

ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD
CREATING RULES

The Wisconsin Natural Resources Board proposes an order to create NR 1.016, 1.05, 1.06 and 1.07 relating to Natural Resources Board policies on protection and management of public waters.

FH-36-04

Summary Prepared by the Department of Natural Resources

Statutory Authority: ss. 30.01(1am), 30.12(1p)(a)3. and (2m), 30.123(6m) and (6s), 30.20(1k)(a)2. and (1m), 30.206(1)(c) and (3) and (3r)., and 227.11(2), Stats.

Statutes interpreted: ss. 30.01(1am), 30.12(1p) and (2m), 30.123(6m) and (6s), 30.20(1k)(a)2. and (1m), 30.206(1)(c) and (3) and (3r), Stats.

Explanation of Agency Authority:

The Department has authority under ch. 30, Stats., to establish rules that identify areas possessing significant scientific value as “areas of special natural resource interest”, to identify portions of navigable waterways containing sensitive fish and aquatic habitat as “priority navigable waterways”, and to establish location standards for exemptions and general permits.

Related statute or rule:

The waters designations in this rule revision relate directly to regulation of activities in navigable waters under ch. 30, Stats., and the NR 300 series of rules.

Plain Language Analysis:

The purpose of this rule is to establish policy guiding the department’s actions as a trustee of public waters and to set the process the department will follow when determining waters to be area of special natural resource interest, waters or portions thereof containing public rights features and priority navigable waters.

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 permit 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:

Activity	Wisconsin	Illinois	Iowa	Michigan	Minnesota
Special waters designation	“Areas of special natural resource interest” and water having significant public trust values	Lake Michigan and 48 traditional Natural Navigable Waters, 10 additional artificial waters used by the public	State trust (owned) and must have public access. Protected Waters Area - one in state, regulates activities affecting contaminated aquifer	All waters of the state	Lake Superior, Trout Streams, Federal Scenic and wild rivers, designated spawning areas.

Summary of Factual Data and Analytical Methodologies:

The basis for all waters designations involves survey work for evaluating water quality, fisheries, aquatic habitat and other waterway features, using accepting scientific protocols and methodology that are established in technical journals and reflected in existing agency rules.

Analysis and Documents supporting determination of Small Business Effect: Any person placing a structure or making similar physical modifications to public navigable waters either qualifies for an exemption or must obtain a general or individual permit under state statute. To comply, small businesses follow the same requirements as other waterfront property owners: (1) make a self-determination of exemption using web-based tools provided by the department or describe their activity on an exemption determination request form; (2) complete a general permit application; or (3) complete an individual permit application. Schedules, application steps and compliance/reporting requirements are very basic for all applicants, and most projects can be planned and conducted by individuals with no specific professional background.

Anticipated Private Sector Costs: No significant fiscal effect on the private sector is anticipated.

Effect on Small Business: Building contractors, developers of waterfront property and their technical consultants, and other waterfront businesses will be affected by the rule revisions. Specific standards will provide clarity and consistency in the permitting process.

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SECTION 1. NR 1.016 is created to read:

NR 1.016 Department responsibilities to conserve and enhance public waters. (1) To meet the departments delegated authorities under the statutes, the Natural Resources Board establishes policy for protecting and preserving public waters. The Natural Resources Board recognizes and reiterates as the basis for its policy the provisions of the statutes enacted by the legislature, the common law public trust principles established by the court interpretations of the statutes under the Wisconsin Constitution, and sound scientific management principles.

(2) The Natural Resources Board recognizes that the State of Wisconsin has an affirmative duty, under the public trust doctrine, emanating from Article IX, Section I, of the Wisconsin Constitution, to protect and preserve the state's waters. The Wisconsin Supreme Court reiterated that, at the time of statehood, the State of Wisconsin "became a trustee of the people charged with the faithful execution of the trust created for their benefit." The Court further stated that the "wisdom of the policy which...carefully preserved to the people the full and free use of waters cannot be questioned, nor should it be limited by narrow construction." (*Diana Shooting Club v. Husting*, 156 Wis. 261(1914)). The Wisconsin courts have established that the State of Wisconsin must take into account the long term collective impacts of projects in our navigable waters in order to carry out its assigned public trust duty (*Sterlingworth v. DNR*, 205 Wis. 2d 710 (Ct. App.1996)). The court has frequently enumerated the public rights, which include the right to navigate, hunt, fish, swim, recreate, and enjoy natural scenic beauty in clean water free of environmental pollution (*Muench v. PSC*, 261 Wis. 492 (1952)), that shall be conserved along with such rights as may be established by law in the future.

(3) The Natural Resources Board recognizes the scientific research demonstrating that the impacts of many, repeated alterations of our shorelines and shallow water habitat are accumulating with significant impacts on our aquatic ecosystems and their associated human uses. The Natural Resources Board shares the concern of many citizens that these impacts, along with other causes of reduced aquatic biodiversity, loss of natural features and varied forms of water pollution threaten human health, the quality of life and a thriving economy. The Natural Resources Board recognizes that by design, installation and location practices the impacts of human activity on shoreline and shallow water habitat can be greatly reduced.

Note: The scientific research and management principles are readily available in the literature, including *Waters of Wisconsin: The Future of our Aquatic Ecosystems and Resources*, Wisconsin Academy of Sciences, Arts and Letters, 2003 (Wisconsin Academy of Sciences, Arts and Letters, 1922 University Avenue, Madison, WI or www.wisconsinacademy.org). For a survey of research on impacts, see *The Construction, Aesthetics and Effects of Lakeshore Development: A Literature Review*, by Sandy Engel and Jerry L. Pederson, Jr., Wisconsin Department of Natural Resources Research Report 177, December 1998.

(4) The Natural Resources Board recognizes that the Legislature and the Governor of the State of Wisconsin reached agreement on legislation (2003 Wisconsin Act 118) with the dual goals of faster and more predictable permit decisions and no reduction in the protection afforded public waters. The Natural Resources Board sets its policies and directs the department to administer its surface water management programs to meet the dual goals of 2003 Wisconsin Act 118.

SECTION 2. NR 1.05 is created to read:

NR 1.05 Identification of areas of special natural resource interest. (1) To fulfill its affirmative duty to protect public trust waters, the department shall identify and designate by rule areas that possess significant scientific value under s. 30.01(1am)(c), Stats., as areas of special natural resource interest under s. 30.01(1am), Stats.

(2) Exemptions listed in ss. 30.12(1g)(a) to (km), 30.123 (6)(d) and (e) and 30.20(1g)(b)1. and 2., Stats., do not apply in areas of special natural resource interest. General or individual permits are required.

Note: Activities not exempted in areas of special natural resource interest under ss. 30.12 and 30.20, Stats., are: deposits less than 2 cubic yards; seasonal structures other than piers or wharves; fish habitat structures; bird nesting platforms; dry hydrants; pilings; riprap repair or replacement; biological shore erosion control structures; intake or outfall structures; dredging to place or maintain an exempt structure; dredging without auxiliary power. Activities not exempted in areas of special natural resource interest under ch. NR 320 are culvert replacements. However, new and existing piers may be exempt in areas of special natural resource interest under s. 30.13, Stats., as set forth in ch. NR 326.

(3) All of the following waters are identified as areas of special natural resources interest under s. 30.01(1am), Stats.:

(a) A state natural area designated or dedicated under ss. 23.27 to 23.29, Stats.

(b) A surface water identified as a trout stream by the department under s. NR 1.02(7).

(c) A surface water identified as an outstanding or exceptional resource water under s. 281.15, Stats.

(4) All of the following are determined to be areas of special natural resources interest under s. 30.01(1am)(c), Stats., as areas with significant scientific value:

(a) Waters or portions of waters that contain endangered or threatened species or aquatic elements as defined and identified in the Wisconsin Natural Heritage Inventory.

Note: The definitions and scientific protocols for their identification are available at <http://dnr.wi.gov/org/land/er> or by contacting the Bureau of Endangered Resources.

(b) Wild rice waters as identified in a written agreement between the department and the Great Lakes Indian Fish and Wildlife Commission.

(c) Waters in areas identified in a special area management plan, abbreviated SAMP, approved by the U.S. Army Corps of Engineers, or special wetland inventory study, abbreviated SWIS, identified under s. NR 103.04.

Note: Special area management plans exist for the City of Superior, Douglas County and Chiwaukee Prairie, Kenosha County. A Special Wetland Inventory Study exists for the area bordering the bay of Green Bay.

(d) Waters in ecologically significant coastal wetlands along Lakes Michigan and Superior as identified in Publication # ER-002-00, Data Compilation and Assessment of Coastal Wetlands of Wisconsin's Great Lakes, March 2000.

(e) Federal or state, under ss. 30.26 and 30.27, Stats., designated wild or scenic rivers.

(5) Areas of special natural resource interest shall be designated by the Natural Resources Board by rule.

(a) The Natural Resources Board may designate by rule categories of waters as areas of special natural resource interest. The status of waters added or removed from designated categories by independent listing processes shall be effective at the time that the name or location of the water is made available in the listing on the department's website as required in sub. (6) and no earlier than the effective date of any rule or required report to the legislature designating a water or portion of a waters as an Area of Special Natural Resource Interest.

(b) The Natural Resources Board may designate by rule individual waters or portions of waters as areas of special natural resource interest.

(6) The department shall maintain on its website and make available at its offices a consolidated list of areas of special natural resource interest along with all other waters designated under ss. NR 1.06 and 1.07 so that a person may readily determine the applicability of all exemptions or permit requirements under ch. 30, Stats. For categories of waters with ongoing independent listing processes, notice of waters or portions of waters added or removed shall be provided at the website as soon as the name or location of the water is made available. Notice shall be maintained for 3 months after the initial listing.

Note: See the department's website at www.dnr.wi.gov under the topic "Waterway and Wetland Permits."

(7) The department shall report to the chairs of the standing natural resource committees of the Legislature and to the co-chairs of the joint committee for review of administrative rules in July of each year the aquatic-dependent species of special concern that may be added or removed from the state's list and those bodies of water that may be impacted by the addition or removal of those species. The department will notify the chairs of the standing natural resource committees of the Legislature and the co-chairs of the joint committee for review of administrative rules in January of those bodies of water that have been added to or removed from the consolidated list of areas of special natural resource interest as required in s. NR 1.05(6) that result from identification of special concern species. This notification shall be included in an annual report on waterway and wetland permit program performance that is provided to all members of the legislature and the clerk of each county.

SECTION 3. NR 1.06 is created to read:

NR 1.06 Identification of public rights features. **(1)** To fulfill its affirmative duty to protect public trust waters, the department shall assess the state's public trust waters to identify locations of public rights features where activities shall require general or individual permit review in lieu of exemptions, or reasonable limitations on location to assure that the public's rights and interests under the public trust doctrine are protected, under ss. 30.12(1p)(a)3. and (2m), 30.123(6m) and (6s), 30.20(1k)(a)2. and (1m), 30.206(1c), (3) and (3r), Stats.

(2) Due to the potential significant adverse impacts of the activity on public rights features, exemptions listed in ss. 30.12(1g)(km), 30.123(6)(e) and 30.20(1g)(b)2., Stats., are not allowed in locations where there are public rights features as described under sub.(4). General or individual permits are required for those activities in locations of public rights features.

Note: Exemptions not allowed in locations of public rights features are: intake or outfall structures other than dry hydrants; replacement culverts with inside diameter not more than 24 inches; dredging without auxiliary power.

However, new and existing piers may be exempt in areas with public rights features under s. 30.13, Stats., as set forth in ch. NR 326.

(3) For those activities that are not allowed in locations where there are public rights features as described under sub. (4), a person may undertake an exempt activity after the person has evaluated the site and determined that the activity is not in the location of a public rights features as described under sub. (4).

Note: Anyone undertaking a project in public waters is encouraged to seek a voluntary exemption determination as provided for in s. 30.12 (2r), 30.123(6r) or 30.20 (1r), Stats. A one-page form for requesting a determination is available from department service centers and at the department's website at www.dnr.wi.gov under the topic "Waterway and Wetland Permits."

Note: As required by ch. NR 310, the department will make reasonable efforts to determine whether sites that are the subject of exemption determination requests or general permit applications are locations of public rights features and will notify requestors or applicants.

(4) For those activities that are not exempt or eligible for general permits in locations where there are public rights features as described in sub. (5), the department will base determinations of whether activities are in locations of public rights features on information as specified in sub. (6).

(5) Public rights features are:

(a) Fish and wildlife habitat, including specific sites necessary for breeding, nesting, nursery and feeding.

Note: Physical features constituting fish and wildlife habitat include stands of aquatic plants; riffles and pools in streams; undercut banks with overhanging vegetation or that are vegetated above; areas of lake or streambed where fish nests are visible; large woody cover.

(b) Physical features of lakes and streams that ensure protection of water quality.

Note: Physical features that protect water quality include stands of aquatic plants (that protect against erosion and so minimize sedimentation), natural streambed features such as riffles or boulders (that cause turbulent stream flow and so provide aeration).

(c) Reaches of bank, shore or bed that are predominantly natural in appearance (not man-made or artificial) or that screen man-made or artificial features.

Note: Reaches include those with stands of vegetation that include intermixed trees, shrubs and grasses; stands of mature pines or other conifer species; bog fringe; bluffs rising from the water's edge; beds of emergent plants such as wild rice, wild celery, reeds, arrowhead.

(d) Navigation thoroughfares or areas traditionally used for navigation during recreational boating, angling, hunting or enjoyment of natural scenic beauty.

Note: Physical features indicative of navigation thoroughfares include shallow water areas typically used by wading anglers or areas frequently occupied by regularly repeated public uses such as water shows.

(6) The department shall base its identification of public rights features on factual information obtained from reputable sources, including:

(a) Field surveys and inspections, including historical surveys for fish, wildlife, rare species, aquatic plants, geologic features or water quality.

(b) Surveys or plans from federal, state or local agencies.

(c) Factual documentation of features or use patterns from property owners, user groups or knowledgeable users on the waterbody.

(7) PROCEDURE FOR IDENTIFYING PUBLIC RIGHTS FEATURES. (a) After survey data shows possible locations of public rights features, the department shall give notice in the official state newspaper or other local media the department selects in the area affected which is likely to inform the local residents. The department shall provide notice on its website and through its system of electronic notices to state media.

(b) The department shall notify the county clerk of any county bordering the lake or reach of a stream, legislators whose districts include the affected public waters and the chairpersons of the committees of the legislature with jurisdiction for natural resources issues, and local, regional or state lake, river or watershed organizations affected by the activity.

(c) The notice shall contain the location and description of the possible public rights features and the basis for its determination that the location is likely to contain public rights features. If a hearing is not requested in writing within 30 days after the mailing of the notice, the department may waive the hearing. Upon receipt of a request for a hearing, the department shall, not less than 10 days before the hearing, mail written notice thereof to each person notified under par. (b), and shall provide notice on its website and through its system of electronic notices to state media.

(d) At each hearing, the department shall take evidence offered by persons in support of or in opposition to the determination. If the department finds any location not properly classified, the location may not be identified as the location containing public rights features.

(8) Sensitive areas designated under ch. NR 107.05(3)i are determined to be public rights features.

Note: Lakes and streams specifically named in the Wisconsin Land Legacy Report, publication number LF-001-2004 are known to contain extensive public rights features. Persons considering activities in these lakes and streams should consult the department before undertaking activities to determine whether they are in public rights features.

(9) The department shall maintain on its website and make available at its offices a consolidated list of waters with identified public rights features along with all other waters designated under s. NR 1.06 as well as a visual guide to identification of public rights features to assist a person in determining the applicability of all exemptions or permit requirements under ch. 30, Stats.

Note: See the department's website at www.dnr.wi.gov under the topic "Waterway and Wetland Permits."

SECTION 4. NR 1.07 is created to read:

NR 1.07 Identification of priority navigable waterways. **(1)** To fulfill its affirmative duty to protect public trust waters, the department shall identify and designate by rule navigable waterways or portions of navigable waterways which contain sensitive fish and aquatic habitat under s. 30.19(1b)(c)4., Stats., as priority navigable waterways under s. 30.19(1b)(c), Stats.

(2) Rules promulgated under s. 30.19(1d), Stats., shall apply to priority navigable waterways.

Note: Under s. 30.19(1g)(c), Stats., and ch. NR 341, a permit is required to grade or remove topsoil from the bank of any navigable waterway where the area exposed by the grading or removal will exceed 10,000 square feet. Under s. 30.19(1d), Stats., and ch. NR 341, bank of a navigable waterway is defined differently for priority navigable waterways.

(3) All of the following waters are determined to be priority navigable waterways under s. 30.19(1b)(c)1. to 3., Stats.:

(a) A navigable waterway, or portion of a navigable waterway, that is identified as an outstanding or exceptional resource water under s. 281.15, Stats.

(b) A navigable waterway, or portion of a navigable waterway, identified as a trout stream by the department under s. NR 1.02(7).

(c) A lake that is less than 50 acres in size.

(4) All of the following waters are determined to be priority navigable waterways under s. 30.19(1b)(c)4., Stats., as navigable waterways or portions of navigable waterways which contains sensitive fish and aquatic habitat:

(a) All areas of special natural resource interest as defined in s. NR 1.05.

(b) All locations containing public rights features as defined in s. NR 1.06.

(c) Tributaries to and rivers connecting to inland lakes containing naturally-reproducing populations of sturgeon up to the first dam.

(d) Navigable waters having self-sustaining populations of walleye located in the ceded territory of the state where resource allocation rights are shared by sovereign tribes.

(e) Muskellunge waters of the state where the muskellunge population is entirely or partially sustained through natural reproduction (Category 0, Category 1 and Category 2 muskellunge waters).

(f) Perennial tributaries to surface waters identified as trout streams by the department under s. NR 1.02(7).

(5) The department shall maintain on its website and make available at its offices a consolidated list of priority navigable waters so that a person may readily determine the applicability of all exemptions or permit requirements under ch. 30, Stats.

Note: See the department's website at www.dnr.wi.gov under the topic "Waterway and Wetland Permits."

SECTION 5. 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 6. BOARD ADOPTION. This rule was approved and adopted by the State of Wisconsin Natural Resources Board on December 8, 2004, March 8, 2005 and March 23, 2005.

Dated at Madison, Wisconsin _____.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By _____
Scott Hassett, Secretary

(SEAL)