

Natural Resources

CR 13-051

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: amend NR 115.01(c)2.d., repeal and recreate NR115.05(1)(e), amend NR 115.05(1)(g)4., 5(intro), a., and c., and 6a., repeal NR 115.05(1)(g)6.f. and 7., and amend NR 115.05(4)(h), and (hm) and NR 115.06(2)(b)1.a.; relating to minimum standards for county shoreland ordinances.

WT-06-12

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

Since August 1, 1966, when the Wisconsin Legislature passed the Water Resources Act (as created by Chapter 614, Laws of 1965), the purpose and direction for shoreland ordinances has been: "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."

Now codified at s. 281.31, Stats., 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 law required the state to establish practical minimum standards and workable regulations in an area where there had been little experience. The act's requirement to enact shoreland ordinances is part of the state's active public trust duty, 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.

NR 115 of the Wisconsin Administrative Code contains minimum shoreland zoning standards for ordinances adopted under s. 59.692, Stats., for the purposes specified in s. 281.31(1), Stats.

Authority

The proposed amendments to ch. NR 115 are intended to ease the administrative burden of a county to implement the current rule and to give a county more flexibility in how they regulate land use in shorelands. The proposed amendments will also 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 purposes of sub. (1), the department shall prepare and provide to municipalities general recommended standards and criteria for navigable water protection studies and planning and 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, if the agency considers it necessary to effectuate the purposes of the statute.

Revision Rationale

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 at the time the rule was adopted in 1970. In response to concerns raised by the counties regarding the implementation and administration of the state's current shoreland zoning standards in NR 115, the department agreed to revise the regulations to address key concerns relating to the impervious surface standards and nonconforming structure standards and to clarify a vegetative management and reporting standard. The proposed revisions to NR 115 are necessary to address the shoreland areas of the state that were developed prior to the revisions in NR 115 went into effect on February 1, 2010. Many of these areas already exceed the impervious surface standard and/or the maximum impervious surface standard. Any proposed development on these properties would result in an administrative and implementation burden on counties, which would have to require the property owners to either conduct mitigation for any future expansions or receive a variance. In addition, the proposed changes allow for a one time lateral expansion in the setback, providing more flexibility for property owners with nonconforming structures that are structurally unable to expand vertically and are unable to expand beyond the setback. Additional changes are minor clarifications of the vegetative management and reporting requirements of the shoreland zoning standards in NR 115.

Revision Process

The revision package is based on concepts developed, negotiated and compromised during numerous meetings with the Wisconsin County Code Administrators, who represent the county planning and zoning staff, and the department. The department also met with the other partners to the shoreland zoning program including representatives from the Wisconsin Realtors Association, Wisconsin Builders Association, River Alliance and Wisconsin Lakes to obtain their input. The dedication and determination of these individuals proves how important our water resources and adjacent shorelands are in the state.

Major provisions and new requirements

While most of the provisions are minor, the major provisions of the proposal include changes to the impervious surface limits to provide more flexibility for properties that are current developed and already exceed the current maximum impervious surface limit of 30%. The rule revisions also provide more flexibility for property owners by allowing for some lateral expansion of nonconforming structures within the setback. Other minor changes to the rule include clarification of the vegetation management standards and reporting standards.

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 governments 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. Other than the nonconforming structure and substandard lot standards, county ordinances must 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 being revised. The Minnesota DNR's 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, impervious surface limits and others. The state has a somewhat similar standards in treatment of nonconforming structures and limits impervious surfaces to 20%, which is a lower limit than Wisconsin's current rule and would be significantly less than the proposed highly developed shoreline standard in the proposed rule.

Michigan

The State of Michigan has a wild and scenic rivers protection program to provide special protection to designated rivers. This program is managed similarly 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 or riparian rights, or that 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 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 and surface water regulation program which includes motor regulations and slow-no-wake areas to reduce shore erosion, and an invasive species

program to help safeguard the biological integrity of the lakes and river systems in Iowa. 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 a number of meetings with county zoning officials to discuss their concerns with implementing and administering the current standards in NR 115. The department has also met with its other stakeholders to discuss proposed changes and garner their input on the rulemaking process. The meetings with county zoning staff evaluated the new shoreland zoning standards that went into effect on February 1, 2010 and how those regulations would be applied and administered by the local governments. Some key problem areas were identified. The proposed changes to ch. NR 115 are intended to address those key problem areas, clarify the standards and reduce the administrative burden on counties.

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. The standards apply to small business just like any other development. Standards contained in this rule will allow current facilities to be maintained, and in some cases expand, depending upon the location of the facility. 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.

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SECTION 1. NR 115.05(1)(c)2.d. is amended to read:

NR 115.05(1)(c)2.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>.

SECTION 2. NR 115.05(1)(e) is repealed and recreated to read:

NR 115.05(1)(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 require all of the following:

1. 'Application.' Impervious surface standards shall apply to the construction, reconstruction, expansion, replacement or relocation of any impervious surface that is or will be located within 300 feet of the ordinary high water mark of any navigable waterway on any of the following:

a. A riparian lot or parcel.

b. A nonriparian lot or parcel that is located entirely within 300 feet of the ordinary high-water mark of any navigable waterway

1m. 'Calculation.' Percentage of impervious surface shall be calculated by dividing the surface area of the existing and proposed impervious surfaces on the lot or parcel by the total surface area of that lot or parcel, and multiplying by 100. For the purposes of this subdivision counties may exclude impervious surfaces described in subdivision 3m. If an outlot lies between the ordinary high water mark and the developable lot or parcel described in subd. 1. and both are in common ownership, the lot or parcel and the outlot shall be considered one lot or parcel for the purposes of calculating the percentage of impervious surfaces. .

2. 'General standard.' Except as allowed in subds. 2m. to 4., a county may allow up to 15% impervious surface as calculated under subd. 1m on a lot or parcel described in subd. 1.

2m. 'Standard for highly developed shorelines.' At its discretion, a county may adopt an ordinance for highly developed shorelines that allows impervious surface as calculated under subd. 1m on lots or parcels described in subd. 1 as follows: up to 30% for residential land uses or up to 40% for commercial, industrial or business land uses.

a. A "highly developed shoreline" means a shoreline within an area identified as an Urbanized Area or Urban Cluster in the 2010 US Census or a shoreline that has a commercial, industrial or business land use as of January 31, 2013.

b. A county may establish, after conducting a hearing and receiving approval by the department, a map of additional areas of highly developed shorelines not included in subd. par. 2m.a.

c. An additional area of highly developed shoreline under subd. par. b, shall include at least 500 feet of shoreline and as of February 1, 2010 have either a majority of its lots developed with more than 30% impervious surface area as calculated under subd. 1m. or be located on a lake and served by a sewerage system as defined in NR 110.03(30), Adm. Code. To obtain approval from the department for an additional area, the county shall provide data to the department that establishes that the additional area meets the criteria under this subd. par..

3. 'Maximum impervious surface.' A county may allow a property owner to exceed the impervious surface standard under subds. 2. and 2m. provided that all of the following requirements are met:

a. For lots or parcels described under subd. 1. that exceed the impervious surface standard under subd. 2. and are not located within a highly developed shoreline as defined in subd. 2m., a county may allow more than 15% impervious surface but not more than 30% impervious surface as calculated under subd. 1m on the lot or parcel.

b. For lots or parcels described under subd. 1. and located within an area defined by county ordinance as a highly developed shoreline under subd. 2m., a county may allow more than 30% impervious surface but not more than 40% impervious surface as calculated under subd. 1m on the lot or parcel for properties that have a residential land use, or more than 40% impervious surface but not more than 60% impervious surface as calculated under subd, 1m for properties that have a commercial, industrial or business land use.

c. For lots or parcels described under subd. 1 that exceed the impervious surface standard under subds. 2. and 2m., but do not exceed the maximum impervious surface standard under subd. par. a. or b., the county shall issue 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.

3m. 'Treated impervious surfaces.' A county may exclude from the calculation under subdivision 1m., any impervious surface where the property owner can show that runoff from the impervious surface is treated by devices such as stormwater ponds, constructed wetlands, infiltration basins, rain gardens, bioswales or other engineered systems, or that the runoff discharges to internally drained pervious area that retains the runoff on the parcel to allow infiltration into the soil.

Note: A property owner may seek a variance to a dimensional standard of the county ordinance, for areas that exceed the maximum impervious surface standard in subd. 3. and do not meet the provisions in subd. 3m. A county board of adjustment must review the request pursuant to s. 59.694(7)(c), Stats. and applicable case law.

Note: Nothing in this paragraph shall be construed to supersede the setback provisions in par. (b). New structures must meet all setback provisions in the county shoreland ordinance unless the property owner obtains a variance from the County Board of Adjustment.

4. 'Existing impervious surfaces.' For existing impervious surfaces that were lawfully placed when constructed but that do not comply with the standards in subds.2. and 3., the property owner may do any of the following as long as the property owner does not increase the percentage of impervious surface that existed on the effective date of the county shoreland ordinance:

- a. maintain and repair all impervious surfaces.
- b. replace existing impervious surfaces with similar surfaces within the existing building envelope.
- c. relocate or modify existing impervious surfaces with similar or different impervious surfaces, provided that the relocation or modification meets the applicable setback requirements in par.(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 paragraph shall be construed to supersede other provisions in county shoreland ordinances.

SECTION 3. NR 115.05(1)(g)4., 5(intro), a., and c., and 6a., is amended to read:

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 also includes such activities as interior remodeling, exterior remodeling, and the replacement or enhancement of plumbing or electrical systems, insulation, and replacement of windows, doors, siding, or roof within the existing building envelope.

5. ~~Vertical expansion~~ Expansion of nonconforming principal structure within the 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 laterally or 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 if a nonconforming use.
- c. Vertical expansion is limited to the height allowed in NR 115.05(1)(f) and lateral expansions are limited to a maximum of 200 square feet over the life of the structure. No portion of the expansion may be any closer to the ordinary high-water mark than the closest point of the existing principal structure.

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 if a nonconforming use.

SECTION 4. NR 115.05(1)(g)6.f. and 7. are repealed:

~~NR 115.05(1)g.6.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.~~

~~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 5. NR 115.05(4)(h) and (hm) are amended to read:

NR 115.05(4)(h) Written notice to the appropriate regional office of the department at least 10 days prior to any hearing on a proposed variance, special exception or conditional use permit, appeal for a map or text interpretation, map or text amendment, and 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).~~

(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 6. NR 115.06(2)(b)1.a. is amended to read:

NR 115.06(2)(b)1.a. A county shall amend its shoreland and subdivision ordinances to meet the minimum standards in this chapter within two years after ~~February 1, 2010~~. [Legislative Reference Bureau insert effective date].

SECTION 7. 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 8. BOARD ADOPTION. This rule was approved and adopted by the State of Wisconsin Natural Resources Board on December 11, 2013.

Dated at Madison, Wisconsin _____

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By _____
Cathy Stepp, Secretary

(SEAL)