

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

The Wisconsin Natural Resources Board proposes an order to repeal NR 115.05 (3) to (6) and 115.06; to renumber NR 115.05 (2); to amend NR 115 (title), 115.01 (1) and (2), 115.05 (title), 115.05 (1) 115.07(title), (1)(a), (s)(a) and (c), (3)(intro.), (c)(note), (e), (g), (j) and (k), (4), (5)(a) to (c), (d)(intro.), (e), (f), (g)(intro.), (h) and (i); to repeal and recreate NR 115.02 and 115.03,; and to create NR 115.01 (4), 115.05 (note), 115.09, 115.11, 115.13, 115.15, 115.17, 115.19, 115.21, 115.23, 115.25 and 115.27 relating to minimum standards for county shoreland zoning ordinances.

WT-28-04

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.

I. Plain Language Rule Analysis:

Background

Growing public awareness and concern for controlling water pollution led to enactment of the Federal Water Pollution Control Act Amendments of 1972. As amended in 1977, this law became commonly known as the Clean Water Act. The Act established the basic structure for regulating discharges of pollutants into the waters of the United States. Here in Wisconsin, our foresight in protecting navigable waters far exceeded that of the federal government. In response to human impacts on public waters, the Wisconsin Legislature on August 1, 1966, passed the Water Resources Act (as created by Chapter 614, Laws of 1965) that articulated the purpose and direction for shoreland zoning: "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."

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 zoning ordinances, sanitary codes, and subdivision regulations to control indirect pollution sources. The basic premise was to establish practical minimum standards and workable regulations in an area where there had been little experience. This act was also very important specifically for shoreland protection because the requirement to enact shoreland zoning ordinances has been interpreted to be part of the active public trust duty of the state of Wisconsin, 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.

Authority

The proposed amendments to ch. NR 115 are intended to allow a county more flexibility in how they regulate land use in shorelands, and to 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 purpose of sub. (1), the department shall prepare and provide to municipalities general recommended standards and criteria for . . . navigable water protection regulations and their administration." Section 59.692 (6), Stats., provides that "if the department, after notice and hearing, determines that a county has enacted an ordinance that fails to meet the shoreland zoning standards, the department shall adopt such an ordinance for the county." 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.

In addition, the rule revision attempts to remove duplication with other Department administrative codes and allow deference to other codes with overlapping jurisdictions. Section 30.27 Stats., provides for the Lower St. Croix River preservation including subsection (2a) which states that “as soon as possible after May 7, 1974, the department shall adopt, by rule, guidelines and specific standards for local zoning ordinances which apply to the banks, bluffs and bluff tops of the Lower St. Croix River.” Under this statute, the Department has promulgated NR 118, Wis. Adm. Code which specifies standards for development in the Lower St. Croix Riverway. Section NR 115.02(6) of the revision allows the Lower St. Croix Riverway zoning ordinance that is adopted by a county in compliance with the requirements of s. 30.27 Stats., and ch. NR 118 to be adopted and administered as the county’s shoreland zoning ordinance for those areas within the Riverway. This removes the criteria that areas within the Riverway boundary apply both the shoreland zoning ordinance and the Lower St. Croix riverway ordinance. Areas outside of the Riverway boundary under shoreland zoning would still be required to adhere to the county shoreland zoning ordinance which meets or exceeds the standards within this chapter.

The Department has also tried to minimize duplication with other agency codes in this revision. Cross reference and deference to Commerce codes, including Private Onsite Wastewater Treatment Systems - Comm 83, the Uniform Dwelling Code – Comm 21.125, Commercial Building Code – Comm 61.115 and sections of the Uniform Plumbing Code – Comm 82.36 and 82.365 are incorporated in the draft. In addition, cross reference and deference has been incorporated for other natural resources programs including the in-water permitting program under ch. 30, Stats., and chs. NR 151 and 216 for stormwater management and erosion control.

Revision Rationale

In response to the increasing impacts on public waters from adjacent shoreland development, the amount and intensity of development today in comparison to 40 years ago and the resulting pressures on our public resources from private land owners and water recreationalists alike, the state launched a broad-based effort to update the shoreland protection standards originally promulgated in 1968. 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 minimum lot sizes, how far structures must be setback from the water’s edge, and limits on removing trees and other vegetation. Controlling the density of development along the waters and creating a buffer around them was the best management practice of the time. With 40 years of growth the way in which we develop the land and the associated pressures on the resource has drastically changed. What once sufficed as a small summer weekend cottage has now grown into a demand for year-round, winterized and much larger homes. The lots that were created years ago may not be capable of handling the increased stress without compromising the integrity of the vary resource that draws our attention in the first place. Over time it has become increasingly clear that change is needed to clarify standards, provide flexibility, protect the resources, improve consistency and local zoning authorities’ ability to implement these standards through their zoning ordinances in a consistent, timely and enforceable manner.

In addition, many of the provisions in the original NR 115 were vague and difficult to interpret and enforce. The revision process represents an attempt to move towards a clear rule with little room for misinterpretation. The proposed amendments to NR 115 are intended to allow a county more flexibility in how they regulate land use in shorelands but still provide the determinations necessary for consistent interpretation among counties. The proposed amendments also provide shoreland property owners more land use options while protecting the very values and resources that make these destinations attractive.

Revision Process

The revision package is based on concepts developed, negotiated and compromised by a very diverse and well-represented advisory committee. The dedication and determination of these individuals proves how important our water resources and adjacent shorelands are in the state.

These amendments are the result of nearly 5 years of work by this group and numerous opportunities for public comment. The Department held 11 public hearings in July and August of 2005 and 8 listening sessions in the fall and winter of 2002. Both venues were an opportunity for the public to review and comment on the draft proposals generated together by the Department and the Advisory Committee.

As a requirement, public hearings are held to generate public comment. The Department far exceeded any legal requirement by holding 11 public hearings around the state. Over 1,000 people attended the hearings and during the public comment period over 12,000 comments were collected.

Listening sessions were added as an additional step in the traditional rule revision process because the Department recognized this issue needed special consideration and debate in an open, informative, honest and participatory forum. Over 850 people attended eight listening sessions that were held around Wisconsin in November and December 2003. Comments were accepted on prepared comment sheets, as oral comments at the sessions, and as written comments submitted before December 31, 2003. Nearly 1100 comments were submitted regarding the NR 115 Advisory Committee recommendations.

Public hearing and listening session comments are summarized on the rule revision website at:

<http://www.dnr.state.wi.us/org/water/wm/dsfm/shore/news.htm>.

In addition to the public hearings and listening sessions, the Bureau of Watershed Management staff have kept a list of interested parties by e-mail and hard mail to provide timely updates to those interested in the process and allow those parties an opportunity to comment on newly generated materials including each draft of the code.

With all the attention and public comment on the revision to NR 115, four main themes can be derived from a majority of the comments:

- Keep the regulations simple,
- Make the regulations enforceable,
- Protect our water resources, and
- Provide communities the flexibility to determine how to best administer the minimum standards.

To that extent, the implementation of the revised rules provide for the following:

Major provisions and new requirements

Major provisions of the proposal include changes to vegetation management in the primary shoreland buffer and changes to regulation of structures within the minimum setback. New requirements include the removal of the nonconforming structure provisions and replacement with impervious surface standards. Counties may still choose to regulate nonconforming structures with traditional standards; however, the new standards will regulate a structure based on its impact to the resource, not on when or how the structure was built. In addition, the code contains changes to the minimum lot size requirements, including the directive for counties to develop standards for multi-unit residential development, mobile home parks, and campgrounds; a reduced setback option as well as allowing development on substandard lots is included in this draft. Finally, a section on mitigation standards was added to the code to help balance the flexibility provided in this chapter.

II. 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.

III. State Regulatory Analysis:

Wisconsin's Shoreland Management Program is a partnership between state and local government that requires development near navigable lakes and streams to meet statewide minimum standards. Each Wisconsin county has zoning ordinance provisions that protect water resource values: water quality, recreation and navigation, fish and wildlife habitat, and natural scenic beauty. County ordinances must have standards that 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 cutting 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 sections of shoreline are developed, long continuous sections of natural shorelines are broken into small fragmented patches. This likely 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. Revision to this program would 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.

IV. State Comparison:

Minnesota

The State of Minnesota has a shoreland program that is also currently in the process of being revised. The MN DNR, on their 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 shoreland zoning including building setbacks, lot sizes and widths, bluff impact zones, slope requirements and others. The states do differ on where the shoreline setback is measured from and how the Ordinary High Water Mark is determined. In practice this difference may result in reduced shoreline setbacks in Minnesota when compared to standards in Wisconsin. The states also have somewhat different standards in treatment of nonconforming structures.

Michigan

The State of Michigan also has a wild and scenic rivers protection program to provide special protection to designated rivers. This program is managed very similar 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, riparian rights, or 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 DEQ.

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 also 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 program, surface water regulation program which includes motor regulations and slow-no-wake areas to reduce shore erosion and a new (January 12, 2005) invasive species program to help safeguard the biological integrity of the lakes and river systems in Iowa. However, Iowa does not have a specific program for shoreland management or shoreland zoning. Most of Iowa's environmental programs are directly mandated by the federal government and required components of EPA or FEMA programs.

V. A Summary of Factual Data:

This rule was developed based on guidelines and criteria for minimum standards outlined in the authorizing statutes sections 59.692, 227.11 (2)(a), and 281.31, Stats. The final revision package was the result of scientific analysis, literature summaries, advisory committee meetings, listening sessions, extensive public comments and formal public hearings that spanned a nearly a five year period. The revision is a result of a collaborative effort between several key stakeholders including local elected officials, implementing agencies, private sector business interests, academic experts and conservation associations. This was a comprehensive effort that began by collecting data, analyzing issues, developing goals and objectives, summarizing comments and data and ultimately reviewing every section of the numerous rule drafts as well as 5 individual workgroups and three issue specific focus groups.

The planning process identified some key problem areas concerning application of the existing zoning standards and regulation consistency. Confusion and misunderstandings have resulted from unclear, subjective language, and inconsistent application of zoning standards. Landowners and local governments have been frustrated in applying and interpreting the intent of the shoreland regulations. The proposed ch. NR 115 has been developed to clarify the standards and provide more flexibility in the application of land use standards and restrictions that will allow reasonable improvement of private properties, while still protecting the resources and natural scenic beauty of Wisconsin's waters.

VI. 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 as a condition of this proposal, singled out as a different use. New impervious surface standards and mitigation requirements will pertain to small business just like a single-family residential development. Safeguards have been put into place to guarantee the amount of mitigation that would be required on large scale projects which may prove beneficial for some small businesses. Standards contained in this rule may limit some facility expansion based on location; however, other modifications in the rule will help in allowing current facilities to maintain and update current structures without limitations now imposed on

the cost of those modifications. The rule requires local units of government to adopt zoning based on these rules. The local units of government will enforce the local ordinances.

VII. 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 zoning authorities sufficient background information to make a determination. This rule will require mitigation. Mitigation costs will be incurred for vegetative plantings, runoff control and other types of practices that may be needed and determined by the local zoning office.

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SECTION 1. Chapter NR 115 (title) is amended to read:

WISCONSIN'S SHORELAND MANAGEMENT PROTECTION PROGRAM

SECTION 2. NR 115.01 (1) is amended to read:

NR 115.01 (1) Section 59.692, Stats., requires a county to adopt zoning ~~and subdivision regulations~~ ordinances for the protection of all shorelands in unincorporated areas ~~by January 1, 1968,~~ and provides that if the department of natural resources determines, after notice and hearing, that a county has not adopted a shoreland zoning ordinance ~~by January 1, 1968,~~ or that a county has adopted an ordinance which fails to meet ~~reasonable minimum~~ the shoreland zoning standards in accomplishing the shoreland protection objectives found in s. 281.31, Stats. this chapter, the department is to ~~shall~~ shall adopt a shoreland zoning ordinance to be administered by that county.

SECTION 3. NR 115.01 (2) is amended to read:

NR 115.01 (2) Section 281.31 (1), Stats., provides that the purpose of 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 structure and land uses and reserve shore cover and natural beauty." A county shall adopt shoreland zoning standards that are consistent with this purpose and which limit the direct and cumulative impacts of shoreland development on water quality; near-shore aquatic, wetland and upland wildlife habitat and natural scenic beauty by all of the following:

(a) Controlling the density and location of development to allow adequate room between structures and navigable waters for primary shoreland buffers, secondary shoreland buffers, and for the infiltration of stormwater runoff.

(b) Preserving and establishing shoreland vegetation in order to infiltrate stormwater runoff to screen shoreland development and to preserve natural beauty.

(c) Ensuring that the construction, reconstruction, structural alteration, expansion or replacement of a structure in the shoreland zone is designed to limit environmental impacts and prevent water pollution.

(d) Minimizing vegetation removal, soil erosion, soil compaction and sedimentation.

SECTION 4. NR 115.01 (4) is created to read:

NR 115.01 (4) In order to meet the shoreland protection objectives found in s. 281.31 (1) and (6), Stats., and to adequately protect local resources, a county may adopt more protective shoreland zoning regulations than are required by the minimum standards in this chapter.

SECTION 5. NR 115.02 is repealed and recreated to read:

NR 115.02 Applicability. (1) The provisions of this chapter are applicable to county regulation of the use and development of unincorporated shoreland areas, and to county, city or village regulation of previously unincorporated shoreland areas that were annexed by a city or village after May 7, 1982 or incorporated as a city or village after April 30, 1994. References in this chapter to a county, or county government agencies, shall be read to apply to cities and villages, or city and village agencies, when this chapter is applied to annexed or incorporated areas in situations where s. 59.692 (7), Stats., requires that shoreland zoning is to continue in effect.

(2) Town zoning ordinances that are more restrictive than the shoreland zoning ordinance of the county in which the town is located may be enforced in the shoreland zone, in addition to county shoreland zoning, to the extent of the greater restrictions, but any provisions that conflict with, or are less restrictive than, the county shoreland zoning ordinance are unenforceable in the shoreland area.

(3) Unless specifically exempted by law, all cities, villages, towns and counties are required to comply with, and obtain all necessary permits under, local shoreland zoning ordinances.

(4) State agencies are required to comply with, and obtain all necessary permits under, local shoreland zoning ordinances if required by s. 13.48 (13), Stats.

(5) The construction, reconstruction, maintenance and repair of state highways, bridges, and other transportation projects carried out under the direction and supervision of the Wisconsin department of transportation are not subject to local shoreland zoning ordinances, if s. 30.2022, Stats., applies.

(6) A Lower St. Croix riverway zoning ordinance that is adopted by a county, city or village in compliance with the requirements of s. 30.27, Stats., and ch. NR 118 may be adopted and administered as the county's shoreland zoning ordinance for shorelands within the Lower St. Croix national scenic riverway. All areas outside of the Riverway boundary that are within the shoreland zone shall be regulated by the county shoreland zoning ordinance which meets or exceeds the standards in this chapter.

SECTION 6. NR 115.03 is repealed and recreated to read:

NR 115.03 Definitions. For the purpose of this chapter:

(1) "Access and viewing corridor" means a vegetated strip of land that extends through the primary shoreland buffer to provide pedestrian access to the waterfront.

(2) "Accessory structure" means a subordinate structure, the use of which is incidental to, and customarily found in connection with, the principal structure or use of the property.

Note: Examples of accessory structures include detached garages, sheds, barns, gazebos, patios, decks, swimming pools, hot tubs, fences, retaining walls, driveways, parking lots, sidewalks and detached stairways and mechanical lifts.

(3) "Agricultural practice" has the meaning found in s. 281.16 (1)(b), Stats.

Note: Section 281.16 (1)(b), Stats., defines "agricultural practice" to mean "beekeeping; commercial feedlots; dairying; egg production; floriculture; fish or fur farming; grazing; livestock raising; orchards; poultry raising; raising of grain, grass, mint and seed crops; raising of fruits, nuts and berries; sod farming; placing land in federal programs in return for payments in kind; owning land, at least 35 acres of which is enrolled in the conservation reserve program under 16 USC 3831 to 3836; and vegetable raising."

(4) "Best management practices" or "BMPs" means structural or non-structural measures, practices, techniques or devices employed to avoid or minimize soil, sediment or pollutants being carried in runoff to navigable waters.

(5) "Compliant building location" means a location on a lot where a structure may legally be placed in accordance with the requirements of the county's shoreland zoning ordinance and which provides at least a 30 foot deep location for the structure.

(6) "Conditional use" or "special exception" means a use that is specifically listed in a shoreland zoning ordinance as either a conditional use or special exception and that may only be permitted if the appropriate governmental body, as authorized by county, city or village ordinance, determines that the conditions specified in the shoreland zoning ordinance for that use are satisfied.

(7) "County zoning agency" means the agency or office that is created or designated by the county board under s. 59.69 (2)(a), Stats., to act in matters pertaining to county planning and zoning.

(8) "Dam" means any artificial barrier in or across a watercourse that has the primary purpose of impounding or diverting water. A dam includes all appurtenant works, such as a dike, canal or powerhouse.

(9) "Department" means the Wisconsin department of natural resources.

(10) "Disabled" means having a physical or mental impairment that substantially limits one or more major life activities.

(11) "Expansion" means an addition to an existing structure that makes the structure larger, taller or both.

(12) "Floodplain" means the land that has been or may be hereafter covered by flood water during the regional flood, as defined in s. NR 116.03 (41).

(13) "Forest land" means any property on which trees exist, standing or fallen, alive or dead, that are primarily grown because they are valuable for forest products, watershed or wildlife protection or non-residential recreational uses. Forest land does not include property where shade or ornamental trees are grown primarily because they are valuable for landscape, aesthetic, agricultural or similar purposes.

Note: A parcel of land need not be designated as managed forest land under ss. 77.80 to 77.91, Stats., or be enrolled in any other forest management program to be considered "forest land."

(14) "Forest management activities" means actions taken to establish, maintain or enhance forest land including planting trees, thinning and trimming trees, and harvesting timber and other forest products.

(15) "Impervious surface" means an area that releases as runoff all or a large portion of the precipitation that falls on it, except for frozen soil. Rooftops, sidewalks, driveways, parking lots and streets are examples of surfaces that typically are impervious unless specifically designed, constructed and maintained to be pervious.

(16) "Land disturbing construction activity" means any man-made alteration of the land surface resulting in a change in the topography or existing vegetative or non-vegetative soil cover, that may result in runoff and lead to an increase in soil erosion and movement of sediment into waters of the state. Land disturbing construction activity includes clearing and grubbing, demolition, excavating, pit trench dewatering, filling and grading activities.

(17) "Levee" means a continuous dike or embankment of earth constructed to prevent the flooding of certain areas of land.

(18) "Lift" means a mechanical device, either temporary or permanent, containing a mobile open-top car, including hand rails or guard rails, a track upon which the open-top car moves, and a mechanical device, which may or may not be motorized, to provide power to the open-top car.

(19) "Lot" means a contiguous parcel of land with described boundaries that abuts, or has access via an easement or areas of common ownership to, a public or private street or road.

Note: For the purpose of calculating lot area, the area or width of a lot may not include any portion of the bed of a navigable body of water below the ordinary high water mark, as provided in s. NR 115.11.

(20) "Mitigation" means implementing measures to restore natural functions to balance values lost through development and human actions.

(21) "Natural areas management activities" means actions taken to establish, maintain or enhance native plant communities or fish or wildlife habitat including forest management activities, prairie restoration, wetland restoration and removal of exotic species.

(22) "Navigable waters" means Lake Superior, Lake Michigan, all natural inland lakes within this state and all streams, ponds, flowages and other waters within the territorial limits of this state, including the Wisconsin portion of the boundary waters, which are navigable under the laws of this state.

Note: Wisconsin case law further defines this term as any body of water, with a defined bed and bank, which is navigable under the laws of the state. In Wisconsin, a navigable body of water is capable of floating the lightest boat or skiff used for recreation or any other purpose on a regularly recurring basis.

Section 281.31 (2m), Stats., also provides that, notwithstanding any other provision of law or administrative rule, a shoreland zoning ordinance required under s. 59.692, Stats., "does not apply to lands adjacent to farm drainage ditches if:

- (a) Such lands are not adjacent to a natural navigable stream or river;
 - (b) Those parts of the drainage ditches adjacent to these lands were nonnavigable streams before ditching;
- and
- (c) Such lands are maintained in nonstructural agricultural use.”

(23) “Ordinary high water mark” means the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation or other easily recognized characteristic.

(24) “Primary shoreland buffer” means a vegetated buffer strip, measured on a horizontal plane, parallel to the ordinary high water mark, and extending inland from the ordinary high water mark a minimum of 35 feet.

(25) “Principal structure” means the main building or other structure on a lot or parcel of land that is utilized for the property’s primary use, including attached garages and porches.

(26) “Reasonable accommodation” means allowing a disabled person to deviate from the strict requirements of the county’s zoning ordinances if an accommodation is necessary and reasonable, in order not to unlawfully discriminate against the disabled person and to allow them equal housing opportunity.

Note: Federal courts have interpreted the “reasonable accommodations” requirement in the Federal Fair Housing Act to mean that an accommodation is reasonable “if it does not cause any undue hardship or fiscal or administrative burdens on the municipality, or does not undermine the basic purpose that the zoning ordinance seeks to achieve.” *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179, 1186 (E.D.N.Y. 1993)

(27) “Secondary shoreland buffer” means a vegetated buffer strip, measured on a horizontal plane, from the inland edge of the primary shoreland buffer to the county designated setback.

(28) “Shoreland setback area” has the meaning found in s. 59.692 (1)(bn), Stats.

Note: Section 59.692 (1)(bn), Stats., defines “shoreland setback area” to mean “an area in a shoreland that is within a certain distance of the ordinary high water mark in which the construction or placement of buildings or structures has been limited or prohibited under an ordinance enacted under this section.”

(29) “Shorelands” and “shoreland zone” have the meaning found in s. 59.692 (1)(b), Stats.

Note: Section 59.692 (1)(b), Stats., defines “shorelands” to mean “the area within the following distances from the ordinary high water mark of navigable waters, as defined under s. 281.31 (2)(d):

1. One thousand feet from a lake, pond or flowage. If the navigable water is a glacial pothole lake, this distance shall be measured from the high water mark of the lake.
2. Three hundred feet from a river or stream or to the landward side of the floodplain, whichever distance is greater.”

(30) “Shoreland-wetland zoning district” means a zoning district, created in compliance with the requirements of s. NR 115.07.

(31) “Structure” means any man-made object with form, shape and utility, either permanently or temporarily placed upon the ground. The term “structure” does not include objects that are easily moved by hand.

Note: Examples of structures include houses, garages, storage sheds, boathouses, camping trailers, mobile homes, swimming pools, hot tubs, fences, patios, decks and retaining walls.

(32) “Variance” means an authorization granted by the appropriate governmental body to construct, place, alter or expand a structure, or use a lot, in manner that deviates from the dimensional requirements of a shoreland zoning ordinance.

(33) “Wetland” has the meaning found in s. 23.32 (1), Stats.

Note: Section 23.32 (1), Stats., defines “wetland” to mean “an area where water is at, near, or above the land surface long enough to be capable of supporting aquatic or hydrophytic vegetation and which has soils indicative of wet conditions.”

SECTION 7. NR 115.05 (title) is amended to read:

NR 115.05 (title) Shoreland regulation standards and criteria zoning districts.

SECTION 8. NR 115.05 (1) is amended to read:

~~NR 115.05(1) ESTABLISHMENT OF APPROPRIATE ZONING DISTRICTS. Counties shall adopt shoreland zoning ordinances that include establish, at a minimum, zoning regulations for a shoreland-wetland zoning districts district that is regulated in compliance with the requirements in s. NR 115.07. A county may create other types of land use districts in shorelands, (such as general purpose, agricultural, industrial, commercial, residential, recreational, or conservancy, or wetlands districts) may be created in addition to shoreland-wetland zoning districts. The districts shall be established in, or incorporated by reference into, the county's shoreland zoning ordinance adopted under s. 59.692, Stats.~~

SECTION 9. NR 115.05 (note) is created to read:

Note: Section 56.692 (5), Stats., provides that an ordinance enacted under s. 59.692, Stats., supersedes all provisions of an ordinance enacted under s. 59.69, Stats., that relate to shorelands.

SECTION 10. NR 115.05 (2) is renumbered NR 115.07.

SECTION 11. NR 115.05 (3) to (6) are repealed.

SECTION 12. NR 115.06 is repealed.

SECTION 13. NR 115.07 (title), (1) (a), (2) (a) and (c), (3) (intro.), (c) (note), (e), (g), (j), and (k), (4), and (5) (a) to (c), (d) (intro.), (e), (f), (g) (intro.), (h) and (i), as renumbered, are amended to read:

NR 115.07 ~~Establishment and regulation of shoreland-wetland~~ Shoreland-wetland zoning districts. (1) COUNTY REVIEW OF PRELIMINARY WETLAND INVENTORY MAPS. Before the department prepares or amends final Wisconsin wetland inventory maps:

~~(a) The department shall transmit to the county zoning agency designated under s. 59.69 (2)(a), Stats., digital or paper copies of preliminary wetland inventory maps for that county.~~

~~(b) The county zoning agency shall have 90 days to review the preliminary maps unless the review period is extended by written approval of the department, but in no case shall the review period extend for more than 180 days.~~

~~(c) The county zoning agency shall hold a public hearing to solicit public comments on the preliminary wetland inventory maps. Notice of the time and place of the hearing shall be mailed to the town clerk of each town in the county and shall be published as a class 1 notice, under ch. 985, Stats.~~

~~(d) On or before the last day of the review period, the county zoning agency shall return the preliminary maps to the department. If the county zoning agency believes that the preliminary maps are inaccurate, discrepancies shall be noted on the maps with an accompanying narrative explaining the problem areas.~~

~~(e) The department shall schedule a meeting with the county zoning agency within 30 days of the return of the preliminary maps if the county zoning agency has indicated that they believe that there are inaccuracies on the maps.~~

~~(f) After meeting with the county zoning agency to discuss apparent map inaccuracies, the department shall, at department expense, consult available soil survey maps and conduct on site inspections, if appropriate, in order to evaluate the county recommendations, and shall then prepare the final Wisconsin wetland inventory maps for that county.~~

~~(g) The adoption of a final Wisconsin wetland inventory map is a final decision of the department and may be reviewed as provided in ch. 227, Stats.~~

(2) COUNTY ADOPTION OF SHORELAND-WETLAND ZONING. (a) Each county shall, within 6 months after receipt from the department of final Wisconsin wetland inventory maps, or Wisconsin wetland inventory map amendments, for that county from the department, zone all shorelands within the county

that are designated as wetlands on the Wisconsin wetland inventory maps, ~~in~~ as a shoreland-wetland zoning district.

(c) The appropriate ~~district~~ regional office of the department shall be provided with a copy of the proposed text and map amendments and with written notice of the public hearing at least 10 days prior to the hearing.

(3) PERMITTED USES IN SHORELAND-WETLAND ZONING DISTRICTS. Within shoreland-wetland zoning districts, a county ~~shall~~ may permit the following uses, which shall also comply with ~~subject to~~ the general requirements of ~~sub. (3) ss. NR 115.05 to 115.27~~, the provisions of chs. 30 and 31, Stats., and other state and federal laws, if applicable:

(c) Note: Local units of government, in the development and application of ordinances which apply to shoreland areas, must consider other programs of statewide interest and other state regulations affecting the lands to be regulated, i.e. regulations and management practices applicable to state and county forests and lands entered under the forest cropland program in subch. I of ch. 77, Stats. and ~~woodland tax law programs~~ the managed forest land program in subch. VI of ch. 77, Stats.

(e) The cultivation of agricultural crops if cultivation can be accomplished without filling, flooding or artificial drainage of the wetland through ditching, tiling, dredging or excavating except that flooding, dike and dam construction, and ditching shall be allowed for the purpose of growing and harvesting cranberries. The maintenance and repair of existing drainage systems, ~~(such as ditching and tiling),~~ shall be ~~permitted~~ allowed. The construction and maintenance of roads shall be ~~permitted~~ allowed if the roads are necessary for agricultural cultivation, cannot as a practical matter be located outside the wetland, and are designed and constructed to minimize the adverse impact upon the natural functions of the wetland.

(g) The construction and maintenance of nonresidential ~~buildings structures, not to exceed 500 square feet,~~ used solely in conjunction with the raising of waterfowl, minnows, or other wetland or aquatic animals, or used solely for some other purpose which is compatible with wetland preservation if the building cannot as a practical matter be located outside the wetland, ~~not to exceed 500 square feet,~~ provided that no filling, flooding, draining, dredging, ditching, tiling or excavating is done.

(i) Note: This section includes wetland conservation activities meeting the standards of ch. NR 353.

(j) The construction and maintenance of electric, gas, telephone, ~~water and sewer transmission and distribution lines, and related facilities, by public utilities and cooperative associations organized for the purpose of producing or furnishing heat, light, power or water to their members,~~ which cannot as a practical matter be located outside the wetland, provided that any filling, excavating, ditching or draining necessary for such construction or maintenance is done in a manner designed to minimize flooding and other adverse impacts upon the natural functions of the wetland.

Note: Major electrical generating facilities and high-voltage transmission lines that have obtained a certificate of public convenience and necessity under s. 196.491, Stats., are not subject to the requirements of local ordinances.

(k) The construction and maintenance of railroad lines which cannot as a practical matter be located outside the wetland, provided that any filling, excavating, ditching or draining necessary for ~~such~~ the construction or maintenance is done in a manner designed to minimize flooding and other adverse impacts upon the natural functions of the wetland.

(4) PROHIBITED USES IN SHORELAND-WETLAND ZONING DISTRICTS. Any use not permitted in ~~par. (e) sub. (3)~~ is prohibited in a shoreland-wetland zoning district unless the wetland or portion thereof is rezoned by amendment of the county shoreland zoning ordinance in accordance with s. 59.69 (5)(e), Stats., and the procedures outlined in ~~par. (e) sub. (5)~~.

(5) REZONING OF SHORELAND-WETLAND ZONING DISTRICTS. (a) ~~Official~~ Ordinance amendments are required for any change in shoreland-wetland zoning ~~districts. Such~~ . The amendments shall be made upon petition in accordance with provisions of s. 59.69 (5)(e), Stats.

(b) The county clerk shall submit a copy of every petition for an amendment to a shoreland-wetland zoning district to the appropriate ~~district~~ regional office of the department within 5 days of the filing of ~~such~~ the petition with the clerk.

(c) All proposed text and map amendments to shoreland-wetland zoning districts shall be referred to the county zoning agency for a public notice and hearing as required by s. 59.69 (5)(e) 2., Stats. The county shall provide written notice of the public hearing at least 10 days prior to ~~such~~ the hearing to the appropriate ~~district-regional~~ office of the department.

(d) In order to ensure that the shoreland protection objectives found in s. 281.31, Stats., will be accomplished by the county shoreland zoning ordinance, a county ~~shall~~ may not rezone a shoreland-wetland zoning district, or portion thereof, if there is a practicable alternative or if the proposed rezoning may result in a significant adverse impact upon any of the following:

(e) If the department determines that the proposed rezoning may have a significant adverse impact upon any of the criteria listed in ~~subd. 4 par. (d)~~, the department shall notify the county zoning agency of its determination either prior to or during the public hearing held on the proposed amendment.

(f) As soon as possible after holding a public hearing, the county zoning agency shall submit its written findings and recommendations to the county board. ~~Said~~ The findings shall outline the reason for the agency's recommendations. After receipt of the county zoning agency's findings and recommendations, the board may approve or disapprove of the proposed amendment.

(g) The county shall send to the appropriate ~~district-regional~~ office of the department ~~shall be provided with:~~

(h) If the county board approves of the proposed amendment and the department determines, after review as required by s. NR ~~445.06-115.25~~ (2)(c), that the county shoreland zoning ordinance if so amended would no longer comply with the requirements of s. 59.692, Stats., and this chapter, the department shall, after notice and hearing, adopt a complying ordinance for the county, under s. 59.692 (6), Stats.

(i) If the department has notified the county zoning agency that a proposed amendment may have a significant adverse impact upon any of the criteria listed in ~~subd. 4 par. (d)~~, ~~that the~~ proposed amendment, if approved by the county board, ~~shall~~ does not become effective until more than 30 days have elapsed since written notice of the county board's approval was mailed to the department, as required by ~~subd. 7 par. (g)~~. If within the 30-day period the department notifies the county board that the department intends to adopt a superseding shoreland zoning ordinance for the county under s. 59.592 (6), Stats., the proposed amendment ~~shall~~ may not become effective while the ordinance adoption procedure is proceeding, but shall have its effect stayed until the s. 59.692 (6), Stats., procedure is completed or otherwise terminated.

SECTION 14. NR 115.09 is created to read:

NR 115.09 Land division review. (1) GENERAL. All divisions of land in the shoreland zone that establish one or more lots that are 5 acres in size or smaller shall be reviewed and approved by the county and shall comply with the applicable minimum lot size standards in s. NR 115.11. In the review the following factors shall be considered:

- (a) County comprehensive planning.
- (b) Hazards to the health, safety or welfare of future residents.
- (c) Proper relationship to adjoining areas.
- (d) Public access to navigable waters, as required by law.
- (e) Appropriate stormwater drainage or retention facilities.
- (f) Conformity to state law and administrative code provisions.

(2) NAVIGABLE BODIES OF WATER WITHIN LOTS. For land divisions in the shoreland zone which are created after the effective date of the county's ordinance implementing the version of this chapter effective on the effective date of this rule [Revisor insert date], a county may not approve creation of a lot that is divided by a navigable stream unless a portion of the lot on at least one side of the stream has a compliant building location.

SECTION 15. NR 115.11 is created to read:

NR 115.11 Minimum lot sizes. (1) GENERAL. (a) *Minimum lot size.* Except as provided in subs. (2) to (5), a county may not permit the construction or placement of a structure on a lot in the shoreland zone which is created after the effective date of the county's ordinance implementing the version of this

chapter effective on the effective date of this rule [Revisor insert date], unless the lot has a minimum area of 20,000 square feet and a minimum width of 100 feet at the ordinary high water mark and at the building setback line.

(b) *Beds of navigable waters excluded.* In calculating the minimum area or width of a lot, the beds of navigable waters may not be included.

(2) MULTI-FAMILY RESIDENTIAL STRUCTURES, MOBILE HOME PARKS AND CAMPGROUNDS. Counties shall develop minimum area or lot size requirements for multi-family residential structures, mobile home parks and campgrounds as part of the county's shoreland zoning ordinance. The ordinance shall require compliance with the rest of the county's shoreland zoning ordinance except the county may allow smaller lot sizes than those allowed under sub. (1)(a).

(3) SUBSTANDARD LOTS. A county may not permit the construction or placement of a structure on a lot in the shoreland zone that does not comply with the standards in this section, unless the lot is a lot of record that complied with applicable lot size requirements in effect at the time that the lot was recorded at the county register of deeds office, and the proposed construction or placement of a structure will comply with all other standards in the county's ordinance.

(4) PLANNED RESIDENTIAL DEVELOPMENTS. A lot may be created which does not meet the requirements of sub. (1) if the county has approved and recorded a plat or certified survey map for a planned unit, cluster or conservation development that allows reduced lot sizes in exchange for larger shoreland buffers, larger lot sizes or larger setbacks on those lots adjacent to the water.

SECTION 16. NR 115.13 is created to read:

NR 115.13 Minimum setbacks. (1) GENERAL. Except as provided in par. (b) and subs. (2) to (5), all structures shall be setback a minimum of 75 feet from the ordinary high water mark of navigable waters.

Note: A house boat or other structure that is licensed as a boat is still regulated under the county's shoreland zoning ordinance as a "structure," as that term is defined in s. NR 115.03 (36).

(a) *Measuring setback.* The minimum setback shall be measured on a horizontal plane from the point of a structure that is nearest to the ordinary high water mark, including roof overhangs and any cantilevered portions of the structure, unless, prior to the effective date of this rule [revisor insert date], a county has measured minimum setbacks to the nearest point of the foundation or base of a structure instead of measuring to roof overhangs. A county may continue to measure the minimum setback on a horizontal plane from the foundation or base of a structure at the point that is nearest to the ordinary high water mark, provided that after the effective date of this rule [revisor insert date], the county's shoreland zoning ordinance also requires, for any new construction, reconstruction, expansion, structural alteration, replacement, or relocation of any structure, that any cantilevered portion of a structure other than roof overhangs to be setback at least 75 feet from the ordinary high water mark and limits roof overhang width to no more than 3 feet.

Note: Porches are considered part of the structure. The width of porch roofs is not limited to 3 feet under s. NR 115.13 (1)(b), regardless of how a county measures the minimum setback.

(b) *Location of ordinary high water mark.* For the purposes of this chapter, if the department and the county determine different ordinary high water marks for a lot, the following procedure may be adopted in the county's shoreland zoning ordinance to resolve the inconsistency:

1. If the difference between the department and the county determination of the ordinary high water mark is one foot or less measured on a horizontal plane, the county determination may be used.

2. If the difference between the department and the county determination of the ordinary high water mark is greater than one foot measured on a horizontal plane, the department's determination shall be used unless a wetland 40 feet or more in depth is present and the county, as part of their county shoreland zoning ordinance, adopts the provision in subd. 3. or a more stringent requirement.

3. If a wetland of 40 or more feet between open water and the wetland-upland boundary is identified, the county may establish a minimum setback of 35 feet landward from the wetland-upland

boundary. If necessary for safety, the primary buffer may be reduced to allow 15 feet of secondary buffer around the principal structure.

(2) EXEMPTED STRUCTURES. The following structures are exempt from the minimum setback standards in sub. (1).

(a) *Boathouses*. Dry boathouses located above the ordinary high water mark may be allowed within the minimum setback provided they are no larger than 250 square feet in size, are not used for human habitation and do not contain plumbing.

(b) *Open sided and screened structures*. Structures such as gazebos, decks, patios and screen houses in the shoreland setback area, that satisfy the requirements in s. 59.692 (1v), Stats., are exempt from the shoreland setback standards in sub. (1).

(c) *Fishing rafts*. Fishing rafts that are authorized on the Wolf river and Mississippi river under s. 30.126, Stats., and that are pulled up onto the shore in the fall for winter storage but are moved onto the water in the spring are exempt from the minimum setback standards in sub. (1).

(d) *Satellite dishes and antennas*. Broadcast signal receivers including satellite dishes or antennas that are one meter or less in diameter and satellite earth station antennas that are 2 meters or less in diameter are exempt from the minimum setback standards in sub. (1).

Note: Under 47 CFR 1.4000 and 25.104, state and local regulations that would impair the installation, maintenance or use of certain satellite dishes or antennas are prohibited.

(e) *Utilities*. Utility transmission and distribution lines, poles, towers, water towers, pumping stations, well pumphouse covers, private on-site wastewater treatment systems that comply with ch. Comm 83, and other utility structures that have no feasible alternative location outside of the minimum setback and that employ best management practices to infiltrate or otherwise control storm water runoff from the structure are exempt from the minimum setback standards in sub. (1).

Note: Major electrical generating facilities and high-voltage transmission lines that have obtained a certificate of public convenience and necessity under s. 196.491, Stats., are not subject to the requirements of local ordinances.

(f) *Flagpoles*. Flagpoles are exempt from the minimum setback standards in sub. (1).

(3) STRUCTURES COUNTIES MAY EXEMPT. Counties may exempt from the minimum setback standards in sub. (1), any structures that are regulated and permitted under ch. 30 or 31, Stats., such as piers, rip-rap, biological shore control structures, fish cribs, boat shelters, boat ramps, and dams and bridges and their appurtenant structures that have required state and federal permits, or meet statutory or administrative rule standards that do not require a state or federal permit.

(4) PERMITTED STRUCTURES. Counties may permit structures within the minimum setback if they are designed, constructed and maintained to minimize runoff to and preserve shore cover on navigable waters and have as their fundamental purpose one or more of the following goals:

1. To provide safe, pedestrian access to navigable waters, including public walkways or trails.
2. To provide public health and safety information.
3. To control significant, on-going erosion or slope stabilization.
4. To maintain or improve fish and wildlife habitat.
5. To maintain or improve water quality.

Note: Structures may include water quality improvement projects which comply with agricultural runoff management performance standards in ss. NR 151.01 to 151.095, wildlife and fisheries habitat improvement structures designated as necessary components of approved management plans and erosion control structures necessary to address significant on-going erosion.

(5) SETBACK REDUCTION PROCESS. A county may permit a reduced minimum setback for a new principal residential structure if all of the following conditions are satisfied:

1. The lot does not have a compliant building location which meets the applicable county setback, a minimum of 75 feet from the ordinary high water mark, due to unique property features.

Note: The department recommends that counties define unique property features to the area in their county shoreland zoning ordinance.

2. The depth of the structure is limited to 30 feet.
3. The lot is a legal lot of record that complied with the applicable lot size standards in effect at the time that the lot was recorded at the county register of deeds office.
4. The minimum setback shall be minimally reduced to create a compliant building location and may not be less than 50 feet from the ordinary high water mark.
5. Soil disturbance and vegetation removal activities do not encroach into the primary shoreland buffer.
6. The impervious surface standards in s. NR 115.19(3) are met.
7. The mitigation requirements in s. NR 115.21 are implemented and maintained.

SECTION 17. NR 115.15 is created to read:

NR 115.15 Height requirements. To protect and preserve the wildlife habitat and natural scenic beauty of lake and riverine environments, after the effective date of this rule [revisor insert date], a county may not permit the construction or placement of a structure on a lot within 300 feet of the ordinary high-water mark of a lake or stream unless the structure height does not exceed 35 feet. A county may create specific standards for height that apply to zoning districts for commercial, agricultural or industrial development within the shoreland zone provide those standards are incorporated into the county's shoreland zoning ordinance.

SECTION 18. NR 115.17 is created to read:

NR 115.17 Shoreland vegetation and buffers. (1) GENERAL. (a) *Vegetation removal criteria.* Any vegetation removal in the shoreland zone shall be governed by sound forestry and soil conservation practices, consideration of the effects on water quality and shall be designed and implemented in a manner to minimize erosion, sedimentation and impairment of near-shore aquatic, wetland, and upland wildlife habitat, and natural scenic beauty.

(b) *Vegetation management.* A county shall adopt standards for vegetation management, including the pruning of vegetation, if necessary, in the primary and secondary shoreland buffer and in the access corridor that will minimize erosion and destruction of natural scenic beauty and will provide visual screening from the water of dwellings, parking areas and other structures.

(2) PRIMARY SHORELAND BUFFERS. Except as provided in subs. (4) to (10), property owners shall preserve or establish, and maintain, a primary shoreland buffer of native shoreland vegetation in the area that extends a minimum of 35 feet inland from the ordinary high water mark of navigable waters under the following circumstances:

- (a) When a new principal structure is being constructed;
- (b) When primary buffer restoration or maintenance is selected to meet the requirements of s. NR115. 21 for any reconstruction, expansion, structural alteration, replacement, or relocation of any proposed structure that does not meet the minimum setback standards in s. NR 115.13 or the impervious surface standards in s. NR 115.19;
- (c) When required by a county's ordinance.

Note: Section 23.24 (3)(a), Stats., provides that no person may introduce a nonnative aquatic plant into the waters of the state without an aquatic plant management permit issued by the department. Property owners should avoid planting nonnative plant species in the shoreland buffer area that may spread to nearby wetlands or waterways, such as reed canary grass.

Note: The Wisconsin Natural Resources Conservation Service Standard for Shoreland Habitat, Code 643A, and its companion Wisconsin Biology Technical Note 1: Shoreland Habitat, provide specific criteria for the establishment of native vegetation for the improvement of fish and wildlife habitat, water quality and bank stability.

(c) *Access and viewing corridor.* Access and viewing corridors may extend through the primary shoreland buffer to the waterfront and shall be maintained in ground layer vegetation in order to provide pedestrian access to the waterfront, provided that the total width of the corridors on a lot does not exceed the following amounts:

1. When a new principal structure is being constructed, or when required under s. NR 115.21, lots 200 feet or less wide at the ordinary high water mark may have a total width of an access and viewing corridor or corridors that may not exceed 40 feet or 30% of the lot's width at the ordinary high water mark, whichever is less.

2. When a new principal structure is being constructed, or when required under s. NR 115.21, lots which are more than 200 feet wide at the ordinary high water mark are allowed a total width of an access and viewing corridor or corridors that may not exceed 200 feet or 20% of the lot's width at the ordinary high water mark, whichever is less.

(d) *Removal.* Vegetation may not be removed from the primary shoreland buffer except in access and viewing corridors. The removal of exotic or invasive species, damaged vegetation, vegetation that must be removed to control disease, or vegetation posing an imminent safety hazard is allowed. Any vegetation removed under this paragraph shall be replaced by planting comparable species of native vegetation in the same area.

(3) SECONDARY SHORELAND BUFFER. Except as provided in subs. (4) to (10), property owners shall preserve or establish, and maintain, a secondary shoreland buffer of native or nonnative, non invasive, ground layer vegetation, including trees and shrubs, under the following circumstances:

(a) when a new principal structure is being constructed;

(b) when secondary buffer restoration or maintenance is selected to meet the requirements of NR115. 21 for any reconstruction, expansion, structural alteration, replacement, or relocation of any proposed structure that does not meet the minimum setback standards in s. NR 115.13 or the impervious surface standards in s. NR 115.19;

(c) when required by a county's ordinance.

(4) AGRICULTURAL PRACTICES AND FARM DRAINAGE DITCHES. (a) Land used for non-structural agricultural practices is exempt from the shoreland buffer requirements in subs. (2) and (3).

Note: The department plans to develop standards for agricultural buffers in the shorelands of navigable bodies of water as part of the process to revise ch. NR 151.

(5) FOREST MANAGEMENT ACTIVITIES. Forest management activities are exempt from the shoreland buffer requirements in subs. (2) and (3) if the property owner, or an agent or contractor of the owner, implements the voluntary forestry best management practices found in "Wisconsin's Forestry Best Management Practices for Water Quality", PUB FR-093 2003, published by the department in March 1995 and reprinted in May 2003.

Note: Copies of "Wisconsin's Forestry Best Management Practices for Water Quality", PUB FR-093 2003, are available for inspection at the offices of the Department of Natural Resources and the Revisor of Statutes. Copies may be obtained from the Wisconsin Department of Natural Resources, Division of Forestry, 101 S. Webster Street, P.O. Box 7921, Madison, WI 53707-7921. Property owners may seek advice on implementation of Forestry "BMPs" from county foresters and foresters employed by the department.

(6) NATURAL AREAS MANAGEMENT ACTIVITIES. Natural areas management activities are exempt from the shoreland buffer requirements in subs. (2) and (3) if carried out consistent with a department-approved management plan, or with a management plan that is approved by the county. Management plans shall promote the purposes in s. NR 115.01 (2) and shall be filed with the county.

(7) DAM AND LEVEE MAINTENANCE ACTIVITIES. Dam and levee maintenance activities are exempt from the shoreland buffer requirements in subs. (2) and (3) if carried out consistent with the requirements of s. 31.18, Stats. Earthen dam and levee embankments shall be maintained with ground layer vegetation, such as turf grass.

(8) UTILITY MAINTENANCE ACTIVITIES. Utility maintenance activities are exempt from the shoreland buffer requirements in subs. (2) and (3) if carried out consistent with the safe operation of public utilities and if ground layer vegetation is preserved and maintained, or established and maintained.

Note: Major electrical generating facilities and high-voltage transmission lines that have obtained a certificate of public convenience and necessity under s. 196.491, Stats., are not subject to the requirements of local ordinances.

(9) ROAD INTERSECTION AND DRIVEWAY MAINTENANCE ACTIVITIES. Roadway intersection and driveway line-of-sight maintenance activities are exempt from the shoreland buffer requirements in subs. (2) and (3) if necessary to maintain required lines-of-sight, provided that ground layer vegetation is preserved and maintained, or established and maintained, and if the activities are carried out consistent with ss. 66.1037 and 82.03 (5)(b), Stats.

(10) TEMPORARY ACCESS. If it is necessary for construction equipment to access the primary or secondary buffer areas, the viewing and access corridor shall be used for temporary access to a project site for construction equipment. If additional access is necessary due to unique property features, activities that provide temporary access to a project site for construction equipment are exempt from the shoreland buffer requirements in subs. (2) and (3) if no other feasible location is available for the equipment to access the project site and if the county approves a revegetation and erosion control plan that is developed, implemented and maintained to address erosion control issues and to restore the ground, shrub and tree layers of vegetation in the areas disturbed by the temporary access.

SECTION 19. NR 115.19 is created to read:

NR 115.19 Impervious surface standard for new and existing construction (1) GENERAL. Whenever the construction of impervious surfaces in the shoreland zone is proposed, a county shall require property owners to address the impact of those surfaces with the use of best management practices to promote infiltration, control erosion and sedimentation into and preserve shore cover on navigable waters of the state. The county's shoreland zoning ordinance shall require compliance with this section.

Note: The department maintains a list of technical standards that it has determined adequate and effective for designing best management practices to achieve the objectives of NR115.19 (1). Contact the department storm water program in the Bureau of Watershed Management to obtain a copy of this list.

(2) IMPERVIOUS SURFACE STANDARD. The construction, reconstruction, expansion, structural alteration, replacement, or relocation of a structure shall comply with the appropriate standards in subs. (3) to (6).

(3) LOTS WITH NEW PRINCIPAL STRUCTURES. On a lot where a new principal structure is proposed the requirements in pars. (a) and (b) shall be met:

(a) 1. The total area of impervious surfaces, including those areas exempted or permitted under s. NR 115.13 (2) to (4), may not exceed 10% of the entire lot area within 300 feet of the ordinary high water mark; or,

2. The total area of impervious surfaces, including those areas exempted or permitted under s. NR 115.13 (2) to (4), may not exceed 20% of the lot area within 300 feet of the ordinary high water mark if the requirements in s. NR 115.21 are met.

(b) Shared impervious surfaces, shall be divided proportionately among the properties within 300 feet of the ordinary high water mark which utilize the impervious surface.

(4) LOTS WITH EXISTING PRINCIPAL STRUCTURES. (a) On a lot with an existing principal structure, unlimited maintenance and repair of the structure is allowed. In a facility licensed under chs. HFS 178 or Comm 95, replacement of a mobile home or travel trailer on the same land surface area on an existing site pad is considered maintenance and repair.

(b) On a lot with an existing principal structure, the requirements in this paragraph shall be met:

1. The total area of impervious surfaces, including those areas exempted or permitted under s. NR 115.13 (2) to (4), may not exceed 15% of the lot area within 300 feet of the ordinary high water mark; or

2. If the requirements in section s. NR 115.21 are met, the total area of impervious surfaces, including those areas exempted or permitted under s. NR 115.13(2) to (4), may not exceed 20% of the lot area within 300 feet of the ordinary high water mark.

3. On a lot with an existing principal structure, shared impervious surfaces, shall be divided proportionately among the properties within 300 feet of the ordinary high water mark which utilize the impervious surface.

(c) On a lot with an existing principal structure, impervious surface expansions within the secondary buffer may be allowed if:

1. The expansion is in a compliant location as a result of a setback reduction process;

2. The expansion does not, along with existing impervious surfaces, exceed the impervious surface percentage cap of 20%; and

3. The requirements in s. NR 115.21 are met.

(d) No structural alterations or expansions to a principal structure entirely located within the secondary buffer may extend closer to the ordinary high water mark than the existing principal structure.

(e) Reconstruction or replacement of a principal structure is allowed within the secondary buffer provided there is not a compliant building location on the lot due to unique property features, the new structure covers the same land surface area as the existing structure, and the requirements in s. NR 115.21 are met.

(f) No impervious surface expansions to structures located wholly or partially within the primary buffer may be allowed.

(g) Principal structures within the primary buffer may be reconstructed if the requirements in s. 59.692(1s), Stats. are met.

(5) ENCLOSING EXISTING IMPERVIOUS SURFACES. Building upon or enclosing existing impervious surfaces is allowed provided the enclosure will not be within the primary buffer, construction is on an existing impervious surface, documentation that demonstrates the impervious surface existed prior to the effective date of this rule [revisor insert date] is provided and the requirements in s. NR 115.21 are met.

(6) REPLACING EXISTING IMPERVIOUS SURFACES. If existing development on a lot within 300 feet of the ordinary high water mark exceeds the applicable cap on impervious surfaces in s. NR115.19 (3) or (4) on the date this rule becomes effective [revisor insert date], no increases of impervious surfaces shall be permitted. Replacement of impervious surfaces is allowed provided the surface or structure is in a compliant building location. If there is not a compliant building location due to unique property features the structure may be replaced if:

(a) The original structure was not in the primary buffer, the replacement structure covers the same land surface area as the original, and the requirements in s. NR 115.21 are satisfied, or

(b) The replacement structure is rebuilt at the most compliant location possible with the same land surface area as the original and the requirements in s. NR 115.21 are satisfied.

(7) RELOCATION OF EXISTING IMPERVIOUS SURFACES. Relocation of impervious surfaces is allowed if the following requirements are met:

(a) The surface or structure is moved to a compliant building location or, if there is not a compliant building location due to unique property features, to the greatest setback possible from the ordinary high water mark;

(b) The surface or structure is outside of the primary buffer;

(c) The requirements in s. NR 115.21 are met; and

(d) Soil permeability shall be restored to any area from which an impervious surface has been removed.

SECTION 20. NR 115.21 is created to read:

NR 115.21 Mitigation. (1) GENERAL. When construction, reconstruction, expansion, structural alteration, replacement, or relocation of a structure is proposed, mitigation shall be required if the minimum setback standards in s. NR 115.13 or the impervious surface standards in s. NR 115.19 are not met. Mitigation may be required when the vegetative management requirements in s. NR 115.17(2) are not met.

(2) PERFORMANCE STANDARD. (a) When mitigation is required, the performance standard that must be met is to protect and enhance existing water quality and habitat while achieving natural scenic beauty. To protect, preserve and enhance water quality, through the use of technical standards developed or approved by the department, counties shall require property owners to contain or infiltrate the average annual rainfall to the maximum extent practicable, with the goal that the pre-development and post-development runoff volumes remaining the same.

Note: If a stormwater management plan has been approved pursuant to ch. NR 216 and the plan meets the standards in this section, the implementation and maintenance of that plan may serve as all or a portion of the mitigation required in this section.

(b) To protect, preserve and enhance wildlife habitat, in the primary buffer one of the following must be met:

1. Natural shoreland habitat is maintained.
2. If natural habitat has been altered from natural conditions, it must be restored or enhanced and maintained to represent area plant communities or other natural features.

Note: Maintained is meant to include existing natural shorelines that already offer protection including rock outcrops, pine forests or sand dunes.

(c) To protect, preserve and enhance natural scenic beauty, shoreland vegetation or other natural features shall be maintained, or restored, through the monitoring and enforcement of the water quality, habitat and county specific visual standards that achieve the purposes of this chapter.

Note: The department may identify technical standards that exist or are specifically developed by qualified groups or organizations as adequate and effective to implement the performance standards in this subsection.

(3) PROPORTIONALITY. County ordinances shall include a mitigation system which requires mitigation that is proportional to the anticipated impacts of the project.

Note: For example, habitat mitigation may consist of a no mow area in the primary buffer or may require an entire restoration depending on the anticipated impacts of the requested project.

SECTION 21. NR 115.23 is created to read:

NR 115.23 Land disturbing construction activities. Counties shall have a permitting system for land disturbing construction activities to minimize erosion and sedimentation. Counties may exempt any land disturbing construction activity for which a permit has been granted by the department under ch. 30, Stats., or ch. NR 216 from the county zoning permit requirement, if the department-issued permit is filed with the county as specified in the county's shoreland zoning ordinance. Counties may also act as an agent of the department, utilizing a county permit to simultaneously grant state approval, if a memorandum of agreement has been developed and approved by the department and the implementing county.

Note: Land disturbing activities must also satisfy the requirements of ch. 30, Stats., chs. NR 151 and 216, and other state and federal laws, where applicable, including those erosion control measures required in the Uniform Dwelling Code (Comm 21.125), the commercial construction site erosion control standards in the Wisconsin Commercial Building Code (Comm 61.115) and the storm water and clearwater plumbing system requirements in the Uniform Plumbing Code. (Comm 82.36 and 82.365)

SECTION 22. NR 115.25 is created to read:

NR 115.25 Adoption of administrative and enforcement provisions. The shoreland ordinance adopted by each county shall provide for all of the following:

(1) The appointment of a zoning administrator, or staff person with the duties of a zoning administrator, and additional staff as the workload may require. The zoning administrator, or other zoning staff with appropriate training, may make the initial determination regarding the navigability of a body of water or the location of the ordinary high water mark for navigable waters of the county. The zoning administrator may contact the appropriate regional office of the department to request an official determination of navigability of or the location of the ordinary high water mark by department staff.

(2) The creation of a county zoning agency, as authorized by s. 59.69, Stats., a board of adjustment, as authorized by s. 59.694, Stats., and a county planning agency, as defined in s. 236.02 (1), Stats., and required by s. 59.692 (3), Stats.

(3) A system of zoning permits and fees for all new development, construction, replacement, reconstruction, expansion, structural alteration and relocation of buildings and other structures and other activities as required by this chapter. This system shall include a plan to coordinate with other county offices and town governments to ensure that landowners in unincorporated areas of the county are informed about the requirements of the county shoreland zoning ordinance when they apply for building

permits and sanitary permits. All applications shall be required to include a site diagram drawn to scale that shows, at a minimum: the setback from the ordinary high water mark of all structures on the lot, any proposed vegetative cutting or removal, and the location and size of all existing and proposed impervious surfaces. A copy of all approved permit applications shall be required to be filed in the office of the county zoning agency. All county shoreland zoning ordinances shall provide that permits shall expire if construction has not commenced by a time limit established in the county ordinance.

(4) Regular inspection of permitted work in progress to insure conformity of structures and other activities with the requirements of the county shoreland zoning ordinance.

(5) A variance procedure which authorizes the appropriate local decision making body to grant a variance from the terms of the ordinance in accordance with s. 59.694 (7)(c), Stats.

(6) A conditional use or special exception procedure for uses presenting special conditions. A county may not substitute a conditional use permit process for the variance process in situations where a variance is necessary because the use or activity is prohibited or is not allowed because specific standards are not satisfied.

(7) The county shall keep a complete record in the form of written minutes, a tape recording, transcript or other appropriate electronic methods of all proceedings before the board of adjustment or the county planning and zoning committee related to proposed variances, conditional uses or special exception permits, and shall retain these records in compliance with s. 19.21 and ch. 59, Stats.

(8) Written notice and a copy of all application forms and attachments submitted by the applicant shall be sent to the appropriate regional office of the department by the county at least 10 business days prior to all hearings on proposed variances, conditional uses, appeals for map or text interpretations, and map or text amendments, and the county shall submit to the same office of the department copies of decisions on variances, conditional uses, appeals for map or text interpretations, and map or text amendments within 10 business days after they are granted or denied.

(9) Mapped zoning use districts and the recording, on an official copy of the map, of all use district boundary amendments. As updated Wisconsin wetland inventory maps become available, a county shall adopt the updated maps for shoreland-wetland zoning districts within 6 months of final completion of the map. The boundaries of the shoreland zone and the location of navigable waters are not required to be mapped if described in the text of the ordinance.

(10) The establishment of appropriate penalties for violations of the requirements of the ordinance, including at a minimum forfeitures of not less than \$10 and not more than \$1,000 per violation, or twice the amount of any permit fee that the violator did not, but should have, paid, whichever is more. Each day of continued violation is a separate offense. Compliance with the ordinance shall also be enforceable as provided in s. 59.69 (11), Stats.

(11) The prosecution of violations of the ordinance.

(12) The procedure that is to be followed to process applications from persons who claim to be disabled and who are requesting that they be allowed to take action that would otherwise be prohibited under the shoreland zoning ordinance because of their disability. In order to allow a disabled person who is entitled to reasonable accommodations under the Americans with Disabilities Act, the federal Fair Housing Act or the Wisconsin Open Housing Law to take action that would otherwise violate the requirements of the county's shoreland zoning ordinance, a county shall issue a special administrative permit to the disabled person. All structures constructed for use by the disabled shall be located, designed, constructed and maintained to minimize runoff to navigable waters and avoid any adverse impact on fish and wildlife habitat and natural scenic beauty. A county may not issue variances to disabled persons unless the statutory variance criteria in s. 59.694 (7)(c), Stats., are satisfied for the lot or structure in question.

Note: The Americans with Disabilities Act ("ADA"), 42 USC 12101 to 12213, requires states and local units of government to take action to avoid discriminating against disabled persons in their employment practices, in public accommodations and in all programs, activities and services provided by the governmental entity. The federal Fair Housing Act, 42 USC 3601 to 3631, and the Wisconsin Open Housing Law, s. 106.50, Stats., require local governments to make "reasonable accommodations" in the application of zoning ordinances in order to provide equal opportunity to housing to disabled persons. However, the issuance of a variance is not the appropriate mechanism for granting "reasonable accommodations" that are required because of a person's disabilities because, under Wisconsin law, variances can only be granted based on the unique characteristics of the property.

SECTION 23. NR 115.27 is created to read:

NR 115.27 Department duties. (1) ASSISTANCE TO COUNTIES. The department shall provide advice and assistance to a county in the development, adoption, administration and enforcement of their shoreland zoning ordinances, consistent with the shoreland protection objectives found in s. 281.31, Stats.

(2) REVIEW AND APPROVAL OF SHORELAND ZONING ORDINANCES. (a) Compliance with the requirements of s. 59.692, Stats., will be determined by the department by comparing the shoreland zoning ordinance that has been enacted by a county with the minimum standards for shoreland regulation contained in this chapter. The department shall issue a certificate of compliance when a county has, in the opinion of the department, complied with s. 59.692, Stats., and this chapter.

(b) The department shall periodically reevaluate shoreland zoning ordinances to ascertain their continuing compliance with this chapter. A county shall keep its shoreland zoning ordinance current, effective and workable to retain its status of compliance.

(c) The department shall review and approve all proposed shoreland zoning ordinance amendments, including amendments to shoreland wetland zoning districts pursuant to s. NR 115.07 (5), to ensure the proposed ordinance will retain its status of compliance with s. 59.692, Stats., and this chapter. Ordinance amendments shall be sent to department's central office in Madison at P.O. Box 7921, Madison, WI 53707-7921.

(d) Once a county ordinance has been revised or amended, the department shall review the ordinance and notify the county of approval or denial of the ordinance. The county shoreland zoning ordinance shall meet or exceed the standards of this chapter before the department issues a certificate of compliance. A county must have a department approved shoreland zoning ordinance to be considered in compliance with the requirements of s. 59.692, Stats.

(3) DETERMINATION OF ORDINANCE NONCOMPLIANCE. (a) A county that has a shoreland zoning ordinance that does not meet the minimum standards contained in this chapter shall be deemed to be in noncompliance with the requirements of s. 59.692, Stats.

(b) If a county fails to modify its ordinance to meet the minimum standards in this chapter within 2 years after the effective date of this rule [revisor insert date], the department shall adopt a superseding ordinance amendment for the county, after notice and hearing, pursuant to s. 59.692 (6), Stats. All costs for action by the department shall be borne by the noncompliant county. The department may grant an extension of time to modify an ordinance if the department determines the extension is in the public interest.

(c) If a county fails to modify its ordinance to meet the minimum standards in this chapter within 6 months after a notification of noncompliance is sent to the county for ordinance amendments other than in (b), the department shall adopt a superseding ordinance amendment for the county, after notice and hearing, pursuant to s. 59.692 (6), Stats. All costs for action by the department shall be borne by the noncompliant county. The department may grant an extension of time to modify an ordinance if the department determines the extension is in the public interest.

(4) MONITORING OF ZONING DECISIONS. It is the responsibility of the department, to aid in the fulfillment of the state's role as trustee of its navigable waters, to monitor the administration and enforcement of shoreland zoning ordinances. In so doing, the department:

(a) Shall review decisions granting conditional uses, variances and appeals to ensure compliance with the county shoreland zoning ordinance and this chapter.

(b) May appeal the actions of county zoning officials to county boards of adjustment, under s. 59.694 (4), Stats.

(c) May seek certiorari review of the decisions of boards of adjustment, under s. 59.694 (10), Stats.

SECTION 24. 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 25. 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 _____
Scott Hassett, Secretary

(SEAL)