

**Wisconsin Department of Natural Resources  
Natural Resources Board Agenda Item**

**SUBJECT:**

Request that the Board adopt Board Order WT-06-12, proposed rules affecting Chapter NR 115 related to revisions of Wisconsin's statewide minimum standards for shoreland zoning.

**FOR: December 2013 Board meeting**

**PRESENTER'S NAME AND TITLE:**

Russ Rasmussen, Deputy Water Division Administrator

**SUMMARY:**

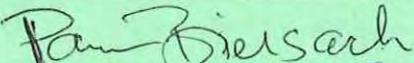
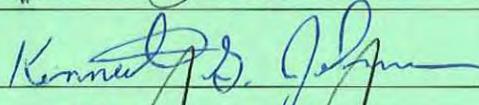
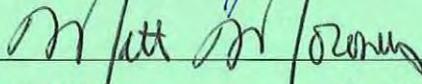
Wisconsin's minimum shoreland zoning standards were originally codified as NR 115, Wis. Adm. Code, in the 1960's, and had been revised very little until 2009. Since the rule revisions in 2009 some counties have identified provisions that are unclear or burdensome to implement. The proposed rule language would simplify the application of impervious surfaces standards, under NR 115.05(1)(e), to only riparian lots or those lots that lie entirely within 300 feet of the ordinary high water mark. Further, the policy would provide additional options for areas that are already highly developed and properties that wish to exceed the maximum impervious surface limit. Second, the proposed rule language would allow, under NR 115.05(1)(g), for some lateral expansion of nonconforming structures that are within 75 feet, but more than 35 feet from the ordinary high water mark and eliminate the requirement that nonconforming accessory structures be removed when relocating or reconstructing a nonconforming principal structure. The proposed rule language would also bring the nonconforming structure standards into compliance with Wisconsin Statutes relating to nonconforming uses and boathouses. Finally, the proposed rule revisions will clarify the reporting requirements for local governments, under NR 115.05(4), and will clarify that counties do not have to require a permit to manage exotic or invasive species, damaged or diseased vegetation or vegetation that creates an imminent safety hazard, under NR 115.05(1)(c)2.(d).

The Board approved the scope statement in March of 2012 and authorized the department to go to hearing in June of 2013. The department held five public hearings around the state in August and solicited comments from June 27th, 2013 until September 9th, 2013. One hundred and forty six people attended the five hearings, but only 44 people testified. At the close of the public comment period the department received 410 comments, which the department thoroughly reviewed and analyzed. The attached background memo and response summary provides more detail of the comments received during the public comment period and the changes the department made in response to the comments.

**RECOMMENDATION:** That the Board adopt Board Order WT-06-12.

**LIST OF ATTACHED MATERIALS (check all that are applicable):**

- |   |   |
|---|---|
| <input type="checkbox"/> (choose one)   | <input checked="" type="checkbox"/> Attachments to background memo    |
| <input type="checkbox"/> Statement of scope   | <input type="checkbox"/> Governor approval of statement of scope      |
| <input checked="" type="checkbox"/> Fiscal estimate and economic impact analysis (EIA) form | <input type="checkbox"/> Environmental assessment or impact statement |
| <input checked="" type="checkbox"/> Response summary  | <input checked="" type="checkbox"/> Board order/rule                  |

Approved by	Signature	Date
Pamela Biersach, Bureau Director		11-5-13
Ken Johnson, Administrator		11-7-13
Cathy Stepp, Secretary		11/18/13

cc: Board Liaison - AD/8

Program attorney - LS/8

Department rule coordinator - LS/8

**CORRESPONDENCE/MEMORANDUM**

DATE: October 21, 2013

TO: All Members of the Natural Resources Board

FROM: Cathy Stepp, Secretary

SUBJECT: Background memo on Board Order WT-06-12, relating to revising Wisconsin's statewide shoreland zoning standards.

**1. Subject of Proposed Rule:**

Although the rule was recently revised in 2009 and went into effect on February 1, 2010, some counties expressed concerns about implementation and enforcement of the minimum standards regulating impervious surfaces and nonconforming structures. While the proposed revisions would primarily address concerns associated with administering and implementing the impervious surface standards and the nonconforming structure standards in the rule, two other minor changes to the vegetative management and administrative reporting standards will clarify the requirements under the rule and ease reporting requirements.

**Impervious Surface standards**

Current standards under ch. NR 115.05(1)(e), Wis. Adm. Code, specify that the impervious surface standards be applied to land within 300 feet of the ordinary high water mark. Current standards require shoreland mitigation if a property expands the impervious surfaces on the property above 15%, and also limit the amount of impervious surfaces on a property to a maximum of 30%. The proposed rule revisions would ease the application of the impervious surface standards by: 1) limiting application of the impervious surface standards to only riparian lots or non-riparian lots that are entirely within 300 feet of the ordinary high water mark; 2) allowing properties to exceed the maximum impervious surface standards if the property owner can show that the runoff from the impervious surfaces is not draining towards a lake or river or is being treated by an engineered system; 3) allowing counties to develop higher impervious surface limits in certain areas of the county that are already highly developed.

The current rule provides that counties shall regulate any impervious surface that is located within 300 feet of the ordinary high water mark. Some counties have indicated that measuring 300 feet from the ordinary high water mark is administratively burdensome and will result in properties where the impervious surface standards are only applied to a portion of a property, and will thus require variances or complex calculations of the impervious surface standards. The proposed modifications to the rule would limit application of impervious surface standards to only riparian lots or non-riparian lots that are located entirely within 300 feet of the ordinary high water mark.

Further, the impervious surface regulations currently provide that shoreland property may contain impervious surfaces up to 15% without a permit. Once a property exceeds 15% impervious surfaces, to increase impervious surfaces the property owner must receive a permit from the county and conduct shoreland mitigation to offset the impacts to the shoreland zone and adjacent waterway. Expanding the impervious surfaces above 30% would require a variance. Some counties and property owners have suggested that impervious surfaces that do not drain toward the waterbody or those that receive some kind of stormwater treatment have less of an impact on water quality than impervious surfaces that drain directly to the waterbody. The proposed rule language would allow property owners to develop or expand the impervious surfaces on their property, if the property owner can show that the runoff from the impervious surface is not draining directly to the lake or river or that the impervious surface is being treated by an engineered stormwater system.

As described above, the current rule requires that property owners obtain a variance from the county if the property owner wishes to expand the impervious surfaces on their lot above 30%. In some developed areas the current maximum impervious surface standards already exceed the maximum impervious surface limit. Any further addition of impervious surfaces on these lots, even minor additions, would require a variance, representing an increased workload for counties.

The proposed rule language allows counties to adopt an ordinance that allows a higher percentage of impervious surfaces for areas of already highly developed shorelines. A highly developed shoreline area, in the proposed rule language, is an area that was identified as an urbanized area or urban cluster in the 2010 US Census, an area that have a commercial, industrial or business land use classification, or any additional area that meets the specifications in the proposed rule. Property owners in areas of highly developed shorelines would be allowed to expand the impervious surfaces on their lots, up to 30% for residential and 40% for commercial, industrial or business land uses, without a shoreland zoning permit. To expand the impervious surfaces above this limit, the property owner will have to receive a permit and provide shoreland mitigation. Finally, to expand the impervious surfaces on the property above 40% for residential and 60% for commercial, industrial or business land uses, the property owner would either have to obtain a variance or show that the additional impervious surface does not drain directly to the lake or river, or that the additional impervious surface is treated by an engineered system.

#### **Nonconforming Structure standards**

The nonconforming structure standards in ch. NR 115.05(1)(g), Wis. Adm. Code, allow property owners to maintain and repair their nonconforming principal structures and allow property owners, whose principal structures are greater than 35 feet from the waterbody to expand vertically within the required setback and relocate or replace the principal structure if the property owner completes a shoreland mitigation project. If the property owner chooses to relocate or replace the principal structure, the county must also determine whether there is any other compliant building location on the property and must require that all other nonconforming accessory structures be removed or relocated beyond the required setback. Further, property owners may expand principal structures vertically or horizontally beyond the required setback. All property owners are allowed unlimited maintenance and repair of their nonconforming structures, and the scope of these repairs is defined by the county ordinance.

The proposed rule language for nonconforming principal structures would clarify the activities allowed under maintenance and repair of a nonconforming principal structure and would allow 200 sq. feet of horizontal expansion over the lifetime of the structure within the shoreland setback and with shoreland mitigation. This revision is to address concerns that some nonconforming principal structures located within the shoreland setback are either structurally inadequate to allow for the addition of a second story, or it is more desirable to build a minor first floor addition to accommodate the needs of the property owner. In addition, the proposed standards would eliminate the requirement that property owners must remove all other nonconforming accessory structures, in order to be allowed to relocate or replace their nonconforming principal structure. Removal of nonconforming accessory structures is often a key component of shoreland mitigation, but if it is a requirement the counties are not allowed to give credit for the removal of these structures despite the benefits to the shoreland zone. Further, the counties identified that property owners tend to view the removal of accessory structures more favorably if removal of these structures is optional rather than a requirement.

Finally, two other minor changes to the nonconforming structure standards will clarify the statutory language and requirements associated with nonconforming uses and wet boathouses. Under s. 59.69(10)(am), Wis. Stats., if a nonconforming use ceases operation for more than 12 months, counties may require the use of the property to come into compliance with the county ordinances. The proposed changes to the rule would clarify the rule language to reflect this statutory language. The other minor change in the proposed rule seeks to eliminate the reference to the maintenance and repair of

nonconforming wet boathouses, which are regulated by the department under s. 30.121, Wis. Stats.. This reference in NR 115.05(1)(g)7. to wet boathouses and compliance with s. 30.121, Wis. Stats. has caused some confusion because counties do not regulate boathouses based upon s. 30.121, Wis Stats.

### **Vegetative Management Standards**

The current rule provides standards for when counties may allow vegetation to be removed from the vegetative buffer zone, which is the area within 35 feet of the ordinary high water mark. One of the standards provides that counties may allow a property owner to remove vegetation within the buffer zone if they are managing for exotic, invasive, damaged or diseased vegetation or if the vegetation poses an imminent safety hazard provided that the area is replanted. However, the standard is unclear whether or not a county must require a permit for the removal of this type of vegetation. Therefore, the proposed rule revision would clarify that the county is not required to issue a permit for such activities.

### **Reporting Standards**

Under NR 115.05(4), Wis. Adm. Code, counties are required to adopt an ordinance that contains a number of administrative and reporting requirements. One of those requirements is to submit any permit the county issues for a nonconforming structure, if requested by the department. The proposed rule would eliminate this requirement because of the administrative burden and cost to the counties and department.

## **2. Background:**

Section 281.31(6), Stats. requires the department prepare and adopt general recommended standards and criteria for municipalities to protect navigable waters giving "particular attention to safe and healthful conditions for the enjoyment of aquatic recreation...the capability of the water resources...building setbacks from the water; preservation of shore growth and cover; shoreland layout for residential and commercial development; suggested regulations and suggestions for the effective administration and enforcement of such regulations." Section 59.692(1m), Stats. requires counties to adopt zoning and subdivision regulations for the protection of shoreland areas to effect the purposes of section 281.31 and to promote public health, safety, and general welfare.

The State's shoreland management program under Chapter NR 115 provides that shoreland zoning regulations shall: "further the maintenance of safe and healthful conditions: prevent and control water pollution: protect spawning grounds, fish and aquatic life: control building sites, placement of structures and land uses, and reserve shore cover and natural beauty." NR 115, Wis. Adm. Code, contains the statewide minimum standards for shoreland zoning in unincorporated areas.

Although the rule was recently revised in 2009 and went into effect on February 1, 2010, some counties expressed concerns about implementation and enforcement of the minimum standards regulating impervious surfaces and nonconforming structures. The department met with a group of counties and interested legislators to identify the concerns and ideas for how to address those concerns. The department then prepared a scoping statement which was approved by the Natural Resources Board and the Governor. The department then developed draft rule language and shared the language with the same group of counties and legislators and then also met with the Wisconsin Realtors Association, Wisconsin Lakes Association, Wisconsin Builders Association, and River Alliance to receive their input on the proposed rule language.

## **3. Why is the rule being proposed?**

Revisions to the rule are being proposed because some counties expressed concerns about implementation and enforcement of the minimum standards for impervious surfaces and nonconforming structures in the current NR 115 that went into effect on February 1, 2010.

The rule making would address the concerns expressed by the counties and would also include some minor changes to the vegetative management and administrative reporting standards to clarify the requirements and ease reporting requirements.

#### **4. Summary of the rule.**

After meeting with counties and other partners, the attached revisions to Ch. NR 115, Wis. Adm. Code are being proposed to provide more flexibility for owners of nonconforming structures and owners of property that is already highly developed and to clarify inconsistencies with the statutes and the vegetative management and reporting requirements under the rule.

The substantive changes would

- Create a higher impervious surface standard for already highly developed areas.
- Ease application of impervious surface regulations to riparian lots or non-riparian lots entirely within 300 feet of the waterway.
- Address impervious surfaces that do not drain directly to a waterway or where runoff is being treated by an engineered system.
- Clarify the types of activities allowed when maintaining and repairing a nonconforming structure.
- Allow up to 200 sq. foot of lateral expansion over the life of the structure within the setback as long as the expansion is no closer to the waterway.
- Clarify that discontinuance language in the Code only applies to structures associated with a nonconforming use to reflect statutory language.
- Eliminate the requirement to remove nonconforming accessory structures when replacing or relocating nonconforming structures.
- Eliminate a provision that states that boathouses shall be regulated under s. 30.121 to clarify that counties may regulate dry boathouses.
- Clarify that a permit is not required to remove invasive, damaged or diseased vegetation, or vegetation that poses a safety hazard.
- Clarify what materials must be submitted to the department.

#### **5. How does this proposal affect existing policy?**

The primary impacts from the proposed rule language will result from the changes to the impervious surface standards, particularly the proposed increase in impervious surface limits for highly developed shorelines, and the proposed change that would allow lateral expansion of nonconforming structures within the setback. These proposed changes to the current rule will allow more development within the shoreland zone than what is currently allowed under NR 115, Wis. Adm. Code.

Impervious surfaces and development within the shoreland zone impact water quality by increasing runoff and pollutant loading into the waterway, which can result in sedimentation, soil erosion, increased water temperature, and increased phosphorous and algae in lakes and rivers. Impervious surfaces and development within the shoreland zone impact fish and wildlife habitat due to declines in water quality and elimination of shoreline and nearshore habitat by the removal of vegetation or sedimentation that covers important habitat. Numerous studies have shown that fish and amphibian species decline significantly as impervious surfaces and development increases within the shoreland zone. Additionally the diversity of species, including birds and aquatic insects, declines as development occurs. Most of the studies have found that when impervious surfaces exceed 12% within a watershed, fish and wildlife diversity declines sharply.

While some studies have shown that maintenance of a shoreland buffer and stormwater ponds may mitigate some of these impacts to fish and wildlife habitat, the studies agree that there are no longer

detectable benefits once the impervious surfaces in the watershed exceed 30%. However, it is important to note that once impervious surfaces exceed 30% within the watershed, the impacts on water quality and fish and wildlife habitat begin to be marginalized over time. Consequently, those watersheds that already exceed 30% impervious are likely already experiencing impacts to water quality and fish and wildlife habitat, such that the proposed rule changes may not result in any further measurable impacts over time. Therefore, while the proposed changes to the impervious surface limits and the nonconforming structure standards may result in impacts to the shoreland zone over time, the impacts are expected to be larger for those watersheds that currently have a lower percentage of impervious surfaces or development, whereas the already highly developed watersheds in the state may not have any noticeable or significant changes in water quality or fish and wildlife habitat.

### **Counties & shoreland property owners**

The proposed rule language affects existing policy by reducing the administrative costs and providing greater flexibility for administering a shoreland zoning ordinance as described above. Additionally shoreland property owners will benefit from the increased flexibility and decreased permit requirements when a property owner seeks to expand the impervious surfaces or a nonconforming principal structure on their property. Shoreland property owners enjoy many benefits from higher water quality, including improved fishing and wildlife viewing, opportunities to recreate in clear water, and increased enjoyment of natural beauty. Consequently, property owners may also experience costs from the proposed rule revisions in the form of decreased property value as a result of additional development.

A number of different studies have estimated the effects of increased water clarity (Secchi measurements) on property values. These studies used hedonic pricing models to examine the change in property values occurring over time. Studies, particularly those in Wisconsin, have found a change of \$7,894 to \$17,892 in property value for an increase in water clarity of one meter in depth. Lower valued properties would probably experience less of a change than higher valued properties. Therefore, if the proposed rules allow for additional development within the shoreland zone and if some waterbodies experience a decline in water quality over time, it is reasonable to conclude that the proposed rule language may have a negative impact on property values over time. However, it is difficult to estimate the potential impacts to property value, in large part because it will depend upon many variables, including the degree of impacts, the real estate market and the type of waterbody.

### **6. Has Board dealt with these issues before?**

Yes, the Board dealt with the changes to Ch. NR 115, Wis Adm. Code during the rulemaking process that began in 2003 and was finalized in 2009. That rulemaking process included listening sessions in 2003 and public hearings in 2005 and 2007. The Board approved the final rule language in June of 2009.

### **7. Who will be impacted by the proposed rule? How?**

Groups likely to be impacted or interested in the proposed rule include local governments, businesses located along the waterfront, builders, contractors, landscapers, building centers, nurseries and garden centers and particular property owners within the shoreland zone. While shoreland property owners will benefit from the increased flexibility and decreased permit requirements when the property owner seeks to expand the impervious surfaces or a nonconforming principal structure, recreational users of lakes and rivers may experience some negative impacts from the proposed rule if there is a decline in water quality, fish and wildlife habitat or natural scenic beauty due to increased impervious surface limits for highly developed shorelines and lateral expansion of nonconforming structures

Local county governments will be the primary party affected by the proposed changes in this rule. The level of that impact will vary county by county, and it will also vary over time. Initial fiscal impacts will

result from ordinance adoption or revision and the costs will depend upon whether or not a county merely adopts the minimum standards, if the county adopts an ordinance that is more restrictive than the minimum standards, or if a county chooses to adopt an ordinance that allows higher impervious surface standards for highly developed shorelines.

Some businesses including builders, contractors, building centers, landscapers, nurseries and garden centers may experience some positive economic impacts as a result of the increased flexibility the proposed rule will offer for shoreland property owners who seek to expand their nonconforming structures or impervious surfaces and must complete a shoreland mitigation project.

## **8. Soliciting public input on the economic impact analysis**

The department completed a Type 3 Economic Impact Analysis (EIA), because the program has already completed at Type 1 Economic Impact Analysis on the current rule, and the proposed changes would be considered relatively minor, which would have less of an economic impact.

The department solicited comments from the public on a draft economic impact analysis from April 22<sup>nd</sup> until May 6<sup>th</sup>, 2013. During the comment period the department received 9 comments, summarized as follows:

### Concerned citizens

- Vern Moore-Expressed concern that the EIA is a poor use of science and believes the vegetative buffer standards and impervious surface limits in the rule are neither supported by science nor necessary for protecting water quality, habitat or natural scenic beauty. No suggestions were made to improve the draft EIA.
- Steve LaValley- Expressed concern that the DNR is ignoring science with the rulemaking proposal and effects of lakeshore development on fish and wildlife habitat. No suggestions were made to improve the draft EIA.
- Kathy Kascewicz- Expressed concern about the impact the proposed rule will have on water quality, habitat and natural scenic beauty. No suggestions were made to improve the draft EIA.

### County Zoning staff.

- Burnett County – Suggested grammatical changes in two locations to better reflect rule language. No suggestions were made to improve the draft EIA.
- Waushara County – The rule would result in extra time and costs for counties to evaluate proposed mitigation measures for exceeding the impervious surface limits, but counties could charge for the review and approval of those plans and economic impact would be minimal. Also not having to issue a permit to cut down a dead tree will save staff time and the county money in implementation costs. No suggestions were made to improve the draft EIA.
- Pierce County - The proposed changes afford counties added flexibility in finding solutions for landowners, but it requires effort and diligence to insure compliance and not all counties have adequately trained staff. The state should ensure it has enough staff to provide guidance to counties. No suggestions were made to improve the draft EIA.
- Racine County – Expressed concerned about the cost to property owners, the cost to the county and the lack of county staff to implement the rule. Concerned about the additional costs for mapping highly developed shorelines and does not see any benefits to the rule. No suggestions were made to improve the draft EIA.

### Partner organizations

- Wisconsin Lakes – Inquired whether the DNR economist had reviewed the draft EIA or whether the department required additional assistance in calculating the costs of declining water quality, habitat, and natural scenic beauty. No suggestions were made to improve the draft EIA.
- Wisconsin Builders Association – Generally believes that the proposed rule would have a positive economic impact, but acknowledges that the potential benefits will be highly variable depending upon a number of factors. Provided rough estimates on potential benefit per nonconforming structure. The draft EIA has been modified to reflect those comments.

The department requested comments from the Wisconsin County Code Administrators, Wisconsin Counties Association, Wisconsin Towns Association, the League of Wisconsin Municipalities, Wisconsin Builders Association, Wisconsin Realtors Association, Wisconsin Association of Lakes, River Alliance, Oneida County Rivers and Lakes Association, and Racine County. Further, the department solicited comments from the 459 GovDelivery subscribers for Shoreland Zoning. The draft economic impact analysis was posted on the Administrative Rules website and the department's proposed permanent natural resources laws website.

## **9. Hearing Synopsis**

The department scheduled five public hearings and accepted public comment from June 27<sup>th</sup> until September 9<sup>th</sup>, 2013. Public Hearings were held in Greenville, Delafield, Tomah, Spooner and Tomahawk. A total of 146 people attended the hearings, but only 44 people provided oral testimony at the hearings. During the public comment period, the department received 410 comments, written or oral, from individuals, organizations and local governments on the proposed rule revisions. Of the comments received, 93 comments support the proposed revisions, 280 comments were opposed, and 37 comments were neutral. Of those opposed to the rule revisions, 256 comments were opposed because the rule was too permissive and 24 comments were opposed because the rule was too restrictive.

Please see ATTACHMENT B for a more detailed description of the comments received during the public comment period and the department's response to the comments.

## **10. Modifications made to the proposed rule following public comment period**

During the public comment period the department received six suggested modifications to the proposed rule language. The department has considered and evaluated those suggestions and has addressed the concerns of the Legislative Council Rules Clearinghouse and most of the other comments.

Please see ATTACHMENT B for a more detailed description of the suggested modification to the proposed rule and the department's response.

## **11. Environmental Analysis**

Under NR 150, Wis. Adm. Code, changing the standards in NR 115, would be considered a Type III action, which does not require the completion of an Environmental Analysis. The Environmental Analysis the department completed for the current rule during the previous rulemaking effort is applicable to this current rulemaking effort, and the proposed changes to the rule would be considered relatively minor such that they should not have a significant impact on the quality of the environment. Further, counties may choose to be more restrictive than the minimum standards for everything except the nonconforming structure standards and the substandard lot standards in NR 115. Therefore, counties may choose not to adopt the proposed changes to the impervious surface limits or may choose to be more restrictive.

## **12. Small Business Analysis**

Wisconsin's shoreland protection standards under NR 115, Wis. Adm. Code, do not distinguish or contain different standards for businesses within the shoreland zone. Therefore, businesses or business sectors are either not directly impacted by the proposed rule, or businesses located within the shoreland zone must meet the same requirements as any other property owner in the shoreland zone. If a business is located in the shoreland zone and the structure is nonconforming or the property exceeds the impervious surface limits, the business may keep what they have and repair or maintain those structures.

Specific businesses and business sectors may be indirectly impacted by the proposed rule depending upon the type of business and location of the business. Given that a primary purpose of the proposed revisions is to ease the administrative burden on counties, some businesses including builders, contractors, building centers, landscapers, nurseries and garden centers may experience some positive economic impacts, because the proposed rule language will provide shoreland property owners with increased flexibility for development of their property.

## **13. Attachments**

- A. Fiscal Estimate and Economic Impact Analysis
- B. DNR Response to Comments
- C. Board Order/Rule

**Contact Person:** Russ Rasmussen, Deputy Water Division Administrator, Department of Natural Resources, P.O.Box 7921, Madison, WI 53707-7921, (608) 267-7651, [Russell.Rasmussen@wisconsin.gov](mailto:Russell.Rasmussen@wisconsin.gov).

## ADMINISTRATIVE RULES Fiscal Estimate & Economic Impact Analysis

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1. Type of Estimate and Analysis

Original    Updated    Corrected

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2. Administrative Rule Chapter, Title and Number

Ch. NR 115, Wisconsin's Shoreland Protection Program

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3. Subject

Modify the rule relating to the impervious surface limits, nonconforming structure provisions, vegetation standards and administrative procedures to reduce the administrative burden on counties.

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4. Fund Sources Affected

GPR    FED    PRO    PRS    SEG    SEG-S

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5. Chapter 20, Stats. Appropriations Affected

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6. Fiscal Effect of Implementing the Rule

No Fiscal Effect    Increase Existing Revenues    Increase Costs  
 Indeterminate    Decrease Existing Revenues    Could Absorb Within Agency's Budget  
 Decrease Cost

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7. The Rule Will Impact the Following (Check All That Apply)

State's Economy    Specific Businesses/Sectors  
 Local Government Units    Public Utility Rate Payers  
 Small Businesses (if checked, complete Attachment A)

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8. Would Implementation and Compliance Costs Be Greater Than \$20 million?

Yes    No

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9. Policy Problem Addressed by the Rule

The modifications to Wisconsin's minimum shoreland zoning standards (NR 115) in 2009, generated some concerns for counties that certain provisions are difficult to implement or are administratively burdensome. The current proposal is to clarify and modify certain sections of the code to reduce the implementation concerns and administrative burden on counties. See Attachment Part I for a more detailed explanation.

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10. Summary of the businesses, business sectors, associations representing business, local governmental units, and individuals that may be affected by the proposed rule that were contacted for comments.

Groups likely to be impacted or interested in the proposed rule include local governments, businesses located along the waterfront, builders, contractors, landscapers, building centers, nurseries, and garden centers and particular property owners within the shoreland zone. Recreational users of lakes and rivers may experience some negative impacts from the proposed rule if there is a decline in water quality, fish and wildlife habitat or natural scenic beauty due to increased impervious surface limits for highly developed shorelines and lateral expansion of nonconforming structures.

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11. Identify the local governmental units that participated in the development of this EIA.

No local governments have participated in the development of this draft EIA. However, the department will solicit comments from local governments on this draft EIA and will send a notice to the Wisconsin County Code Administrators, Wisconsin Counties Association, Wisconsin Towns Association and the League of Municipalities.

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12. Summary of Rule's Economic and Fiscal Impact on Specific Businesses, Business Sectors, Public Utility Rate Payers, Local Governmental Units and the State's Economy as a Whole (Include Implementation and Compliance Costs Expected to be Incurred)

See Attachment Part II

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13. Benefits of Implementing the Rule and Alternative(s) to Implementing the Rule

The primary benefit of these proposed rule revisions is to ease the administrative burden on counties and provide more flexibility for properties that are either highly developed and/or have nonconforming principal structures. The proposed rule revisions will also establish clear and consistent regulatory requirements associated with vegetative management standards and reporting requirements. The proposed rules establish more flexibility and clarify the minimum requirements.

## ADMINISTRATIVE RULES Fiscal Estimate & Economic Impact Analysis

An alternative to promulgation of these proposed rule revisions is to retain the current rule language, but this would not address the concerns that have been raised and would not alleviate concerns about the number of variance applications counties will receive from property owners wishing to expand above the maximum impervious surface limit or those who wish to expand their nonconforming structure within the setback. While the current rule attempted to reduce the administrative burden on counties and reduce the number of variances that property owners would need to expand nonconforming structures, the proposed rule would provide more flexibility for counties. The Department does not believe that there is an alternative method to achieve the rule intent, yet address the concerns that have been expressed.

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14. Long Range Implications of Implementing the Rule  
See Attachment- Part III

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15. Compare With Approaches Being Used by Federal Government  
There are no specific existing or proposed federal regulation that are intended to address the activities regulated by the shoreland zoning program or the proposed rule modifications.

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16. Compare With Approaches Being Used by Neighboring States (Illinois, Iowa, Michigan and Minnesota)  
See Attachment- Part IV

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17. Contact Name Russ Rasmussen	18. Contact Phone Number 608-267-7651
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This document can be made available in alternate formats to individuals with disabilities upon request.

## ADMINISTRATIVE RULES Fiscal Estimate & Economic Impact Analysis

### ATTACHMENT A

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1. Summary of Rule's Economic and Fiscal Impact on Small Businesses (Separately for each Small Business Sector, Include Implementation and Compliance Costs Expected to be Incurred)

Wisconsin's shoreland protection standards, under NR 115, Wis. Adm. Code, do not distinguish or contain different standards for businesses within the shoreland zone. Therefore, small businesses are not directly regulated or impacted by the proposed rule unless the business is located within the shoreland zone, then it must meet the same requirements as any other property owner in the shoreland zone. If a business is located in the shoreland zone and the structure is nonconforming or the property exceeds the impervious surface limits, the business may keep what they have and repair or maintain those structures. Given that a primary purpose of the proposed revisions is to ease the administrative burden on counties, some businesses including builders, contractors, building centers, landscapers, nurseries and garden centers may experience some indirect positive economic impacts.

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2. Summary of the data sources used to measure the Rule's impact on Small Businesses

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3. Did the agency consider the following methods to reduce the impact of the Rule on Small Businesses?

- Less Stringent Compliance or Reporting Requirements
- Less Stringent Schedules or Deadlines for Compliance or Reporting
- Consolidation or Simplification of Reporting Requirements
- Establishment of performance standards in lieu of Design or Operational Standards
- Exemption of Small Businesses from some or all requirements
- Other, describe:

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4. Describe the methods incorporated into the Rule that will reduce its impact on Small Businesses

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5. Describe the Rule's Enforcement Provisions

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6. Did the Agency prepare a Cost Benefit Analysis (if Yes, attach to form)

- Yes  No
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**ATTACHMENT TO ADMINISTRATIVE RULES  
FISCAL ESTIMATE AND  
ECONOMIC IMPACT ANALYSIS**

Revision of Rules on  
Ch. NR 115, Wisconsin's Shoreland Protection Program

*The purpose of this document is to comply with s. 227.137, Wis. Stats., which requires an agency to prepare an economic impact analysis for a proposed rule before submittal to the legislative council staff. The analysis discusses the anticipated costs and benefits of the proposed rule language on the environment, counties, property owners and businesses.*

**PART I**

Policy Problem Addressed by the Rule

Section 281.31(6), Stats. requires the department prepare and adopt general recommended standards and criteria for municipalities to protect navigable waters giving "particular attention to safe and healthful conditions for the enjoyment of aquatic recreation...the capability of the water resources...building setbacks from the water; preservation of shore growth and cover; shoreland layout for residential and commercial development; suggested regulations and suggestions for the effective administration and enforcement of such regulations." Section 59.692(1m), Stats. requires counties to adopt zoning and subdivision regulations for the protection of shoreland areas to effect the purposes of section 281.31 and to promote public health, safety, and general welfare.

The State's shoreland management program under Chapter NR 115 provides that shoreland zoning regulations shall: "further the maintenance of safe and healthful conditions; prevent and control water pollution; protect spawning grounds, fish and aquatic life; control building sites, placement of structures and land uses, and reserve shore cover and natural beauty." NR 115, Wis. Adm. Code, contains the statewide minimum standards for shoreland zoning in unincorporated areas.

Although the rule was recently revised in 2009 and went into effect on February 1, 2010, some counties have expressed concerns about implementation and enforcement of the minimum standards regulating impervious surfaces and nonconforming structures. The proposed revisions would address concerns associated with administering and implementing the impervious surface standards and the nonconforming structure standards in the rule. Further, minor changes to the vegetative management and administrative reporting standards will clarify the requirements under the rule and ease reporting requirements.

**Impervious Surface standards**

Current standards under ch. NR 115.05(1)(e), Wis. Adm. Code, specify that the impervious surface standards be applied to land within 300 feet of the ordinary high water mark. Shoreland mitigation is required if a property expands the impervious surfaces on the property above 15% and limits the amount of impervious surfaces on a property to a maximum of 30%. The proposed rule revisions would ease the application of the impervious surface standards by: 1) limiting application of the impervious surface standards to only riparian lots or non-riparian lots that are entirely within 300 feet of the ordinary high water mark; 2) allowing properties to exceed the maximum impervious surface standards if the property owner can show that the runoff from the impervious surfaces is not draining towards a lake or river or is being treated by an engineered system; 3) allowing counties to develop higher impervious surface limits in certain areas of the county that are already highly developed.

The current rule provides that counties shall regulate any impervious surface that is located within 300 feet of ordinary high water mark. Some counties have indicated that measuring 300 feet from the ordinary

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high water mark is administratively burdensome and result in properties where the impervious surface standards are only applied to a portion of a property and will thus; require variances or complex calculations of the impervious surface standards. The proposed modifications to the rule would limit application of impervious surface standards to only riparian lots or non-riparian lots that are located entirely within 300 feet of the ordinary high water mark.

Further, the impervious surface regulations currently provide that shoreland property may contain impervious surfaces up to 15%, without a permit. Once a property exceeds 15% impervious surfaces, then the property owner must receive a permit from the county and conduct shoreland mitigation to offset the impacts to the shoreland zone and adjacent waterway. Expanding the impervious surfaces above 30% would require a variance. Some counties and property owners have suggested that impervious surfaces that do not drain toward the waterbody or those that receive some kind of stormwater treatment have less of an impact on water quality than impervious surfaces that drain directly to the waterbody. The proposed rule language would allow property owners to develop or expand the impervious surfaces on their property, above the maximum impervious surface limit, if the property owner can show that the runoff from the impervious surface is not draining directly to the lake or river or that the impervious surface is being treated by an engineered stormwater system.

As described above, the current rule requires that property owners obtain a variance from the county, if the property owner wishes to expand the impervious surfaces on their lot above 30%. In some developed areas, the current maximum impervious surface standards already exceed the maximum impervious surface limit. Any further addition of impervious surfaces on these lots, even minor additions, would require a variance, representing an increased workload for counties.

The proposed rule language allows counties to adopt an ordinance that allows a higher percentage of impervious surfaces for areas of already highly developed shorelines. A highly developed shoreline areas, in the proposed rule language, are areas that were identified as an urbanized area or urban cluster in the 2010 US Census, areas that have a commercial, industrial or business land use classification, or any additional areas that meet the specifications in the proposed rule. Property owners in areas of highly developed shorelines would be allowed to expand the impervious surfaces on their lots, up to 30% for residential and 40% for commercial, industrial or business land uses, without a shoreland zoning permit. To expand the impervious surfaces above this limit, the property owner will have to receive a permit and provide shoreland mitigation. Finally, to expand the impervious surfaces on the property above 40% for residential and 60% for commercial, industrial or business land uses, the property owner would either have to obtain a variance or show that the additional impervious surface does not drain directly to the lake or river, or that the additional impervious surface is treated by an engineered system.

#### **Nonconforming Structure standards**

The nonconforming structure standards in ch. NR 115.05(1)(g), Wis. Adm. Code, allow property owners, whose principal structures are greater than 35 feet from the waterbody, to expand vertically within the required setback and relocate or replace the principal structure if the property owner completes a shoreland mitigation project. If the property owner chooses to relocate or replace the principal structure, the county must also determine whether there is any other compliant building location on the property and must require that all other nonconforming accessory structures be removed or relocated beyond the required setback. Further, property owners may expand principal structures vertically or horizontally beyond the required setback. All property owners are allowed unlimited maintenance and repair of their nonconforming structures, and the scope of these repairs is defined by the county ordinance.

The proposed rule language on shoreland standards would allow a one-time horizontal expansion within the setback with shoreland mitigation. This revision is to address concerns that some nonconforming principal structures, which are located within the shoreland setback, are either structurally inadequate to

allow for the addition of a second story or it is more desirable to build a minor first floor addition to accommodate the needs of the property owner. In addition, the proposed standards would eliminate the requirement that property owners must remove all other nonconforming accessory structures to relocate or replace their nonconforming principal structure. Removal of nonconforming accessory structures is often a key component of shoreland mitigation and if it is a requirement, the counties are not allowed to give credit for the removal of these structures, despite the benefits to the shoreland zone. Further, the counties identified that property owners tend to view the removal of accessory structures more favorably if removal of these structures is optional rather than a requirement.

Finally, two other minor changes to the nonconforming structure standards will clarify the statutory language and requirements associated with nonconforming uses and wet boathouses. Under s. 59.69(10)(am), Wis. Stats., if a nonconforming use ceases operation for more than 12 months, counties may require the use of the property to come into compliance with the county ordinances. The proposed changes to the rule would clarify the rule language to reflect this statutory language. The other minor change in the proposed rule seeks to eliminate the reference to the maintenance and repair of nonconforming wet boathouses, which are regulated by the department under s. 30.121, Wis. Stats.. This reference in NR 115.05(1)(g)7. to wet boathouses and compliance with s. 30.121, Wis. Stats. has caused some confusion because counties do not regulate boathouses based upon s. 30.121, Wis Stats.

#### **Vegetative Management Standards**

The current rule provides standards for when counties may allow vegetation to be removed from the vegetative buffer zone, which is the area within 35 feet of the ordinary high water mark. One of the standards provides that counties may allow a property owner to remove vegetation within the buffer zone if they are managing for exotic, invasive, damaged or diseased vegetation or vegetation that poses an imminent safety hazard if the area is replanted. However, the standard is unclear whether or not a county must require a permit for the removal of this type of vegetation. Therefore, the proposed rule revision would clarify that the county is not required to issue a permit for such activities.

#### **Reporting Standards**

Under NR 115.05(4), Wis. Adm. Code, counties are required to adopt an ordinance that contains a number of administrative and reporting requirements. One of those requirements is to submit any permit the county issues for a nonconforming structure, if requested by the department. The proposed rule would eliminate this requirement because of the administrative burden and cost to the counties and department.

## **PART II**

### **Summary of Rule's Economic and Fiscal Impact on Businesses and Local Government.**

Local county governments will be the primary party affected by the proposed changes in this rule. However, the level of that impact will vary county by county, and it will also vary over time. The initial fiscal impacts will result from ordinance adoption or revision and the costs will depend upon whether a) the county merely adopts the minimum standards, b) if the county adopts an ordinance that is more restrictive than the minimum standards, or c) if a county chooses to adopt an ordinance that allows higher impervious surface standards for highly developed shorelines. A 2006 survey asked counties to predict the average cost for initial adoption and implementation of NR 115, Wis. Adm. Code. 38% of the counties responded to the survey, identifying an average cost of \$17,841, with a standard deviation of \$33,059. Adoption of the model ordinance would require the least amount of staff time and effort, but an ordinance that develops more restrictive standards or allows for higher impervious surface standards for highly developed shorelines will result in additional costs for the counties to adopt an ordinance. The department anticipates that the additional costs to adopt an ordinance would be absorbed by the counties existing budgets and may require reallocation of staff priorities.

It is likely that the costs to adopt a shoreland ordinance that includes the proposed rule language, may be similar to the projected costs above, but may also be higher if a county chooses to adopt an ordinance that provides higher impervious surface standards for highly developed shorelines. To develop an ordinance that allows a higher percentage of impervious surfaces for highly developed shorelines, a county will have to map these areas, which may require the collection data to identify these areas it wishes to include in the designation. This mapping may result in additional staff time for development of the maps, public and or committee hearings. It is anticipated that the potential increase in costs for adopting an ordinance with higher impervious surface limits for highly developed shorelines, should be limited to approximately 15 counties if those counties choose to adopt the higher impervious surface standards into a shoreland ordinance. To help counties defray the cost of ordinance amendments, the proposed rule language would allow counties at least one year to bring their ordinance into compliance. Counties may also be able apply for and obtain Lakes Planning grants and River Planning grants from the department to help further defray amendment costs. Currently there are 12 counties that have adopted the standards in the current NR 115, Wis. Adm. Code. It is unclear whether or to what extent these 12 counties would further revise their shoreland zoning ordinance as a result of the proposed rule language.

Once the county adopts an ordinance, initial implementation of the ordinance will have short-term costs associated with county staff time explaining the new ordinance language to landowners and businesses. However these costs will decrease over time as county staff, landowners and businesses become more familiar with the new requirements. Additionally, each county will realize cost savings from the proposed rule language due to the reduced number of variances needed if the impervious surface and nonconforming structure standards are adopted.

An example of the potential costs and savings of implementing the proposed rule language, compared to the current rule, was provided by the Waukesha County Division of Planning and Zoning. Waukesha County issues approximately 281 permits per year for activities that involve either increasing or modifying the existing impervious surfaces within the shoreland zone. (Table 1) Like most counties, Waukesha has not adopted the current standards in NR 115 and does not currently require permits for driveways or walkways, which under the current and proposed NR 115, Wis. Adm. Code, may require a permit. Therefore, utilizing 281 permits per year for comparative analysis is a conservative estimate of the potential workload and costs savings for the county. A random sample by Waukesha County of 41 shoreland properties revealed that none of the properties were below the existing impervious surface standard of 15%, approximately half of the properties were above 15% but below the current maximum impervious standard of 30% and the remaining half of the properties exceeded the maximum impervious surface standards. (Table 2) Extrapolating that data across the entire county suggests that any increase in impervious surfaces within the shoreland zone of Waukesha County will likely require permits and shoreland mitigation, or a variance, which will result in an increase in staff workload for Waukesha County.

On the other hand the proposed rule would ease the administrative workload and costs for Waukesha county because most of the lakes and some of the rivers within Waukesha County would be considered highly developed shorelines. Thus the proposed changes to the impervious surface standards would reduce the number of administrative permits required with mitigation by 49%, because properties within highly developed shorelines that have less than 30% impervious surface on their lot would not be required to obtain a permit from the county or implement a shoreland mitigation plan. Further, the number of variances required for properties to exceed the maximum impervious surface standards would decrease at least 36% but could also decrease more if those properties could show that the impervious surfaces are draining away from the waterbody or are being treated by an engineered stormwater system.

Table 1. Waukesha County Shoreland Permitting

Average number of annual permits 2006-2011

Activity	Average # Permits
New Homes	48
Remodel/Additions	120
Accessory Buildings	46
Decks/Patios	67
Total	281

\*Note- Permits are not currently issued for driveways/walkways

Table 2. Waukesha County Average Percentage of Impervious Surface for Riparian Lots

% Impervious Surface	# of Example Sites	% of Example Sites
0-15%	0 of 41	0%
>15-30%	20 of 41	49%
>30-40%	15 of 41	36%
>40-60%	6 of 41	15%

Wisconsin's shoreland protection standards, under NR 115, Wis. Adm. Code, do not distinguish or contain different standards for businesses within the shoreland zone. Therefore, businesses or business sectors are either not directly impacted by the proposed rule, or businesses located within the shoreland zone must meet the same requirements as any other property owner in the shoreland zone. If a business is located in the shoreland zone and the structure is nonconforming or the property exceeds the impervious surface limits, the business may keep what they have and repair or maintain those structures.

Specific businesses and business sectors may be indirectly impacted by the proposed rule, depending upon the type of business and location of the business. Given that a primary purpose of the proposed revisions is to ease the administrative burden on counties, some businesses including builders, contractors, building centers, landscapers, nurseries and garden centers may experience some positive economic impacts. The proposed rule language will provide shoreland property owners with increased flexibility for use of their property. For example, the Wisconsin Builders Association estimates that the proposed rule language that would allow a one-time 200 square foot lateral expansion of nonconforming structure, with all other factors being constant and based upon an average construction cost of \$100 per square foot, would generate \$20,000 of economic activity per nonconforming structure in Wisconsin. However, the number of nonconforming structures is unquantifiable at this time but at a minimum measures in the thousands. Consequently, the department is incapable of quantifying the potential benefits to businesses that may result from the increased flexibility in the proposed rule language because it will be highly variable and will depend upon how much riparian property owners seek to develop or expand the structures on their property.

### **PART III**

#### Long Range Implications of Implementing the Rule

##### **Water Quality, Natural Scenic Beauty and Fish & Wildlife Habitat**

The primary impacts to Wisconsin's lakes and rivers from the proposed rule language will result from the changes to the impervious surface limits, particularly the proposed increase in impervious surface limits for highly developed shorelines, and the proposed change that would allow lateral expansion of nonconforming structures within the setback. These proposed changes to the current rule will allow more development within the shoreland zone than what is currently allowed under NR 115, Wis. Adm. Code, which is likely have long range implications on the water quality, natural scenic beauty, and fish and wildlife habitat of Wisconsin's lakes and rivers.

Impervious surfaces and development within the shoreland zone impact water quality by increasing runoff and pollutant loading into the waterway, which can result in sedimentation, soil erosion, increases

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in water temperature, increases in phosphorous and algae in lakes and rivers. Impervious surfaces and development within the shoreland zone impact fish and wildlife habitat due to declines in water quality and elimination of shoreline and nearshore habitat by the removal of vegetation or sedimentation that covers important habitat. Numerous studies have shown that fish and amphibian species decline significantly as impervious surfaces and development increases within the shoreland zone. Additionally the diversity of species, including birds and aquatic insects, declines as development occurs. Most of the studies have found that when impervious surfaces exceed 12% within a watershed, that the fish and wildlife diversity declines sharply.

While some studies have shown that maintenance of a shoreland buffer and stormwater ponds may mitigate some of these impacts to fish and wildlife habitat, the studies agree that there are no longer detectable benefits once the impervious surfaces in the watershed exceed 30%. However, it is important to note that once impervious surfaces exceed 30% within the watershed, the impacts on water quality and fish and wildlife habitat begin to be marginalized over time. Consequently, those watersheds that already exceed 30% impervious are likely already experiencing impacts to water quality and fish and wildlife habitat, such that the proposed rule changes may not result in any further measurable impacts over time. Therefore, while the proposed changes to the impervious surface limits and the nonconforming structure standards may result in impacts to the shoreland zone over time, the impacts are expected to be larger for those watersheds that currently have a lower percentage of impervious surfaces or development, whereas the already highly developed watersheds in the state may not have any noticeable or significant changes in water quality or fish and wildlife habitat.

Although studies have shown the substantial benefits to water quality, habitat and natural scenic beauty from maintaining a shoreland buffer and limiting impervious surfaces within a watershed, there is insufficient data or robust models that can calculate the actual costs and dollar values. If the department were to attempt to portray the actual costs of declining water quality, habitat, and natural scenic beauty, the department would need to know how restrictive of a shoreland ordinance a county would adopt, the pre-existing development trends on each individual lake and the potential changes to those development trends as a result of the proposed rule language. Then the department would have to develop a hydrologic model that evaluates changes in water quality as a result of development for each individual lake. Once a model is developed the department would then need to determine people's willingness to pay via contingent valuation surveys of riparian property owners, recreational users of the waterways and passive users, who would enjoy the shoreland zone for the important functions it provides, such as bird habitat for bird watchers and ornithologists, for each lake. Consequently, the department does not have the resources available to it to accurately portray the costs of declining water quality, habitat and natural scenic beauty on all 15,000 lakes in Wisconsin, not to mention the thousands of miles of rivers and streams,

#### **Counties & shoreland property owners**

The long-term effects of the proposed rule revision for counties are reduced administrative costs and greater flexibility for administering a shoreland zoning ordinance as described above. Additionally shoreland property owners will benefit from the increased flexibility and decreased permit requirements when the property owner seeks to expand the impervious surfaces or a nonconforming principal structure. Shoreland property owners enjoy many benefits from higher water quality, including improved fishing and wildlife viewing, opportunities to recreate in clear water, and increased enjoyment of natural beauty. Consequently, property owners may also experience costs from the proposed rule revisions in the form of decreased property value as a result of additional development.

A number of different studies have estimated the effects of increased water clarity (Secchi measurements) on property values. These studies used hedonic pricing models to examine the change in property values

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occurring over time. Studies, particularly those in Wisconsin, have found a change of \$7,894 to \$17,892 in property value for an increase in water clarity of one meter in depth. Lower valued properties would probably experience less of a change than higher valued properties. Therefore, if the proposed rules allow for additional development within the shoreland zone and if some waterbodies experience a decline in water quality over time, it is reasonable to conclude that the proposed rule language may have a negative impact on property values over time. However, it is difficult to estimate the potential impacts to property value, in large part because it will depend upon many variables, including the degree of impacts, the real estate market and the type of waterbody.

## **PART IV**

### Compare with Approaches Being Used by Neighboring States (Illinois, Iowa, Michigan and Minnesota)

*Minnesota and Wisconsin have considerable inland water resources and have developed shoreland zoning standards with similar goals and standards for development. Other neighboring states to Wisconsin lie within a different ecological landscape and contain few inland water resources. The approaches to shoreland zones taken by other neighboring states have less in common than Minnesota and Wisconsin and in general offer fewer protections for the shoreland zones.*

#### **Minnesota**

The State of Minnesota has a shoreland program that is also being revised. The Minnesota DNR's website states that an increase in development pressure around lakes and rivers has raised concerns about water quality and impacts on lake use, therefore resulting in the need to review current shoreland minimum standards in the state. Minnesota bases their shoreland program on statewide classification of all surface waters based on size and shape, amount and type of existing development, road and service accessibility, existing natural character of the water and other parameters. Waterbodies are classified as natural environment lakes, recreational development lakes, general development lakes, remote river segments and forested rivers. Each class has specific standards associated with the shoreland ordinance including building setbacks, lot sizes and widths, bluff impact zones, slope requirements, impervious surface limits and others. The state has a somewhat similar standards in treatment of nonconforming structures and limits impervious surfaces to 20%, which is a lower limit than Wisconsin's current rule and would be significantly less than the proposed highly developed shoreline standard in the proposed rule.

#### **Michigan**

The State of Michigan has a wild and scenic rivers protection program to provide special protection to designated rivers. This program is managed similarly to other wild and scenic river protection programs nationwide. The protection standards are outlined in Natural River Zoning Rule 281 which outlines standards for river setbacks, minimum lot widths, special vegetation management standards, and nonconforming structure improvements. The program applies only to wild and scenic rivers. Inland lakes or rivers that are not designated are not protected under the program. Additional activities that may have potential impacts to the public trust or riparian rights, or that may impair or destroy the waters or other natural resources of the state, including inland lakes and streams, the Great Lakes, wetlands, and groundwater, are regulated by the Department of Environmental Quality.

#### **Illinois**

The State of Illinois regulates inland waters through an administrative code detailing conservation measures for public waters. The purpose of the program is to protect the public's interests, rights, safety and welfare in the State's public bodies of water. More specifically, construction is regulated to prevent obstruction to, or interference with, the navigability of any public body of water; encroachment on any public body of water; and impairment of the rights, interests or uses of the public in any public body of

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water or in the natural resources thereof. Illinois does not have a specific program for shoreland management or shoreland ordinance requirements.

**Indiana**

The state of Indiana regulates lake-side construction activities and provides standards for the activities along and within public freshwater lakes. The state also has standards for nonconforming uses and nuisances including the removal of a lawful nonconforming use if the structure or facility affects public safety, natural resources, natural scenic beauty or the water level of a public freshwater lake. Indiana does not have a specific program for shoreland management or shoreland ordinance requirements.

**Iowa**

The state of Iowa has an integrated watershed management and surface water regulation program which includes motor regulations and slow-no-wake areas to reduce shore erosion and an invasive species program to help safeguard the biological integrity of the lakes and river systems in Iowa. Iowa does not have a specific program for shoreland management or shoreland ordinance requirements. Most of Iowa's environmental programs are directly mandated by the federal government and required components of Environmental Protection or Federal Emergency Management Agency programs.

ATTACHMENT B  
DNR Response to Comments  
Proposed Revisions to Ch. NR 115, Wis. Adm. Code  
Board Order WT-06-12

## I. GENERAL SUMMARY

The department scheduled five public hearings and accepted public comment from June 27<sup>th</sup> until September 9<sup>th</sup>, 2013. Public Hearings were held in Greenville, Delafield, Tomah, Spooner and Tomahawk. A total of 146 people attended the hearing, but only 44 people provided oral testimony at the hearings. During the public comment period, the department received 410 comments, both written or oral, from individuals, organizations and local governments on the proposed rule revisions. Of the comments that were received 93 comments were in support of the proposed revisions, 280 comments were opposed, and 37 comments were neutral. Of those that were opposed to the rule revisions there were 256 comments that were opposed because the rule was too permissive and 24 comments were opposed because the rule was too restrictive. The following state legislative representatives, organizations and local governments provided oral or written comments on the proposed rule revisions.

### In Support

Big Hills Lake Management District  
Dodge County Zoning  
Door County Zoning Administration  
Kenosha County Planning & Development.  
League of Wisconsin Municipalities  
Lincoln County Zoning  
Marathon County Planning & Development  
North Lake Management District  
Oneida County Planning & Development  
Realtors Association of NW Wisconsin  
Sen. Tom Tiffany – 12<sup>th</sup> Senate District  
Town of Merrimac  
Town of Oshkosh  
Vilas County Zoning Department  
Waushara County Land Conservation & Zoning  
Wisconsin Counties Association  
Wisconsin County Code Administrators  
Wisconsin Realtors Association  
Wisconsin Realtors Association of SE WI

### In Opposition- rule too permissive

Bayfield County Lakes Forum  
Clean Wisconsin  
Diamond Lake Assoc.  
Douglas Co. Association of Lakes & Streams  
Eagle Springs Management District  
Eau Claire Area Lakes Property Owners  
Manitowish Waters Lake Association  
Midwest Environmental Advocates  
Milwaukee Riverkeeper  
River Alliance of WI  
St. Croix River Association Board of Directors  
Tainter Menomin Lakes Improvement Association  
Terra Firma WI  
Tri-Lakes Protection Association  
Town & County Resource Conservation & Develmnt.  
US Department of Interior  
Vilas County Lakes and Rivers Association  
Washburn Co. Lakes & Rivers Assoc  
Waupaca Chain O' Lakes Protection & Rehab Dis  
Whitefish Lake Conservation Organization  
Wisconsin Association of Lakes  
Wisconsin Chapter of the Nature Conservancy  
Wolflake Property Owners Association

### In Opposition- rule still too restrictive

Rep. Garey Bies – 1 <sup>st</sup> Assembly District	Racine County Planning & Zoning
Rep. Mary Czaja – 35 <sup>th</sup> Assembly District	Rep. Rob Swearingen – 34 <sup>th</sup> Assembly District
Forest County	Town of Burlington
Forest County Zoning	Town of Peshtigo
Rep. Jeff Mursau – 36 <sup>th</sup> Assembly District	Town of Waterford
Rep. John Nygren – 89 <sup>th</sup> Assembly District	Town of Wausaukee Land Use Committee
Rep. Al Ott – 23 <sup>rd</sup> Assembly District	Waterford Waterway Management District
Racine County	

The department also received comments from the Legislative Council Rules Clearinghouse. The department thoroughly considered and evaluated all of the comments that were received and has attempted to address the concerns of the Legislative Council Rules Clearinghouse. The department has re-organized the impervious surface section of NR 115 to provide additional clarity and has made a couple of other modifications to the nonconforming structure section and impervious surface section to address comments and concerns that were expressed during the public comment period. Section II contains a summary of the suggested modifications to the proposed rule, which were received during the public comment period, beginning with the comments from the Legislative Council Rules Clearinghouse and then those that were received from counties, organizations or individuals. Then Section III includes a summary of the most common general comments received by the department, separated by those that are in support and those that are opposed to the proposed rule revisions and the department's response to those comments.

## II. SUGGESTED MODIFICATIONS TO THE PROPOSED RULE LANGUAGE

During the public comment period the department received a number of suggested modifications to the proposed rule language including those from the Legislative Council Rules Clearinghouse. The department has considered the suggested modifications and has attempted to address a number of the suggested modifications through slight modifications in the proposed rule language. The changes provide clarity, flexibility and should address most of the concerns expressed. The suggested modifications are below, including the department's response, and are broken into two sections: the comments from the Rules Clearinghouse and the other suggested modifications.

### A. COMMENTS FROM THE LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

#### 2. *Form, Style and Placement in Administrative Code*

*a. In the enumeration of sections treated by the proposed rule, "NR 115.01 (c) 2. d." should be written as "NR 115.05 (1) (c) 2. d.". Similarly, the enumeration of sections treated by the rule should refer to "NR 115.05 (1) (e) (intro.), 1., and 2".*

Response: This change was made.

*b. In the analysis prepared by the department, in the "Revision Rationale" section, the slashed alternative "and/or" should be deleted and replaced with the word or phrase that reflects the department's intent. [See s. 1.01 (9) (a) Manual.]*

Response: This change was made.

*c. The rule analysis should specify the place where comments may be submitted and a deadline for submission. [See s. 1.02 (2) (a) 13., Manual.]*

Response: No change was made prior to the public hearings and public comment period.

*d. Generally, the department may wish to revise SECTION 2 of the proposed rule to better reflect the substance of the department's amendments. For example, the underscored material appears to relate to two definitions of "highly developed shoreline" as well as two impervious surface standards (one general standard, one standard for highly developed shoreline). The substance of these amendments may be better communicated by repealing and recreating the entire par. (e). [See s. 1.02 (3), Manual.]*

Response: The department has attempted to address this comment by re-organizing the impervious surface section in NR 115.05(1)(e).

*e. Throughout the proposed rule, cross-references should conform to the styles prescribed by s. 1.07 (2), Manual. If a sentence ends with a cross-reference that includes a period, a second period is unnecessary.*

Response: This change was made.

*f. When a rule provision is repealed and recreated, or created, the treated material should not be underscored.*

Response: This change was made.

*g. SECTION 6 of the proposed rule includes many rule provisions that are not subject to treatment. It appears that more specific treatments may be appropriate. For example, it appears SECTION 6 could be replaced by sections of the proposed rule that amend s. NR 115.05 (1) (g) 4. (Note), 5. (intro.), a., and c., and 6. a.; and repeal s. NR 115.05 (1) (g) 6. f. and 7. It appears unnecessary to renumber s. NR 115.05 (1) (g) 6. g.*

Response: This change was made.

*h. In SECTION 8, material to be removed from the code should be indicated and stricken-through.*

Response: This change was made.

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

*a. In the analysis prepared by the department, in the "Major provisions and new requirements" section, "current" should be changed to "currently".*

Response: This change was made.

*b. In s. 115.05 (1) (e) 2. b., it appears that "over 30% of the lot" should be changed to "over 30% of the lots".*

Response: This change was made.

*c. In s. 115.05 (1) (e) 3m. title, "Impervious Surfaces" should be changed to the lowercase.*

Response: This change was made.

## B. OTHER SUGGESTED MODIFICATIONS

1. *COMMENT: Modify the hearing requirement for the adding areas of highly developed shorelines, to that used for variances, special exceptions or conditional uses, and map amendments under NR 115.05(4)(h).*

Response: While this is the administrative process that the department intended for counties to utilize in creating additional areas of highly developed shorelines, the department has attempted to clarify the language in the proposed rule language NR 115.05(1)(e)2m.b.

2. *COMMENT: The department should require that any stormwater devices utilized to treat runoff under NR 115.05(1)(e)3m. should be engineered devices that are stamped by a state-licensed engineer and should provide guidance to counties for implementing, monitoring and enforcing this requirement.*

Response: No change was made. However, the department plans on providing guidance to the counties to aid in the implementation and enforcement of this provision and counties may require the devices be engineered and stamped by a licensed professional engineer.

3. *COMMENT: Instead of limiting the application of the impervious surface limits to riparian properties or only non-riparian properties that fall entirely within 300 feet of the ordinary high water mark under NR 115.05(1)(e)1., the department should require that any property that falls within 300 feet of the ordinary high water mark, even if it is only a portion of the lot, then the impervious surface limits apply to the entire property.*

Response: No change was made. The purpose of the rulemaking process was to ease the administrative burden on counties. The proposed language would limit the number of properties that would fall within the impervious surface limits, thus reducing the administrative workload for counties in implementing the impervious surface standards. However, counties may be more restrictive in regulating impervious surfaces and could adopt the proposed modifications mentioned in this comment and regulate any property that falls even partially within 300 feet of the ordinary high water mark.

4. *COMMENT: Limiting the application of the impervious surface limits to riparian lots or non-riparian lots that fall entirely within 300 feet of the ordinary high water mark, will allow property owners who have deeper lots, in excess of 300 feet, to create an outlot along the lakeshore to avoid the impervious surface limits. The language in the rule should be modified to address this situation.*

Response: The department has attempted to address this concern by adding a sentence in NR 115.05(1)(e)1m. Further, the county may have other zoning restrictions or standards that could prevent or discourage property owners from creating an outlot to avoid the impervious surface limits. For example, some counties review all land divisions, some counties prohibit the construction of an accessory structure, such as a boathouse or stairs, if there is not a principal structure on the property and some counties may choose to be more restrictive in regulating impervious surfaces and could adopt the proposed modifications mentioned in comment 3) above and regulate any property that falls even partially within 300 feet of the ordinary high water mark.

5. *COMMENT: The proposed rule creates differential treatment for urban areas and rural areas in the proposed impervious surface limits for highly developed shorelines. The proposed rules should not provide preferential treatment for urban areas but should provide economic and regulatory equality for all areas of Wisconsin, when limiting the amount of impervious surfaces on the property.*

Response: Modification to the rule language was made in NR 115.05(1)(e)2m.c. to provide more flexibility for counties that choose to adopt a highly developed shoreline standard and to encompass more areas of the state that may be already developed above the impervious surface limits.

6. *COMMENT: Modify the proposed horizontal or lateral expansion provision in NR 115.05(1)(g)5.(c) to limit the lateral expansion of a nonconforming principal structure to 200 sq. feet over the life of the structure instead of a one-time expansion of 200 sq. feet to allow property owners to build smaller expansions if desired.*

Response: Modification to the rule language was made in NR 115.05(1)(g)5.(c).

7. *COMMENT: The proposed rule should recognize that relocation of some principal structures to meet the setbacks would actually result in more environmental damage and undue hardship to the property owner or clarify that variance should be issued in these situations.*

Response: No change. For principal structures that are at least 35 feet from the ordinary high water mark, counties should take into consideration the potential limitations on the property when considering the relocation of a nonconforming principal structure, NR 115.05(1)(g)6.d.. This would include other zoning restrictions, such as highway setbacks, utilities, topographic or other environmental limitations on the property. If the structure is within 35 feet, the property owner would have to obtain a variance to expand or replace a nonconforming structure, because these structures are located within the vegetative buffer zone and tend to have the greatest impacts on the shoreland zone. The standards for issuance of a variance are established by statute and broadly apply to any zoning variance. These standards have been further defined over time through case law. Boards of Adjustment can certainly take into consideration property limitations and the hardship that relocation of the structure would put on the property owner, when taking into consideration the issuance of a variance.

8. *COMMENT: The department should modify the language regarding maintenance and repair of nonconforming structures to clarify whether a property owner can conduct exterior remodeling, and replace or enhance components of the structure.*

Response: The department made some slight modifications to NR 115.05(1)(g)4. to clarify that exterior remodeling is allowed and that electrical and plumbing systems, insulation, doors, windows or a roof may be replaced or enhanced. The department did not modify the requirements that maintenance and repair of a nonconforming principal structure must be within the existing building envelope of the existing structure.

9. *COMMENT: In calculating of the impervious surface limits on a property the department should clearly reference that counties do not need to include treated impervious surfaces in that calculation.*

Response: The department modified NR 115.05(1)(e)1m. and 3m. to cross reference the calculation of impervious surfaces with the treated impervious surface section.

10. *COMMENT: The proposed rule should exclude areas from the impervious surface limits if the area is served by a public sanitary sewer.*

Response: Modification to the rule language was made in NR 115.05(1)(e)2m.c. to provide more flexibility for counties that choose to adopt a highly developed shoreline standard for those areas that are currently served by sanitary sewer.

### III. OTHER GENERAL COMMENTS RECEIVED DURING THE PUBLIC COMMENT PERIOD

Comments- Neutral	37
Comments- Support	93
Comments - Opposed-too restrictive	24
Comments -Opposed-too permissive	256
Total Number of Comments	410

#### A. COMMENTS IN SUPPORT OF THE RULE REVISIONS

There were 93 people that submitted comments in support of the proposed rule revisions. The comments in support of the rule revisions and the department's response may be summarized as follows.

1. *Comment: The proposed revisions represent a better balance between property rights and the environment and will provide more flexibility for property owners.*

Response: Wisconsin statutes require the Department to set minimum statewide standards to protect water quality, fish and wildlife habitat and natural scenic beauty (s. 281.35, Wis. Stats.). While some supporters prefer more restrictive or more lenient standards, the rule attempts to balance science with private property rights. Shoreland zoning is ultimately a partnership and it requires that the department work with counties to develop a rule that balances protection of the resource with the administrative burden of implementing the minimum standards in the rule.

2. *Comment: Stricter shoreland standards are not the answer.*

Response: The existing and proposed rule language in NR 115 represents an interwoven web of standards that allow some reasonable development within the shoreland zone while requiring property owners to offset those impacts through mitigative measures such as restoration of the shoreland buffer zone, rain gardens or other stormwater treatment devices.

3. *Comment: Will promote denser development*

Response: The proposed rule revisions would not modify the minimum lot size standards that have been in NR 115 since its initial adoption in 1968. Therefore, development won't necessarily be denser as a result of the proposed revisions, but would allow already densely developed areas more flexibility to develop their parcels.

4. *Comment: Current impervious surface standards are too restrictive and impracticable.*

Response: Numerous studies have shown that fish and amphibian species decline significantly as impervious surfaces and development increases within the shoreland zone. Additionally the diversity of species, including birds and aquatic insects, declines as development occurs. Most of the studies have

found that when impervious surfaces exceed 12% within a watershed, that the fish and wildlife diversity declines sharply.

While some studies have shown that maintenance of a shoreland buffer and stormwater ponds may mitigate some of these impacts to fish and wildlife habitat, the studies agree that there are no longer detectable benefits once the impervious surfaces in the watershed exceed 30%. However, it is important to note that once impervious surfaces exceed 30% within the watershed, the impacts on water quality and fish and wildlife habitat begin to be marginalized over time. Consequently, those watersheds that already exceed 30% impervious are likely already experiencing impacts to water quality and fish and wildlife habitat, such that the proposed rule changes may not result in any further measurable impacts over time.

The proposed changes to the impervious surface limits recognizes that some lakes and rivers in Wisconsin already exceed 30% impervious along their shorelines and the current standards would require many property owners to receive variances for even minor additions. The proposed rule attempts to allow some additional development within the shoreland zone with the implementation of a shoreland mitigation project.

5. *Comment: Even with these modifications the rule is still too burdensome*

Response: While the revision offers more flexibility than current law, waterfront property owners will have to make calculated decisions when considering improving or making changes on their lots. Therefore, costs will differ for each property owner based on their individual goals for their property and adjacent water body. Property owners may incur costs to mitigate, but only when they choose to modify buildings or surfaces in ways that exceed dimensional standards. In some cases, mitigation measures may save money for property owners. Corporate landowners can save between \$270 to \$640 per acre in annual mowing and maintenance costs when they keep open lands as a natural buffer instead of replacing it with turf.

While local county governments will experience fiscal impacts to amend their shoreland ordinances the costs will depend upon whether: a) the county merely adopts the minimum standards, b) the county adopts an ordinance that is more restrictive than the minimum standards, or c) the county chooses to adopt an ordinance that allows higher impervious surface standards for highly developed shorelines. Adoption of the model ordinance would require the least amount of staff time and effort, but an ordinance that develops more restrictive standards or allows for higher impervious surface standards for highly developed shorelines will result in additional costs for the counties to adopt an ordinance.

To help counties defray the cost of ordinance amendments, the proposed rule language would allow counties at least one year to bring their ordinance into compliance. Counties may also be able to apply for and obtain Lakes Planning grants and River Planning grants from the department to help further defray amendment costs. Currently there are 12 counties that have adopted the standards in the current NR 115, Wis. Adm. Code. It is unclear whether or to what extent these 12 counties would further revise their shoreland zoning ordinance as a result of the proposed rule language.

Once the county adopts an ordinance, initial implementation of the ordinance will have short-term costs associated with county staff time explaining the new ordinance language to landowners and businesses. However these costs will decrease over time as county staff, landowners and businesses become more familiar with the new requirements. Additionally, each county will realize cost savings from the proposed rule language due to the reduced number of variances needed if the impervious surface and nonconforming structure standards are adopted.

## B. COMMENTS OPPOSED TO THE RULE BECAUSE IT IS TOO RESTRICTIVE

There were 24 people that submitted comments opposed to the proposed rule revisions because the proposed rule was still too restrictive. The comments from and response to those who were opposed to the rule because it was still too restrictive may be summarized as follows:

1. *Comment: The proposed rule is still too burdensome for property owners and the counties.*

Response: While the revision offers more flexibility than current law, waterfront property owners will have to make calculated decisions when considering improving or making changes on their lots. Therefore, costs will differ for each property owner based on their individual goals for their property and adjacent water body. Property owners may incur costs to mitigate, but only when they choose to modify buildings or surfaces in ways that exceed dimensional standards. In some cases, mitigation measures may save money for property owners. Corporate landowners can save between \$270 to \$640 per acre in annual mowing and maintenance costs when they keep open lands as a natural buffer instead of replacing it with turf.

While local county governments will experience fiscal impacts to amend their shoreland ordinances the costs will depend upon whether: a) the county merely adopts the minimum standards, b) the county adopts an ordinance that is more restrictive than the minimum standards, or c) the county chooses to adopt an ordinance that allows higher impervious surface standards for highly developed shorelines. Adoption of the model ordinance would require the least amount of staff time and effort, but an ordinance that develops more restrictive standards or allows for higher impervious surface standards for highly developed shorelines will result in additional costs for the counties to adopt an ordinance.

To help counties defray the cost of ordinance amendments, the proposed rule language would allow counties at least one year to bring their ordinance into compliance. Counties may also be able to apply for and obtain Lakes Planning grants and River Planning grants from the department to help further defray amendment costs. Currently there are 12 counties that have adopted the standards in the current NR 115, Wis. Adm. Code. It is unclear whether or to what extent these 12 counties would further revise their shoreland zoning ordinance as a result of the proposed rule language.

Once the county adopts an ordinance, initial implementation of the ordinance will have short-term costs associated with county staff time explaining the new ordinance language to landowners and businesses. However, these costs will decrease over time as county staff, landowners, and businesses become more familiar with the new requirements. Additionally, each county will realize cost savings from the proposed rule language due to the reduced number of variances needed if the impervious surface and nonconforming structure standards are adopted.

2. *Comment: NR 115 will negatively affect property values.*

Response: Studies show that property values do not decrease in response to zoning ordinances and in many cases continue to increase under more restrictive zoning provisions. Searches revealed no data showing that property values have decreased as a result of the adoption of zoning standards.

Data from Wisconsin and across the nation demonstrate that water quality, fish and wildlife, and natural scenic beauty have a quantifiable positive effect on property values and recreation-based economic sectors. Local and state economies are affected by water quality, fish and wildlife, and natural scenic beauty, as demonstrated by studies in Wisconsin and elsewhere. The presence of water resources of good quality contributes positively to local economic activity.

3. *Comment: Should give more counties relief from the impervious surface limits*

Response: The purposes, established by the Wisconsin legislature, were to set the minimum statewide shoreland zoning standards to protect water quality, fish and wildlife habitat and natural scenic beauty (s. 281.31, Wis. Stats.). While some would prefer more restrictive standards and some would prefer more lenient standards, shoreland zoning is a partnership and the department must balance the purposes of shoreland zoning and science with the rights of property owners and the burden on counties to implement the rule. The impervious surface standards play an important role in protecting our lakes and rivers while allowing a reasonable level of development.

4. *Comment: Shoreland zoning is an unfunded mandate for counties*

Response: With the exception of Milwaukee County, all counties currently administer shoreland ordinances. Ordinance development and adoption are eligible for DNR Lake and River grants of \$10,000 to \$50,000 available on an annual basis. In the past, many counties have taken advantage of available grants to revise ordinances and improve administrative practices.

By rule the Department cannot provide or require funding or specific commitments of funds. However, in the past the Department has been able, through existing grant programs (see above), to fund ordinance adoption during the two-year adoption period and develop model grant proposals for ordinance adoption.

Additionally, the changes to the administrative and enforcement provisions create more flexibility and should reduce county costs of administering the current rule by easing the application of the impervious surface limits, reducing the number of variances by allowing counties to adopt higher impervious surface limits for highly developed shorelines and providing more flexibility for nonconforming structures, and eliminating the requirement that counties submit copies of all nonconforming structure permits. Also some of the Department duties, such as providing a model ordinance, technical assistance and training for local governments, reduce local costs.

5. *Comment: NR 115 takes away property rights and violates citizens constitutional rights*

Response: Private property rights are fundamental to American society and are recognized in the proposed rule (e.g., provisions increasing flexibility for continued use of existing buildings and substandard lots; proposed standards do not strictly adhere to scientific thresholds for water quality or habitat impacts). Socially and legally, the right to use property is not so absolute that it allows the right to harm others (*Just v. Marinette*, 1972). With the importance of water resources to Wisconsin's economy and culture, the state's Constitution, legislative, judicial and administrative systems treat lakes and streams as if they are owned by all and seeks to maximize the benefits for all (*Hixon v. PSC*).

6. *Comment: There is no scientific proof that the shoreland zoning standards are necessary to protect the environment. Other sources of pollution to lakes should be controlled first.*

Response: Since the adopt of NR 115 in 1968, numerous studies have found that protection of the shoreland zone is necessary to maintain water quality and fish and wildlife habitat and that shoreland zoning is important to protect the natural scenic beauty of our waterways and tourism.

Other sources of pollution to our lakes and rivers are regulated under different local and state programs. For example construction site erosion control and stormwater runoff is regulated by the DNR, Dept. of Transportation, municipal ordinances, and the Department of Safety and Professional Services. Agricultural runoff is regulated by the DNR, Department of Agriculture, Trade and Consumer Protection, and through municipal ordinances. Pesticides and Fertilizers are regulated by the Department of Agriculture, Trade and Consumer Protection and through municipal ordinances. Finally, wastewater discharges are regulated by the DNR.

7. *Comment:* NR 115 discriminates against town residents because the rules don't apply in cities and villages

Response: While Section 59.692(7) requires cities and villages to apply the county shoreland provisions to areas annexed after May 7, 1982 and areas incorporated since April 30, 1984. However, no Wisconsin Statutes require shoreland zoning in areas of cities and villages within the municipal boundary before May 7, 1982. Absent such a statutory mandate from the legislature, the Department has no authority to require local governments to adopt shoreland zoning for areas not required to adopt such zoning by the legislature.

### C. COMMENTS OPPOSED TO THE RULE BECAUSE IT IS TOO PERMISSIVE

There were 256 people that submitted comments opposed to the proposed rule revisions because the rule was too permissive. The comments from and response to those who opposed the rule because it was too permissive may be summarized as follows:

1. *Comment: Opposed to the relaxation of the impervious surface and nonconforming structure standards.*

Response: The Wisconsin legislature stated that the purpose of setting the minimum statewide shoreland zoning standards was to protect water quality, fish and wildlife habitat and natural scenic beauty (s. 281.31, Wis. Stats.). However, shoreland zoning is a partnership and the department must balance the purposes of shoreland zoning and science with the rights of property owners and the burden on counties to implement the rule. Counties have the ability and may choose to establish more restrictive impervious surface standards. While the nonconforming structure standards will now be the minimum and maximum standards, any expansion of a nonconforming structure will also have to comply with the impervious surface limits in NR 115.

2. *Comment: The current rule was already a compromise between science and property rights and should be implemented.*

Response: Wisconsin statutes require the Department to set minimum statewide standards to protect water quality, fish and wildlife habitat and natural scenic beauty (s. 281.31, Wis. Stats.). While some supporters prefer more restrictive standards or explicit adherence to scientifically derived parameters (e.g., impervious surface), the rule attempts to balance science with private property rights. Further, shoreland zoning is a partnership that requires the department to work with counties to develop a rule that balances protection of the resource with the administrative burden of implementing the minimum standards in the rule.

3. *Comment: The proposed revisions would not protect the shoreland zone and will impact fish and wildlife habitat.*

The department agrees that the cumulative effect of development within the shoreland zone may negatively impact the water quality, fish and wildlife habitat or natural scenic beauty of Wisconsin's lakes and rivers. However, the existing and proposed rule language in NR 115 represents an interwoven web of standards that allow some reasonable development within the shoreland zone while requiring property owners to offset those impacts through mitigative measures such as restoration of the shoreland buffer zone, rain gardens, or other stormwater treatment devices.

4. *Comment: The proposed changes to the impervious surfaces standards will not reduce county oversight and will ultimately result in more runoff to lakes and rivers.*

Response: While the department agrees that oversight of the impervious surface limits will still be necessary even with the revisions to NR 115, reducing the application of the impervious surface limits to only riparian lots or non-riparian lots that are entirely within 300 feet of the will reduce some of the administrative burden for counties. Additionally the higher impervious surface limits will reduce the number of variances counties will need to process for properties that are located within a highly developed shoreline by allowing some expansion. The pre-treatment option for impervious surfaces and the requirement that property owners complete a shoreland mitigation project if they exceed the impervious surface limits, will help to offset the water quality impacts from the proposed development.

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

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

WT-06-12

Analysis prepared by the Department of Natural Resources

**Statutory authority:** Sections 59.692, 227.11 (2) (a), and 281.31, Stats.

**Statutes interpreted:** Sections 59.69, 59.692, 59.694 and 281.31, Stats.

**Plain Language Rule Analysis:**

**Background**

Since August 1, 1966, when the Wisconsin Legislature passed the Water Resources Act (as created by Chapter 614, Laws of 1965), the purpose and direction for shoreland ordinances has been: "To aid in the fulfillment of the state's role as trustee of its navigable waters and to promote public health, safety, convenience, and general welfare."

Now codified at s. 281.31, Stats., Wisconsin's Water Resources Act utilized a novel approach toward comprehensive pollution control by supplementing state-level regulation of direct polluters (industries and municipal treatment plants) with county-administered shoreland ordinances, sanitary codes, and subdivision regulations to control indirect pollution sources. The law required the state to establish practical minimum standards and workable regulations in an area where there had been little experience. The act's requirement to enact shoreland ordinances is part of the state's active public trust duty, which requires the state to protect navigable waters not only for navigation, but also to protect and preserve those waters for fishing, recreation and scenic beauty.

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

**Authority**

The proposed amendments to ch. NR 115 are intended to ease the administrative burden of a county to implement the current rule and to give a county more flexibility in how they regulate land use in shorelands. The proposed amendments will also give shoreland property owners more land use options, while still protecting the public interest in navigable waters and adjacent shorelands. Section 281.31(6), Stats., provides: "Within the purposes of sub. (1), the department shall prepare and provide to municipalities general recommended standards and criteria for navigable water protection studies and planning and for navigable water protection regulations and their administration." Section 59.692(1m), Stats., provides that each county shall zone by ordinance all shorelands in its unincorporated area. Section 59.692(1)(c), Stats., defines "shoreland zoning standard" to mean "a standard for ordinances enacted under this section that is promulgated as a rule by the department." Section 227.11(2)(a), Stats., gives the department the authority to promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purposes of the statute.

### Revision Rationale

NR 115 was created to protect water quality, fish and wildlife habitat and scenic beauty along navigable lakes and rivers by establishing statewide minimum standards including lot sizes, building setbacks from the water's edge, and limits on tree removal. Controlling the density of development along the waters and creating a buffer around them was the best management practice at the time the rule was adopted in 1970. In response to concerns raised by the counties regarding the implementation and administration of the state's current shoreland zoning standards in NR 115, the department agreed to revise the regulations to address key concerns relating to the impervious surface standards and nonconforming structure standards and to clarify a vegetative management and reporting standard. The proposed revisions to NR 115 are necessary to address the shoreland areas of the state that were developed prior to the revisions in NR 115 went into effect on February 1, 2010. Many of these areas already exceed the impervious surface standard and/or the maximum impervious surface standard. Any proposed development on these properties would result in an administrative and implementation burden on counties, which would have to require the property owners to either conduct mitigation for any future expansions or receive a variance. In addition, the proposed changes allow for a one time lateral expansion in the setback, providing more flexibility for property owners with nonconforming structures that are structurally unable to expand vertically and are unable to expand beyond the setback. Additional changes are minor clarifications of the vegetative management and reporting requirements of the shoreland zoning standards in NR 115.

### Revision Process

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

### Major provisions and new requirements

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

### **Federal Regulatory Analysis:**

There is no specific existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule.

### **State Regulatory Analysis:**

Wisconsin's Shoreland Management Program is a partnership between state and local governments that requires development near navigable lakes and streams to meet statewide minimum standards. Each Wisconsin county has shoreland ordinance provisions that protect water resource values, water quality, recreation and navigation, fish and wildlife habitat, and natural scenic beauty. Other than the nonconforming structure and substandard lot standards, county ordinances must meet or exceed the minimum state standards contained in Chapter NR 115, Wisconsin Administrative Code. The shoreland provisions include:

- setbacks for structures from waterways
- minimum lot sizes
- controls on removing shoreland vegetation
- standards for land disturbance activities
- protection of wetlands
- restrictions on improvements to nonconforming structures

Current development trends continue to pose major challenges to the shoreland program. As new development occurs, long continuous sections of natural shorelines are broken into small fragmented

patches. This reduces the availability and quality of habitat needed by shoreline-dependent species, such as loons, eagles, osprey, and many amphibian species, particularly in northern Wisconsin. Along highly developed shorelines, preserving even small amounts of near-shore and fringe wetland habitat becomes critical for maintaining natural reproduction of fish populations. As smaller seasonal cabins are replaced with larger four-season homes, concerns over the size of lots and carrying capacity of the land arise. In addition, development in areas typically considered undevelopable, and second and third tier development, are now problems that the shoreland program did not predict nearly 40 years ago.

Much has changed in the way we develop waterfront property and the demands we place upon our developed areas. Changes in this program will equip the county with the tools and techniques needed to protect these valuable resource areas while allowing reasonable development to continue for the foreseeable future.

### **State Comparison:**

#### **Minnesota**

The State of Minnesota has a shoreland program that is also being revised. The Minnesota DNR's website states that an increase in development pressure around lakes and rivers has raised concerns about water quality and impacts on lake use, therefore resulting in the need to review current shoreland minimum standards in the state. Minnesota bases their shoreland program on statewide classification of all surface waters based on size and shape, amount and type of existing development, road and service accessibility, existing natural character of the water and other parameters. Waterbodies are classified as natural environment lakes, recreational development lakes, general development lakes, remote river segments and forested rivers. Each class has specific standards associated with the shoreland ordinance including building setbacks, lot sizes and widths, bluff impact zones, slope requirements, impervious surface limits and others. The state has a somewhat similar standards in treatment of nonconforming structures and limits impervious surfaces to 20%, which is a lower limit than Wisconsin's current rule and would be significantly less than the proposed highly developed shoreline standard in the proposed rule.

#### **Michigan**

The State of Michigan has a wild and scenic rivers protection program to provide special protection to designated rivers. This program is managed similarly to other wild and scenic river protection programs nationwide. The protection standards are outlined in Natural River Zoning Rule 281 which outlines standards for river setbacks, minimum lot widths, special vegetation management standards, and nonconforming structure improvements. Additional activities that may have potential impacts to the public trust or riparian rights, or that may impair or destroy the waters or other natural resources of the state, including inland lakes and streams, the Great Lakes, wetlands, and groundwater, are regulated by the Department of Environmental Quality.

#### **Illinois**

The State of Illinois regulates inland waters through an administrative code detailing conservation measures for public waters. The purpose of the program is to protect the public's interests, rights, safety and welfare in the State's public bodies of water. More specifically, construction is regulated to prevent obstruction to, or interference with, the navigability of any public body of water; encroachment on any public body of water; and impairment of the rights, interests or uses of the public in any public body of water or in the natural resources thereof.

#### **Indiana**

The State of Indiana regulates lake-side construction activities and provides standards for the activities along and within public freshwater lakes. The state also has standards for nonconforming uses and nuisances including the removal of a lawful nonconforming use if the structure or facility affects public safety, natural resources, natural scenic beauty or the water level of a public freshwater lake.

#### **Iowa**

The state of Iowa has an integrated watershed management and surface water regulation program which includes motor regulations and slow-no-wake areas to reduce shore erosion, and an invasive species

program to help safeguard the biological integrity of the lakes and river systems in Iowa. Iowa does not have a specific program for shoreland management or shoreland ordinance requirements. Most of Iowa's environmental programs are directly mandated by the federal government and required components of Environmental Protection or Federal Emergency Management Agency programs.

**Summary of Factual Data:**

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

A 1997 department study "Effectiveness of Shoreland Zoning Standards to Meet Statutory Objectives: A Literature Review with Policy Implications" showed that existing shoreland standards were not adequately achieving the statutory objectives of the program to protect critical fish and wildlife habitat, natural scenic beauty, and water quality of lakes and streams. Scientific studies during the 1990's found that fish and insect populations and water quality decline dramatically when watershed impervious surfaces reach 8-12%. A northern Wisconsin study found significant declines in populations of green frogs and key bird species on developed shorelines. When purchasing waterfront property, people inherently value clean water, plentiful wildlife and scenic vistas. A study in Maine found that waterfront property values would decline by 5% with a three-foot decline in lake water clarity. More details on these and other supporting studies are provided in the Environmental Assessment for this rule revision.

**Effect on Small Businesses:**

Small businesses are not expected to be significantly impacted by the proposed rule changes. Lot size and setback requirements have been imposed on businesses within the shoreland zone since the inception of the program back in the late 1960s. Commercial development has never been, and is not in this proposal, singled out as a different use. The standards apply to small business just like any other development. Standards contained in this rule will allow current facilities to be maintained, and in some cases expand, depending upon the location of the facility. The rule requires local units of government to adopt shoreland ordinances based on these rules. The local units of government will enforce the local ordinances.

**Anticipated Costs Incurred by the Private Sector:**

Submission of an application for a permit under the local ordinances will result in costs to the applicant to provide the needed background information. The application costs will vary by individual permit application depending on the type of project undertaken and the level of detailed information needed to provide local authorities sufficient background information to make a determination.

**Agency contact person:** Russ Rasmussen (608) 267-7651 [russell.rasmussen@wisconsin.gov](mailto:russell.rasmussen@wisconsin.gov)

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

NR 115.05(1)(c)2.d. The county may allow removal of vegetation within the vegetative buffer zone to manage exotic or invasive species, damaged vegetation, vegetation that must be removed to control disease, or vegetation creating an imminent safety hazard, provided that any vegetation removed under the permit be replaced by replanting in the same area as soon as practicable.

**Note:** Information regarding native plants, shoreland and habitat management is available from the University of Wisconsin-Extension publications website: <http://clean-water.uwex.edu/pubs/index.htm>.

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

NR 115.05(1)(e) *Impervious surfaces.* Counties shall establish impervious surface standards to protect water quality and fish and wildlife habitat and protect against pollution of navigable waters. County impervious surface standards shall require all of the following:

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

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

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

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

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

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

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

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

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

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

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

c. For lots or parcels described under subd. 1 that exceed the impervious surface standard under subds. 2. and 2m., but do not exceed the maximum impervious surface standard under subd. par. a. or b., the county shall issue a permit that requires a mitigation plan approved by the county and implemented by the property owner by the date specified in the permit. The mitigation plan shall include enforceable obligations of the property owner to establish or maintain measures that the county determines adequate to offset the impacts of the impervious surface on water quality, near-shore aquatic habitat, upland wildlife habitat and natural scenic beauty. The mitigation measures shall be proportional to the amount and impacts of the impervious surface being permitted. The obligations of the property

owner under the mitigation plan shall be evidenced by an instrument recorded in the office of the County Register of Deeds.

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

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

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

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

- a. maintain and repair all impervious surfaces.
- b. replace existing impervious surfaces with similar surfaces within the existing building envelope.
- c. relocate or modify existing impervious surfaces with similar or different impervious surfaces, provided that the relocation or modification meets the applicable setback requirements in par. (b).

**Note:** For example this provision would allow an existing at-grade patio to be removed and replaced with a new building, if the new building meets the shoreland setback requirements.

**Note:** Nothing in this paragraph shall be construed to supersede other provisions in county shoreland ordinances.

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

4. 'Maintenance of nonconforming principal structure.' An existing principal structure that was lawfully placed when constructed but that does not comply with the required building setback under par. (b)1. may be maintained and repaired within its existing building envelope. Maintenance and repair also includes such activities as interior remodeling, exterior remodeling, and the replacement or enhancement of plumbing or electrical systems, insulation, and replacement of windows, doors, siding, or roof within the existing building envelope.

5. Vertical expansion Expansion of nonconforming principal structure within the setback. An existing principal structure that was lawfully placed when constructed but that does not comply with the required building setback under par. (b)1. may be expanded laterally or vertically, provided that all of the following requirements are met:

- a. The use of the structure has not been discontinued for a period of 12 months or more if a nonconforming use.
- c. Vertical expansion is limited to the height allowed in NR 115.05(1)(f) and lateral expansions are limited to a maximum of 200 square feet over the life of the structure. No portion of the expansion may be any closer to the ordinary high-water mark than the closest point of the existing principal structure.

6. 'Replacement or relocation of nonconforming principal structure.' An existing principal structure that was lawfully placed when constructed but that does not comply with the required building setback under par. (b)1. may be replaced or relocated on the property provided all of the following requirements are met:

- a. The use of the structure has not been discontinued for a period of 12 months or more if a nonconforming use.

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

~~NR 115.05(1)g.6.f. The county shall issue a permit that requires that all other structures on the lot or parcel that do not comply with the shoreland setback requirement in par. (b)1. and are not exempt under par. (b)1m. to be removed by the date specified in the permit.~~

~~7. 'Boathouses.' The maintenance and repair of nonconforming boathouses which extend beyond the ordinary high-water mark of any navigable waters shall be required to comply with s. 30.121, Stats.~~

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

NR 115.05(4)(h) Written notice to the appropriate regional office of the department at least 10 days prior to any hearing on a proposed variance, special exception or conditional use permit, appeal for a map or text interpretation, map or text amendment, and copies of all proposed land divisions submitted to the county for review under sub. (2). ~~Upon request of the Department a county shall provide to the appropriate regional office a copy of any permit issued under sub. (1)(g).~~

(hm) Submission to the appropriate regional office of the department, within 10 days after grant or denial, of copies of ~~any permit granted under sub. (1)(g), any decision on a variance, special exception or conditional use permit, or appeal for a map or text interpretation, and any decision to amend a map or text of an ordinance.~~

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

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

SECTION 7. EFFECTIVE DATE. This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22 (2)(intro.), Stats.

SECTION 8. BOARD ADOPTION. This rule was approved and adopted by the State of Wisconsin Natural Resources Board on \_\_\_\_\_.

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

STATE OF WISCONSIN  
DEPARTMENT OF NATURAL RESOURCES

By \_\_\_\_\_  
Cathy Stepp, Secretary

(SEAL)