

01-007

**NOTICE TO PRESIDING OFFICERS
OF PROPOSED RULEMAKING**

Pursuant to s. 227.19, Stats., notice is hereby given that final draft rules are being submitted to the presiding officer of each house of the legislature. The rules being submitted are:

Natural Resources Board Order No. LE-01-01

Legislative Council Rules Clearinghouse Number 01-007

Subject of Rules Boating safety & enforcement

Date of Transmittal to Presiding Officers August 28, 2001

Send a copy of any correspondence or notices pertaining to this rule to:

Carol Turner, Rules Coordinator
DNR Bureau of Legal Services
LS/5, 101 South Webster

Telephone: 266-1959
e-mail: turnec@dnr.state.wi.us

An electronic copy of the proposed rule may be obtained by contacting Ms. Turner

REPORT TO LEGISLATURE

NR 5, Wis. Adm. Code
Boating safety and enforcement

Board Order No. LE-01-01
Clearinghouse Rule No. 01-007

Statement of Need

Section NR 5.125 was revised last year by adding two additional motorboat noise testing procedures. At that time, a subsection that no longer applied to the new testing procedures was inadvertently left in and has caused problems for prosecutors. This subsection is repealed and replaced with an additional procedure that does apply to the stationary testing procedure.

Currently the definition of boat exempts "fishing rafts" even if they are motorized, which is contrary to the federal law which requires that all motorized watercraft be registered. The proposed definition of boat would resolve this conflict by requiring the registration of motorized fishing rafts.

Water skiing equipment has evolved to include a variety of apparatus such as knee boards and wake boards that were never conceived when the water skiing laws were enacted. The proposed definition would include these technological advancements to the sport.

The current wording that caps the reimbursement for administrative time of municipal boat patrols at 40% is unclear and open to challenge. The proposed wording would clarify this requirement to be consistent with the original intent of the section and to conform to the current DNR policy.

The U.S. Coast Guard has recently revised the property damage threshold for requiring reporting of boat accidents. This proposal would keep our standards consistent with the federal requirements.

Modifications as a Result of Public Hearing

The sentence, "Registering a fishing raft as a boat does not exempt it from any state or local fishing raft regulations" was added to the definition of a boat.

Section NR 5.08(1)(intro.) was added increasing the property damage threshold for reporting boat accidents.

The section creating standards for enacting local boating ordinances was deleted.

Appearances at the Public Hearings and Their Position

Public hearings were held in Wausau, Green Bay and Madison. No one appeared at the hearings.

Response to Legislative Council Rules Clearinghouse Report

The recommendations were accepted.

Final Regulatory Flexibility Analysis

This rule will primarily affect individual boaters and units of government, and will not directly impact small businesses.

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

The Wisconsin Natural Resources Board adopts an order to amend NR 5.08(1)(intro.) and 50.13(6); to repeal and recreate NR 5.125(1)(c); and to create NR 5.001(1m), (11m) and (16m) relating to boating safety and enforcement.

LE-01-01

Analysis Prepared by Department of Natural Resources

Statutory authority: ss. 30.505, 30.62(2)(d) 2. and 3., 30.79(2m) and 227.11(2)(a), Stats.
Statutes interpreted: ss. 30.50(2), 30.62(2)(b), 30.635, 30.67, 30.69 and 30.79(5), Stats.

Section 1. Creates the following definitions; "boat" for the purpose of requiring registration of motorized fishing rafts to be consistent with federal law; "public access" for the purposes of motorboat prohibitions on lakes 50 acres or less; "water skis, aquaplane or similar device" to include the technological advancements in the sport.

Section 2. Amends the property damage limit for a reportable boat accident to remain consistent with a recent federal rule change.

Section 3. Creates a set of standards for a new motorboat noise testing procedure.

Section 4. Clarifies the requirement that sets a 40% cap on a municipal boat patrol's administrative expenses.

SECTION 1. NR 5.001(1m), (11m) and (16m) are created to read:

NR 5.001(1m) "Boat", for the purposes of s. 30.51, Stats., includes the definition of "boat" under s. 30.50(2), Stats., and also includes fishing rafts which are equipped with propulsion machinery, whether or not the machinery is the principal source of propulsion. Registering a fishing raft as a boat does not exempt it from any state or local fishing raft regulations.

(11m) "Public access", for the purposes of s. 30.635, Stats., and this chapter means any site through which the general public may gain legal access to a body of water by the process of launching a boat.

(16m) "Water skis, aquaplane or similar device", for the purposes of s. 30.69, Stats., and this chapter includes, but is not limited to, water skis, kneeboards, wakeboards, inflatable devices or barefoot or skiless skiing.

SECTION 2. NR 5.08(1) (intro.) is amended to read:

NR 5.08(1)(intro.) Written reports of boating accidents required by s. 30.67, Stats., shall be submitted to the Department of Natural Resources, Box 7921, Madison, Wisconsin 53707, on forms provided by the department, postmarked within 10 days after the date of the accident. Reportable accidents are defined as all boating accidents that result in loss of life, personal injury which required medical treatment beyond first aid, damage to the boat and other property exceeding

~~\$500.00~~ \$2,000.00, or complete loss of the boat. All reports shall contain the following information:

SECTION 3. NR 5.125(1)(c) is repealed and recreated to read:

NR 5.125(1)(c) When the J2005 testing method is used, the officer shall deduct 2 decibels from the decibel reading obtained in order for the test to be comparable to the J34a and J1970 tests.

SECTION 4. NR 50.13 (6) is amended to read:

NR 50.13 (6) Except for time spent on teaching boating education courses, no local unit of government ~~may receive~~ is eligible for more than 40% of the total amount of its claim number of hours claimed on Form 8700-61 for administrative costs time.

The foregoing rules were approved by the State of Wisconsin Natural Resources Board on August 15, 2001.

The rules contained herein shall take effect on the first day on the month following publication in the Wisconsin administrative register, as provided in s. 227.22(2)(intro.), Stats.

Dated at Madison, Wisconsin _____

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By _____
Darrell Bazzell, Secretary

(SEAL)

Fiscal Estimate — 1999 Session

- Original Updated
 Corrected Supplemental

LRB Number	Amendment Number if Applicable LE-01-01
Bill Number	Administrative Rule Number

Subject

Revision of ss. NR 5 and 50, Wisconsin Administrative Code pertaining to the boating safety and enforcement programs.

Fiscal Effect

State: No State Fiscal Effect

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.

- Increase Existing Appropriation Increase Existing Revenues
 Decrease Existing Appropriation Decrease Existing Revenues
 Create New Appropriation

- Increase Costs — May be possible to absorb within agency's budget.
 Yes No
 Decrease Costs

Local: No Local Government Costs

1. Increase Costs
 Permissive Mandatory
2. Decrease Costs
 Permissive Mandatory
3. Increase Revenues
 Permissive Mandatory
4. Decrease Revenues
 Permissive Mandatory

5. Types of Local Governmental Units Affected:
 Towns Villages Cities
 Counties Others
 School Districts WTCS Districts

Fund Sources Affected

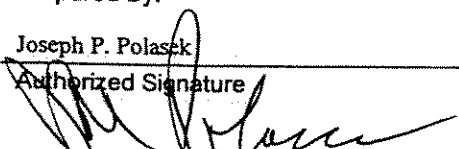
- GPR FED PRO PRS SEG SEG-S

Affected Chapter 20 Appropriations

Assumptions Used in Arriving at Fiscal Estimate

There will be no net change in FTE hours or expenditure of new funds for these rule revisions. The change will only be in terms of method of enforcement tactic used and definition of terms within said rules. Wardens will use existing equipment and existing hours to enforce these rules.

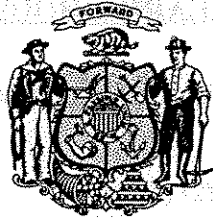
Long-Range Fiscal Implications

Prepared By: Joseph P. Polaszk	Telephone No. (608) 266-2794	Agency D.N.R.
Authorized Signature 	Telephone No. 6-2794	Date (mm/dd/ccyy) 12-4-00

RULES CLEARINGHOUSE

Ronald Sklansky
Director
(608) 266-1946

Richard Sweet
Assistant Director
(608) 266-2982



Terry C. Anderson, Director
Legislative Council Staff
(608) 266-1304

One E. Main St., Ste. 401
P.O. Box 2536
Madison, WI 53701-2536
FAX: (608) 266-3830

CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

CLEARINGHOUSE RULE 01-007

AN ORDER to renumber NR 5.15; to amend NR 50.13 (6); to repeal and recreate NR 5.125 (1) (c); and to create NR 5.001 (1m), (11m) and (16m), relating to boating safety and enforcement.

Submitted by **DEPARTMENT OF NATURAL RESOURCES**

02-06-01 RECEIVED BY LEGISLATIVE COUNCIL.

03-05-01 REPORT SENT TO AGENCY.

RS:JLK:jal;rv

LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

Comment Attached YES NO

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

Comment Attached YES NO

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

Comment Attached YES NO

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS [s. 227.15 (2) (e)]

Comment Attached YES NO

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

Comment Attached YES NO

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL REGULATIONS [s. 227.15 (2) (g)]

Comment Attached YES NO

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

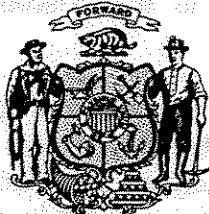
Comment Attached YES NO

WISCONSIN LEGISLATIVE COUNCIL STAFF

RULES CLEARINGHOUSE

Ronald Sklansky
Director
(608) 266-1946

Richard Sweet
Assistant Director
(608) 266-2982



Terry C. Anderson
Director
Legislative Council Staff
(608) 266-1304

One E. Main St., Ste. 401
P.O. Box 2536
Madison, WI 53701-2536
FAX: (608) 266-3830

CLEARINGHOUSE RULE 01-007

Comments

[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]

I. Statutory Authority

a. Section 30.77 (3) (a), Stats., provides that a town, village or city may, in the interest of public health, safety or welfare enact ordinances applicable to waters within its jurisdiction "if the ordinances are not contrary to or inconsistent with [ch. 30, Stats.] and if the ordinances relate to the equipment, use or operation of boats or to any activity regulated by ss. 30.60 to 30.71." Section 30.77 (3) (b), Stats., includes a similar provision for counties with regard to rivers and streams within a county's jurisdiction. In contrast, s. 30.77 (2), Stats., provides that any municipality (defined in s. 30.01 (4), Stats., for this purpose as a city, village, town or county) may enact ordinances that are in strict conformity with ss. 30.50 to 30.71, Stats.

In *Menzer v. Village of Elkhart Lake*, 51 Wis. 2d 70, 186 N.W.2d 290 (1971), the Wisconsin Supreme Court attempted to reconcile the "strict conformity" language with the "not contrary to or inconsistent with" language in an earlier version of the statutes. The court did not require "strict conformity" with respect to all local regulations but permitted a town, village or city to enact a local regulation that was not contrary to or inconsistent with ch. 30, Stats., and that was in the interest of public health or safety. (Since that case, in the interest of public welfare has been added to the statutes.)

Based on this court decision, it appears that a town, village or city (or county with respect to a river or stream) may, under certain circumstances, enact ordinances relating to "the equipment, use or operation of boats or to any activity regulated by ss. 30.60 to 30.71" that are not in "strict conformity" with the statutes. Thus, it could be argued that, under certain

circumstances, local ordinances may be "more restrictive than state law" as indicated by s. NR 5.15 (1) (a). (Under this line of reasoning, it would be more appropriate to refer to "more restrictive than state statutes" inasmuch as the Wisconsin Administrative Code and court decisions also constitute "state law.")

Given the *Menzer* decision and the specific references in s. 30.77 (3) (a) and (b), Stats., to "ss. 30.60 to 30.71," it is unclear that there is statutory authority to specify in s. NR 5.15 (1) (b) that certain statutes in this range (namely, ss. NR 30.60, 30.61, 30.62, 30.63, 30.64, 30.65, 30.67, 30.675, 30.68 (3) (b) and 30.71, Stats.) may not be changed by local ordinance, especially if the statute involves an "activity." What is the basis for limiting local authority with respect to these statutes?

If the response is that s. 30.77 (3) (cr), Stats., does not include these statutes as examples of what may be included in ordinances, then it would be unclear why other statutes in the ss. 30.60 to 30.71 range, for example, s. 30.625, the remainder of s. 30.68 and all of s. 30.681, Stats., were also not included on the list of statutes that may not be changed by local ordinance.

b. Given the court's reasoning in *Menzer*, it is unclear that there is authority for s. NR 5.15 (1) (d), Stats., which specifies that local ordinances may not regulate boating activities based "solely" on boat size or horsepower.

Moreover, even if this were a permissible limitation on the authority of local units of government, it appears that questions could be raised as to what could be combined with boat size or horsepower to create an appropriate regulation. For example, could a time of day provision coupled with a horsepower provision (for example, no boats with more than 10 horsepower between the hours of 6:00 a.m. and 6:00 p.m.) be appropriate if all other conditions were met?

2. Form, Style and Placement in Administrative Code

a. The three definitions added to s. NR 5.001 are unusual in that all indicate that the terms are defined for the purpose of a specific statute. One of the three definitions ("water skis, aquaplane or similar device" in s. NR 5.001 (16m)) goes further to explain that that term is being defined not only for the purpose of a particular statute but also for the purpose of ch. NR 5.

Typically, introductory language in a definitions section specifies that terms are being defined for a specified portion of the Wisconsin Administrative Code, for example, by using a phrase such as: "In this chapter:", "In this subchapter:" or "In this section:". Current s. NR 5.001 does not include such introductory language. This means that there is some ambiguity as to the exact purpose for which a term is being defined. For example, when "public access" is specified in s. NR 5.001 (11m) as being defined for the purpose of s. 30.635, Stats., does that mean it is not being defined in the same way whenever the term is used in ch. NR 5, for example, in s. NR 5.20? This question is especially pertinent when that definition is contrasted with the definition of "water skis, aquaplane or similar device" in s. NR 5.001 (16m). The latter definition indicates that the term is being defined for the purpose of s. 30.69, Stats., and also for the purpose of ch. NR 5.

In contrast to these two approaches, some of the existing definitions in s. NR 5.001 do not specify the purpose for which they are being defined. They are presumably being defined for purposes of ch. NR 5, but this is not specified. These varying approaches lead to ambiguity. Section NR 5.001 should be revisited to clarify this matter.

b. Section NR 5.001 (1m) defines "boat" for the purpose of s. 30.51, Stats.; that is, for the purpose of certificate of number and registration. According to s. 30.50 (2), Stats., the term "boat" does not include fishing rafts for the purpose of regulation of boating under ss. 30.50 to 30.80, Stats. Nevertheless, s. 30.505, Stats., provides that for purposes of certificate of number systems, Wisconsin law must be in conformity with the federal system of identification number of boats. Thus, it appears that it is appropriate to define "boat" in this more expansive manner for very limited purposes in ch. NR 5, for example, for ss. NR 5.01 to 5.07.

The rule should more clearly explain which sections of ch. NR 5 the definition of "boat" in s. NR 5.001 (1m) applies to. Otherwise, it could be implied that every reference to "boat" in ch. NR 5 includes motorized fishing rafts, which would be contrary to s. 30.50 (2), Stats.

c. SECTION 3 renumbered s. NR 5.15 to s. NR 5.15 (2). Was it the intention to delete the title? If so, this should be indicated. If not, a title should be added to s. NR 5.15 (1). [See s. 1.05 (1), Manual.]

d. In the first sentence of s. NR 5.15 (1) (a), "entity will provide" should be changed to "entity shall provide." [See s. 1.01 (2), Manual.]

4. Adequacy of References to Related Statutes, Rules and Forms

The rule does not explain what use the Department of Natural Resources will make of the condition report required under s. NR 5.15 (1) (a).

Further, it is not clear when a condition report must be submitted, for example, before or after an ordinance becomes effective. Section NR 5.15 (1) (a) (intro.) suggests that the report is to be submitted after enactment. Is that the intention? The rule should be clarified as to the timing of the submission of the report.

Also, how does the timing of the submission of this condition report interface with the pre-enactment submission of proposed ordinances that must occur with respect to inland lakes under s. 30.77 (3) (d), Stats.?

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. In s. NR 5.001 (16m), the phrase "or an inflatable device and barefoot or skiless skiing" is unclear. Was this intended to mean "or an inflatable device used with barefoot or skiless skiing"?

b. In s. NR 5.15 (1) (a) 3., the requirement that there be "[a] statement concerning the impact the regulation will have on public health, safety or welfare if the regulation is not

adopted" should be changed to "[a] statement concerning the impact on public health, safety or welfare if the regulation is not adopted."

c. In s. NR 5.15 (1) (c), the phrase "such as slow-no-wake areas" should be set off by commas.

d. In s. NR 5.15 (1) (e), a period should be inserted at the end of the paragraph.



WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

TO: MEMBERS OF THE SENATE COMMITTEE ON ENVIRONMENTAL RESOURCES

FROM: John Stolzenberg, Staff Scientist

RE: Clearinghouse Rule 01-077 and the Local Regulation of Boating

DATE: September 25, 2001

At the Senate Committee on Environmental Resource's hearing on September 20, 2001 on Clearinghouse Rule (CHR) 01-007, Chairperson Baumgart asked me to review the Department of Natural Resource's (DNR) response to the Legislative Council's Rules Clearinghouse comments on the rule relating to the local regulation of boating.

The following points summarize the current situation with respect to the local regulation of boating and CHR 01-007:

1. The DNR has for a number of years published guidelines on local boating regulations. These guidelines are advisory and not enforced by the DNR. The present guidelines were published in 2000 and are entitled *Guidelines for Creating Local Boating Ordinances and Placing Waterway Markers in Wisconsin Waters*, DNR Publication No. LE-317-2000.
2. The version of CHR 01-007 that the DNR submitted to the Rules Clearinghouse included the creation of proposed s. NR 5.15, Standards for Enacting Local Boating Ordinances. This section interpreted s. 30.77, relating to local regulation of boating. According to John Lacenski, DNR Boating Law Administrator, these standards were based upon the DNR's guidelines identified in point #1.
3. In response to the Rules Clearinghouse questions relating to the DNR's statutory authority to promulgate these standards, the DNR removed the standards from the final draft form of the rule that it submitted to the Legislature.
4. The Joint Legislative Council's Special Committee on Navigable Waters Recodification is presently considering a proposal that repeals and recreates s. 30.77, Stats. See WLC: 0163/3 at http://www.legis.state.wi.us/lc/studies/NAV/0163_3.pdf. The prefatory note in WLC:

0163/3 states that "this bill draft reorganizes s. 30.77, stats., relating to local regulation of boating and makes many changes in the current statutory language of s 30.77 to enhance readability of this statute."

If you have any questions on CHR 01-007, please feel free to direct them to me at the Legislative Council offices.

JES:wu;ksm