

# 07hr\_SC-ENR\_CRule\_04-088\_pt02



(FORM UPDATED: 08/11/2010)

## WISCONSIN STATE LEGISLATURE ... PUBLIC HEARING - COMMITTEE RECORDS

### 2007-08

(session year)

### Senate

(Assembly, Senate or Joint)

### Committee on ... Environment and Natural Resources (SC-ENR)

#### COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

#### INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... **HR** ... **bills and resolutions** (w/Record of Comm. Proceedings)
  - (**ab** = Assembly Bill)                      (**ar** = Assembly Resolution)                      (**ajr** = Assembly Joint Resolution)
  - (**sb** = Senate Bill)                              (**sr** = Senate Resolution)                              (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

## REPORT TO LEGISLATURE

NR 326, Wis. Adm. Code  
Regulation of piers, wharves, boat shelters, boat hoists, boat lifts  
and swimming rafts in navigable waterways

Board Order No. FH-42-04  
Clearinghouse Rule No. 04-088

### **Basis and Purpose of the Proposed Rule**

Changes to state statute passed by the Wisconsin legislature in early 2004 modified the regulations for piers and similar structures in navigable public waters. In the past, most piers did not need a permit under state regulations and DNR dimensional guidelines. The statute changes, in legislation called 2003 Wisconsin Act 118, codified these guidelines and created specific exemptions from permitting for a pier or wharf, and for related seasonal structures. Rulemaking is needed to provide clear definitions, establish standards to qualify for an exemption, and create general permit and individual permit standards for non-exempt activities.

To ensure compliance with the stated goal of the Legislature and the Governor in the adoption and signing of Act 118, namely that the public trust protections for Wisconsin waters not be diminished, the Department needs to adopt permanent rules designating waters, identifying administrative processes, and establishing standards for these activities in navigable waterways. For supporting analysis, see "Legal Memorandum Re: Permanent Rulemaking - Act 118", included as Attachment 1.

### **Rulemaking History**

- April 1981 – Original NR 326 went into effect
- 2002 – NR 326 revised to add swimming raft regulations
- April 2004 - Natural Resources Board adopts Emergency Rule NR 326 to implement Act 118
- June 2004 – Legislative Joint Committee on Review of Administrative Rules suspends Emergency NR 326, due to concern about how DNR would enforce the rules for existing piers, and misunderstandings about specific rule provisions
- July 2004 – Natural Resources Board authorizes hearings on permanent revisions to NR 326
- July – October 2004 – DNR convenes Stakeholder Group to review DNR proposal and develop improved language (see Attachment 2 for list of Stakeholder Group members)
- November and December 2004 – Public Hearings and Public Comment Period
- September 2005 – NR 326 revisions adopted by Natural Resources Board
- November 2005 – Natural Resources Board votes to reconsider rule in light of new studies on pier size and impacts of piers to aquatic habitat
- December 2005 – Revised NR 326 adopted by Natural Resources Board

### **Summary of Rule Proposal**

The proposed NR 326 interprets and administers the exemption, general permit and individual permit requirements provided in chapter 30, Stats., as recently revised by Act 118. The rule establishes construction, design and placement standards for projects to be eligible for statutory exemptions, creates general permits with standards, and establishes standards and review factors for individual permits. Under this rule, any structure that is already authorized by a chapter 30 permit can continue to be placed and maintained under the terms of the original permit, without any new permit requirements. The Board Order proposes to repeal the existing NR 326 and replace it with a new rule – Attachment 3 provides an outline of the new rule organization.

### ***A. Piers and Wharves***

**Exemptions** – New or existing piers that meet the standards qualify for an exemption, meaning no need to obtain a permit or contact DNR. 85% of all existing piers are estimated to meet the exemption. The rule establishes clear requirements for a pier or wharf to be eligible for an exemption from state permitting, based on the statutory criteria and standards. The proposed standards are nearly identical to the requirements and guidelines provided to citizens in DNR's "Pier Planner" brochure since 1991.

The statutory standards for a pier or wharf exemption are:

- Length - no longer than to reach 3-foot depth, or length needed to adequately moor a boat or use a boat hoist/lift; pier may extend to the pierhead line if one is established by local ordinance
- Width - maximum width of 6' wide
- Number of boats - 2 boat slips for the first 50' of shoreline, 1 additional boat slip for each additional full 50' of shoreline

Other key requirements for an exemption include that the pier or wharf:

- Is not a solid structure or on rock-filled cribs
- Is not located in a sensitive area designated by the Department under NR 107
- May not block water movement, cause sedimentation, or accumulate debris
- May not extend more than 25% across a river, stream or channel

The rule also allows several other categories of piers to be exempt: solid piers built before April 1981, piers designated as "historic property", a shared pier used by two adjacent owners, and piers authorized by a consent order between DNR and another party.

**General Permits** – Another 14% of existing piers that don't qualify to be exempt, will be "grandfathered" through a general permit created in the rule. This one-time process makes it easy for owners of piers and wharves that pre-dated the Act 118 legislation to "keep what they have", with very few limitations. This general permit authorizes the preexisting length and number of boat slips, and once obtained, the permit automatically transfers to future property owners. Under the rule, applicants do not have to pay a fee. The pier or wharf is limited to a width to 8-feet and a maximum loading platform of 200 square feet – structures bigger than this go well beyond what's needed for reasonable docking and loading/unloading on a pier, are a large private structure in public waters, and can have significant impacts on habitat and public rights. Owners of larger structures can choose to downsize a larger pier to qualify for this "grandfathering" general permit; otherwise an individual permit review is required. Structures that are the subject of formal enforcement action or past court ruling or judgment can't qualify, and this General Permit is available for three years from the effective date of the rule.

The rule establishes two general permits for piers on specific Wisconsin waterways that have unique docking requirements due to deep water and/or water level fluctuation, wave fetch, boat wakes, and large boat size:

- Piers on rock-filled cribs in Lake Geneva, Walworth County
- Piers up to 8-feet wide and 40-feet long on the Lower St. Croix Riverway, Pierce and St. Croix Counties

Finally the rule establishes two additional general permits:

- Piers in a Sensitive Area designated by the Department under NR 107
- Public Piers – larger width allowed for public fishing, swimming or transient docking

**Individual Permits** – Approximately 1% of all existing piers will not qualify for an exemption or a general permit based on Department estimates. For those few existing piers, and for any new piers that do not qualify for an exemption or GP, this order sets forth some specific individual permits that are available, and establishes standards and factors for consideration during review, to provide for consistent and orderly review of individual permit applications. The following individual permits are found in this rule:

- Solid piers – only in specific waters; only for either repair/expansion of existing solid piers, or new solid piers for public or commercial purposes
- Piers on rock-filled cribs – only in Lake Michigan, Lake Superior or Lake Geneva
- Commercial and municipal marinas

- Piers and wharves in sensitive areas designated by the Department under NR 107
- Other piers and wharves - different design or dimensions may be allowed for preexisting facilities, navigational stability, or to accommodate a disability

***B. Boat Shelters, Hoists and Lifts***

Exemptions - This order also sets forth standards for exemptions for seasonally-placed boat shelters, and for boat hoists and boat lifts. These standards are similar to those for piers and wharves, and include:

- dimensional and design standards
- must be placed adjacent to a pier, wharf or shoreline

General Permits - The rule creates a general permit for permanent boat shelters as required by statute. The general permit standards are those currently in NR 326, with the exceptions that permanent boat shelters are allowed to go out the same length as piers, and that the standard for "developed shoreline" has been revised to be more objective.

Individual Permits – An individual permit is available for existing boat shelters, hoists and lifts that don't meet the exemption or general permit criteria. The rule prohibits new boat shelters, lifts and hoists that do not qualify for the exemption or general permit.

***C. Swimming Rafts***

Exemptions - This rule order establishes standards for swimming rafts (which includes water trampolines), consistent with the standards that are currently in NR 326. To qualify for an exemption, a swimming raft must meet several standards, including:

- may not be placed more than 200 feet from shore (statutory requirement)
- may not exceed 200 square feet or 38" in height, except that size and height restrictions do not apply to rafts removed from the water daily or placed in designated swimming areas
- shall be seasonally placed (removed between December 1 and April 1)

How does this proposal affect existing policy?

The rule creates standards for various structures to be placed under exemptions, general permits and individual permits. The standards are consistent with Department rule standards that have been in place in NR 326 since 1981, guidelines issued in the Department's "Pier Planner" brochure since 1991, and past practice working with waterfront property owners. It is also consistent with decisions issued in Wisconsin court cases, and with the new regulatory framework and requirements of Act 118. Definitions and standards have been developed to ensure that administration of the new statutory framework is as consistent as possible with past policies and guidance, and provides equivalent protection of public rights in navigable waters.

Summary of Public Comments

Over 300 citizens and organizations testified or submitted comments at 6 public hearings or by mail during a two-month public comment period. A detailed summary of the response to comments received during the initial comment period is in the "Response to Public Comments" in Attachment 4, prepared in August 2005. Subsequent to initial adoption of the Board Order in September 2005, the Natural Resources Board directed staff to revise the rule further in response to various studies on pier sizes and impacts in Wisconsin. The Board adopted a revised rule on December 7, 2005.

Modifications Made

A detailed description of the modifications made in response to the initial comment period is in the "Response to Public Comments" in Attachment 4 and the "Response to Legislative Clearinghouse" in Attachment 5. Subsequent to initial adoption of the Board Order in September 2005, the rule was revised at the direction of Natural Resources Board. Modifications included changing the standards for exempt piers to reflect the statutory dimensions, expanding the general permit for preexisting piers to allow loading platforms up to 200 square feet in size, and eliminating the fee for preexisting non-exempt piers so they can simply be registered at no cost to pier owners. The rule was also modified to allow a 3-year period for property owners who need permits to apply for them, without risk of enforcement action.

Appearances at the Public Hearing

November 1, 2004 – Video conference

Eau Claire

In support:

Randy R. Burch, N4898 Photic Road, Ladysmith, WI 54848

In opposition:

Faye Hedrington, 558 Maitland Drive, Apt. 26, Chippewa Falls, WI 54729

As interest may appear:

Pat Andress, 787 Terrill, Chippewa Falls, WI 54729

Everett R. Hedrington, 558 Maitland Drive, Apt. 26, Chippewa Falls, WI 54729

Barbara Thomas, E5190 650 Avenue, Menomonie, WI 54751

Clair Rasmussen, N8490 Hay Creek Road, Willard, WI 54493

Green Bay

In support:

Andy Wallander, 221 Woodview Lane, Luxemburg, WI 54217

In opposition – none

As interest may appear:

David Wentland, Coastal Planning & Design, Inc., 1304 Raebrook Lane, DePere, WI 54115

Mike Kahr, 11648 Old Stage Court, Ellison Bay, WI

Larry Perkins, 1032 Cottage Lane, Ellison Bay, WI 54210

Greg Sunstrom, Little Sister Resort, 360 Little Sister Road, Sister Bay, WI 54234

Tom Catlin, W4511 Shagbark Lane, Waupaca, WI 54981

Jennifer Sunstrom, 6124 Aerotech Drive, Appleton, WI 54911

November 3, 2004 – Tomahawk

In support:

Don Szatkiewicz, 5096 Oakridge Road, Harshaw, WI 54529

In opposition:

Jay Verhulst, 11346 Willies Drive, Arbor Vitae, WI 54568

Chuck Ahlborn, Chairman, Vilas Co. Zoning, P.O. Box 1934, Arbor Vitae, WI 54568

Sandra Verhulst, 11346 Willies Drive, Arbor Vitae, WI 54568

David Calhoun, 693 N. 4<sup>th</sup> Street, Tomahawk, WI

Lonn Lamer, N11668 Lamer Road, Tomahawk, WI 54487

Lin Kenworthy, W5220 Terrace View Road, Tomahawk, WI 54487

Michael Mulleady, 8268 Voss Road, Minocqua, WI 54548

Stephanie Von Holdt, 10203D High Fishtrap Lake Road, Boulder Junction, WI 54512

As interest may appear:

Gary Baier, 9378 Norway Lane, Tomahawk, WI 54487  
William C. Liebert, 361 Highview Parkway, Rhinelander, WI 54501  
Mark Patulski, 6730 Prune Lake Road, Rhinelander, WI 54501  
Glenn R. Sontag, 9335 Lt. Bearskin Creek Road, Harshaw, WI 54529  
Bill Wulf, 703 Tee Lane Drive, Merrill, WI 54452  
Darrell Rice, 13728 Highway 8, Tripoli, WI 54564  
R. Wayne Plant, W4385 Eagle Ridge Lane, Merrill, WI 54452  
Charles Merten, N10377 Cabin Drive, Tomahawk, WI 54487  
Jim Meyer, 9002 Camp Highland Road, Sayner, WI 54560  
Ray [last name illegible], W6524 Navajo Trail, Tomahawk, WI  
Jessica Minloff, Tomahawk Leader, 315 W. Wisconsin Avenue, Tomahawk, WI 54487  
Irvin King, N11445 County Road A, Tomahawk, WI 54487

November 4, 2005 – Hayward

In support:

Waldo Asp, P.O. Box 205, Birchwood, WI 54817  
David A. Anderson, 12507 W. Moreland Road, Hayward, WI 54843

In opposition:

William L. Wilcox, 12504 N. Tanning Point Road, Hayward, WI 54843  
Dorothy Pasko, 7685 W. Pine Point Road, Hayward, WI 54843  
Bruce Meyers, 10860 N. Clear Lake Drive, Hayward, WI 54843  
Tom Burgess, 15171 W. Circle Road, Hayward, WI 54843

As interest may appear:

J. Leslie Hall, 51320 S. Call 'O the Wild Road, Barnes, WI 54873  
Jim Brakken, 45255 E. Cable Lake Road, Cable, WI 54821  
Daniel Vertanen, 12694 Tanning Point Road, Hayward, WI 54843  
Bob and Jan Hahn, 13683 W. Pine Shores Lane, Hayward, WI 54843  
Judith Brodsky, 8157 N. Woodland Drive, Hayward, WI 54843  
Gerald Brodsky, 8157 N. Woodland Drive, Hayward, WI 54843  
Leonard G. Eckerly, 11191 W. Pine Knoll Road, Couderay, WI 54828  
Jackie Eckerly, 11191 W. Pine Knoll Road, Couderay, WI 54828  
Dave Ferris, 7410 County Road K, #109, Siren, WI 54872

November 9, 2004 – Waukesha

In support:

Cheryl Nenn, Friends of Milwaukee's Rivers, 1845 N. Farwell Ave., #100, Milwaukee, WI 53202  
Chris Krieg, Elkhart Lake Improvement Assn., 15275 Westover Road, Elm Grove, WI 53122

In opposition – none

As interest may appear:

Dick Cooley, 5637 Peters Drive, West Bend, WI 53095  
Dave Berganini, 5314 Woodland Drive, West Bend, WI 53095  
Atty. Tim Swatek, P.O. Box 760, Lake Geneva, WI 53147  
Sue Link, W172 S7297 Lannon Drive, Muskego, WI 53150  
Doug Wheaton, 4830 Indian Hills Drive, #204, Racine, WI 53406

Bill Gage, P.O. Box 220, Williams Bay, WI 53191  
Chris Fox, 13325 N. Lakewood Drive, Mequon, WI 53097  
R. Stephen Linn, 1427 Snowshoe Lane, Eagle River, WI 54521  
Jeff Reed, W3199 County Road BB, Lake Geneva, WI 53121  
Jay Lindmeyer, 1284 E. [street name illegible], West Bend, WI  
Mark Adams, 838 S. 110<sup>th</sup> Street, West Allis, WI 53214  
Allan B. Wheeler, 1840 N. Prospect Avenue, #309, Milwaukee, WI 53202  
Jeff Spence, P.O. Box 66, Nashotah, WI 53058  
Allan C. Orth, 2205 Bonnie Brae, Lake Geneva, WI  
Andy Schmidt, N2591 Sunset Blvd., Lake Geneva, WI 53147  
Marne Stuek, 12300 W. Center Street, Milwaukee, WI 53222  
Tom Hoppens, 240 Mavina Court, #26, Waterford, WI 53185  
Carole Linn, 1427 Snowshoe Lane, Eagle River, WI 54521  
Marcia H. Grossman, 790 Lake Shore Road, Grafton, WI 53024  
Leroy W. Grossman, Jr., 790 Lake Shore Road, Grafton, WI 53024  
Robert Grossman, W62 N346 Hanover Ave., Cedarburg, WI 53012  
Roger Lyon, 19315 Tanala Drive, Brookfield, WI 53045

November 10, 2004 -- Madison

In support:

Charles Dykman, Yahara Lakes Assn., 4611 Tonyawatha Trail, Monona, WI  
Mack Van Egieren, Lake Monona Sailing Club, 1518 Homberg Lane, Madison, WI 53716  
Lola Dvorak, Wis. Assn. of Lakes, 1 Point Place, Suite 101, Madison, WI 53713  
Susan Tesarik, 2918 Ashford Lane, Apt. 8, Madison, WI 53713

In opposition:

Philip H. Salkin, Wis. Realtors Assoc., 127 N. Main Street, Verona, WI 53593

As interest may appear:

Steve Statz, 2040 Bluebill Park, Madison, WI  
Ron Von Haden, 308 E. Bluff St., P.O. Box 248, Boscobel, WI 53805  
Gary Pavlicek, 5063 Sand Lake Road, Webster, WI 54893  
Tom Larson, 4801 Forest Run Road, Madison, WI 53705  
Karen Pavlicek, 5063 Sand Lake Road, Webster, WI 54893  
Mark Faultersack, 6400 Century Avenue, Middleton, WI 53562  
Eileen Brunkewitz, 5134 Reynolds Avenue, Waunakee, WI 53597  
Russell J. Hovde, N2009 N. Lakeshore Drive, Fontana, WI 53125  
Robert Houghton, 822 W. Parkview Street, Cottage Grove, WI 53527  
George Meyer, 201 Randolph Drive, Madison, WI 53717  
Paul Didier, 1019 Rooster Run, Middleton, WI 53562  
Ezra Meyer, One Point Place, Suite 101, Madison, WI 53719  
Neil Derkowski, 3911 Fish Hatchery Road, Fitchburg, WI 53711  
Jacob Schuster, 215 N. Frances Street, Madison, WI 53703  
Dick Murray, 1421 Wyldewood Drive, Madison, WI 53704

#### Changes to Rule Analysis and Fiscal Estimate

The anticipated revenue and costs are reduced because after the Board's amendments, more piers will qualify for the exemption - meaning no permit fee and reduced DNR workload.

## Response to Legislative Council Rules Clearinghouse Report

The Department considered all comments from the Clearinghouse Report and the rule has been modified accordingly. A detailed response to the Clearinghouse comments is attached.

## Final Regulatory Flexibility Analysis

Any person or small business conducting an activity in navigable waters can qualify for an exemption or apply for a general permit or individual permit. To obtain a permit, small businesses follow the same requirements as other waterfront property owners: complete an application form and submit information to describe their project and demonstrate that it complies with statutory and code requirements to receive a certification. Schedules, application steps and compliance/reporting requirements are very basic for all applicants, and most projects can be planned and conducted by individuals with no specific professional background. The proposed rules will not have a significant economic impact on a substantial number of small businesses, so under s. 227.19(3m) Wis. Stats., a final regulatory flexibility analysis is not required.



DATE: November 3, 2004

FILE REF: 8300

TO: Secretary Scott Hassett

FROM: Michael Cain, Legal Services

SUBJECT: Legal Memorandum Re: Permanent Rulemaking – Act 118

**Synopsis of Opinion-** Act 118 modifies provisions in Chapter 30, Stats., to authorize, through exemptions and general permits, the placement of structures, dredging of bed materials, and the grading on the banks of navigable public trust waters. Wisconsin's Constitution, Article IX, Section 1, and a large body of case law known as the public trust doctrine, require that these public waters be protected for the public. In order to assure compliance with the stated goal of the Legislature and the Governor in the adoption and signing of this law, namely that public trust protections for WI waters not be diminished, the Department needs to adopt permanent rules defining the scope of these activities and establishing processes for the administration of the program.

#### **Question asked and Background of the Legislation**

You have asked questions concerning the adoption and implementation of WI Act 118, which relates to the regulation of physical activities affecting the State's public trust waters and which became effective on February 6, 2004. Other memoranda (attached Act summary) outline the substance of the law. As it relates to Chapter 30, Stats., the law modifies the previously existing regulatory system to streamline the process and to establish a large number of exemptions and a large number of mandatory general permits.

It has been asserted by some parties that the granting of exemptions, without any pre-construction notice or review process, is an abdication of the State's public trust responsibilities under Article IX, Section 1 of the WI Constitution. You have asked that I review these issues and provide some legal context and suggested approaches to deal with these issues.

#### **Public Trust and Constitutional Background**

Article IX, Section 1 of the Wisconsin Constitution provides that "...the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States...." This language provides the basis for the Public Trust Doctrine in navigable water in Wisconsin.

Over the 155 years Wisconsin has been a state, the state Supreme Court, the Legislature, the Department of Natural Resources, and the citizens of the state have been responsible for administering this public trust established in the Constitution. The Wisconsin Supreme Court has broadly construed and consistently upheld the trust doctrine. Citizens have routinely brought violations of the Public Trust Doctrine to the court seeking remedies.

Additionally, the Public Trust Doctrine has evolved as society's understanding of the ecology of water and waterways and the uses made of our waters have changed over time.

In 1914, in the *Husting* case, which affirmed that all citizens had the right to hunt on the waters of the Rock River as they flowed through the Horicon Marsh, the state Supreme Court noted the public nature of all state waters and recognized the need to broadly construe the trust doctrine so "the people reap the full benefit of the grant secured to them." The court admonished 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" and that the "wisdom of the policy which steadfastly and carefully preserved to the people the full and free use of public waters cannot be questioned, nor should it be limited by narrow constructions." In the 1930s, the courts noted that as people began to use waters for more recreational activities, "sailing, rowing, canoeing, bathing, fishing, hunting, and skating" are public uses that are protected under the trust

doctrine.

In the 1950s, both the Legislature and the Supreme Court noted that enjoyment of natural scenic beauty is a protected public right. In the 1960s, as the Clean Water Act was being debated in Congress, and as water quality problems became critically important in Wisconsin, the Wisconsin Court noted that the right to clean, unpolluted waters was an important consideration under the Public Trust Doctrine.

The state Supreme Court held, in Hixon v. PSC, in 1966, that state officials must consider the cumulative impacts of fills and structures in waters, noting that: "A little fill here and there may seem to be nothing to become excited about. But one fill, though comparatively inconsequential, may lead to another, and another, and before long a great body of water may be eaten away until it may no longer exist. Our navigable waters are a precious natural heritage; once gone, they disappear forever." The Hixon court went on to say that: "Although the legislature has constitutionally permitted some structures and deposits, it permitted them under s. 30.12...only if the Public Service Commission[now the DNR] found that such structure does not materially obstruct navigation...and is not detrimental to the public interest."

In 1972, in Just v. Marinette, the Court noted that wetlands, which were once considered "wasteland," now are recognized to play a "vital role in nature" and that protection of such areas near our navigable waters is critical "not only to promote navigation but also to protect and preserve those waters for fishing, recreation and scenic beauty."

In 1996, in Sterlingworth Condominium Ass'n v. DNR, the Court of Appeals dealt with a case in which there was a proposal to expand piers into a bay containing important habitat for fish and wildlife. The Court upheld the Department's findings on the impacts on public rights due to adverse impacts on aquatic plants, water quality, fish spawning and nursery habitat. The Court held that:

Although nine additional boat slips may seem inconsequential to a proprietor such as Sterlingworth, we approach it differently. Whether it is one, nine or ninety boat slips, each slip allows one more boat which inevitably risks further damage to the environment and impairs the public's interest in the lakes. The potential ecological impacts include direct impacts on water quality and sediment quality alteration, as well as direct and indirect influences on flora and fauna. For this very reason, the consideration of "cumulative impact" must be taken into account....In our opinion, the DNR, in limiting Sterlingworth's permit to 25 boat slips, carried out its assigned duty as protector of the overall public trust in maintaining one of Wisconsin's most important natural resources.

The Legislature has enacted statutes, which are administered by the DNR and local municipalities, to assure that the "public rights and interests" in state surface waters and wetlands are protected under the trust doctrine. The courts have recognized that those citizens who own property abutting waters have rights to use their frontage for access to the water and have the right to "reasonable use" of the water for such things as piers and boat storage. It is important to note, however, that these private rights are subject to the rights of the public under the public trust doctrine.

This tension between the rights of the public and rights of private landowners often results in controversy. The Wisconsin Supreme Court has repeatedly made it clear that regulations put in place to prevent harm to these public trust waters are reasonable and necessary under the Public Trust Doctrine and do not constitute a taking of private property.

#### **Limitations on Legislative Authority**

The Courts have also made it clear that there are limitations on all parties, including the Legislature, in allowing activities to occur in public trust waters without appropriate oversight to assess the impacts on the public trust. When the Legislature enacted a statute in the late 1800's to authorize the draining of Big Muskego Lake in Waukesha County for development purposes, the case challenging the statute went to the WI Supreme Court.

The Court held that the legislative Act was a violation of the public trust doctrine and that the lake must be restored, stating, in Priewe v. Wisconsin State Land and Improvement Co., 103 Wis. 537 (1899):

"The legislature has no more authority to emancipate itself from the obligation resting upon it which was assumed at the commencement of its statehood, to preserve for the benefit of all the people forever the enjoyment of the navigable waters within its boundaries, than it has to donate the school fund or the state capitol to a private purpose."

Similarly, in Muench v. Public Service Commission, 261 Wis. 492(1951), there was a controversy over the placement of a dam on the Namekagon River. The Legislature granted authority to counties to make the final decision on the placement of dams on all waters except those in state parks and state forests under the "county board law", which provided:

...but in case of a dam or flowage located outside the boundaries of a state park or state forest no permit shall be denied on the ground that the construction of such proposed dam will violate the public right to the enjoyment of fishing, hunting or scenic beauty if the county board....approves the construction of such dam. Section 31.06(3) 1947.

The WI Supreme Court noted that the issue of "public rights of hunting, fishing, and scenic beauty by the erection of a dam on a navigable stream is of statewide concern", and that the statute that precluded findings by the state regulatory agency for public trust issues (then the PSC, now the DNR) was unconstitutional. The Court stated, on re-hearing:

The trust doctrine has become so thoroughly embodied in the jurisprudence of this state that this court should not now repudiate the same, as it applies to the rights of recreational enjoyment of our public waters....

It is a well-recognized principle of the law of trusts that a trustee charged with the duty of administering a trust cannot delegate to agents powers vested in the trustee which involve an exercise of judgment and discretion.... The delegation of power attempted in the "county board law" permits the "public right to the enjoyment of fishing, hunting or natural scenic beauty" in a navigable stream to be seriously impaired or destroyed through the action of a county board and the Public Service Commission is rendered powerless thereby to intervene to protect these public rights. Such an attempted delegation of power by the legislature, involving as it does a complete abdication of the trust, is therefore void. (Emphasis added) Muench at pp. 515-l and 515-m.

The WI Courts have thus made it clear that the issues relating to impacts to navigable waters, including cumulative impacts caused by multiple small activities, that may cause the "public right to the enjoyment of fishing, hunting or natural scenic beauty" in navigable waters to be seriously impaired or destroyed, are matters of statewide concern protected under the public trust doctrine. It is clear that the State of WI cannot abdicate its trust responsibilities to local governments or to private individuals relative to these public trust impacts.

Some parties have asserted that Act 118, especially as it relates to exempted activities, does constitute such an abdication of the public trust responsibilities of the State of Wisconsin. Proponents of the law assert that, due to the potential for the State of WI to recapture activities after they have occurred, there are adequate safeguards in the law to comport with the public trust doctrine.

### **Analysis of the Law**

Does Act 118 constitute such a broad delegation to individuals and contractors that it is an abdication of the trust doctrine and is potentially an unconstitutional enactment?

Under Act 118, the exempted activities became effective on February 6, 2004. The bill does not require any notice to the Department before citizens or their contractors undertake these exempted activities. Under these circumstances, the exemption of these activities in public trust waters without any notice to the Department or the public who may use such waters, and without any pre-construction oversight of the

activities, might be perceived as an abdication of the State's public trust responsibilities under Article IX, Section 1, of the Wisconsin Constitution.

In the adoption of Act 118, there were many concerns expressed about the potential diminution of protection of public trust waters due to the exemptions which were being granted in the bill. While some of the exemptions clearly relate to relatively minor activities (such as bird nesting platforms, and dry hydrants), some of them relate to activities which have the potential, especially on a cumulative basis, to have significant adverse impacts on habitat and public use on lakes and streams (e.g., dredging associated with the placement of piers and other structures and placement of up to 2 cubic yards of fill associated with other exempted activities).

While the undertaking of some exempted activities may often not be a problem, some of them clearly have the potential to cause adverse impacts on public trust waters and the public's ability to use such waters. As an example, while placement of most piers is not a problem today, we experience many cases each year where the dredging associated with the proposed placement of piers in a shallow bay will have very significant impacts on spawning and nursery habitat, wildlife habitat, valuable aquatic plants beds, and the public uses associated with these areas. Similarly, based on our experience, fill associated with the placement of structures may, if placed in spawning vegetation or over gravel substrate, significantly affect habitat and the public uses of a navigable water. This is especially true when the cumulative impacts of these activities on a particular shoreline or bay are considered.

The exemptions, as contained in Act 118, have the limitation that they cannot be placed in "areas of special natural resource interest", which will protect some of our navigable waters, such as trout streams, scientific and natural areas, etc. It is likely these limitations will likely cover in the range of 20% of our navigable waters.

Act 118 also contains discretionary provisions allowing a party to contact the Department prior to placement of an exempted activity to determine whether the activity is exempt. See, for example, sub. 30.12(2r). There are provisions for the Department, after "an investigation" and site visit, to recapture an activity by determining that it does not meet the requirements of an exemption. See, for example, sub. 30.12(2m).

The Department adopted emergency rules to address many of the issues relating to the exempt activities and to establish a number of initial general permits. These emergency rules will expire in early 2005. Without permanent rules in place to clarify the exemptions and general permits, I believe these provisions may be inadequate to protect public rights in waters. The Department has no way to anticipate where or when an exempt activity will be undertaken. While a project proponent "may" choose to notify the Department, there is no requirement that they do so. The "recapture" provision, without additional rules to refine the places where exempt activities are to be undertaken, provides no explicit protection, before a project is undertaken, to assure that spawning areas, valuable aquatic plant beds that provide food and habitat for fish, wildlife and other aquatic life, will be protected to preserve the habitat and public rights in our navigable waterways. The Department staff's experience is that once these natural resources are removed by dredging or covered with fill, there is often no way to reasonably restore them and the habitat and public use values that previously existed.

There is no provision, in sub. 30.12(1g), requiring an assessment of impacts of structures or fills on habitat or concerning the creation of obstructions to navigation. Prior to this bill being adopted, no structure or fill could be placed without a consideration of its impacts to public rights and its impacts to navigation. While piers could previously be placed without a permit in accordance with a specific set of criteria in Section 30.13, Stats., ("does not interfere with public rights"), none of these public rights criteria apply to the newly exempted pier structures under s. 30.12(1g).

The bill sponsors made many public statements during the Legislative review process to make it clear that their intent was to provide exemptions for "very minor activities". They stated that, "The public trust is simply not diminished by the [Act]." Similarly, relative to the general permits which are identified in the bill, it was stated by the bill's sponsors, "Under the [Act], the DNR is **required** to consider public rights or interest when promulgating rules regarding the issuance of statewide general permits." (Public Trust Fact

Sheet, issued by Rep. Kaufert on January 9, 2004.) The expressed intent of the Legislature, and of Governor Doyle in signing the bill, was to "uphold the highest environmental standards." (Statement of Governor Doyle, January 20, 2004.) Senator Cathy Stepp, in a January 20, 2004 press release, stated, "Governor Doyle and the Legislature knew it would be possible to streamline the process and protect the environment at the same time. The Job Creation Act strikes this balance." Assembly Speaker Gard noted that: "The bill, based on similar reforms in Minnesota, maintains the state's strong environmental standards but reforms the bureaucratic process to ensure timely response to permit requests made to the state."-- Press Release from Rep. John Gard (principal sponsor of Assembly bill), January 22, 2004.

### **Statutory Construction**

In addition to the public trust issues, there are a number of basic principles of statutory construction that support the adoption of permanent rules under the circumstances here. These include:

1. Statutes in derogation of an existing common law doctrine will be strictly construed. Some assert that this statute is clearly in derogation of the common law public trust doctrine. Act 118 authorizes dredging, placement of structures, and placement of fill in public trust waterbodies without any prior notice to the State and without any public interest or public rights criteria expressly articulated in the statute. The provisions of the exemptions and general permits should be strictly construed in a manner that assures their application will not erode public trust protections. See Waukesha County v. Johnson, 107 Wis. 2d 155(Ct. App., 1982); where the Court stated:

It is well established that a statute in derogation of common law must be strictly construed so as to have minimal effect on the common law rule. The canons of construction provide that a statute does not abrogate or change any principle or rule of common law unless it is clearly expressed as to leave no doubt of the legislature's intent.

Administrative rules should be adopted to make clear the scope of the exemptions and general permits and to assure they are not in derogation of the principles of common law relating to the protection of public trust waters, including consideration of cumulative impacts. With such rules in place, we can assure that these public trust protections are given full vitality in the administration of this new law.

2. Statements made in the process of adopting a statute may be used in determining the purpose of a statute. See State v. Radke, 256 Wis. 2d 448(2002). As outlined above, both the legislative sponsors and the Governor made it clear that it was their intent not to diminish the public trust standards in the adoption of this law.
3. A statute is presumed to be constitutional. It must be interpreted in a manner which yields a constitutional result. The WI Supreme Court has held that "it is the duty of this court to so interpret a statute as to uphold its constitutionality if this can be reasonably done without doing violence to the rules of statutory interpretation." Lewis Realty v. WI R.E. Broker's Board, 6 Wis. 2d 99(1958).

### **Conclusion**

In order to carry out the intent of the Legislature that Act 118 not diminish the public trust in state waters, the Department should adopt permanent rules relating to the administration of this new law. Absent such rules to assure that we can assess the individual and cumulative impacts of these exemptions and general permits on public rights and interests in our navigable waters, there is likelihood this law would be found unconstitutional. This may be especially true of the exemptions, which authorize the placement of fill, the dredging of the beds of navigable waters, and the placement of structures, with no prior notice to the public or the Department and with no public interest criteria expressly articulated in the statute.

**NR 326 Rulemaking – ATTACHMENT 2  
Stakeholder Group Membership List**

<u>Name and Organization</u>	<u>Representing</u>
Barney Brugger, City of Lake Geneva	municipality
Bruce Lunde, JJR	marina design and engineering
"Bud" Styer, Crystal Lake Campground	campground owner
Frank Michel, Burkett Realty	realtor
Jeff Christensen, Radtke Contractors	pier and marina contractor
John Molinaro, Lake Ripley	waterfront property owner
Peter Murray, Wisconsin Association of Lakes	statewide lake organization

**NR 326 Rulemaking – ATTACHMENT 3  
Rule Outline and Summary of New Rule Organization**

The proposed new NR 326 is organized into subchapters. Subchapter I includes general information and requirements that apply to all structures regulated in the rule, and the remaining subchapters establish standards for different structures and activities. Most sections of the existing NR 326 are retained – some are renumbered and moved, while several sections are substantially revised. New text is added.

**Subchapter I – General**

Purpose  
Applicability  
Definitions  
Riparian Rights Determinations  
Procedures  
Complaints  
Enforcement  
Impoundment Determination

***Subchapter II – Piers and Wharves***

General Standards  
Exemptions  
General Permits  
Individual Permits  
Application Requirements

***Subchapter III – Boat Shelters, Hoists and Lifts***

Exemptions  
General Permits  
Individual Permits  
Prohibitions

***Subchapter IV – Swimming Rafts***

Finding  
Exemptions  
Measurements  
Individual Permits  
Prohibitions

## NR 326 Rulemaking – ATTACHMENT 4 Response to Public Comments

### SUMMARY

Department staff convened a 7-member Stakeholder Group from July to October, 2004. The NR 326 Stakeholder Group reviewed the Department's original draft rule, and made proposals for modifications. Public Comments on the Stakeholder Group's version were sought at public hearings in November and in writing through December 15, 2004. 329 individuals or organizations submitted comments. The results of the public comment were shared with the NR 326 Stakeholder Group, who provided Department staff with their recommendations for the Top 3 Topics of public comment. The rule has been revised to respond to Stakeholder Group recommendations and public comment as described in detail below.

### NR 326 STAKEHOLDER GROUP

Department staff convened a 7-member Stakeholder Group from July to October, 2004. The NR 326 Stakeholder Group reviewed the Department's original draft rule, and made proposals for modifications. The group's goals were to have clear, easy-to-understand rules that would protect habitat and public rights in waterways, and that would allow existing pier owners to "keep what they have" with a few restrictions. The group proposed a variety of changes to DNR's original draft rule, to make language clearer and more specific. They proposed that new piers could not be exempt if they were located in an Area of Special Natural Resource Interest or Public Rights Features (waters designations in NR 1). They proposed to grandfather non-exempt preexisting piers and wharves via a one-time general permit. The group proposed to allow wider areas on piers as "loading platforms" – 120 square feet for exempt piers, and 200 square feet under the "grandfathering" general permit. The group reached a consensus on rule language that they wanted to seek public comment on, and DNR staff agreed to advance their recommendations at public hearings to gather input.

### PUBLIC COMMENT

Public Comments received during November and December 2004 ranged from specific detailed comments on particular rule provisions, to very brief general remarks about the rule in general. Results are presented for each topic that received 10 or more comments, followed by a summary of minor topics.

#### Topic #1: "Grandfathering"

**The rule proposed a General Permit for preexisting piers and wharves that don't qualify for the new statutory exemption. The requirements included that the pier was placed prior to 1998 and not expanded or changed, be no more than 6-feet wide, have up to 200 square foot loading platform, and not be the subject of a complaint or enforcement action. No limits on preexisting length or number of boat slips were proposed.**

**Public Comments:** 97 people or organizations commented on this topic. 67 commenters felt the rule was too restrictive. Most wanted all existing piers to be grandfathered permanently; some felt this should be without limitation. Some commented that piers should be exempt without having to get a permit, that any permit should be free, that it shouldn't matter if DNR had received a complaint about the pier, or that the date to allow grandfathering should be the same date that the statute changed. 1 commenter supported the Preexisting Pier General Permit. 29 commenters felt the rule was too permissive. Reasons included that larger piers or piers with a large number of boats have adverse impacts on aquatic life, natural scenic beauty and public rights, and that it's unfair for DNR to allow some to have larger piers just because they didn't follow DNR guidelines in the past. Some also commented that non-exempt piers should be required to downsize or come into compliance over time.

**Stakeholder Group Recommendation:** The group voted 6:1 to retain the "grandfathering" General Permit and broaden it to allow piers that were placed before the statute change (February 6, 2004), increase the allowed width up to 8-feet, and eliminate the complaint provision. 1 member wanted the general permit broadened further to allow all existing piers to be grandfathered.

**Department Response:** A one-time permit is the simplest mechanism to authorize preexisting, non-exempt piers and provide owners with the assurance that their structure is approved, and a permit to pass

along to future property owners. State statute requires the Department to charge a fee for a waterway permit, and the lowest fee established in rule is \$50, a reasonable one-time fee to protect the owner's waterfront property investment and allow the Department to administer the permit program. Department staff propose a broadened General Permit to allow piers that were placed before February 6, 2004, increase the allowed width up to 8-feet, and eliminate the complaint provision. Because these are private structures in public waters, and to address the adverse impacts of larger structures and be responsive to comments on this point, the "loading platform" in the general permit has been reduced to 160 square feet (see Topic 2).

### **Topic #2: "Loading Platform"**

**The rule proposed that an exempt pier have a maximum 6-foot width, but it could include a single wider loading platform of up to 120 square feet on the lakeward end of the pier. Under the proposed general permit for preexisting piers, the rule proposed to allow a 200 square-foot loading platform.**

**Public Comments:** 76 people or organizations commented on this topic. 55 commenters felt the rule was too permissive, and were strongly opposed to allowing any part of a pier to exceed 6-feet wide. Most expressed concerns that these are really private decks that should not be allowed in public water, and also expressed concerns about the negative environmental impacts of larger structures. Some also commented that existing loading platforms should be required to come into compliance with the 6-foot maximum width. 8 commenters supported the loading platforms as proposed. 13 commenters, several who were from the same family writing about a single pier, felt the rule was too restrictive, and wanted a larger loading platform allowed.

**Stakeholder Group Recommendation:** The group voted 7:0 to "codify the Pier Planner" and only allow the statutory maximum width of 6-feet for the exemption, without a wider loading platform. The group voted 6:1 to retain the 200 square foot loading platform in the grandfathering general permit: 1 member wanted the loading platform in the general permit broadened further to allow all existing piers to be grandfathered (see Topic 1).

**Department Response:** State statutes allow a riparian the right to place a pier in aid of navigation. However, piers are private structures placed in public waterways, and they are appropriately limited by statute, and ultimately by the Public Trust Doctrine which gives the state the responsibility to protect public rights in these waters for all citizens. Recent DNR research confirms that larger or wider pier structures have adverse impacts on aquatic life – shading reduces or eliminates aquatic vegetation, which in turn has affects up the food chain to aquatic macroinvertebrates and fish. Based on the public comment, recommendations of the Stakeholder Group, and research results, the rule has been modified to limit the dimensions for exempt piers to those in the statute – maximum 6-foot width. The proposed "grandfathering" general permit has been revised to allow a maximum 160-square foot loading platform.

### **Topic #3: "Designated Waters"**

**The rule proposed that new piers in an Area of Special Natural Resource Interest (ASNRI) or Public Rights Features (PRF) could not be exempt, and would require a permit. New piers in ASNRI waters that otherwise meet the exemption standards could obtain a General Permit, while new piers in PRFs would require an Individual Permit.**

**Comments:** 65 people or organizations commented on this topic. 38 commenters felt the rule was too restrictive. Most were concerned about the large number of listed designated waters, and were concerned that DNR could add waters to the list without a public process or legislative oversight. Some felt that all waters should be treated the same, while others felt that piers in designated waters should be subject to greater restrictions, but still be exempt from permitting. 17 commenters supported the use of Designated Waters in the rule as proposed. 10 commenters felt the rule was too permissive. Reasons included that the list doesn't protect enough waters and should be expanded.

**Response:** Department staff agree that waters given a special designation by statute and rule merit some special consideration, but we are concerned that the proposed framework of permit requirements



for new piers is not a manageable system and would create more of a regulatory burden and uncertainty for waterfront property owners. As new waters are added to the lists in the future, owners with existing exempt piers will suddenly be non-exempt; Department staff will constantly be tracking these changes and trying to notify landowners after-the-fact. Instead, we propose a more manageable system that protects critical habitat. The final rule includes a set of standards under which all piers are exempt, regardless of what year they were built or whether the waterway has any special designation (with one exception). This makes it easy to look at any pier in 10 or 20 years, and know that it is exempt. In order to protect habitat, two simple standards have been added to the exemption requirements – placement of piers cannot disturb aquatic plant beds, or disturb or remove large woody cover. The exception is that the rule proposes to prohibit piers from being exempt in Sensitive Areas identified by DNR under ch. NR 107. Sensitive Area Studies have been conducted for less than 150 lakes so far, using an established codified protocol, and including a public process and property owner notification. Few if any piers already exist in Sensitive Areas, so this requirement provides the greatest opportunity for habitat protection with the least impact on existing piers. The rule proposes a General Permit for piers in Sensitive Areas – this allows piers which meet the exemption standards to qualify, except the pier is limited to a 4-foot width, and may be longer than the line of navigation if needed to avoid impacts. An Individual Permit is also available for piers in Sensitive Areas.

#### **Topic #4: Pier Exemption Requirements in General**

**The rule proposed a set of exemption standards based on statutory requirements and reasonable installation practices, construction and design requirements, and limits on location.**

**Public Comments:** 98 people or organizations commented on the overall pier exemption standards, rather than on a specific exemption requirement. 36 commenters felt the rule was too restrictive. Most objectors thought that the rule required an “L” or “T” shaped pier and wanted to have a straight pier. Several objected because they weren't sure if their existing pier would be exempt. 34 commenters supported the rule as proposed. Several said that it will benefit landowners to have clearer standards. 28 commenters felt the rule was too permissive. Some said it was OK for a resort, campground or business, but that a private individual does not need as many piers or as large a width.

**Department Response:** Most objectors misunderstood the rule proposal with regard to pier shape – the language regarding pier configuration is revised to be clearer, and a note added to correct misinformation and clarify that a pier can be straight, in an L or T, or other shape. No other changes are made.

#### **Topic #5: Pier Length**

**The rule proposed that exempt piers be allowed to extend to the statutory length limits of the 3-foot water depth or the length necessary to adequately moor a boat or use a boat lift/hoist. This is administered in the rule through the definition “line of navigation”, which also allows exempt piers to extend out to a pierhead line, if one is established by local ordinance. Under the exemption, piers are also limited to no more than 25% across any river, stream or channel.**

**Public Comments:** 51 people or organizations commented on this topic. 46 commenters felt the rule was too restrictive. Most objectors thought that piers could only go out to the 3-foot water depth. Some wanted piers to be longer for swimming and other recreation, or to accommodate multiple boats. Some suggested specific manufactured lengths. 2 commenters supported the rule as proposed. 3 commenters felt the rule was too permissive. One wanted a specific 32-foot length maximum, one suggested no more than 20% across rivers, streams or channels, and one suggested the 25% also apply to bays.

**Department Response:** Most objectors misunderstood the rule proposal – the definition of line of navigation is revised slightly to be clearer, and public outreach and information can correct misinformation. The rest of the rule is unchanged on this issued. While some may want longer piers for other uses, longer piers extend into the public's navigational area, so it's important to have a length limit that balances the private right to have a pier with public use of the waterway.

#### **Topic #6: Pier Individual Permits**

**The rule proposed several individual permits for specific situations. Each individual permit contains some standards, and some factors for consideration in project design and evaluation of the permit application.**

**Public Comments:** 50 people or organizations commented on this topic. 8 commenters felt the rule was too restrictive. One commenter thought the proposal was designed for more income for DNR. Some suggested that solid piers should be grandfathered if built before permits were required. A suggestion was also made that solid piers be repaired without a permit, and that impacts should be balanced with public use. One commenter indicated that if private solid pier permits are going to be denied, the rule should just say no. 16 commenters supported the rule as proposed. Most felt that there should always be a process for special cases, and that IPs should allow preexisting piers. 26 commenters felt the rule was too permissive. They felt that IPs should not be granted for new piers – “what is the need?” Some suggested that IPs should only be granted if there is a community benefit for access, such as a commercial or business entity. Some said that there should be no extenuating circumstances, except for a disability. One commenter indicated that higher boat slip density should only be for public use – that the term “historic” has been abused in the past. One commenter said that solid piers should not be allowed on any river.

**Department Response:** Solid piers require specific engineering design, and can have significant adverse impacts – both direct and cumulative – on aquatic life, natural scenic beauty and neighboring shorelines. The rule has been revised to address solid piers in several ways. An exemption is proposed for maintaining a solid pier that was constructed prior to April 1, 1981, the original effective date of NR 326 when permits for solid piers were clearly required. Modification of existing solid piers requires an individual permit. Construction of a new solid pier after the effective date of the rule is limited to commercial or municipal marinas, public boat landings, and commercial purposes. Other individual permit language is revised to allow projects to exceed the exemption standards or general permit requirements, provided the applicant demonstrates that the structures are either preexisting, required for navigational stability, or to accommodate a disability of a property owner.

#### **Topic #7: Boat Shelters, Lifts and Hoists**

**The rule proposed that boat shelters, lifts and hoists be exempt, if they met certain standards including only being placed seasonally from April 1 to November 1. A general permit for a permanent boat shelter was proposed, with conditions similar to the standards in existing NR 326.**

**Public Comments:** 40 people or organizations commented on this topic. 27 commenters felt the rule was too restrictive. Many suggested that a lift should be allowed to hold 2 boats, such as lifts that hold 2 personal watercraft. Several suggested that seasonal should extend until December 1 since in some years open water extends past November 1. Some suggested allowing a longer structure to accommodate the length of boats in common use today. Several couple asked about whether boat lifts or hoists could be permanent as long as the roof or canopy was removed. One thought permanent boat shelters should be allowed on other waters. 1 commenter supported the rule as proposed. 12 commenters felt the rule was too permissive. Some felt that roofs and canopies should not be allowed, that they should be prohibited on designated waters, or that color should be natural and blend in.

**Department Response:** The final rule proposes to allow seasonal boat shelters, and seasonal or permanent hoists or lifts, under the exemption. Definitions are changed to allow these structures for use with 1 or 2 boats, and to extend “seasonal” to December 1. The maximum length for an exempt structure is extended to 34-feet. Statute prohibits regulation of color or architectural features of these structures. The permanent boat shelter proposal is not modified.

#### **Topic #8: Piers on the St. Croix River**

**The rule had no specific proposal related to the St. Croix River.**

**Public Comments:** 33 people or organizations commented on this topic. All 33 commenters felt the rule was too restrictive. Almost all commenters were waterfront property owners on the river, and cited a need for wider piers, due to fluctuating water levels, boat wakes, and large boats. A few suggested that Act

118 be rescinded for this waterway. Several suggested that the Department follow recommendations of a local Land Use Advisory Group to allow a 10-foot wide dock, and that Wisconsin match our pier regulations to Minnesota. Most wanted a pier wider than 6-feet without a state permit; some were agreeable to a permit as long as the fee wasn't too high.

**Department Response:** The St. Croix River is a federally-designated wild and scenic river, and land and water use activities are managed under a Cooperative Management Plan signed in January 2002 by Wisconsin, Minnesota and the federal government. Under this plan, the Department sits on the Lower St. Croix Management Commission, and works with other agencies to adopt policy resolutions for joint management of the river. The Department acknowledges that a pier with a large mass is required to dock a large boat and withstand fluctuating river conditions. Floating docks wider than 6-feet are already in place on the river, some that exceed that 10-foot width recommended by commenters. Minnesota allows an 8-foot wide pier without a permit. Local DNR staff report that new wider piers are regularly proposed, and that pier design could be modified to provide greater mass without further increasing pier width. In response to public comment, the final rule proposes a general permit for piers on a specified reach of the Lower St. Croix River. To be consistent with the policy resolutions of the LSCM Commission, this general permit allows a floating pier that is no more than 8-feet wide and 40-feet long, and has no more than 1 boat slip for every 200 feet of frontage. Situations where a larger dock is required to withstand navigational conditions can be authorized through an Individual Permit.

#### **Topic #9: Number of Boat Slips**

**For an exemption, the rule proposed to allow 2 boat slips for less than 50 feet of frontage, another 1 boat slip at 50-feet, and another 1 boat slip for every full 50-feet thereafter.**

**Public Comments:** 26 people or organizations commented on this topic. 4 commenters felt the rule was too restrictive. They generally said "you can never have enough boats" and that riparians should be entitled to place as many slips as they can safely install. 2 commenters supported the rule as proposed. 20 commenters felt the rule was too permissive. Most objected saying this is an excessive number, especially on smaller frontages.

**Department Response:** Cumulatively, a larger number of boats docked at each shoreline can lead to overcrowding, navigational impacts and harm to aquatic habitat. The final rule proposal eliminates the proposed extra boat slip at 50-feet of frontage. It returns to the statutory formula for the allowed number of boats under an exemption, which was a Department guideline for boat density since 1991.

#### **Topic #10: Accessories**

**The rule proposed to prohibit structures such as a roof, shed or building on a pier, and to allow navigational accessories such as a table, chairs, flagpole or diving board.**

**Public Comments:** 23 people or organizations commented on this topic. 5 commenters felt the rule was too restrictive. Two objected to items that are not proposed in the rule. Some wanted other items allowed, such as fishing gear. 1 commenter supported the rule as proposed. 17 commenters felt the rule was too permissive. Most objected to the characterization of tables, chairs and flagpoles as "navigational" accessories. Some proposed that accessories be removed daily. One person remarked that listing items is not needed – limiting the size of pier decking will automatically control abuses.

**Department Response:** The final rule retains the list of prohibited items for an exemption or general permit. The list of allowed accessories is deleted and will be limited simply by pier size and personal preference.

#### **Topic #11: Swimming Rafts**

**The rule proposed to retain standards in existing NR 326 for an exemption, and added requirements for a 10-foot setback from other in-water structures.**

**Public Comments:** 10 people or organizations commented on this topic. 1 commenter felt the rule was too restrictive, citing concern over a long-existing 14x14 swimming raft. 9 commenters felt the rule was

too permissive. Some suggested that exemptions be limited to 100 square feet, and that distance from shore be limited. A couple commenters objected to "huge multicolor trampolines".

**Department Response:** the allowed distance from shore is established by statute and will be added to the rule for clarity. Other provisions will be retained as proposed, to reflect strong public support during the original swimming raft rulemaking in 2002.

#### **Summary of Other Comments and DNR Responses**

**12. Lake Geneva general permit** – A few commenters objected to the proposed general permit, because it wasn't allowed on other lakes besides Lake Geneva. The rule as proposed allows 8-foot wide piers on rock-filled cribs, consistent with the docking requirements of this deep lake and Department's past practice of permits on Lake Geneva. No changes to the rule were made.

**13. Historic Pier** – Several commenters, including the State Historical Society of Wisconsin, proposed that piers be exempt from any permitting if the structure is designated as "historic property". The Department consulted with the SHS and learned that two piers currently have this designation, and no more than 2 dozen are likely to qualify. Some of these piers would be exempt under the rule based on their dimensions, others not. The Department concurs that structures designated as "historic property" should be allowed to be maintained and replaced consistent with historic preservation requirements, without a permit from DNR. An exemption has been created in the rule for this category, with a simple requirement that the owner provide documentation to DNR of the historic designation, and a limitation on boat slips to ensure that changes in use of the structure are consistent with the public interest.

**14. Dockminiums** – One commenter provided extensive suggestions for addressing case law regarding "dockminiums" in the rule. Because most piers do not require a permit, requiring a review to determine if a project complies with s. 30.133, Stats., for proper transfer of riparian rights is not feasible. The rule has been revised to identify that the riparian has the responsibility for complying with these laws, and that any exemption determination or permit issued by DNR does not necessarily constitute that compliance.

**15. Housekeeping, Wording or Definitions** – A number of commenters provided specific suggestions on language edits to improve clarity or simplicity of rule language. Each suggestion was considered and most were incorporated into the rule as appropriate and allowed under our statutory authority.

**NR 326 Rulemaking – ATTACHMENT 5**  
**Response to Comments from Legislative Council Rules Clearinghouse**

**1. Statutory Authority**

a. The term "navigable waterway" is defined in s. 30.01 (4m), Stats. The first sentence of the definition in s. NR 326.03 (5m) adds a requirement that the body of water must have a defined bed and banks. The definition in the rule also adds a second sentence regarding the ability of the body of water to float a boat. The statutory definition of "navigable waterway" is "any body of water which is navigable under the laws of this state." Both bed and banks and floating a boat are part of the "laws" of this state that determine whether a waterway is navigable. Therefore, it appears that this additional information does not add anything to the legal sufficiency of the definition in the rule. However, the definition in the statute provides virtually no information on how to determine whether a particular body of water is navigable. The department may wish to consider defining "navigable waterway" by a cross-reference to the statute, but adding to the rule a comprehensive procedure on determinations of navigability. Another approach would be to add a note after the rule definition that cross-references the statutory definition, with an extensive description of the law of navigability in this state.

**Response:** We are not going to change the definition of "navigable waterway" in the rule, but we will add a note to reflect that the definition incorporates both the statutory definition and the common law decisions which guide the application of this term. The "Note" will state that the definition used in the rule incorporates the definition at s. 30.01(4m), Stats., and current case law, which requires a watercourse to have a bed and banks, *Hoyt v. City of Hudson*, 27 Wis. 656 (1871), and requires a navigable waterway to float on a regularly recurring basis the lightest boat or skiff, *DeGayner & Co., Inc. v. DNR*, 70 Wis. 2d 936 (1975); *Village of Menomonee Falls v. DNR*, 140 Wis.2d579 (Ct. App. 1987).

b. Section 30.12 (1p), Stats., places limits on the department's authority to promulgate rules concerning exempt activities. Does the list of "standards" in s. NR 326.08 (1) (c) comply with these limitations?

**Response:** Yes.

c. Sections NR 326.08 (1) (c) 2. and 326.09 (1) (c) 2. prohibit the placement of a pier or wharf, or a boat shelter, boat hoist, or boat lift wherever there are public rights features as defined in s. NR 1.06. This restriction is not expressly authorized in the statute. What is the statutory authority for this restriction?

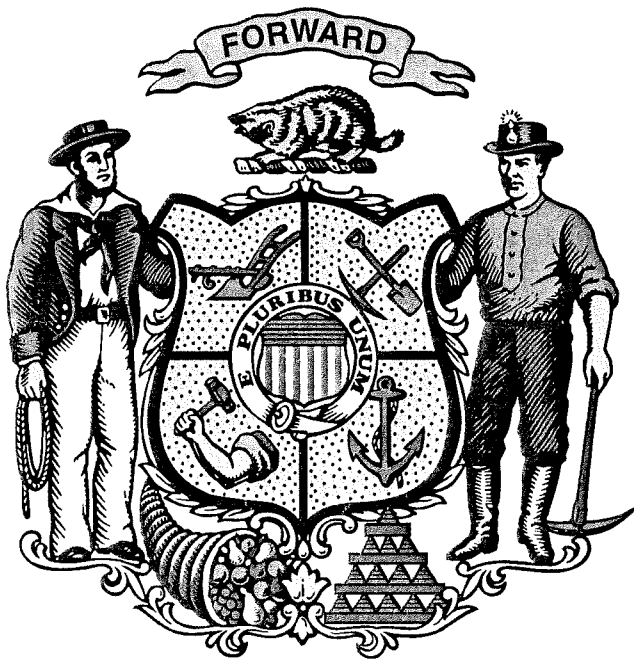
**Response:** This provision has been deleted from the proposed rule.

d. The standard in s. NR 326.08 (1) (c) 6. allows one additional boat slip for each additional full 50 feet of shoreline footage. The word "full" is added to the statutory language, which authorizes one additional boat slip for each additional 50 feet of the riparian owner's shoreline. The department should follow the statutory language.

**Response:** The statutory language is unclear in how to determine the number of boat slips where a riparian owns a length of shoreline that is not exactly 50 feet or some multiple of 50 feet. The word "full" is inserted to clarify and interpret the statutory language, to indicate that an additional full 50 feet is needed to qualify for an additional boat slip, rather than some increment of 50 feet.

e. What is the authority for prohibiting dredging in connection with exempt structures? Section NR 326.09 (1) (c) 17. prohibits dredging under s. 30.20 (1g) (b) 1., Stats., for placement or maintenance of a boat shelter, boat hoist, or boat lift. What is the authority for this prohibition of dredging that is allowed under the statute? See also s. NR 326.10 (2) (c) 4.

**Response:** Section 30.20(1k) establishes the Department's authority to promulgate rules regarding exempt dredging. Dredging can cause significant adverse impacts to habitat for fish and aquatic life and to water quality. Since dredging is not necessary for several exempt activities regulated in this rule, prohibition of dredging in those cases minimizes environmental impacts.



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

The Wisconsin Natural Resources Board proposes an order to repeal and recreate ch. NR 326 related to regulation of piers, wharves, boat shelters, boat hoists, boat lifts and swimming rafts in navigable waterways.

FH-42-04

Summary Prepared by the Department of Natural Resources

Statutory Authority: ss. 30.12(1), (1p), and (3)(br), 30.13(1) and (1m), 30.206, and 227.11(2), Stats.

Statutes interpreted: ss. 30.12(1), (1g)(a), (b), (e) and (f), (1p), (2m), (3), and (3m), 30.13(1) and (1m), 30.134, 30.20(1g)(b)2., and 30.206, Stats.

Explanation of Agency Authority:

The Department has authority under s. 30.12, Stats., to promulgate rules that establish installation practices, construction and design requirements and limitations on the location of structures placed under statutory exemptions. The Department has authority under ss. 30.12 and 30.206, Stats., to promulgate rules to establish general permits.

Related statute or rule:

These rules relate directly to regulation of activities in navigable waters under ch. 30, Stats., and to the NR 300 series of rules.

Plain Language Analysis:

The purpose of this rule proposal is to interpret and administer the exemption, general permit and individual permit requirements provided by statute, as revised by 2003 Wisconsin Act 118 which went into effect on February 6, 2004. The order proposes to repeal the existing NR 326 and replace it, as most sections of the existing rule are renumbered and/or formatted, and several sections are substantially revised. This rule establishes definitions and procedures; establishes construction, design, placement and location standards for projects to be eligible for statutory exemptions; establishes general permits for specific types of piers and for permanent boat shelters; and establishes standards for projects that may be authorized under an individual permit.

Subchapter I includes general information that applies to the entire rule. Following a detailed Purpose statement and applicability, the rule contains a Definitions section that provides clear explanations of terms used in the rule. A section on Riparian rights determinations is virtually unchanged from the existing rule. The Procedures, Complaints and Enforcement sections explain the responsibilities of property owners and DNR under the rule. The rule establishes that structures with existing permits continue to be authorized so owners don't need to obtain a new permit. The last section explains Impoundment Determinations for waterway access under s. 30.134, Stats.

Subchapter II addresses piers and wharves. The rule establishes standards for a pier or wharf to be eligible for an exemption from state permit requirements, based on the statutory criteria and standards. Key requirements for a pier or wharf to be exempt include:

- Length - no more than the 3-foot water depth, or length needed to moor a boat or use a boat hoist/lift; pier may extend to the pierhead line if one is established by local ordinance; may not extend more than 25% across a river, stream or channel
- Width - maximum width of 6' wide
- Number of boats - 2 boat slips for the first 50' of shoreline, 1 more for each additional full 50'
- Not a solid structure or on rock-filled cribs
- Not located in a sensitive area designated by the Department under NR 107
- Must not block water movement, cause sedimentation, or accumulate debris

For a pier or wharf that does not meet the exemption standards, the rule establishes five general permits with specific standards:

1. a "grandfathering" general permit to authorize most non-exempt piers and wharves that existed before the effective date of Act 118
2. a general permit for 8-foot piers on rock-filled cribs in Lake Geneva, Walworth County
3. a general permit for 8-foot wide piers on the Lower St. Croix River, Pierce and St. Croix Counties
4. a general permit for a pier in a sensitive area designated by the Department under NR 107
5. a general permit for a public pier - for fishing, swimming or transient docking

For any piers and wharves that don't qualify for an exemption or general permit, or are located in critical habitat, this order sets some additional standards and outlines factors for consideration in review, to provide for consistent and orderly review of individual permit applications. The following types of individual permits are available in this rule:

- Solid piers – only in specific waters; only for either maintenance, repair or modification of existing solid piers, or for new solid piers for public or commercial purposes
- Piers on rock-filled cribs – only in Lake Michigan, Lake Superior or Lake Geneva
- Commercial and municipal marinas
- Piers and wharves in sensitive areas designated by the Department under NR 107
- Other piers and wharves where different design or dimensions may be allowed for preexisting facilities, navigational stability, or to accommodate a disability

Subchapter III deals with boat shelters, hoists and lifts. The rule sets forth standards for exemptions for seasonally-placed boat shelters, and for boat hoists and boat lifts. These exemption standards are similar to those for piers and wharves, and include:

- dimensional and design requirements
- must be placed adjacent to a pier, wharf or shoreline

The rule creates a general permit for permanent boat shelters, using standards that are in the existing NR 326, with the exception that the standard for "developed shoreline" has been revised to be more objective. The rule prohibits boat shelters, hoists or lifts placed after February 6, 2004, if they do not qualify for the exemption or general permit.

Finally, Subchapter IV establishes standards for swimming rafts (including water trampolines), consistent with the standards that are currently in NR 326. To qualify for an exemption, a swimming raft must meet several standards, including:

- shall be placed within 200 feet of shore (statutory requirement)
- may not exceed 200 square feet or 38" in height, except that size and height restrictions do not apply to rafts removed from the water daily or placed in marked swim areas.
- shall be seasonally placed (removed between December 1 and April 1)

For a swimming raft that doesn't qualify for an exemption, this order outlines factors for permit evaluation.

#### 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 chapter 30, Stats., in which case the project is authorized by the Corps under general permits GP-01-WI or GP-LOP-WI. Dredging or discharge into waters declared navigable under Section 10, Rivers and Harbors Act, 1899 is also regulated, and requires an Individual Permit from the Corps.

#### Comparison with Adjacent States

**Minnesota** is comparable to Wisconsin, with some regulations being slightly less restrictive, some slightly more. Their decision-making criteria are more subjective. Docks, floating or temporary structures, watercraft lifts and mooring facilities are allowed without a permit if they meet width and length standards and do not obstruct navigation or free flow of water. All wharves and marina mooring facilities require an individual permit from the Minnesota DNR.



**Michigan** is comparable to Wisconsin in their restrictions, though their decision-making criteria are more subjective. Permanent docks or boat hoists require a permit from the Michigan Department of Environmental Quality. Seasonal docks and hoists do not require a permit if they are for private, non-commercial use by a landowner, do not unreasonably interfere with the use of the water by others, and do not interfere with water flow. Marina operating permits are required.

**Illinois** is generally less restrictive and their decision-making criteria are more subjective. A statewide permit is available for minor docks that meet dimensional and other standards. Otherwise, an individual permit is required from Illinois DNR for structures in public waters or in the floodways of rivers, lakes and streams.

**Iowa** is generally more restrictive, though their decision-making criteria are subjective. A general permit is available for certain private docks that meet dimensional standards. Otherwise, a Sovereign Lands Construction Permit from the Iowa DNR is required for all other piers, and for all other structures in public waters or in the floodway. The applicant must analyze the availability of alternatives and measures to prevent, minimize or mitigate adverse impacts to natural resources or public use of the affected area.

Summary of Factual Data and Analytical Methodologies:

The literature on the ecological and related impacts of piers and similar structures is well-summarized in Research Report 177, The Construction, Aesthetics and Effects of Lakeshore Development: A Literature Review, Sandy Engel and Jerry L. Pederson, Jr., December 1998; and Waters of Wisconsin: The Future of Our Aquatic Ecosystems and Resources. Madison, WI: Wisconsin Academy of Sciences, Arts and Letters, 2003. In addition, data on actual field conditions from Department files is used.

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 an 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: Pier and building contractors, commercial marinas and other waterfront businesses will be affected by the rule revisions. However, the rule does not directly regulate pier and building contractors as the primary impact of the rule is on the riparian owner. Marinas and solid piers have been subject to a permit requirement for many years and the new rules do not add any significant requirements to this process. Specific standards will provide clarity and consistency in the permitting process.

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

---

SECTION 1. Chapter NR 326 is repealed and recreated to read:

**PIERS, WHARVES, BOAT SHELTERS, BOAT HOISTS, BOAT LIFTS,  
AND SWIMMING RAFTS IN NAVIGABLE WATERWAYS**

**SUBCHAPTER I  
GENERAL PROVISIONS**

**NR 326.01 Purpose.** (1) The purpose of this chapter is to define terms and establish standards for placement of piers, wharves, boat shelters, boat hoists, boat lifts and swimming rafts in navigable waterways as regulated under ss. 30.12 and 30.13, Stats., and to define terms used in ss. 30.133 and 30.134, Stats. These standards reflect statutory changes to ch. 30, Stats., which became effective on February 6, 2004, and are established in order to protect the public rights and interest in the navigable, public waters of the state as defined in s. 30.10, Stats.

(2) The standards for exemptions, general permits and individual permits in this chapter balance the riparian right to place a pier, wharf, boat shelter, boat hoist, boat lift or swimming raft, with the public rights and interests in navigable waters. Standards protect navigable waters from the direct and cumulative impacts of these structures. The public rights and interest in navigable waters include navigation, recreation, fish and wildlife habitat, water quality, and natural scenic beauty.

(3) Standards for exemptions provide clear and consistent requirements so that individuals can determine whether they qualify, and easily design projects to meet the requirements. To achieve this, exemption standards establish reasonable installation practices to minimize environmental impacts, establish reasonable construction and design requirements consistent with the purpose of the activity, and establish reasonable limitations on location.

(4) Standards for general permits ensure that cumulative adverse environmental impact of authorized activities is insignificant and that issuance of the general permit will not injure public rights or interests, cause environmental pollution as defined in s. 299.01(4), Stats., or result in material injury to the rights of any riparian owner. To achieve this, general permit standards establish construction and design requirements consistent with the purpose of the activity, location requirements that ensure that the activity will not materially interfere with navigation or have an adverse impact on the riparian property rights of adjacent riparian owners, and restrictions to protect areas of special natural resource interest.

(5) Standards and factors for individual permits provide direction for detailed evaluation of permit applications, and balance case-by-case review with consistent decision-making. Individual permit standards and factors allow greater flexibility in size and dimension for structures which will be open to the general public or where the owner can document the structure's historic existence and use. Individual permits may only be granted where the department determines that the structure will not materially obstruct navigation, will not be detrimental to the public interest, and will not materially reduce the flood flow capacity of a stream.

(6) The general permit for preexisting piers and wharves recognizes existing structures and historic uses, and authorizes their continued placement and maintenance with some limitations, unless they are found to be detrimental to the public interest. The general permit for preexisting piers and wharves does not authorize expansion or re-configuration. The rule provides a 3-year period to allow individuals to apply for this general permit, and no permit application fee is required.

**NR 326.02 Applicability.** This chapter applies to construction, placement and maintenance of piers, wharves, boat shelters, boat hoists, boat lifts and swimming rafts regulated under ss. 30.12(1), (1g)(a), (b), (e) and (f), (3) and (3m), 30.13(1) and (1m) and 30.20(1g)(b)2., Stats. Any person that intends to construct, place or maintain a pier, wharf, boat shelter, boat hoist, boat lift or swimming raft in any navigable waterway shall comply with all applicable provisions of this chapter and any permit issued under this chapter.

**NR 326.03 Definitions.** As used in this chapter:

(1) "Area of special natural resource interest" has the meaning in s. 30.01(1am), Stats., and as identified by the department in s. NR 1.05.

**Note:** "Area of special natural resource interest" means any of the following:

(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).

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

(c) An area that possesses significant scientific value, as identified by the department in s. NR 1.05.

Information and lists can be obtained by contacting the department, or found on the department's website at [www.dnr.wi.gov](http://www.dnr.wi.gov), under the topic "Waterway and Wetland Permits".

(2) "Boat" has the meaning in s. 30.50(2), Stats.

**Note:** In s. 30.50(2), Stats., "boat" or "vessel" means every description of watercraft used or capable of being used as a means of transportation on water, except a seaplane on the water and a fishing raft.

(3) "Boat hoist" means a structure attached to a pier or wharf or shoreline, that is designed and placed for the purpose of lifting one or 2 docked boats out of the water. A boat hoist with a roof or cover is a boat shelter.

(4) "Boat lift" means a structure placed on the bed of a waterway adjacent to a pier or wharf or shoreline, that is designed and placed for the purpose of lifting one or two docked boats out of the water. A boat lift with a roof or cover is a boat shelter.

(5) "Boat shelter" has the meaning given in s. 30.01(1c), Stats.

**Note:** In s. 30.01(1c), Stats., "boat shelter" means a structure in navigable waters designed and constructed for the purpose of providing cover for a berth place for watercraft, which has a roof but does not have walls or sides. Such a structure may include a device for lifting a boat.

(6) "Boat slip" means any place where a boat is docked in the water adjacent to a pier, wharf or shoreline, including a space outlined by catwalks or created by placement of a boat shelter, boat lift or boat hoist. A boat slip does not include a space occupied for less than 24 hours by a guest at a pier or wharf that is not part of a commercial or municipal marina. A berth or a berth place is the same as a boat slip.

(7) "Commercial marina" means a facility containing piers, wharves and other mooring spaces, where the riparian property is not owned by a municipality, but is open to the general public, and the primary purpose of the facility is to provide boats or boat slips either for rental or for free.

(8) "Department" means the department of natural resources.

(9) "Impoundment" for purposes of s. 30.134, Stats., means the pool of water created by a dam. "Impoundment" does not include waters upstream of the pool which are raised, but within the original river channel. "Impoundment" includes the entire Mississippi river in Wisconsin.

(10) "Line of navigation" means the point where the water is 3 feet deep at its maximum depth based on the normal summertime low levels on the waterway or summer minimum levels where established by department order, or the point where there is adequate depth for mooring a boat or using a boat hoist or boat lift, whichever is greatest. Where a municipality has adopted an ordinance establishing a municipal pierhead line authorized under s. 30.13, Stats., the line of navigation is the municipal pierhead line.

(11) "Littoral drift" means the sedimentary material which moves in the zone of waves breaking on the shore because of waves and current.

(12) "Municipal marina" means a facility containing piers, wharves and other mooring spaces, where the riparian property is owned by a municipality and the primary purpose of the facility is to provide boats or boat slips for rental or for free.

(13) "Navigable waterway" means any body of water with defined bed and banks, which is navigable under the laws of the state. In Wisconsin, a navigable body of water is capable of floating the lightest boat or skiff used for recreation or any other purpose on a regularly recurring basis.

**Note:** This incorporates the definition at s. 30.01(4m), Stats., and current case law, which requires a watercourse to have a bed and banks, *Hoyt v. City of Hudson*, 27 Wis. 656 (1871), and requires a navigable waterway to float on a regularly recurring basis the lightest boat or skiff, *DeGayner & Co., Inc. v. DNR*, 70 Wis. 2d 936 (1975); *Village of Menomonee Falls v. DNR*, 140 Wis. 2d 579 (Ct. App. 1987).

(14) "Open to the general public" means available to any person conditioned only upon the payment of a reasonable fee. "Open to the general public" does not include conditions that require purchase of a boat, boat slip, parcel of property, condominium unit or membership in a club or organization; and does not include conditions that require rental of a room, apartment, condominium unit, residence, campsite or parcel of property.

(15) "Ordinary high water mark" means the point on the banks or shore up to which the presence and action of water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation or other easily recognizable characteristics.

(16) "Outlying waters" as defined in s. 29.001(63), Stats., means Lakes Superior and Michigan, Green Bay, Sturgeon Bay, Sawyer's harbor, and the Fox river from its mouth up to the dam at DePere.

(17) "Pier" has the meaning given in s. 30.01(5), Stats. A dock is the same as a pier.

**Note:** In s. 30.01(5), Stats., "pier" means any structure extending into navigable waters from the shore with water on both sides, built or maintained for the purpose of providing a berth for watercraft or for loading or unloading cargo or passengers onto or from watercraft. Such a structure may include a boat shelter which is removed seasonally. Such a structure may include a boat hoist or boat lift, and the hoist or lift may be permanent or may be removed seasonally.

(18) "Pierhead line" means a line established in the water adjacent to and roughly parallel to the shoreline under s. 30.13, Stats., by municipalities, and subject to approval by the department, for the purpose of creating uniformity in the length of piers extending from the shoreline into the waterway.

(19) "Reasonable fee" means a fee comparable to those charged the general public for similar facilities on the waterway or a similar waterway in the vicinity.

(20) "Riparian" means an owner of land abutting a navigable waterway.

(21) "Seasonal" for the purposes of this chapter means a pier, wharf, boat shelter, boat lift, boat hoist or swimming raft which is removed from the water between December 1 and April 1 annually.

(22) "Similar conveyance" for purposes of s. 30.133, Stats., means any transfer in excess of 2 years. "Similar conveyance" does not include a lease of a marina facility to an operator of the facility.

(23) "Solid pier" means a structure, not allowing for the free flow of water beneath, extending into the water from the shore to serve as an aid to navigation. For the purposes of this chapter, the term solid pier does not include piers that utilize rock filled cribs or similar types and size devices as foundation. Such foundations require permits under s. 30.12, Stats.

(24) "Swimming raft" has the meaning given in s. 30.01(6e), Stats., and includes a water trampoline.

Note: In s. 30.01(6e), Stats., "swimming raft" means a floating platform without railings, roof or walls that is adequately anchored to the bed of navigable waters and is designed for swimming, diving and related activities.

(25) "Watercraft" has the meaning in s. 30.01(7), Stats.

Note: In s. 30.01(7), Stats., "watercraft" means any device used and designed for navigation in water.

(26) "Wharf" has the meaning given in s. 30.01(8), Stats.

Note: In s. 30.01(8), Stats., "wharf" means any structure in navigable waters extending along the shore and generally connected with the uplands throughout its length, built or maintained for the purpose of providing a berth for watercraft or for loading or unloading cargo or passengers onto or from watercraft. Such a structure may include a boat hoist or boat lift, and the hoist or lift may be permanent or may be removed seasonally.

**NR 326.04 Determination of riparian rights lines.** (1) In order to determine whether a pier, boat shelter or other structure interferes with the rights of an adjacent riparian, the department and riparian shall use the method outlined in this subsection which it determines most fully meets the Wisconsin supreme court ruling in *Rondesvedt v. Running*, 19 Wis. 2d 614 (1962), that ". . . each must have his due proportion of the line bounding navigability and a course of access to it from the shore exclusive of every other owner, and that all rules for apportionment or division are subject to such modification as may be necessary to accomplish substantially this result."

(2) The alternative methods of apportionment for identifying the riparian rights lines include:

(a) *Apportionment of the line of navigation.* The general procedure for the apportionment of the line of navigation is to measure the whole shoreline of the cove or bay and the line of navigation in front of the shoreline and to apportion the line of navigation among the riparians in proportion to the length of their respective holdings on the shoreline. The area of water within which each riparian may place a pier to reach the line of navigation is determined by drawing straight lines between the corresponding points of division on the shoreline and the line of navigation.

(b) *Coterminous riparian rights lines.* Chords are drawn to connect points established at the intersection of each lot line with the ordinary high water mark. The lines which bisect the angle formed by adjacent chords are the coterminous riparian rights lines. The extension of the coterminous riparian rights lines to the line of navigation describes the portion of the water within which each riparian may place a pier to gain access to the line of navigation. If the coterminous riparian rights lines intersect before the line of navigation is reached, another method of apportionment will be used.

(c) *Extended lot lines.* Under the extended lot line method the area of water within which each riparian may place a pier to reach the line of navigation is determined by extending the lot lines along the same alignment from the upland to the line of navigation.

(d) *Other method.* Any other method for determining the rights of riparians to gain access to the line of navigation that is compatible with the general rule adopted in sub. (1).

(3) To provide each riparian with sufficient room to place a pier and moor a boat along the common line between adjacent riparians the following technique shall be used:

(a) Each riparian shall back their respective pier away from the common line or point of intersection of that line with the line of navigation in proportion to the riparian's share of the 2 adjacent shoreline lengths until sufficient room is provided to moor each riparian's boat at their respective pier and to provide safe maneuvering room for each boat to approach or leave the respective pier.

(b) If a riparian cannot move sufficiently from one side without violating the rule on the other side, then the riparian shall position the pier in that location which best satisfies the rule on both sides and each riparian shall then move far enough to the side regardless of shoreline proportions to afford the necessary clearance.

**NR 326.05 Procedures. (1) NR 310 REQUIREMENTS.** Exemptions, general permits and individual permits shall be processed according to the procedures in ch. NR 310.

(2) **EXISTING PERMITS.** A structure or structures regulated under this chapter which is authorized by an existing department permit shall continue to be authorized, provided the structures are maintained in compliance with all the conditions of the original permit. Any modifications to the structure or structures that do not comply with the original permit conditions shall be subject to the requirements of this chapter.

(3) **APPLICATION INFORMATION REQUIREMENTS.** Applications for a permit for a pier or wharf shall include all the information specified in s. NR 326.25. Applications for all other permits shall include the information specified on the application materials provided by the department.

**Note:** Exemption Determination Request forms and Permit Application forms can be obtained by contacting the department, or found on the department's website at [www.dnr.wi.gov](http://www.dnr.wi.gov), under the topic "Waterway and Wetland Permits".

(4) **BURDEN OF PROOF.** The burden of proving that a pier or wharf meets all the requirements to qualify for a general permit or an individual permit shall be on the applicant.

(5) **SEEK TO ACHIEVE COMPLIANCE.** The Department and the applicant will seek to achieve compliance with statutory and rule standards through various measures including design alternatives, relocation and down-sizing of structures where possible and where consistent with protection of the public interest, during the application and review process for a general permit or an individual permit.

(6) **PERMIT APPLICANT.** The permit applicant shall be the riparian for the property where the structure will be placed. When the riparian consists of multiple owners, the permit application shall be signed either by an authorized agent of the riparian owners, or by 100% of the individual riparian owners.

(7) **COMPLIANCE WITH LOCAL ORDINANCES.** The riparian is responsible for ensuring that the structure complies with all local ordinance requirements. Issuance of an exemption determination or a permit by the department under this chapter does not waive or constitute a determination of compliance with local ordinance requirements.

(8) **COMPLIANCE WITH OTHER LAWS.** The riparian is responsible for ensuring that the structure complies with s. 30.133, Stats., and applicable case law including *ABKA Limited Partnership v. DNR*, 2001 WI App 223, 247 Wis. 2d 793, 635 N.W.2d 168 (*ABKA I*), and *ABKA Ltd. Partnership v. DNR*, 2002 WI 106, 255 Wis. 2d 486, 648 N.W.2d 854 (*ABKA II*). Issuance of an exemption determination or a permit by the department under this chapter does not waive or constitute a determination of compliance with s. 30.133, Stats., and applicable case law.

(9) **PROHIBITION.** A structure which is not eligible for an exemption, general permit, or an individual permit, or otherwise authorized under this chapter is prohibited.

**NR 326.06 Complaints. (1)** Upon receipt of a complaint by any municipality or person under s. 30.14, Stats., regarding a structure regulated under this chapter, the department shall investigate and may inspect the structure mentioned in the complaint to determine whether it conforms to applicable provisions of s. 30.12 or 30.13, Stats., and this chapter.

(2) The burden of proving that a structure is in violation of ss. 30.12 or 30.13, Stats., and this chapter, is ordinarily on the complainant. The department may request any additional information as may be required from the complainant.

(3) For a complaint that a structure violates the riparian rights lines provisions of s. NR 326.04, the complainant shall provide a survey prepared by a registered land surveyor, showing at a minimum all of the following:

(a) The location of the shoreline at the ordinary high water mark.

(b) The property boundary and location of the lot lines on the property that is the subject of the complaint, and on the adjacent property on each side.

(c) The location of any easement that provides access to the water.

(d) The location and dimensions of the structure or structures that are the subject of the complaint, and all other in-water structures on the property that is the subject of the complaint and on the adjacent property on each side.

(e) The location of the line of navigation at normal summer water levels.

(4) Upon completion of the investigation, the department shall provide all known parties with the results of the investigation. The department may conduct a hearing under s. 30.14, Stats.

(5) This section does not limit in any manner the authority of the department to require a permit or bring an enforcement action alleging that a pier, wharf, boat shelter, boat hoist, boat lift or swimming raft adversely affects public rights in navigable waters.

**NR 326.07 Enforcement.** (1) Noncompliance with the provisions of s. 30.12, 30.13, 30.20 or 30.206, Stats., this chapter, or any conditions of an exemption, general permit or an individual permit issued by the department, constitutes a violation and may result in a forfeiture. The department may seek abatement under s. 30.294, Stats., for any activity in violation of s. 30.12, 30.13, 30.20 or 30.206, Stats.

(2) The department will seek to achieve compliance with statutory and rule standards through various measures including design alternatives, relocation and down-sizing of structures where possible and where consistent with protection of the public interest, before seeking removal of a noncompliant structure.

(3) If the activity may be authorized by a general permit under s. 30.206, Stats., the failure of the applicant to follow procedural requirements may result in a forfeiture but may not, by itself, result in abatement of the activity until a reasonable opportunity to comply with the procedural requirements has been provided.

(4) When an after-the-fact permit application has been filed with the department, the department shall follow the procedures in ch. NR 301 for violations.

(5) Any violation of these rules shall be treated as a violation of the statutes they interpret or are promulgated under.

(6) No person may place a pier, wharf, boat shelter, boat hoist, boat lift or swimming raft in a navigable waterway if the activity is not eligible for an exemption, authorized by a general permit or an individual permit issued under this chapter, or otherwise authorized under this chapter.

**NR 326.08 Impoundment determination.** The boundaries of the pool of an impoundment shall be determined at normal summer water levels.

## **SUBCHAPTER II PIERS AND WHARVES**

**NR 326.21 General standards.** In addition to the standards identified in s. NR 326.22, 326.23 or 326.24, all piers and wharves shall meet the following conditions:

(1) The pier or wharf may be placed and maintained only by a riparian, or an easement holder that meets the requirements of s. 30.131, Stats. The pier or wharf may be placed, installed or maintained for the riparian or qualifying easement holder by an authorized agent or contractor.

**Note:** Section 30.131, Stats., allows a "grandfathering" of wharves or piers placed or maintained by non-riparians if the requirements of the statute are met. These requirements include that the non-riparian must have a written easement that was recorded prior to December 31, 1986, and that the pier or wharf was not expanded and was placed seasonally at least once every 4 years since the easement was recorded.

(2) The pier or wharf and any boats, boat shelters, hoists or lifts associated with it shall be located entirely within the riparian rights lines, as determined under s. NR 326.04.

(3) The pier or wharf may not totally enclose any portion of a navigable waterway, unless it is placed in a swim area marked and approved pursuant to s. NR 5.09.

(4) The pier or wharf may not interrupt the free movement of water nor cause deposition of littoral drift upon the bed of the waterway.

(5) The pier or wharf may not be constructed or maintained with a screen or similar structure underneath or in any other manner which would trap or accumulate aquatic plants or other debris.

**NR 326.22 Exemptions.** (1) **APPLICABLE ACTIVITIES.** A pier or wharf that meets all the standards in s. NR 326.21 and this section shall be exempt under ss. 30.12(1g)(f) and 30.13, Stats.

(2) **EXEMPTION STANDARDS.** A pier or wharf may be placed pursuant to s. 30.13(1), Stats., without a permit under s. 30.12(1), Stats., provided that the structure meets the standards in s. NR 326.21 and all the following requirements:

(a) The pier or wharf may not be located in a sensitive area designated under ch. NR 107.

**Note:** Information and lists of sensitive areas can be obtained by contacting the department, or found on the department's website at [www.dnr.wi.gov](http://www.dnr.wi.gov) by going to the Index and selecting "Lakes ", then choosing "Sensitive Areas".

(b) Large woody cover that exists at the site may not be removed in order to place the pier or wharf.

(c) Placement of the pier or wharf may not involve removal of aquatic plants other than in compliance with the provisions for waiver of the permit requirement under s. NR 109.06, or exemptions in s. 23.24 (4), Stats.

(d) The pier or wharf may be located in an area of special natural resource interest.

(e) The pier or wharf may not extend beyond the line of navigation. A pier or wharf on a river, stream or channel may extend no further than the line of navigation, and may not extend out more than 25% of the width across the river, stream or channel.



(f) The pier or wharf may be no more than 6 feet wide, as measured across the shortest horizontal distance of any portion of the pier or wharf surface.

**Note:** A pier or wharf may be straight, or configured in an "L" or "T" or similar shape, and may include catwalks.

(g) The riparian property shall have no more than 2 boat slips for the first 50 feet of riparian owner's shoreline footage, and no more than one additional boat slip for each additional full 50 feet of the riparian owner's shoreline. A boat shelter, boat hoist or boat lift may be placed as a boat slip, provided that the boat shelter, boat hoist and boat lift meets the requirements of subch. III.

(h) The pier or wharf may not be a solid pier, or constructed on rock-filled cribs or similar size and type devices serving as a foundation.

(i) The pier or wharf may not have a roof, canopy, second story, building, shed or storage unit placed upon it.

**Note:** This provision means that items such as a flagpole, flower pot or bench may be placed.

(j) A pier or wharf on a river or stream shall be securely anchored to the shoreline to prevent it from becoming a floating hazard.

(k) Except in an area of special natural resource interest, a deposit of sand, gravel or stone under s. 30.12(1g)(a), Stats., may be associated with the placement of any pier or wharf provided the deposit is limited to the area underneath or within one foot of the posts or pilings and is less than 2 cubic yards.

(L) Except in an area of special natural resource interest, dredging under s. 30.20(1g)(b)1., Stats., is allowed for the placement of a pier or wharf, provided it is limited to incidental dredging not to exceed one cubic yard associated with jet-installation of permanent posts or pilings.

**Note:** Removal of aquatic vegetation is limited to the amount necessary for placement of the pier or wharf under ch. NR 109.

**(3) SOLID PIER.** A solid pier originally constructed prior to April 1, 1981 that was not authorized by a permit issued under ch. 30, Stats., may continue to be maintained pursuant to s. 30.13(1), Stats., without a permit under s. 30.12(1), Stats., provided no repair, replacement or modification is required. Any repair, replacement or modification requires a permit under s. NR 326.24. The burden of proving that a solid pier was originally constructed prior to April 1, 1981 shall be on the riparian.

**(4) HISTORIC PIER.** A pier or wharf that is "historic property" as defined in s. 87.304(1)(a), Stats., may be maintained, repaired or replaced pursuant to s. 30.13(1), Stats., without a permit under s. 30.12(1), Stats., provided that use of the structure meets the limitations in sub. (2)(g). To qualify for this exemption, the riparian shall submit information to the department to document that the structure is a "historic property" within the meaning of this subsection, and that the Wisconsin Historical Society State Historic Preservation Officer has reviewed the proposed maintenance, repair or replacement work and certified that this work preserves the historic integrity of the property.

**(5) SHARED PIER.** A shared pier may be placed for use by 2 contiguous riparians pursuant to s. 30.13(1), Stats., without a permit under s. 30.12(1), Stats., provided that the pier meets all the following requirements:

(a) No other pier may be placed on either of the 2 contiguous riparian properties.

(b) The pier complies with the standards in s. NR 326.21 and sub. (2), except that the pier and any boats, boat shelters, hoists or lifts associated with it shall be located entirely within the outer riparian rights lines of the 2 contiguous properties, as determined under s. NR 326.04.

(c) The pier does not exceed the sum of the number of boat slips that each riparian would separately be allowed under sub. (2)(g) of this section.

**(6) CONSENT ORDER.** A pier or wharf may be placed under s. 30.13(1), Stats., without a permit under s. 30.12(1), Stats., if it is placed pursuant to a stipulation or consent order entered into with the department.

**(7) PERMIT REQUIRED.** (a) Activities which do not meet the standards in sub. (2), (3), (4), (5) or (6), or are otherwise determined ineligible for an exemption by the department shall require a general permit or an individual permit.

(b) The department has the authority under s. 30.12(2m), Stats., to require a permit in lieu of exemption.

**Note:** Section 30.12(2m), Stats., states that the department may decide to require a person engaged in an exempt activity to apply for an individual permit or seek authorization under a general permit if the department has conducted an investigation and visited the site of the activity and has determined that conditions specific to the site require restrictions on the activity in order to prevent significant adverse impacts to the public rights and interest, environmental pollution, as defined in s. 299.01(4), Stats., or material injury to the riparian rights of any riparian owner.

**NR 326.23 General permits. (1) PROCEDURES.** (a) Applications for a general permit for a preexisting pier or wharf under sub. (3) shall be submitted no later than 36 months after the effective date of this rule ... [revisor insert date]. A pier or wharf which qualifies for a general permit for a preexisting pier or wharf under sub. (3) may not be subject to formal enforcement action by the department provided an application is received by the department by 36 months after the effective date of this rule ... [revisor insert date].

(b) Applications for a general permit for a preexisting pier or wharf under sub. (3) do not require a permit application fee.

**(2) APPLICABLE ACTIVITIES.** A pier or wharf that meets the standards in s. NR 326.21 and all the criteria in sub. (3), (4), (5), (6) or (7) shall be eligible for general permit coverage under ss. 30.12(3)(br) and 30.206, Stats.

**(3) GENERAL PERMIT FOR PREEXISTING PIER OR WHARF.** A preexisting pier or wharf shall be authorized under a general permit if it meets all of the following requirements:

(a) The pier or wharf was originally placed at the waterfront property before February 6, 2004.

(b) The pier or wharf dimensions and configuration were not expanded or relocated after February 6, 2004.

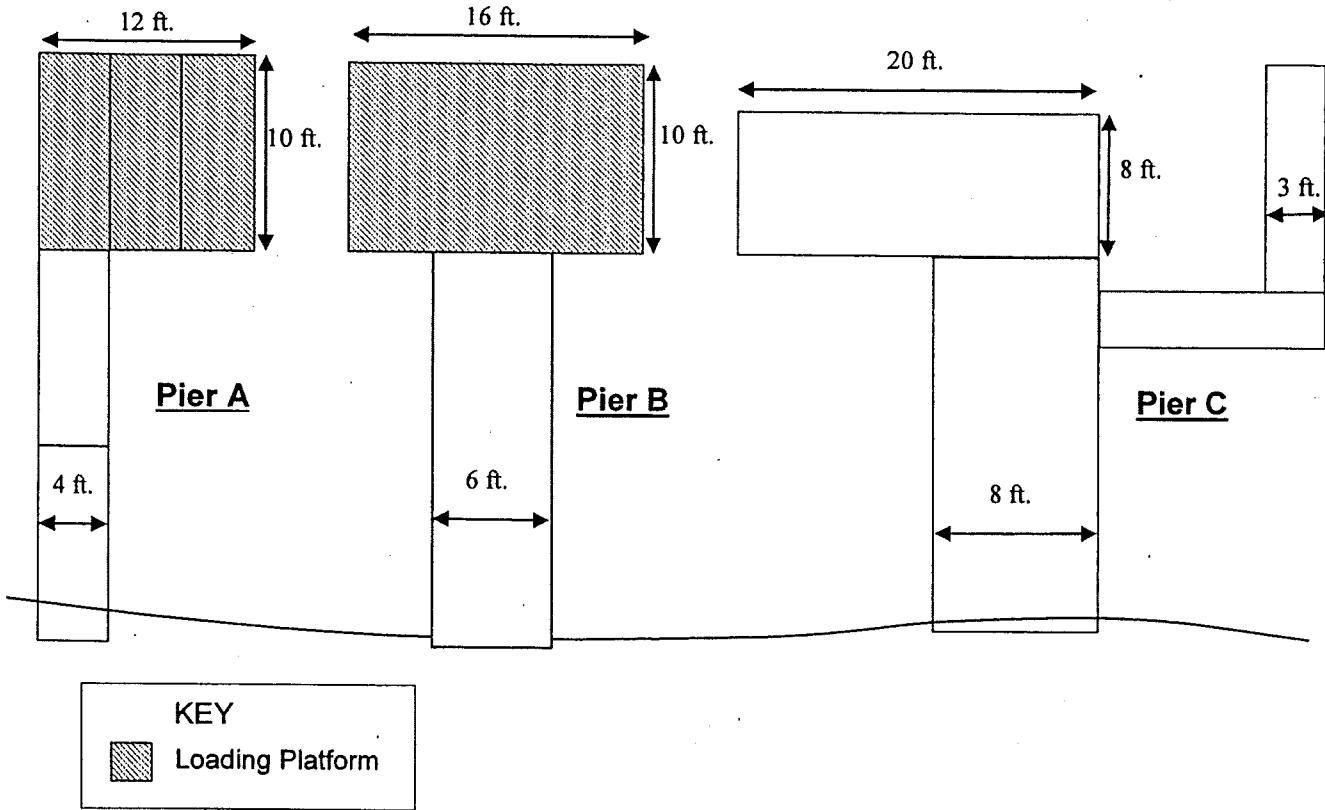
**Note:** This provision allows a seasonal pier to be placed and removed from the same waterfront property each year, provided it is placed in essentially the same location each year.

(c) The pier may not have a roof, canopy, second story, building, shed or storage unit placed upon it.

**Note:** This provision means that items such as a flagpole, flower pot or bench may be placed.

(d) The pier or wharf may be no more than 8 feet wide, as measured across the shortest horizontal distance of any portion of the pier or wharf surface, except that a pier may have a single area as a loading platform that exceeds 8 feet in width, provided the area is located at the lakeward end of the pier, and does not exceed 200 square feet in surface area. See Figure 1.

**Note:** A pier or wharf may be straight, or configured in an "L" or "T" or similar shape, and may include catwalks.



**Figure 1. Examples of Width for Preexisting Pier General Permit**

This figure shows 3 preexisting piers that meet the general permit standard for width. Pier A has a main stem made up of 3 sections that are each 4-feet wide by 10-feet long. The loading platform on Pier A is 120 square feet, consisting of 3 sections that are each 4-feet wide by 10-feet long. Pier B has a main stem that is 6 feet wide and a loading platform that is 160 square feet. Pier C has a main stem and "L" section that are 8 feet wide, and 2 catwalks that are each 3-feet wide creating a boat slip. (drawings not to scale)

(e) The pier or wharf is not a solid pier.

(f) The pier or wharf is not the subject of a department enforcement action, including issuance of a citation, referral for contested case hearing under ss. 30.03 and 227.42, Stats., enforcement of a ruling by a court or administrative tribunal, or referral to the department of justice.

(g) If the pier is a shared pier, it shall be located entirely within the outer riparian rights lines of the 2 contiguous properties, as determined under s. NR 326.04.

**(4) GENERAL PERMIT FOR A PIER IN A MAPPED SENSITIVE AREA.** A pier located in a sensitive area designated under ch. NR 107 may be authorized under a general permit if it meets all of the following requirements:

(a) The pier or wharf shall meet all the requirements in ss. NR 326.21 and 326.22(2), except as provided in pars. (b) and (c).

(b) The pier or wharf may extend beyond the line of navigation as needed to avoid or minimize impacts to the sensitive area, but may not extend beyond the 5-foot water depth.

(c) The pier or wharf may be no more than 4 feet wide, as measured across the shortest horizontal distance of any portion of the pier or wharf surface.

**Note:** A pier or wharf may be straight, or configured in an "L" or "T" or similar shape, may include catwalks, but may not include any area wider than 4 feet.

**(5) GENERAL PERMIT FOR A PIER ON LAKE GENEVA.** A pier on rock-filled cribs may be authorized under a general permit if it meets all of the following requirements:

(a) The pier or wharf shall meet all the requirements in ss. NR 326.21 and 326.22(2), except as provided in pars. (b) to (e).

(b) The pier is located on Lake Geneva in Walworth county.

(c) The pier may be constructed on rock-filled cribs.

(d) The pier may not exceed 8 feet in width, as measured across the shortest horizontal distance of any portion of the pier surface.

**Note:** A pier or wharf may be straight, or configured in an "L" or "T" or similar shape, and may include catwalks.

(e) Any existing pier cribs adjacent to the riparian property shall be either re-used in place, removed and the material re-used for pier cribs in new locations, or completely removed from the waterway for upland disposal.

**(6) GENERAL PERMIT FOR A PIER ON THE LOWER ST. CROIX RIVER.** A pier may be authorized under a general permit if it meets all of the following requirements:

(a) The pier or wharf shall meet all the requirements in ss. NR 326.21 and 326.22(2), except as provided in pars. (b) to (f).

(b) The pier is located on the Lower St. Croix River in Pierce or St. Croix county, and is located south of the Arcola sandbar.

(c) The pier may not exceed 40 feet in length.

(d) The pier may not exceed 8 feet in width, as measured across the shortest horizontal distance of any portion of the pier surface.

**Note:** A pier or wharf may be straight, or configured in an "L" or "T" or similar shape, and may include catwalks.

(e) Riparian property in common association ownership may have no more than one boat slip for the first 200 feet of riparian owner's shoreline footage, and no more than one additional boat slip for each additional full 200 feet of the riparian owner's shoreline.

(f) The pier shall be a floating dock, and the pier, spud poles, posts and all other components may only be placed on the bed of the river on a seasonal basis. Flotation shall be attached to the pier. Metal barrel flotation is not permitted. Plastic barrel flotation is allowed, provided that the barrels are cleaned of any product residue. Polystyrene used for flotation shall be encased.

**Note:** This general permit is consistent with the January 2002 Lower St. Croix National Scenic Riverway Cooperative Management Plan, and the policy resolutions of the Lower St. Croix Management Commission, the primary policy body for joint management of the riverway under the plan.

**(7) GENERAL PERMIT FOR PUBLIC PIER OR WHARF.** A pier or wharf may be authorized under a general permit if it meets the following requirements:

(a) The pier or wharf shall meet all the requirements in ss. NR 326.21 and 326.22(2), except as provided in pars. (b) to (f).

(b) The pier or wharf is part of a commercial or municipal marina, or placed for commercial purposes.

(c) The pier or wharf is open to the public.

(d) The pier or wharf is for fishing, swimming or transient docking of boats for less than 24 hours.

(e) The pier may not exceed 8 feet in width, as measured across the shortest horizontal distance of any portion of the pier surface.

**Note:** A pier or wharf may be straight, or configured in an "L" or "T" or similar shape, and may include catwalks.

(f) The riparian property may have no more than 2 boat slips for the first 50 feet of riparian owner's shoreline footage, and no more than 2 additional boat slips for each additional full 50 feet of the riparian owner's shoreline. A boat shelter, boat hoist or boat lift may be placed as a boat slip, provided that the boat shelter, boat hoist and boat lift meets the requirements of subch. III.

**(8) INDIVIDUAL PERMIT REQUIRED.** (a) Activities which do not meet the standards in sub. (3), (4), (5), (6) or (7), or are otherwise determined ineligible for a general permit by the department shall require an individual permit.

(b) The department has authority under s. 30.206(3r), Stats., to require an individual permit in lieu of a general permit.

**Note:** Section 30.206(3r), Stats., states that the department may decide to require a person who has applied for a general permit to apply for an individual permit, if either of the following applies:

1. The department determines that the proposed activity is not authorized under the general permit.

2. The department has conducted an investigation and visited the site and has determined that conditions specific to the site require restrictions on the activity in order to prevent significant adverse impacts to the public rights and interest, environmental pollution, as defined in s. 299.01(4), Stats., or material injury to the riparian rights of any riparian owner.

**NR 326.24 Individual permits. (1) APPLICABLE ACTIVITIES AND PROCEDURES.** (a) Any pier or wharf which is not exempt under s. NR 326.22 and is not authorized by a general permit under s. NR 326.23, requires authorization by an individual permit pursuant to s. 30.12(1), Stats.

(b) A pier or wharf placed prior to February 6, 2004 which qualifies for an individual permit under this section may not be subject to formal enforcement action by the department provided an application is received by the department by 36 months after the effective date of this rule ... [revisor insert date].

(2) STATUTORY STANDARDS. An individual permit may only be granted for piers or wharves which meet the standards in s. 30.12 (3m), Stats. Individual permits may only be granted where the department determines that the structure will not materially obstruct navigation, will not be detrimental to the public interest, and will not materially reduce the flood flow capacity of a stream.

(3) INDIVIDUAL PERMIT FOR SOLID PIERS. (a) A solid pier may be authorized under an individual permit provided it meets the statutory standards in sub. (2) and all of the following conditions:

1. For a solid pier constructed or placed before the effective date of this rule ... [revisor insert date], the permit shall only authorize maintenance, repair, modification or replacement of the existing solid pier, and the solid pier shall be located on one of the following waters: outlying waters; harbors connected to outlying waters; Fox river from the DePere dam to Lake Winnebago; Lake Winnebago; and Mississippi river.

2. For a solid pier constructed or placed after the effective date of this rule ... [revisor insert date], the solid pier shall be part of a commercial or municipal marina, public boat landing, or placed for commercial purposes, and the solid pier shall be located on one of the following waters: outlying waters; harbors connected to outlying waters.

3. Solid piers shall be provided with a sufficient opening to provide for the passage of littoral drift. The opening size shall be adequate to prevent the deposition of littoral drift considering wave energy, littoral drift supply and near-shore water depths. The department may waive this requirement on a case-by-case basis for solid piers constructed prior to the effective date of this rule ... [revisor insert date], considering factors such as the cost of modifying the existing solid pier, the ongoing environmental impacts occurring at a solid pier without sufficient openings, the potential environmental impacts of the modification, and whether the original construction of the solid pier was prior to April 1, 1981.

4. Project plans for a solid pier shall be prepared and approved by a registered professional engineer.

(b) Design of a solid pier, and evaluation of a permit application for a solid pier, shall take into consideration the following factors:

1. Wave heights that are expected to occur in the vicinity of the solid pier.

2. Ice action including moving ice floes in the vicinity of the solid pier.

3. Minimum distance between the water surface and top of structure necessary to accomplish the project purpose.

4. Structural components, including foundation design, necessary to withstand the calculated natural forces, including overtopping by waves and ice pushes.

5. The minimum footprint and fill necessary to accomplish the project purpose.

6. The potential for wave energy and wave reflection to cause increased erosion to adjacent shorelines or damage to other properties.

(c) A solid pier that is not authorized under s. NR 326.22(3) or this subsection is prohibited.

**(4) INDIVIDUAL PERMIT FOR A COMMERCIAL OR MUNICIPAL MARINA.** (a) Piers or wharves for a commercial or municipal marina may be authorized under an individual permit, provided they meet the statutory standards in sub. (2) and all of the following conditions:

1. The marina is open to the general public.
2. The marina may place boat shelters, boat hoists or boat lifts as boat slips, provided that each boat shelter, boat hoist and boat lift meets the requirements of subch. III.
3. The marina piers or wharves may not exceed 8 feet in width, as measured across the shortest horizontal distance of any portion of the pier or wharf surface, unless the applicant demonstrates that greater width is needed to address safety, engineering design, or stability, or is needed to provide specific services related to operation of the marina such as a loading platform or fueling dock.

(b) Design of a marina, and evaluation of a marina permit application, shall take into consideration the following factors:

1. The potential for overcrowding of boats on the waterway.
2. The potential impacts of the marina on neighboring riparians and users of the waterway.
3. The number of boat slips existing or proposed, relative to the amount of frontage owned by the applicant and to other similar properties on the waterway.
4. Whether the marina is in an area of special natural resource interest and the impacts of the marina on that area.
5. Whether the marina is in a sensitive area designated under ch. NR 107, and the impacts of the marina on the sensitive area.

(c) A commercial or municipal marina that is not authorized under this subsection is prohibited.

**(5) INDIVIDUAL PERMIT FOR A PIER OR WHARF IN A SENSITIVE AREA.** (a) A pier or wharf in a sensitive area designated under ch. NR 107 may be authorized under an individual permit provided it meets the statutory standards in sub. (2).

(b) The pier or wharf shall be designed to comply with the exemption standards in s. NR 326.22(2).

(c) The department may require an alternative design or location for the pier or wharf to avoid or minimize potential impacts to public rights and interests in navigable waters, including reduced size, reduced number of boats or increased length.

(d) A pier or wharf in a sensitive area that is not authorized under s. NR 326.23(4) or this subsection is prohibited.

**(6) INDIVIDUAL PERMIT FOR ALL OTHER PIERS AND WHARVES.** (a) For a pier or wharf that does not qualify for an exemption under s. NR 326.22, is not authorized by a general permit under s. NR 326.23, and is not authorized by any other individual permit under this section, the pier or wharf may only be authorized under an individual permit if it meets the statutory standards in sub. (2) and all of the following requirements:

1. For a pier or wharf placed prior to February 6, 2004, an application for a pier or wharf that does not meet the exemption standards in s. NR 326.22(2) may only be authorized if the applicant demonstrates that the pier or wharf was originally placed at the waterfront property before February 6,

2004, and that the pier or wharf dimensions, configuration and number of boat slips were not expanded or relocated after February 6, 2004.

**Note:** This provision allows a seasonal pier that is placed and removed from the same waterfront property each year, provided it is placed in essentially the same location each year.

2. For a pier or wharf placed on or after February 6, 2004, a pier or wharf with dimensions that exceed what is allowed under the exemption standards in s. NR 326.22(2) may only be authorized if the applicant demonstrates one of the following:

a. That the requested dimensions and design for the pier or wharf are required for stability of the structure or to adequately moor the boat or boats, based on the specific boat or boats that will be using the structure or the specific conditions on the waterway where the pier or wharf will be located.

b. That the requested dimensions and design are to accommodate a physically disabled person who is a resident of the riparian property. For the purposes of this provision, a physically disabled person is a person who has been determined by the department of transportation to have a permanent disability and who has been issued a disabled registration plate or special identification card under s. 353.51, Stats.

3. For a pier or wharf placed on or after February 6, 2004, a pier or wharf with a number of boat slips that exceeds what is allowed under the exemption standards in s. NR 326.22(2) is prohibited.

4. For an application for a pier placed on or after February 6, 2004 and placed on rock-filled cribs, the pier may only be located on Lake Michigan, on Lake Superior, on any bay or harbor of Lake Michigan or Lake Superior, or on Lake Geneva in Walworth county.

(b) In addition to the requirements of par. (a), design of the pier or wharf, and evaluation of the individual permit application, shall take into consideration the following factors:

1. The potential for overcrowding of boats on the waterway.

2. The potential impacts on neighboring riparians and users of the waterway.

3. The size of the pier or wharf and the number of boat slips existing or proposed, relative to the amount of frontage owned by the applicant and to other similar properties on the waterway.

4. Whether the pier or wharf is in an area of special natural resource interest and the impacts of the structure on that area.

5. Whether the pier or wharf is in a sensitive area designated under ch. NR 107, and the impacts of the structure on that area.

6. Requirements of any local ordinance.

7. Recommendations of any local, regional, state, federal or waterway management plan.

8. For a pier or wharf placed prior to February 6, 2004, the length of time the pier or wharf in its existing configuration has been placed at the waterfront property.

**NR 326.25 Permit application requirements. (1) ALL APPLICATIONS.** Except where modified by sub. (2), any application for a general permit or an individual permit under this subchapter shall include the following information:

(a) The applicant's name, mailing address, local address where the pier or wharf is located if different, and telephone number.



- (b) The name, mailing address and telephone number for any contractor or agent.
- (c) A description of the purpose and need for the pier or wharf.
- (d) A top view diagram of the project, showing:
  - 1. The location of the shoreline and the length of shoreline owned by the applicant.
  - 2. The location of each existing or proposed pier or wharf at the applicant's property.
  - 3. The dimensions of each pier or wharf that is existing or proposed at the applicant's property.
  - 4. The water depth contours at one-foot intervals from the shoreline to one contour beyond the end of the longest existing or proposed pier or wharf, based on normal water levels.
  - 5. The location of the property lines for the applicant's property, and other information necessary to identify the location of the applicant's riparian rights lines.
  - 6. The names of the adjacent riparians on each side.
  - 7. A north arrow.
- (e) A cross-sectional view of each existing pier or wharf, showing:
  - 1. The length of the existing or proposed pier or wharf.
  - 2. The location of any pier or wharf supports.
  - 3. The contour of the lakebed or streambed from the shoreline to beyond the end of the pier or wharf, based on normal water levels.
  - 4. The height of the structure above the normal water level.
  - 5. The scale of the diagram.
- (f) A description of the boat or boats that will be moored at each pier or wharf, including length, type of boat, and water depth requirements for mooring.
- (g) A description of the equipment to be used for construction, if any, and how the equipment will gain access to the project site.
- (h) A description of any other piers, wharves, boathouses or other in-water structures at the applicant's property and at the adjacent riparian property on each side.
- (i) A description of the type of bottom substrate, such as sand, rock, gravel, or silt, at the location of the pier or wharf.
- (j) A description of the materials to be used in construction of the pier or wharf.
- (k) A description of how the boat slips are assigned if the pier or wharf will have multiple users.
- (L) A description or diagram of the historic use and placement of piers, wharves and boat slips at the applicant's property.

(m) All other information necessary to show that the project will comply with the requirements of this subchapter to be eligible for a general permit or an individual permit.

**(2) APPLICATION FOR A PREEXISTING PIER OR WHARF.** An application for a general permit under s. NR 326.23 (3) for a preexisting pier or wharf shall include the information required in sub. (1)(a) and (d). In addition, the application shall include written and photographic documentation to show that the structure meets the general permit standards in s. NR 326.23(3)(a) and (b). In the absence of sufficient written or photographic evidence, the applicant shall submit a signed statement verifying that each of the general permit standards in s. NR 326.23(3)(a) and (b) have been met.

### **SUBCHAPTER III BOAT SHELTERS, BOAT HOISTS AND BOAT LIFTS**

**NR 326.31 Exemptions. (1) APPLICABLE ACTIVITIES.** A seasonal boat shelter that meets all the criteria in sub. (2) shall be exempt under ss. 30.12(1g)(e) and (f), Stats. A boat hoist or boat lift that meets all the criteria in sub. (2) shall be exempt under s. 30.12(1g)(f), Stats.

**(2) EXEMPTION STANDARDS.** (a) The boat shelter, boat hoist or boat lift shall comply with all local ordinance requirements.

(b) The boat shelter, boat hoist or boat lift may not be located in a sensitive area designated under ch. NR 107.

(c) The boat shelter, boat hoist or boat lift may be placed and maintained only by a riparian, or an easement holder that meets the requirements of s. 30.131, Stats. The boat shelter, boat hoist or boat lift may be placed, installed or maintained for the riparian or qualified easement holder by an authorized agent or contractor.

(d) The boat shelter, boat hoist or boat lift shall allow the free movement of water underneath and may not cause deposition of littoral drift on the bed of the waterway.

(e) The boat shelter, boat hoist or boat lift may not be placed in any federal or state wild or scenic rivers designated under ss. 30.26 and 30.27, Stats.

(f) The boat shelter, boat hoist or boat lift shall be located entirely within the riparian rights lines, as determined under s. NR 326.04.

(g) All boat shelters shall be designed and used exclusively for the berthing of watercraft. Any boat shelter originally placed or permitted after September 1, 1991 may not exceed an outside dimension of 12 feet wide by 28 feet long on waters under 1000 acres in size and may not exceed an outside dimension of 14 feet wide by 34 feet long on waters 1000 acres and larger in size. The burden of proving that a boat shelter was placed prior to September 1, 1991 shall be on the owner. A seasonal boat shelter originally placed prior to September 1, 1991 and which does not comply with this subsection may not be expanded in size.

(h) A boat shelter, boat hoist or boat lift shall be attached to a pier, wharf or shoreline, or placed within 5 feet of a pier, wharf or shoreline.

(i) A boat shelter may include a roof or canopy, and may have a valance not to exceed 24-inches in height, but may not include walls, sides or equivalent construction such as canvas side drops. A boat shelter roof shall be pitched not less than one foot nor more than 2.5 feet from the roof peak to the bottom of the eaves. Only the size and number of vertical components required to support the watercraft and any roof are permitted.

(j) Storage facilities may only be included within the boat shelter above the height of the eaves.

(k) A boat shelter may include only a single sign necessary to identify the property and may only include lighting essential for safety and mooring.

(L) A boat shelter, boat hoist or boat lift may be placed as a boat slip.

(m) Permanent and seasonal boat shelters shall be placed as close together as practicable at a single location adjacent to each property. Adjacent lots in common ownership shall be considered a single property for the purpose of this subchapter.

(n) Except in an area of special natural resource interest, a deposit of sand, gravel or stone under s. 30.12(1g)(a), Stats., may be associated with the placement of any boat shelter, boat hoist or boat lift provided the deposit is limited to the area underneath or within one foot of the posts or supports and is less than 2 cubic yards.

(o) Dredging under s. 30.20(1g)(b)1., Stats., is not allowed for the placement or maintenance of any boat shelter, boat hoist or boat lift.

(p) The boat shelter, boat hoist or boat lift may not extend beyond the line of navigation. On a river, stream or channel, the boat shelter, boat hoist or boat lift may extend no further than the line of navigation, and may not extend out more than 25% of the width across the river, stream or channel.

(q) A boat shelter shall be seasonal. A boat hoist or boat lift may be permanent, provided it is attached to or within 5 feet of a pier, wharf or shoreline.

**Note:** This means that a boat shelter shall be removed between December 1 and April 1 annually. A boat hoist or boat lift that may also serve as a boat shelter may be placed year-round, provided that any roof or cover is removed between December 1 and April 1 annually.

**(3) PERMIT REQUIRED.** (a) Activities which do not meet the standards in sub. (2) or are otherwise determined ineligible for an exemption by the department shall require a general permit or an individual permit.

(b) The department has the authority under s. 30.12(2m), Stats., to require a permit in lieu of exemption.

**Note:** Section 30.12(2m), Stats., states that the department may decide to require a person engaged in an exempt activity to apply for an individual permit or seek authorization under a general permit if the department has conducted an investigation and visited the site of the activity and has determined that conditions specific to the site require restrictions on the activity in order to prevent significant adverse impacts to the public rights and interest, environmental pollution, as defined in s. 299.01(4), Stats., or material injury to the riparian rights of any riparian owner.

**NR 326.32 General permits. (1) APPLICABLE ACTIVITIES.** A permanent boat shelter that meets all the criteria in sub. (2) shall be eligible for general permit coverage under ss. 30.12(3)(a)6. and 30.206, Stats.

**(2) PERMANENT BOAT SHELTERS.** A boat shelter which is not seasonal may be authorized as a permanent boat shelter under this general permit if the project complies with s. NR 326.31(2) (a) through (p) and all of the following requirements:

(a) No permit may be granted for a permanent boat shelter constructed after May 3, 1988 if the owner's riparian property also contains a boathouse over navigable waters or within 75 feet of the ordinary high water mark. Each permit issued for a permanent boat shelter shall contain a condition which provides that the permit becomes void if there is any subsequent construction of a boathouse over

navigable waters adjacent to the owner's property or within 75 feet of the ordinary high water mark on the owner's property.

(b) A permit may not be granted for a permanent boat shelter to be placed on lakes or flowages of less than 500 acres or on rivers except the Mississippi river, the Wolf river from Lake Butte des Morts to the upstream limits of the village of Fremont, and the Fox river from the DePere dam to Lake Winnebago. For the purpose of this paragraph, a series of lakes or flowages which have a connection which is commonly navigated by motorized craft and which have a common water level shall be considered a single lake or flowage. For the purpose of this paragraph, artificial mooring basins and navigation channels and reaches of rivers where water levels are controlled by a dam are considered part of the lake or flowage to which they are connected.

(c) No more than one permanent boat shelter may be permitted for each riparian property. Contiguous riparian properties which are owned by the same riparian shall be considered one property for the purpose of this paragraph.

(d) Permits for permanent boat shelters may only be granted for locations adjacent to developed shorelines. Developed shorelines are those where there are at least 5 contiguous riparian properties, including the applicant's property, which each have a principal residential structure located within 500 feet of the proposed permanent boat shelter.

**(3) INDIVIDUAL PERMIT REQUIRED.** (a) Activities which do not meet the standards in sub. (2) or are otherwise determined ineligible for a general permit by the department shall require an individual permit.

(b) The department has authority under s. 30.206(3r), Stats., to require an individual permit in lieu of a general permit.

**Note:** Section 30.206(3r), Stats., states that the department may decide to require a person who has applied for a general permit to apply for an individual permit, if either of the following applies:

1. The department determines that the proposed activity is not authorized under the general permit.
2. The department has conducted an investigation and visited the site and has determined that conditions specific to the site require restrictions on the activity in order to prevent significant adverse impacts to the public rights and interest, environmental pollution, as defined in s. 299.01(4), Stats., or material injury to the riparian rights of any riparian owner.

**NR 326.33 Individual permits. (1) APPLICABLE ACTIVITIES.** Any boat shelter, boat hoist or boat lift which is not exempt under s. NR 326.31 and is not authorized by a general permit under s. NR 326.32 requires authorization by an individual permit pursuant to s. 30.12(1), Stats.

**(2) INDIVIDUAL PERMIT FOR A BOAT SHELTER, BOAT HOIST OR BOAT LIFT.** A boat shelter, boat hoist or boat lift meeting the standards in s. 30.12(3m), Stats., may be authorized under an individual permit.

**NR 326.34 Prohibition.** A boat shelter, hoist or lift placed after February 6, 2004 that does not qualify for an exemption under s. NR 326.31 and is not authorized by a general permit under s. NR 326.32 is prohibited.

#### **SUBCHAPTER IV SWIMMING RAFTS**

**NR 326.41 Finding.** The natural resources board finds that near shore areas are the most heavily used areas of a water body and are the most valuable ecological areas. Extensive and large structures on an individual and cumulative basis interfere with the public's ability to use and enjoy near shore areas and affect the growth of aquatic vegetation necessary for fish and wildlife habitat.

Accordingly, the natural resources board finds that the use of swim rafts in excess of 200 square feet in surface area or 38 inches in height may interfere with public rights as used in s. 30.13(1m), Stats., and thereby require a permit under s. 30.12, Stats.

**NR 326.42 Exemptions. (1) APPLICABLE ACTIVITIES.** A seasonal swimming raft that meets all the criteria in sub. (2) shall be exempt under ss. 30.12(1g)(b) and 30.13(1), Stats.

**(2) EXEMPTION STANDARDS.** (a) Pursuant to s. 30.13(1m)(c), Stats., the swimming raft shall be placed within 200 feet of shore.

(b) The swimming raft may be placed and maintained only by a riparian. The swimming raft may be placed, installed or maintained for the riparian by an authorized agent or contractor.

(c) The swimming raft may not exceed 200 square feet in surface area or 38 inches in height above the water level.

(d) A deposit of sand, gravel or stone under s. 30.12(1g)(a), Stats., may not be associated with the placement of any swimming raft.

(e) Dredging under s. 30.20(1g)(b)1., Stats., is not allowed for the placement or maintenance of any swimming raft.

(f) The size and height limitations of par. (b) do not apply to swimming rafts which are pulled onto shore and completely removed from the water on a daily basis or that are placed in swim areas marked and approved pursuant to s. NR 5.09.

(g) The height limitation of par. (b) does not apply to protective covers, diving boards, ladders and slides.

**(3) PERMIT REQUIRED.** (a) Activities which do not meet the standards in sub. (2) or are determined ineligible for an exemption by the department shall require an individual permit.

(b) The department has the authority under s. 30.12(2m), Stats., to require a permit in lieu of exemption.

**Note:** Section 30.12(2m), Stats., states that the department may decide to require a person engaged in an exempt activity to apply for an individual permit or seek authorization under a general permit if the department has conducted an investigation and visited the site of the activity and has determined that conditions specific to the site require restrictions on the activity in order to prevent significant adverse impacts to the public rights and interest, environmental pollution, as defined in s. 299.01(4), Stats., or material injury to the riparian rights of any riparian owner.

**NR 326.43 Measurements.** Calculations to determine the square footage of a swimming raft shall include diving boards, ramps, slides and similar accessories.

**NR 326.44 Individual permits. (1) APPLICABLE ACTIVITIES.** Any swimming raft which is not exempt under s. NR 326.42 requires authorization by an individual permit pursuant to s. 30.12(1), Stats.

**(2) INDIVIDUAL PERMIT FOR A SWIMMING RAFT.** A swimming raft meeting the standards in s. 30.12(3m), Stats., may be authorized under an individual permit.

**(3) PERMIT EVALUATION.** Design and placement of the swimming raft, and evaluation of the individual permit application, shall take into consideration all of the following factors:

1. The potential impacts on neighboring riparians and users of the waterway.
2. The size of swimming raft relative to the amount of frontage owned by the applicant.
3. Whether the swimming raft is in an area of special natural resource interest and the impacts of the structure on that area.
4. Whether the swimming raft is in a sensitive area designated under ch. NR 107, and the impacts of the structure on that area.
5. Requirements of any local ordinance.
6. Recommendations of any local, regional, state, federal or waterway management plan.
7. The length of time the swimming raft has been placed at the waterfront property.

**NR 326.45 Prohibitions. (1)** A swimming raft may not be attached to a pier, wharf, boathouse, boat shelter, boat hoist or boat lift.

**(2)** A swimming raft may not be located within 10 feet of any pier, wharf, boathouse, boat shelter, boat hoist or boat lift.

**SECTION 2. 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 3. BOARD ADOPTION.** This rule was approved and adopted by the State of Wisconsin Natural Resources Board on September 28, 2005 and December 7, 2005.

Dated at Madison, Wisconsin \_\_\_\_\_.

STATE OF WISCONSIN  
DEPARTMENT OF NATURAL RESOURCES

By \_\_\_\_\_  
Scott Hassett, Secretary

(SEAL)