervious surface on the portion of a lot or parcel that is within 300 feet of the ordinary high-water mark.

3. 'Maximum impervious surface.' A county may allow more than 15% impervious surface but not more than 30% impervious surface on the portion of a lot or parcel that is within 300 feet of the ordinary high-water mark, provided that the county issues a permit that requires a mitigation plan approved by the county and implemented by the property owner by the date specified in the permit. The mitigation plan shall include enforceable obligations of the property owner to establish or maintain measures that the county determines adequate to offset the impacts of the impervious surface on water quality, near-shore aquatic habitat, upland wildlife habitat and natural scenic beauty. The mitigation measures shall be proportional to the amount and impacts of the impervious surface being permitted. The obligations of the property owner under the mitigation plan shall be evidenced by an instrument recorded in the office of the County Register of Deeds.

Note: A property owner may seek a variance to a dimensional standard of the county ordinance and a county board of adjustment may review the request pursuant to s. 59.694(7)(c), Stats.

4. 'Existing impervious surfaces.' For existing impervious surfaces that were lawfully placed when constructed but that do not comply with the standards in subpar. 2. and 3., the property owner may do any of the following:

a. maintenance and repair of all impervious surfaces;

b. replacement of existing impervious surfaces with similar surfaces within the existing building envelope;

c. relocation or modification of existing impervious surfaces with similar or different impervious surfaces, provided that the relocation or modification does not result in an increase in the percentage of impervious surface that existed on the effective date of the county shoreland ordinance, and meets the applicable setback requirements in NR115.05(1)(b).

Note: For example this provision would allow an existing at-grade patio to be removed and replaced with a new building, if the new building meets the shoreland setback requirements.

Note: Nothing in this subsection shall be construed to supersede other provisions in county shoreland ordinances.

(f) *Height.* To protect and preserve wildlife habitat and natural scenic beauty, on or after the effective date of this section... [Legislative Reference Bureau insert date], a county may not permit any construction that results in a structure taller than 35 feet within 75 feet of the ordinary high-water mark of any navigable waters.

~~(e)(g) Nonconforming structures and uses. 1. 'General rule for nonconforming uses.' Under s. Pursuant to ss. 59.69 (10) (a) and 59.692 (2) (a), Stats., an ordinance enacted under those provisions may not prohibit the continuation of the lawful use of a building, structure or property, existing at the time that exists when an ordinance or ordinance amendment takes effect, which is not in conformity with the provisions of the ordinance or amendment, including routine maintenance of such a building or structure, shall may not be prohibited, but the alteration of, addition to, or repair, over the life of the building or structure, in excess of 50% of the equalized assessed value of an existing nonconforming building or structure may be prohibited. If a county prohibits alteration, addition or repair in excess of 50% of the equalized assessed value of an existing nonconforming building or structure, the property owner may either appeal the decision to the county board of adjustment and seek court review if the board's determination is unfavorable, under s. 59.694 (4) and (10), Stats., or petition to have the property rezoned under sub. (2) (e) and s. 59.69 (5) (e), Stats.~~

~~2. 'Nonconforming use of temporary structure.' The continuance of the nonconforming use of a temporary structure may be prohibited.~~

~~3. 'Discontinued nonconforming use.' If a nonconforming use is discontinued for a period of 12 months, any future use of the building, structure or property shall conform to the ordinance.~~

~~4. 'Maintenance of nonconforming principal structure.' An existing principal structure that was lawfully placed when constructed but that does not comply with the required building setback under par. (b)1. may be maintained and repaired within its existing building envelope. Maintenance and repair includes such activities as interior remodeling, plumbing, insulation, and replacement of windows, doors, siding, or roof.~~

~~5. 'Vertical expansion of nonconforming principal structure.' An existing principal structure that was lawfully placed when constructed but that does not comply with the required building setback under par. (b)1. may be expanded vertically, provided that all of the following requirements are met:~~

~~a. The use of the structure has not been discontinued for a period of 12 months or more.~~

~~b. The existing principal structure is at least 35 feet from the ordinary high-water mark.~~

~~c. Vertical expansion is limited to the height allowed in NR 115.05(1)(f).~~

~~d. The county shall issue a permit that requires a mitigation plan that shall be approved by the county and implemented by the property owner by the date specified in the permit. The mitigation plan shall include enforceable obligations of the property owner to establish or maintain measures that the county determines adequate to offset the impacts of the permitted expansion on water quality, near-shore aquatic habitat, upland wildlife habitat and natural scenic beauty. The mitigation measures shall be proportional to the amount and impacts of the expansion being permitted. The obligations of the property owner under the mitigation plan shall be evidenced by an instrument recorded in the office of the County Register of Deeds.~~

~~e. All other provisions of the shoreland ordinance shall be met.~~

~~Note: Other provisions include requirements such as impervious surface limitations.~~

~~Note: This code does not supercede s. 59.692(1s), Stats.~~

~~5m. 'Expansion of nonconforming principal structure beyond setback'. An existing principal structure that was lawfully placed when constructed but that does not comply with the required building setback under par. (b)1., may be expanded horizontally, landward or vertically provided that the expanded area meets the building setback requirements in par. (b)1, and that all other provisions of the shoreland ordinance are met. A mitigation plan is not required solely for expansion under this paragraph, but may be required under par. (e)3.~~

~~6. 'Replacement or relocation of nonconforming principal structure.' An existing principal structure that was lawfully placed when constructed but that does not comply with the required building setback under par. (b)1. may be replaced or relocated on the property provided all of the following requirements are met:~~

~~a. The use of the structure has not been discontinued for a period of 12 months or more.~~

~~b. The existing principal structure is at least 35 feet from the ordinary high-water mark.~~

~~c. No portion of the replaced or relocated structure is located any closer to the ordinary high-water mark than the closest point of the existing principal structure.~~

~~d. The county determines that no other location is available on the property to build a principal structure of a comparable size to the structure proposed for replacement or relocation that will result in compliance with the shoreland setback requirement in par. (b)1.~~

e. The county shall issue a permit that requires a mitigation plan that shall be approved by the county and implemented by the property owner by the date specified in the permit. The mitigation plan shall include enforceable obligations of the property owner to establish or maintain measures that the county determines are adequate to offset the impacts of the permitted expansion on water quality, near-shore aquatic habitat, upland wildlife habitat and natural scenic beauty. The mitigation measures shall be proportional to the amount and impacts of the replaced or relocated structure being permitted. The obligations of the property owner under the mitigation plan shall be evidenced by an instrument recorded in the office of the County Register of Deeds.

f. The county shall issue a permit that requires that all other structures on the lot or parcel that do not comply with the shoreland setback requirement in par. (b)1. and are not exempt under par. (b)1m. to be removed by the date specified in the permit.

g. All other provisions of the shoreland ordinance shall be met.

Note: Other provisions include requirements such as height and impervious surface limitations.

Note: This code does not supercede s. 59.692(1)s. Stats.

4-7. 'Boathouses.' 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.

SECTION 12. NR 115.05 (4) is renumbered to NR 115.05 (2), and NR 115.05 (2) (intro) as renumbered is amended to read:

(2) ESTABLISHMENT OF LAND DIVISION REVIEW. Each county shall review, pursuant to s. 236.45, Stats., all land divisions in shoreland areas which create 3 or more parcels or building sites of 5 acres each or less within a 5-year period. In such review all of the following factors should shall be considered:

SECTION 13. NR 115.05 (5) is renumbered to NR 115.05 (3).

SECTION 14. NR 115.05 (6) is renumbered to NR 115.05 (4), and NR 115.05 (4)(intro) and (4)(h) as renumbered are amended to read:

NR 115.05 (4) ADOPTION OF ADMINISTRATIVE AND ENFORCEMENT PROVISIONS. The shoreland ordinance adopted by each county shall ~~provide for~~ require all of the following:

NR 115.05 (4) (h) Written notice to the appropriate ~~district~~ regional office of the department at least 10 days prior to ~~any hearing~~ hearing on a proposed ~~variances variance~~, special ~~exceptions~~ exception or (conditional uses use) permit, appeals appeal for a map or text ~~interpretations interpretation~~, and map or text ~~amendments amendment~~, and ~~submission to the same office of the department of copies of decisions on variances, special exceptions (conditional uses), appeals for map or text interpretations, and map or text amendments within 10 days after they are granted or denied~~ copies of all proposed land divisions submitted to the county for review under sub. (2). Upon request of the Department a county shall provide to the appropriate regional office a copy of any permit issued under sub. (1)(g).

SECTION 15. NR 115.05 (4) (hm) is created to read:

NR 115.05 (4) (hm) Submission to the appropriate regional office of the department, within 10 days after grant or denial, of copies of any permit granted under sub. (1) (g), any decision on a variance, special exception or conditional use permit, or appeal for a map or text interpretation, and any decision to amend a map or text of an ordinance.

SECTION 16. NR 115.06 (2) is amended to read:

NR 115.06 (2) REVIEW AND APPROVAL OF SHORELAND ZONING AND LAND DIVISION ORDINANCES.

When determining whether a shoreland zoning or subdivision ordinance or any subsequent amendment enacted by a county complies with s. 59.692, Stats., the department shall compare the ordinance and amendments with the minimum standards and requirements for shoreland regulation in this chapter.

(a) *Initial ordinance.* Compliance with the requirements of s. 59.692, Stats., will be determined by the department by comparing the shoreland zoning and land division ordinance that has been enacted by a county with the minimum standards for shoreland regulation contained in s. NR 115.05. The department shall issue a certificate of compliance when a county has, in the opinion of the department, complied with s. 59.692, Stats., and this chapter.

(b) *Amendments to ordinance.* The department shall periodically reevaluate shoreland zoning and land division ordinances to ascertain their continuing compliance with s. NR 115.05. 1. A county shall keep its shoreland zoning ordinance current, effective and workable to retain its status of compliance, and each county shall assure that the county shoreland ordinance continues to comply with this chapter by doing the following:

1. 'County duties.' A county shall keep its shoreland zoning and subdivision ordinances in compliance with s. 59.692, Stats., and this chapter by doing all of the following:

a. A county shall amend its shoreland and subdivision ordinances to meet the minimum standards in this chapter within two years after the effective date of this rule ...[Legislative Reference Bureau insert date].

b. Pursuant to s. NR 115.05 (4) (h) and (hm), a county shall provide the department notice of hearing on any proposed ordinance amendment and a copy of any decision denying or enacting an amendment.

2. 'Department duties.' a. The department may periodically reevaluate county shoreland zoning and subdivision ordinances for continuing compliance with s. 59.692, Stats., and this chapter.

b. The department shall review any ordinance amendment enacted pursuant to subd. 1.a. and shall issue a certificate of compliance when the amended ordinance, in the opinion of the department, complies with s. 59.692, Stats., and this chapter.

(c) *Proposed amendments to shoreland-wetland districts.* The department shall review all proposed amendments to shoreland-shoreland-wetland zoning districts pursuant to s. NR 115.05 (2) (e) 5-115.04 (2) to ensure that determine whether an ordinance which is amended as proposed will retain its status of compliance comply with s. 59.692, Stats., and this chapter.

SECTION 17. NR 115.06 (3) is amended to read:

NR 115.06 (3) (a) *Failure to enact initial ordinance or amendments.* Counties which do not have a shoreland zoning ordinance and land division subdivision ordinance in effect or that fails to amend its ordinance as required by sub. (2) (b) 1. shall be deemed to be in noncompliance with s. 59.692, Stats., and this chapter. Pursuant to s. 59.692 (6), Stats., and after notice and hearing, the department shall, pursuant to s. 59.692 (6), Stats., adopt an ordinance, after notice and hearing, if a county fails to either do one of the following:

1. Proceed with the drafting and enactment of Draft and enact shoreland regulations and subdivision ordinances or required amendments within a given time period, or, specified by the department.

2. Contact Contract with a consultant to draft the regulations shoreland and subdivision ordinances or required amendments and enact the ordinances within a given time period, or, specified by the department.

3. Cooperate with the staff of the department staff to draft the shoreland and subdivision ordinance ordinances or required amendments to be enacted by the county within a given time period specified by the department not to exceed 180 days. All costs for such action by the department shall be borne by the noncomplying county.

(b) *Failure to meet minimum standards in initial ordinance or amendments.* Counties which have shoreland zoning and land division subdivision ordinances or amendments that the department has reviewed under sub. (2) and found do not meet the minimum standards contained in s. NR 115.05 in this chapter shall be deemed to be in noncompliance with the requirements of s. 59.692, Stats., and this chapter, and the procedures in par. (a) shall apply. If a county fails to modify its ordinance to meet the

minimum standards within 6 months after receipt of final amended Wisconsin wetland inventory maps for that county as required by s. NR 115.04 (2) (b), the department shall adopt an ordinance for the county, after notice and hearing, pursuant to s. 59.692 (6), Stats.

(c) Extension of time. The department may extend the time periods specified in pars (a) and (b) if it determines an extension is in the public interest.

(d) Costs. Pursuant to ss. 59.692 (6) and 87.30 (1) (c), Stats. the costs of any actions by the department under this subsection to adopt an ordinance or amendments shall be assessed against the county concerned and collected in substantially the same manner as other taxes levied by the state.

SECTION 18. 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 19. BOARD ADOPTION. This rule was approved and adopted by the State of Wisconsin Natural Resources Board on November 13, 2009.

Dated at Madison, Wisconsin _____

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By _____
Matthew J. Frank, Secretary

(SEAL)