

SUBJECT: Request Adoption of Revisions to Wis. Admin. Code ch. NR 345 pertaining to general permit standards to allow operation of a motor vehicle on the beds of outlying waters.

FOR: MARCH 2008 BOARD MEETING

TO BE PRESENTED BY: Martin Griffin

SUMMARY:

The department is proposing to revise Wisconsin Administrative Code ch. NR 345- Dredging in Navigable Waterways to create general permits for dredging to include authorization for the operation of a motor vehicle, on the beds of "outlying waters" (as defined in s. 29.001 (63), Stats.) to remove algae, mussels, dead fish and similar large public nuisance deposits; and for the removal and control of invasive plants on exposed lake bed.

The operation of motor vehicles and the removal or disturbance of materials on the beds of navigable waterways (also know as dredging) is regulated by Wis. Stats. Chapter 30 and Wisconsin Administrative Code Chapter NR 345. The statutes and current rule allows lakefront property owners to apply for an individual permit to use mechanized methods to remove nuisance deposits, or other invasive or unwanted vegetation. However, individual permits require a \$500 application fee and a 30 day public comment period before the permit can be issued.

Considering the changing lakeshore due to decreased water levels and the abundance of invasive species, the Department proposes to revise ch. NR 345 to create two new general permits. The general permits would allow lakefront property owners to operate motor vehicles on the beds of "outlying" navigable waters (as defined in s. 29.001 (63), Stats.) to remove public nuisance deposits (Cladophora, Zebra mussels, dead fish, etc.) and to control and manage invasive vegetation on exposed lakebed more efficiently while complying with general permit conditions created to protect the public interest in the lakebed. The general permit has a \$50 application fee and is processed in 30 days.

RECOMMENDATION: Final Adoption of Revisions to Wis. Admin. Code ch. NR 345 pertaining to general permit standards to allow operation of a motor vehicle on the beds of outlying waters.

LIST OF ATTACHED MATERIALS:

- | | | | | | |
|----|-------------------------------------|---|-----|-------------------------------------|----------|
| No | <input type="checkbox"/> | Fiscal Estimate Required | Yes | <input checked="" type="checkbox"/> | Attached |
| No | <input checked="" type="checkbox"/> | Environmental Assessment or Impact Statement Required | Yes | <input type="checkbox"/> | Attached |
| No | <input type="checkbox"/> | Background Memo | Yes | <input checked="" type="checkbox"/> | Attached |

APPROVED:

/s/	2/11/08
Bureau Director, Russell Rasmussen	Date
/s/	2/29/08
Administrator, Todd Ambs	Date
/s/	3/07/08
Secretary, Matt Frank	Date

- | | |
|---------------------------|-------------------------|
| cc: Laurie J. Ross - AD/5 | Dan Houston- Park Falls |
| Russell Rasmussen - WT/4 | Bob Wakeman - Waukesha |
| Edwina Kavanaugh - LS/5 | |
| Martin Griffin - WT/4 | |
| Kristy Rogers - Green Bay | |

DATE: February 11, 2008

TO: Natural Resources Board

FROM: Matt Frank, Secretary

SUBJECT: Request Adoption of Permanent Rule Revisions to NR 345, Wisconsin Administrative Code, pertaining to general permit standards to allow operation of a motor vehicle on the beds of outlying waters.

1. Why is this rule being proposed?

Under the direction of s. 30.20 sub. (1t) par. (b), Wis. Stats; and s. 30.206, Wis. Stats., the department is proposing revised rules that would create 2 new general permits for dredging. The two general permits include authorization for the operation of a motor vehicle, on the beds of "outlying waters" (as defined in s. 29.001 (63), Stats.) to remove algae, mussels, dead fish and similar large public nuisance deposits; and for the removal and control of emergent non-native and invasive plants on exposed lake bed.

The proposed rule changes will establish general permits for activities that would otherwise require individual permits.

Background information and rationale for the rule

From 1965 to 1997, water levels in the Great Lakes were at or above their long-term average. However, from 1998-2000 water levels dropped significantly to around 3 feet below their long-term average. Water levels have continued to stay below their long-term averages, although no longer dropping as sharply as they did from 1998-2000.

Presently water levels are below water levels of the year 2005 and 2006 and the National Oceanic and Atmospheric Administration (NOAA) long-range forecast for 2008 indicates more of the same. Specifically for the Great Lakes that border Wisconsin, Lake Michigan is 17 inches below its long-term average and Lake Superior is within 2 inches of its all time low.

Low water levels are not the only challenge facing the Great Lakes. Increased populations of invasive species such as Zebra mussels, Quagga mussels, Phragmites, and blooms of the nuisance algae Cladophora, have continued to plague the Great Lakes. Lower water levels contribute to a greater exposed beach area, and, as a result, mussel shells, large floating mats of algae, and other biological material often get deposited by wave action in large quantities along the lakeshore. The beached algal mats mixed with decaying zebra mussels and other invertebrates and fish result in unsightly, malodorous conditions. Piles of decaying Cladophora may affect tourism and recreation and owner property values, have been linked to taste and odor problems in drinking water, and may exacerbate levels of E. coli and other bacteria in beach sand and swimming waters, thus raising questions about beach safety. In Wisconsin, these nuisance conditions have been reported at many sites ranging from northeastern Green Bay and the tip of Door County to Kenosha. (UW Sea Grant 2005)

The biomass of Cladophora that washes ashore varies between years and locations. Mats of stranded algae two feet thick may collect in some areas— often embayments where waters are calmer and materials tend to collect (Whitman et al. 2003). In 2004, twenty five tons of Cladophora were removed from Milwaukee's lakeshore alone (Stauffer 2004). In other areas, accumulations are less where the decaying algae may remain offshore or confined to the swash zone (Harris 2004).

Lower water levels contributing to greater exposed beach area may also cause other challenges in addition to nuisance deposits. When water levels continue to stay low, the increased use of the exposed beach area and lakebed allows the disturbed area to become more susceptible to invasion by invasive plant species like Phragmites (Grime 2001). These invasive stands of Phragmites can become so dense that diverse wetland plant communities are eliminated. In addition, nonnative plants do not provide valuable food and shelter for fish and wildlife that native plants provide (Davis et al. 2000; Hulme and Bremer 2006).

Waterfront property owners desire to remove unwanted public nuisance deposits and invasive plants in an efficient manner. Currently, lakefront property owners are only allowed to remove public nuisance deposits by hand as

existing statutes preclude them from using mechanized removal methods without a permit. Similarly, lakefront owners are only allowed to remove invasive plants (e.g., *Phragmites*) below the ordinary high water mark (OHWM) by hand cutting using non-vehicle means (e.g. weed whacker or non-riding lawn mower).

As the volume of public nuisance deposits and invasive plants vegetating exposed lakebed increases property owners can't realistically remove these unwanted deposits or invasive plants by hand. For nuisance deposits, the key to successful clean-up is vigilance in removing the algal mats as soon as they wash ashore. This is due to the fact that after only a few days in the warm sun, the algae begins to decay into an organic soup which makes it harder to remove; and in addition the longer the warm, moist conditions created by the algae persist, the more *E. coli* has a chance to grow. For emergent invasive plants growing on exposed lake bed (i.e. *Phragmites*, whose plant colonies spread mainly by underground root extensions), the key to successful management is to cut and chemically treat the cut stems in early spring and late summer when the plant is pulling nutrients down to the roots. Mowing during the winter months has also proven successful in reducing biomass and giving native plants a chance to get established in the late spring, early summer.

The mechanical removal of large plant and animal accumulations has been accomplished with front-end loaders, backhoes or beach grooming equipment. However, monitoring of indicator bacteria in beach sand has shown that heavy equipment may grind decaying algae into moist sand creating conditions that promote higher bacterial growth (Harris 2004). The most efficient way to control *Phragmites* and other unwanted vegetation growing on the exposed lakebed is with the aid of motor vehicles such as beach groomers and all terrain vehicles. To allow limited use of motor vehicles for these purposes, precautions must be taken to avoid damaging sensitive beach vegetation and near shore habitat for fish and wildlife. There are currently no state guidelines for *Cladophora* removal or use of motor vehicles for invasive species management. By promulgating General Permits with standards for mechanized removal that include location standards (where on the shoreline can the activity take place), substrate restrictions (limits on the volume of sand vs. cobble that can be removed incidentally), area standards (how much material can be removed), types of mechanized methods allowed, and guidance on what to do with the removed material, among other things, we will be able to ensure that sensitive beach vegetation and near shore habitat impacts are avoided and that these activities are not inadvertently promoting bacterial growth.

The operation of motor vehicles and the removal or disturbance of materials on the beds of navigable waterways (also known as dredging) is regulated by Wis. Stats. Chapter 30 and Wisconsin Administrative Code Chapter NR 345. The statutes and current rule allows lakefront property owners to apply for an individual permit to use mechanized methods to remove nuisance deposits, or other invasive or unwanted vegetation. However, individual permits require a \$500 application fee and a 30 day public comment period before the permit can be issued.

Considering the changing lakeshore due to decreased water levels and the abundance of invasive species, the Department proposes to revise ch. NR 345 to create two new general permits. The general permits would permit lakefront property owners on the beds of "outlying" navigable waters (as defined in s. 29.001 (63), Stats.) to remove public nuisance deposits (*Cladophora*, Zebra mussels, dead fish, etc.) and invasive vegetation on exposed lakebed more efficiently while complying with general permit conditions created to protect the public interest in the lakebed. The general permit has a \$50 application fee and is processed in 30 days.

References

- Davis, M., J. P. Grime, and K. Thompson. 2000. Fluctuating resources in plant communities: a general theory of invasibility. *Journal of Ecology* 88:528-534
- Grime, J.P. 2001. Plant strategies, vegetation processes, and ecosystem properties. 2nd ed. John Wiley & Sons Ltd, Chichester.
- Harris, Vicki. 2004. "Cladophora Confounds Coastal Communities –Public Perceptions and Management Dilemmas" in *Cladophora Research and Management in the Great Lakes Proceedings of a Workshop Held at the Great Lakes WATER Institute, University of Wisconsin-Milwaukee, December 8, 2004*
- Hulme, Philip E. and Eleanor T. Bremner (2006) Assessing the impact of *Impatiens glandulifera* on riparian habitats: partitioning diversity components following species removal. *Journal of Applied Ecology* 43 (1): 43–50

Stauffer, Rebekah. 2004. "Cladophora: How is it Handled?" in *Cladophora Research and Management in the Great Lakes Proceedings of a Workshop Held at the Great Lakes WATER Institute, University of Wisconsin-Milwaukee, December 8, 2004*

UW Sea Grant. 2005. "Nuisance Algae on Lake Michigan Shores"

Whitman, Richard L, Dawn A. Shively, Heather Pawlik, Meredith B. Nevers, and Muruleedhara N. Byappanahalli. 2003. "Occurrence of *Escherichia coli* and *Enterococci* in *Cladophora* (Chlorophyta) in Nearshore Water and Beach Sand of Lake Michigan". *Applied and Environmental Microbiology* 69(8): 4714–4719

2. Summary of Rule Proposal

The operation of motor vehicles and the removal or disturbance of materials on the beds of navigable waterways (also known as dredging) is regulated by Wis. Stats. Chapter 30 and Wisconsin Administrative Code Chapter NR 345. The statutes and current rule require lakefront property owners to apply for an individual permit to use motor vehicles to remove nuisance deposits, or other invasive or unwanted vegetation below the OHWM. However, individual permits require a \$500 application fee and a 30 day public comment period before the permit can be issued.

With regards to invasive species management, currently the removal of vegetation on exposed lakebed areas (below the OHWM) is limited to a single 30 foot wide path measured along the shoreline per property¹. All vegetation (except for any state or federally listed endangered species) may be removed in this 30 foot wide path by hand without any Department approvals (e.g., hand pull it, use a string trimmer, push lawn mower, etc.). However, as the amount of exposed lake bed is increasing, the density of *Phragmites* and other invasive species is increasing and the use of hand held devices is becoming ineffective. Riparian land-owners have expressed the desire to employ the use of motorized vehicles (e.g. ATV, commercial riding mower, etc.) to control invasive species growing on exposed lakebed.

Considering the changing lakeshore due to decreased water levels and the abundance of invasive species, the Department proposes to revise ch. NR 345 to create two new general permits. The general permits would allow lakefront property owners to 1) remove large plant and animal nuisance deposits (*Cladophora*, mussel shells, dead fish, etc.) on the beds of outlying navigable waters (as defined in s. 29.001 (63), Stats.) more efficiently and 2) remove and control of invasive plants on exposed lake bed of outlying waters; while complying with general permit conditions created to protect the public interest in the lakebed. The general permit has a \$50 application fee and is processed in 30 days.

Currently, there are no specific state standards for *Cladophora* removal nor are there specific standards for the use of motorized vehicles to control invasive species. By promulgating a new general permit with standards for mechanized removal we will be able to ensure that sensitive beach vegetation and near shore habitat impacts are avoided. Some of the new general permit standards for the plant and animal nuisance deposit proposed includes:

- the removal will be limited to plant and animal nuisance deposits in the swash zone of the waterway,
- the total amount of material removed must be less than 3000 cubic yards,
- the General Permit issued is for the one time removal of the plant and animal nuisance deposit, and
- Equipment used must skim the nuisance deposit off the top of the lakebed and minimize any impact to the lakebed and surrounding vegetation.

Some of the new general permit standards for the management of invasive species growing on exposed lake bed include:

- Mowing or spreading herbicide in conformance with an invasive species control plan that includes a description of the existing condition including the types of plants present and their abundance; a strategy for the control of the invasive species; a plan for the re-establishment of the native plant community; and a monitoring plan to assess the success or failure of the control plan.

¹ Nonnative or invasive aquatic plants as designated under s. NR 109.07 may be removed by hand in an unlimited area

- The general permit issued is for the use of a motor vehicle for the explicit purpose of controlling emergent nonnative or invasive plant species and the vehicle must only be operated in the specific area that is detailed in the approved invasive species control plan or permit.
- The motor vehicle used must be low ground pressure equipment, such as a wide-tire vehicle or tracked equipment to minimize rutting and shall be used in a manner that minimizes the impacts to the native lakebed material and any surrounding native vegetation.

3. How does this proposal affect existing policy?

The proposed rule revision provides procedures and standards which are necessary to administer the regulation of dredging activities in navigable waters under chapter 30, Stats. The rule revision does not represent a change in policy but represents a change in permit process.

4. Has the Board dealt with these issues before?

Yes, emergency rules were put into effect June 10th, 2007 by order WT-26-07(E) authorizing a general permit for the operation of motor vehicles on the beds of outlying waters to remove large plant and animal nuisance deposits.

5. Who will be impacted by the proposed rules? How?

All types of waterfront property owners along the shores of outlying waters- from private landowners to business, builders and developers; will benefit from the additional general permits provided in these rules, and the clear procedures and standards. Aquatic plant managers, Municipalities, NRCS and other agencies or contractors who remove unwanted aquatic plants and dead animals from shoreline as well as participate in invasive species control and management will benefit from the streamlined general permits. The public who use and enjoy Wisconsin's navigable waters will also benefit from standards established to protect the public interest.

6. Information on environmental analysis, if needed.

The Bureau of Environmental Analysis and Review has determined that these rule revisions are a Type III action under s. NR 150, Wis. Adm. Code, and no environmental analysis is required. [150.03 (6) (b)]

7. Recommendation.

Department staff recommends adoption of the proposed rule revision to NR 345 as described in the attached Natural Resource Board Order WT-41-07

RESPONSE TO COMMENTS

Permanent Rule Revisions to NR 345, Wisconsin Administrative Code, pertaining to general permit standards to allow operation of a motor vehicle on the beds of outlying waters

Legislative Council drafting items – All changes made as recommended.

Comments Regarding Rule

Comment #1: Of concern is the use of the term “motorized vehicle” in connection with the general permit. We feel that this further confuses what is or is not allowed on the lakebed as we already have problems with pickup trucks, ATCS, snowmobiles and dirt bikes traversing the exposed lakebed.

Response #1: State law prohibits the operation a motor vehicle in or on any navigable water or the exposed bed of navigable waters. In order to be consistent with the language found in state statutes (e.g., s. 30.29, Wis Stats.) we have decided to keep the current term “motor vehicle” since it is already defined, and that definition includes the types of vehicles the rule was intended to include.

Comment #2: The rule should address standards for the removal of the cut Phragmites clippings.

Response #2: In order to be eligible for a general permit, projects must meet all of the general permit standards in addition to the specific activity standards. The current general permit standards already include the requirements for disposal of dredged material (any material removed from the lakebed). We feel that these requirements are sufficient and therefore did not add any additional requirements to the specific activity standards pertaining to aquatic plant removal.

Comment #3. The rule should outline specific standards for what constitutes "low ground pressure equipment" and “rutting”

Response #3. We have chosen to give examples of what low ground pressure equipment is (e.g., wide-tire vehicles, and tracked equipment), instead of listing specific standards. We determined that it is not feasible to come up with a list, since the standards for low ground pressure equipment are variable and new innovations and information on how to minimize impacts of ground disturbance caused by tires are constantly being discovered. The most important thing we feel is to minimize impact, so we opted to define a rutting standard, so regardless of what low ground pressure equipment an operator uses, the level of ground disturbance that is acceptable is defined.

Questions About Rule

Question #1. Please explain what types of vehicles are included in "motor vehicles".

Answer #1. The term “motor vehicle” is defined in s. 30.29, Stats. However, the rule revision currently proposes a standard that minimizes rutting and therefore restricts motor vehicles to low ground pressure equipment, such as a wide-tire vehicle or tracked equipment.

Question #2. Are there any testing requirements for the removed material?

Answer #2. The proposed rule changes only change items 7 and 9 under SECTION 5. NR 345.04(2)(c). The testing requirements are not being changed and therefore are not reflected in the proposal. If you are interested the testing requirements for NR 345 you can find them under NR 345.04(2)(c) item #1 < <http://www.legis.state.wi.us/rsb/code/nr/nr345.pdf> >

Question #3. Can any bottom material be removed beside the algae, zebra mussels, invasive plants, dead fish and other public nuisances? For example, silt, sand, clay, other organics?

Answer #3. No, in the proposed rule definitions there is a note for the definition of "plant and animal nuisance deposit" that says "Plant and animal nuisance deposit" does not include the natural deposition of the native lakebed material like sand, cobble, silt, detritus, and other organic material.

Question #4. Is there a limit of cubic yards that can be removed?

Answer #4. Yes, for the general permit that deals with the nuisance deposit removal, the removal is limited to "less than 3000 cubic yards".

Question #5. I assume all removed material still must go to "upland disposal".

Answer #5. Yes, since we do not propose to change this, it is not seen in the rule proposal. You can locate this requirement for general permits in the existing rule under NR 345.04(2)(c) item #3 <
<http://www.legis.state.wi.us/rsb/code/nr/nr345.pdf> >

Fiscal Estimate — 2007 Session

<input checked="" type="checkbox"/> Original <input type="checkbox"/> Updated <input type="checkbox"/> Corrected <input type="checkbox"/> Supplemental		LRB Number	Amendment Number if Applicable
		Bill Number	Administrative Rule Number NR 345

Subject
 General permit standards for dredging or operating a motor vehicle on outlying waters of the state

Fiscal Effect

State: No State Fiscal Effect
 Indeterminate

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

<input type="checkbox"/> Increase Existing Appropriation	<input checked="" type="checkbox"/> Increase Existing Revenues
<input type="checkbox"/> Decrease Existing Appropriation	<input type="checkbox"/> Decrease Existing Revenues
<input type="checkbox"/> Create New Appropriation	

Increase Costs — May be possible to absorb within agency's budget.

Yes No

Decrease Costs

Local: No Local Government Costs
 Indeterminate

1. <input type="checkbox"/> Increase Costs <input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory	3. <input type="checkbox"/> Increase Revenues <input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory
2. <input type="checkbox"/> Decrease Costs <input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory	4. <input type="checkbox"/> Decrease Revenues <input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory

5. Types of Local Governmental Units Affected:

Towns Villages Cities
 Counties Others
 School Districts WTCS Districts

Fund Sources Affected

GPR FED PRO PRS SEG SEG-S

Affected Chapter 20 Appropriations

20.370 (4) (bi)

Assumptions Used in Arriving at Fiscal Estimate

Summary:

This rule package creates 2 new general permits for dredging (including the operation of a motor vehicle) on the beds of the Great Lakes. The first general permit would allow for the removal of algae, mussels, dead fish and similar large plant and animal nuisance deposits. The second general permit would allow for the control of emergent non-native and invasive vegetation growing on exposed lakebeds. These activities are currently subject to individual permits.

Assumptions:

Department staff that work in the areas that would be affected by the new general permit report that approximately 20 requests are made annually for permission to dredge on Great Lakes beds. Under current rules, approximately 4 of these requests actually result in an application for an individual permit at a cost of \$500 each, for an estimated total annual revenue of \$2,000 (4 permit applications x \$500).

Based on knowledge of current beach conditions, Department staff estimate that the implementation of the new general permits, as well as the streamlined permit process that goes with it, will double the number of requests for permission to dredge on Great Lakes beds from 20 to 40 annually, and that all 40 requests will result in actual permit applications.

In addition, it is estimated that there are approximately 30 property owners along the Great Lakes that are currently controlling emergent non-native and invasive vegetation on exposed lakebeds without a permit and that all of these owners will apply for and receive a permit.

Therefore, in total, it is estimated that the rule package will increase the number of permits issued annually for dredging on Great Lakes beds from 4 to 70.

Long-Range Fiscal Implications

Prepared By:	Telephone No.	Agency
Joe Polasek	266-2794	Department of Natural Resources
Authorized Signature	Telephone No.	Date (mm/dd/ccyy)
	266-2794	

Fiscal Estimate — 2007 Session

Page 2 Assumptions Narrative Continued

LRB Number	Amendment Number if Applicable
Bill Number	Administrative Rule Number NR 345

Assumptions Used in Arriving at Fiscal Estimate – Continued

Fiscal Estimate:

The Department estimates that under the proposed rule, approximately 4 dredging requests per year will continue to require a \$500 individual permit, for a total of \$2,000 in individual permit revenue. The remaining 66 requests will result in the issuance of a general permit, for a total of \$3,300 in general permit revenue (66 general permits x \$50/each). Therefore, total revenue for individual and general permits is estimated to be \$5,300, which represents a \$3,300 increase in annual permitting revenue.

The rule change will have no impact on local government costs.

Fiscal Estimate Worksheet — 2007 Session
 Detailed Estimate of Annual Fiscal Effect

Original Updated
 Corrected Supplemental

LRB Number	Amendment Number if Applicable
Bill Number	Administrative Rule Number NR 345

Subject
 General permit standards for dredging or operating a motor vehicle on outlying waters of the state

One-time Costs or Revenue Impacts for State and/or Local Government (do not include in annualized fiscal effect):

Annualized Costs:		Annualized Fiscal Impact on State Funds from:	
		Increased Costs	Decreased Costs
A. State Costs by Category			
State Operations — Salaries and Fringes	\$	\$ -	
(FTE Position Changes)	(FTE)	(- FTE)
State Operations — Other Costs		-	
Local Assistance		-	
Aids to Individuals or Organizations		-	
Total State Costs by Category	\$	\$ -	
B. State Costs by Source of Funds			
GPR	\$	\$ -	
FED		-	
PRO/PRS		-	
SEG/SEG-S		-	
State Revenues	Complete this only when proposal will increase or decrease state revenues (e.g., tax increase, decrease in license fee, etc.)	Increased Revenue	Decreased Revenue
GPR Taxes		\$	\$ -
GPR Earned			-
FED			-
PRO/PRS		3,300	-
SEG/SEG-S			-
Total State Revenues	\$	3,300	\$ -

Net Annualized Fiscal Impact

	<u>State</u>	<u>Local</u>
Net Change in Costs	\$ _____	\$ _____
Net Change in Revenues	\$ 3,300	\$ _____

Prepared By: Joe Polasek	Telephone No. 266-2794	Agency Department of Natural Resources
Authorized Signature	Telephone No. 266-2794	Date (mm/dd/ccyy)

Proposed Revisions to NR 345, Wisconsin Administrative Code
Small Business Analysis

A. Describe the compliance and/or reporting requirements imposed on small business and whether they can be made less stringent.

State statute requires that any person operating motor vehicles and/or removing or disturbing materials on the beds of public navigable waters either qualify for an exemption or obtain a general or individual permit. Small businesses would need to do several activities to comply: (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; (3) complete an individual permit application. Permit applications are based on the business' construction plans and site features.

B. Describe the schedules or deadlines for compliance or reporting and whether these schedules/deadlines can be made less stringent for small business.

Any person operating motor vehicles and/or removing or disturbing materials on the beds of public navigable waters will either qualify for an exemption or need to obtain a general or individual permit. If a business seeks an exemption determination, the request must be made 20 days before the planned start date. Applications for general permits must be made 35 days prior to the planned start date. For an individual permit, a public notice and 30-day comment period is required. Interested parties may request a public informational hearing, which could extend the permit review period another 45 days. Permit applicants are generally asked to return requested information within 30 days of receiving the department's request. Once a permit is received, a permittee must notify the department in advance of starting construction, and photographs of finished projects are required for some activities. These schedules and deadlines are very basic for all applicants. A separate schedule or requirements for small businesses would likely make the system more confusing for small businesses, rather than simplifying. With less information the department may not be able to make determinations, resulting in unanticipated follow-up and potential delays.

C. Can compliance or reporting requirements for small business be consolidated or simplified?

The compliance and reporting requirements are very basic for all applicants. Separate compliance and reporting requirements for small businesses would likely make the system more confusing for small businesses, rather than simplifying. With less information the department may not be able to make determinations, resulting in unanticipated follow-up and potential delays.

D. Can performance standards be established for small businesses in lieu of design or operational standards?

Small businesses can design to meet general permit standards, or the individual permit process allows more latitude.

E. Can small businesses be exempted from any or all requirements of the rule?

Other than the exemptions provided for all projects, small businesses cannot be exempted. A small business activity in a lake or stream has the same impact as the same activity conducted by a larger business or an individual. To preserve habitat, natural scenic beauty and water quality in our state's waterways, anyone conducting a project in public waters must meet the performance standards.

F. Initial Regulatory Flexibility Analysis

1. Describe the type of small business that will be affected by the rule.

Small businesses affected by this rule will include contractors, developers and consultants who provide plans or design for projects along public navigable waterways which may include the removal of unwanted aquatic plants and dead animals from shoreline as well as participating in invasive species control and management.

2. Briefly explain reporting, bookkeeping and other procedures required for compliance with the rule.

The person responsible for a project in or along a lake or stream must develop plans and occasionally conduct some analyses, submit an application, and observe the site during the activity. For some activities, photographs of the completed project are required. For the aquatic plant management activities outlined in the rule, an invasive species control plan that includes a description of the existing condition (including the types of plants present and their abundance); a strategy for the control of the invasive species; a plan for the re-establishment of the native plant community; and a monitoring plan to assess the success or failure of the control plan may be required.

3. Describe the type of professional skills necessary for compliance with the rule.

Map reading, basic computer use, mathematics, drawing to scale, and clear writing are the skills needed to comply with these rules. While it may be helpful or efficient, hiring a consulting firm is not necessary to comply with these requirements. Many projects are planned and conducted by individuals with no professional background. If the site has particularly challenging features, then professional ecological or engineering expertise may be helpful.

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

The Wisconsin Natural Resources Board proposes an order to amend NR 345.04(2)(a)3., (b), (c)(intro.) and 9. and (j)1.; and to create NR 345.03(10g), (10r), (12m) and (13m), 345.04(2)(a)2m.,(im) and (ir) relating to general permits for dredging in Great Lakes navigable waterways.

WT-41-07

Summary Prepared by the Department of Natural Resources

Statutory Authority: ss. 30.20(1), (1t) and (2), 30.206 and 227.11(2), Stats.

Statutes Interpreted: ss. 30.20(1), (1g), (1m), (1t) and (2) and 30.206, Stats. and Section 44.40, Stats.

Explanation of Agency Authority:

The Department has authority under ss. 30.20 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., waters designations in ch. NR 1, and the NR 300 series of rules.

Plain Language Analysis:

The purpose of this rule revision is to modify the existing rule to establish new general permits with appropriate conditions. This rule revision establishes standards for projects to be eligible for a general permit for dredging including operation of a motor vehicle, on the beds of the Great Lakes to remove algae, mussels, dead fish and similar large plant and animal nuisance deposits and to remove and control emergent invasive aquatic plants. The proposed rule establishes general permits for activities that would otherwise require individual permits. The rule revision also removes riprap as an option for soil stabilization when topsoil is exposed during a dredging activity.

Federal Regulatory Analysis:

Any activity that results in a discharge (including deposits and structures) into “waters of the United States” is regulated by the U.S. Army Corps of Engineers (Corps) under section 404 of the Clean Water Act. An Individual Permit from the Corps is required, unless Wisconsin regulates the project in its entirety under ch. 30, Stats., in which case the project is authorized by the Corps under general 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 – Individual permit required (joint application with Corps). Exempts dredging in water courses with total drainage area of less than 5 square miles and not trout water. Prohibits dredging in number of cases including where dredging would not provide an effective solution to the problem. Similar information requirements and permit conditions to Wisconsin’s.

Michigan – Individual dredging permit required for all dredging from inland lakes and streams from MDEQ (Section 404 program has been assumed by state, so state permit serves as federal permit); individual permit dredging permit required from MDNR and Corps for dredging from Great Lakes waters and connecting waterways.

Iowa – Individual permit (joint application with Corps) required for all dredging projects in Iowa waters. Similar information requirements. Standard Corps permit conditions.

Illinois – Individual permit required to dredge from navigable waters. Disposal may require separate permit from Illinois EPA. Separate dredging permit required from Corps in navigable waters of the U.S.

Summary of Factual Data and Analytical Methodologies: Substantial published scientific literature on the effects on fish, wildlife and water quality during and after physical alterations to lake and streambeds is the basis for the rule parameters. In addition, data on actual field conditions during and after such alterations from department files is applied.

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

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

Effect on Small Business: Dredging contractors, marinas and other waterfront businesses who wish to conduct dredging activities will be affected by the rule. Specific standards will provide clarity and consistency in the permitting process.

Agency Contact Person: Martin Griffin, MartinP.Griffin@wisconsin.gov, (608) 266-2997

SECTION 1. NR 345.03 (10g), (10r) and (13m) are created to read:

NR 345.03 (10g) "Outlying waters" has the meaning in s. 29.001 (63), Stats.

(10r) "Plant and animal nuisance deposit" means a recent and natural deposit within the swash zone of a waterway of mussels, dead fish, Cladophora or similar natural, biological-based material caused by wave action in a quantity that is causing an annoyance, damage, or health issue to the public or waterway.

Note: "Plant and animal nuisance deposit" does not include the natural deposition of the native lakebed material like sand, cobble, silt, detritus, and other organic material.

(12m) "Rutting" is defined as an elongated depression caused by wheels or tracks of machinery, equipment or other vehicles and is 6 inches deep or more.

(13m) "Swash zone" as defined by the United States Army Corps of Engineers Coastal Engineering Manual, means the zone of wave action on the beach, which moves as water levels vary, extending from the limit of run-down to the limit of run-up.

Note: The "swash zone" does not typically include areas that are stabilized with vegetation. The United States Army Corps of Engineers Coastal Engineering Manual can be found at: <http://www.usace.army.mil/publications/eng-manuals/>

SECTION 2. NR 345.04 (2)(a)2m. is created to read:

NR 345.04(2)(a)2m. If the department determines that the dredging proposal submitted under this section has the potential to impact an archaeological site or historic structure in accordance with s. 44.40, Stats., the application shall be deemed incomplete. The department may not consider the application complete or issue a general permit until the applicant submits documentation to demonstrate that the dredging project avoids impacts to the archaeological site or historic structure, or completes and documents requested investigations of archaeological sites or historic structures in accordance with s.

44.40, Stats. Reports of completed archaeological or historic structures investigations for projects are subject to departmental and Wisconsin Historical Society review and approval in advance of permit issuance.

SECTION 3. NR 345.04(2)(a)3. is amended to read:

NR 345.04(2)(a)3. If the applicant modifies their dredging project plans to meet the requirements of subd. 2. or 2m., the modified plans shall be submitted before the department can consider the application complete or issue a general permit.

SECTION 4. NR 345.04 (2) (b) is amended to read:

NR 345.04(2)(b) *Applicable activities*. Dredging that meets all of the standards in pars. (c) and either (d), (f), (h), ~~or (i)~~, (im) or (ir) is eligible for a general permit under ss. 30.20 (1t) (b) and 30.206, Stats. Dredging that meets all of the standards in pars. (c) and either (e) or (g) is eligible for a general permit under ss. 30.20 (1t) (a) and (am) and 30.206, Stats.

SECTION 5. NR 345.04(2)(c)(intro.), 7. and 9. are amended to read:

NR 345.04(2)(c) *General permit standards*. (intro.) In order to be eligible for a general permit, projects must meet all of the general permit standards in par. (c) in the addition to the specific activity standards in par. (d), ~~or (e)~~, (im) or (ir).

7. Erosion control measures shall meet or exceed the technical standards for erosion control approved by the department under subch. V of ch. NR 151. Any area where topsoil is exposed during construction shall be immediately seeded and mulched ~~or riprapped~~ to stabilize disturbed areas and prevent soils from being eroded and washed into the waterway.

Note: These standards can be found at the following website:
<http://dnr.wi.gov/org/water/wm/nps/stormwater/techstds.htm>

~~9. All equipment used for the project shall be de-contaminated for invasive and exotic species prior to use and after use. All equipment that comes in contact with infested waters, including but not limited to tracked vehicles, barges, boats, silt or turbidity curtain, sheet pile and pumps shall be thoroughly disinfected.~~

An operator shall decontaminate all equipment used for constructing, operating, or maintaining the project, including tracked vehicles, barges, boats, silt or turbidity curtains, hoses, sheet piles, and pumps, for invasive species and viruses before and after use or prior to use within another navigable waterway. To the extent practicable, equipment used on waterways known to be infested with invasive species and viruses may not be used on other non-infested waters unless properly decontaminated. An operator shall perform this subd. a. to c. and either d., e., f. or g.

- a. Inspect all equipment and remove all aquatic plants and animals, and mud.
- b. Drain all water from all equipment.
- c. Dispose of aquatic plants and animals in the trash. An operator may not transfer aquatic plants or animals or water from one water body to another.
- d. Wash all equipment at a temperature of not less than 212 degrees Fahrenheit water (steam clean).
- e. Wash all equipment with soap and water or high pressure water of not less than 2000 pounds per square inch and allow all equipment to dry thoroughly for not less than 5 days.

f. Disinfect all equipment with 200 parts per million (0.5 ounces per gallon) chlorine for not less than 10 minute contact time. Every effort should be made to keep the disinfection solution and rinse water out of surface waters.

Note: Chlorine refers to either household bleach solution (5.25% chlorine) or granular chlorine (70% calcium hypochlorite)

g. Follow the most recent disinfection protocols for infested waters. The department shall maintain on its website and make available at its offices the most recent disinfection protocols for invasive species and viruses and a consolidated list of infested waters containing known aquatic invasive species and viruses.

Note: See the department's website at dnr.wi.gov under the topic "Aquatic Invasive Species"

SECTION 6. NR 345.04(2)(im) is created to read:

NR 345.04(2)(im) *Standards for removal of plant and animal nuisance deposits.* All of the following are standards for removal of plant and animal nuisance deposits.

1. The removal shall only be located in outlying waters.

2. This general permit is for the one time removal of the plant and animal nuisance deposit. Only 3 general permits for plant and animal nuisance deposits may be issued for any area of a waterbody on an annual basis. For the general permit requirements listed under s. NR 345.05(2)(im), an area of a waterbody is the geographical location of the project as indicated on the general permit application form.

Note: General permit application forms are available at department service centers and on the department website at <http://dnr.wi.gov> under the topic "Waterway and Wetland Permits".

3. The project area to which this general permit applies shall be under the same ownership as the applicant.

4. The removal may not be located where there are public rights features as described in s. NR 1.06 or in waters in ecologically significant coastal wetlands along Lakes Michigan and Superior as identified in the Coastal Wetlands of Wisconsin (DNR-CMP project).

Note: The Coastal Wetlands of Wisconsin's Great Lakes can be found at the following website <http://dnr.wi.gov/org/land/er/nhi/projects/> under the topic "Coastal Wetlands".

5. The removal shall only be located within the swash zone of the waterway.

6. The removal is limited to the plant and animal nuisance deposit only. The removal of material other than plant and animal nuisance deposits should be limited to the extent practicable and shall not exceed a de minimus amount.

Note: The material may contain trash which should be removed along with the plant and animal nuisance deposit.

7. The total amount of material removed shall be less than 3000 cubic yards.

8. This general permit does not authorize the redistribution of native lakebed material which includes sand, cobble, silt, detritus, and other organic material or the placement of additional sand/stone, etc.

9. Equipment used shall be designed to skim only the plant and animal nuisance deposit off of the native lakebed. The equipment shall be used in a manner that minimizes the impacts to the native lakebed and surrounding vegetation.

10. Equipment used shall be low ground pressure equipment, including wide-tire vehicles, and tracked equipment, to minimize rutting. The equipment shall remove the material along a path parallel to the shore within the swash zone. Equipment operation shall cease when rutting occurs. Any rutting of the lakebed shall be immediately restored by the operator of the vehicle.

Note: The depth of the rut is measured from the original lakebed surface to the bottom of the depression. If individual lug depressions are visible, the depth would be measured to the lesser of the two depths (e.g., the top of the lug). Measurements are not cumulative.

11. If the removed material will be disposed of by landspreading, the material shall be incorporated into the soil by plowing or disking within 24 hours.

12. Unless using a developed boat launch, equipment used in the removal shall access the swash zone along one path perpendicular to the shore. The chosen route shall minimize the impact to the shoreline and vegetated lakebed.

SECTION 7. NR 345.04(2)(ir) is created to read:

NR 345.04(2)(ir) *Standards for using motor vehicles for the management of non-native and invasive plant species growing on the exposed lakebed of outlying waters.* All of the following are standards for using motor vehicles, as defined in s. 30.29, Stats., for the management of non-native and invasive emergent plant species growing on exposed lakebed.

1. The project shall be located on the exposed lakebed of outlying waters.
2. The project shall be conducted when the exposed lakebed is dry.
3. The project area to which this general permit applies shall be under the same ownership as the applicant.
4. The use of the motor vehicle is for the purpose of controlling emergent invasive or nonnative aquatic plant species as designated by the department under s. 23.24. Stats., and s. NR 109.07.
5. The use of the motor vehicle is for mowing or spreading herbicide in conformance with a written invasive or nonnative aquatic plant species control plan approved by the department.

Note: An invasive or nonnative aquatic plant species control plan, as required under s. NR 109.04 (3) and described in s. NR 109.09, must contain the following items: a description of the existing condition including the types of plants present and their abundance; a strategy for the control of the invasive or nonnative aquatic plant species; a plan for the re-establishment of the native plant community; and a monitoring plan to assess the success or failure of the control plan.

6. For projects requiring a permit under ch. NR 107 or 109, before the department can consider the application complete or issue a general permit under this section, the applicant shall submit documentation to demonstrate that a permit under ch. NR 107 or 109 has been applied for.

Note: The chemical treatment of aquatic plants may require a permit under ch. NR 107 and physical removal of aquatic plants may require a permit under ch. NR 109.

7. The motor vehicle may only be operated in the specific area that is detailed in the approved invasive species control plan or permit. This permit does not authorize the operation of any motor vehicle in areas outside of those designated in the approved plan or permit.

8. Equipment used shall be low ground pressure equipment, including wide-tire vehicles, and tracked equipment, to minimize rutting. Equipment operation shall cease when rutting occurs. Any rutting of the lakebed shall be immediately restored by the operator of the vehicle.

Note: The depth of the rut is measured from the original lakebed surface to the bottom of the depression. If individual lug depressions are visible, the depth would be measured to the lesser of the 2 depths (e.g., the top of the lug). Measurements are not cumulative.

9. The motor vehicle shall be used in a manner that minimizes the impacts to the native lakebed material and any surrounding native vegetation.

10. To minimize impacts to small animals and native plants and to prevent soil disruption and rhizome spread, the mowing deck shall be set no lower than 4 inches above the ground when operating equipment.

11. To protect wildlife habitat during nesting seasons, the use of a motor vehicle to control emergent invasive or nonnative aquatic plant species may only occur between August 1st and March 15th of the subsequent year.

12. The applicant may request that the requirement in subd. 11. be waived by the department on a case-by-case basis, by submitting a written statement signed by the local department wildlife biologist, documenting consultation about the proposed control plan, and that the local department wildlife biologist has determined that the requirements of subd. 11. are not necessary to protect wildlife habitat during the nesting season for the proposed project.

SECTION 8. NR 345.04(2)(j)1. is amended to read:

NR 345.04(2)(j) *Individual permit or contract required.* 1. Activities which do not meet the standards in par. (c) and either (d), (e), (f), (g), (h), (i), (im), (ir) or (j) shall require an individual permit or contract.

SECTION 9. 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 10. BOARD ADOPTION. This rule was approved and adopted by the State of Wisconsin Natural Resources Board on _____.

Dated at Madison, Wisconsin _____.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By _____
Matthew J. Frank, Secretary

(SEAL)