



Department of Natural Resources Testimony – Clearinghouse Rule 13-051

Assembly Committee on Natural Resources and Sporting Heritage

Russ Rasmussen, Deputy Administrator
Water Division
Department of Natural Resources

Subject: Clearinghouse Rule 13-051 – Minimum standards for county shoreland zoning ordinances

Good morning Chairman Ott and committee members. Thank you for the opportunity to testify on Clearinghouse Rule 13-051, which provides for minimum standards for county shoreland zoning ordinances. Today I am testifying for informational purposes on behalf of the Department of Natural Resources.

Clearinghouse rule 13-051 revises several portions of Administrative Rule NR 115 which sets out minimum standards for shoreland zoning that counties must adopt into their shoreland zoning ordinances. NR 115 was first promulgated in 1970 and remained unchanged until 2010, when revisions were adopted to address changes in development patterns on lots adjacent to navigable lakes, rivers and streams in Wisconsin. Among the 2010 revisions were the establishment of standards for impervious areas on riparian lots, clarification of standards in the 35 foot vegetated buffer zone landward from the ordinary high water mark, and mitigation requirements. Shortly after promulgation, county zoning administrators identified certain provisions that posed significant challenges in implementation. The department met with these county officials and other stakeholders to derive solutions to these implementation challenges which are reflected in these proposed revisions.

County officials identified several areas related to the impervious surface standards where certain revisions would clarify and facilitate more straight forward and fair implementation. The 2010 rule provides that new development may contain up to 15% of the lot area as impervious surface. The owner may add up to 30% of the lot area as impervious surface if they obtain a permit from the county and implement mitigation measures. Counties are given flexibility to determine the type and scope of mitigation measures required.

All existing impervious surfaces were grandfathered in the 2010 rule. In addition to standard grandfathering concepts, which allows an owner to keep what they have, the 2010 rule simply required the landowner not to exceed the percentage of impervious surface they had when the rule was promulgated. They not only could keep and maintain their existing impervious surface, but they can move it around on their lot, or change its makeup or character (e.g. change a shed into a tennis court, or vice versa), as long as they don't exceed the grandfathered existing impervious surface percentage. The 2010 rule also provides that the impervious surface standard applies to all areas within 300 feet of the ordinary high water mark of a navigable lake, river or stream.

Clearinghouse rule 13-051 revises the impervious standards of the 2010 rule in the following ways:

The standards only apply to riparian lots or lots wholly within 300 feet. This eliminates the issue of the standard applying to only a portion of a nonriparian lot.

If runoff from an impervious surface is directed to a designed area such as a rain garden or bioswale, or even onto a pervious portion of the lot where the water will be contained and infiltrate into the soil – so that it does not carry pollutants into the receiving water – that impervious surface is not included in the percentage calculations for purposes of compliance with the standard. This takes a performance approach to the standard, meaning that if the runoff can be managed so that it does not pollute the receiving water, it accomplishes the purposes for which the

standard was established. This allows landowners to add additional impervious surface, as long as they manage the runoff from it so that it does not carry pollutants into the adjacent receiving water.

Many counties have dense development in portions of their unincorporated areas which have impervious surface percentages on many lots that exceed the impervious standards. While the previously developed lots are grandfathered as previously described, adjacent lots or infill lots will be subject to the smaller percentages. Recognizing this, Clearinghouse rule 13-051 provides the option for counties to designate highly developed areas with increased impervious surface standard percentages. Instead of the 15% impervious surface without a permit standard, up to 30% with a permit and mitigation, the standards in these highly developed areas are 30% without a permit and up to 40% with a permit and mitigation for residential areas and 40% without a permit and up to 60% with a permit and mitigation for commercial areas.

Other revisions are proposed to eliminate a requirement that counties must provide the department with copies of permits issued under approved variances, and to clarify that no permit is needed from a county for an owner to remove dead, diseased, invasive or hazardous vegetation from within the 35 foot vegetated buffer zone.

These revisions also provide additional clarification and flexibility for landowners with nonconforming structures. Structures that are within the 75 foot setback have been subject to the 50% rule which restricts maintenance and repair to 50% of the structure's valuation. This has led to differences in interpretation both among and even within counties. These revisions clarify that landowners may perform unlimited maintenance and repair to nonconforming principle structures. This is even available if a structure encroaches into the 35 foot vegetative buffer zone with the only restriction that the work be done within the existing building envelope. For structures outside the 35 foot vegetative buffer zone but inside the 75 foot setback requirement, the revisions provide for additions of up to 200 square feet within the setback (but no nearer the water) along with unlimited additions behind the setback. In addition, a mitigation requirement that nonconforming accessory structures be removed when relocating or replacing a principle structure has been eliminated.

Finally, I would like to address the issue of nonconformity itself. When the original standards were promulgated in 1970, a minimum setback from the ordinary high water mark of 75 feet, and minimum lot sizes of 20,000 square feet (or 10,000 square feet for sewerred lots) were established. This created a number of nonconforming structures and lots where structures were already placed within the setback or lots plated that were smaller than the minimums. Neither the 2010 rule nor these revisions make any changes to those standards. The department does not believe that the impervious surface standards promulgated in 2010 and certainly not as revised with this proposal, create any additional nonconformity beyond the 1970 standards. This position is supported by numerous internal and external attorneys.

Thank you for providing me with the opportunity to testify on this rule today and I would be happy to offer any additional information or answer any questions.



Testimony on Clearinghouse Rule 13-051
Amber Meyer Smith, Director of Programs and Government Relations
Assembly Committee on Natural Resources and Sporting Heritage
April 23, 2013

Clean Wisconsin is a non-profit environmental advocacy group focused on clean water, clean air and clean energy issues. We were founded forty four years ago as Wisconsin's Environmental Decade and have 20,000 members and supporters around the state.

Clean Wisconsin is concerned about the revisions to NR 115 that you are considering today because they could have major impacts on water quality around the state by increasing impervious surface and non-conforming structures on shorelines across the state. We are also opposed because this revision undoes a compromise that was forged after years and years of stakeholder feedback and scientific examination between diverse groups – from realtors to environmentalists. That was a hard-fought compromise that took great care to balance property rights with water protections that is not represented in the changes before you. In addition, we don't believe enough analysis has been done by DNR to fully understand and evaluate how these proposed changes will impact the various lakes and rivers that could see more shoreline development.

DNR's own summary of the proposed rule states

“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.” (Attachment to the fiscal estimate, p. 5)

Impervious Surface Standard Increased

The rule increases the allowable impervious surface on waterfront properties, well beyond the 10-12% where studies have shown water quality is impacted. Current rules already allow impervious surface of 15% to 30%, which was a huge compromise to make back in 2009 because of the water quality impacts. Now the rule proposes to increase the maximum impervious surface standard from 30% to 60% for highly developed areas. Furthermore, the new rule exempts any areas that runoff through a treatment system from impervious surface standards. However, the rule is unacceptably vague about what would qualify as an “engineered system” under this revision. Without certainty that systems will work and are being kept up, this exemption has the potential for huge unintended consequences for waterways.

In addition, the proposed rule now excludes all property that only partially falls within 300 feet of the ordinary high water mark from the impervious surface guidelines. Since we know runoff from as far as 1000 feet impacts water quality, excluding these properties will further erode a waterway's protections

Taking Away Local control over Non-Conforming Structures

The treatment of non-conforming structures has always been a difficult issue in dealing with NR 115 at the local level. We can sympathize with the workload that evaluating non-conforming structures has caused county code administrators, and the headaches it has caused homeowners. But 2011 Act 170 already allows counties to relax restrictions about non-conforming structures. The tool already exists for those counties who are having problems dealing the treatment of non-conforming structures.

Now not only does the proposed rule relax restrictions on expanding a non-conforming structure, but it also sets those relaxed standards as the maximum that a county can adopt. A county can no longer decide they want to be more protective of water quality and set more restrictive limits on non-conforming structures. Several counties had already implemented new NR 115 standards and will now have to go back and revise their ordinances, even though the tools are already available to address the problems some counties were having.

No Environmental Analysis of Changes

Clean Wisconsin also believes that DNR should have conducted an environmental analysis for these rule changes. We feel these are major revisions that meet the criteria set forth in Wisconsin's Environmental Policy Act for a more robust analysis. Instead, when drafting the revisions, the DNR treated these changes as minor and didn't conduct such an analysis, leaving many unanswered questions about the impact of the proposed rule changes. Without an analysis, we don't know exactly where these relaxed standards will be applied, and where they might have dramatic impacts. The only analysis of what constitutes a highly urbanized area, a totally new category under this rule that allows for more impervious surface, comes from Waukesha County who took it upon themselves to analyze census data on highly developed areas. We believe the environmental analysis would have been critical in letting people around the state have a better assessment of what the exact impacts on their lake could be.

The totality of these changes could have grave impacts on water quality throughout the state. As described in DNR documents related to the rule revision:

“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 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.”

The current NR 115 was a compromise package that balanced those impacts to our natural resources with the need for property rights. The proposed rule loses that balance, and our waters will suffer for it. We urge you to reject these changes.



Rep. Al Ott, Chair
Assembly Committee on Natural Resources and Sporting Heritage
Room 323 North
State Capitol

April 23, 2014

Rep Ott and members of the Committee,

The River Alliance of Wisconsin is testifying in opposition to Clearinghouse Rule 13-051 regarding changes in shoreland zoning rules in NR115.

Why are proposed changes to NR115 a concern?

The 2009 rules were a carefully crafted package that balanced protection of the environment with increased flexibility for property owners. DNR staff worked closely with the Wisconsin Realtors Association, the Wisconsin Builders Association, Wisconsin Lakes, representatives of the Wisconsin Code Administrators, and River Alliance of Wisconsin to reach this reasonable compromise. The final package won support of all stakeholders.

The scientific rationale for most of the elements of the rule is simple:

- The less impervious surface in the area that drains to a waterway, the less polluted runoff and the better the water quality
- A deep buffer of natural vegetation near the shore improves water quality by filtering runoff and providing habitat
- Structures and impervious surfaces close to the water send runoff directly into the waterway

Changes proposed in the rule undo these careful compromises and will ultimately cause more water pollution. These changes include:

1) Weakening of water quality protection by exceeding the 30% impervious surface cap

- Studies show loss of water quality with as little as 10-12% impervious surface. The compromise rule already allows for up to 30%. Proposed changes would allow for 30% and beyond under certain conditions.
- In some cases, up to 100% of the surface of a waterfront parcel could be paved as long as there is a structure in place to divert runoff. Yet, there is no requirement for such a structure to be properly engineered or maintained.

2) Loss of Local Control for Non-conforming Structures.

- The proposed changes relax the rules on expanding legal but “non-conforming” structures built closer than 75 feet to the water.

- 2011 Act 170 already prohibited county shoreland zoning ordinances from being more restrictive than NR115 with respect to nonconforming structures. If a county already has the flexibility to pass a less restrictive non-conforming structure standard under Act 170 why are we mandating a weakened standard for all?
- At least 14 counties have zoning rules that will now need to be changed. In fact, those counties were early adopters of shoreland zoning as prescribed by the 2009 compromise, and will now be penalized by having to re-do their code yet again. It will force them to weaken shoreland protections, even if they desire more robust protection of water quality.

3) Weakening of water quality protection by restricting the area of application of impervious surface limits

The current rule sets a limit for impervious surfaces within 300' of the waterway. DNR proposes changing this to only riparian lots or properties entirely contained within 300' of the waterway. This will substantially shrink the amount of land that must be managed to protect water quality around a river or lake. The impact of impervious surfaces goes beyond just waterfront parcels to the whole watershed.

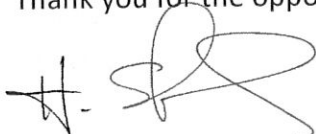
4) Finally, DNR proposes a major policy change but provides no analysis of the scope of impact

The rule change proposes to create a new category called "highly developed shorelines". These properties would be permitted a much higher % impervious surface, in some cases up to 60% of the parcel (with mitigation). Biologists have documented that water quality and fish habitat degrades when impervious surfaces exceed 10-12% in the watershed.

This represents a policy change that can have significant impact on fisheries and water quality of many rivers and lakes in the state. Yet DNR has done no assessment of how many waters are impacted and where in the state they are located. Waukesha County provided DNR with a map showing what regional waterways will qualify for less stringent zoning but the agency has done no assessment of their own.

We urge that the rules be left as is. These changes are short-sighted, imbalanced and will result in increased pollution running into rivers and lakes throughout the state. Most importantly, it is unfair to property owners in the state to make rule changes without them having any idea if they might be affected or not.

Thank you for the opportunity to comment.



Helen Sarakinos
Policy Director.



To: All legislators

From: Tom Larson, Vice President of Legal and Public Affairs

Date: April 23, 2014

Re: Changes to Wis. Admin. Code Ch. NR 115 (CR 13-051)

The Wisconsin REALTORS® Association supports CR 13-051, proposed changes to the state's minimum standards for county shoreland zoning regulations. The proposed changes are designed to make the regulations more flexible for zoning administrators and waterfront property owners without compromising the environmental protection goals of the rules.

Background

In 2009, the DNR revised NR 115 due to increased development pressure along our waterways and numerous complaints about the prior regulations. However, after having more time to analyze the impacts on existing property owners and future development, many county zoning administrators believe that several of the new regulations are overly restrictive and will create hardships for new development and for property owners wishing to expand their existing homes.

Proposed Changes

In response, the DNR has introduced several new modifications to the NR 115, including changes related to impervious surfaces, nonconforming structures, and the trimming of vegetation. Specifically, these changes include the following:

+ Higher impervious surface standard for already highly-developed areas. The current regulations limit the amount of impervious surfaces (concrete, blacktop, footprint of structure, etc.) for new construction and expansions of existing homes and buildings within 300 feet of the water to no more than 15% of the lot area, or up to 30% if mitigation is performed.

For more urban areas with higher densities and smaller lots, these impervious surface standards would place significant restrictions on the size of the home that can be built on the lot and, in some cases, could make the lots unbuildable. For example, in a sample study performed in Waukesha County, over 50% of the existing homes exceeded the 30% impervious surface standard and, thus, could not have been built in the same manner if the impervious surface limits were in place when the homes were constructed.

Under the proposed changes, the impervious surface standards would be increased in areas with highly developed shorelines, according to the 2010 U.S. Census, or areas with a

commercial, industrial or business zoning classification. In these areas, the impervious surface standards for residential development would be increased to 30% without mitigation and up to 40% if mitigation was performed. For commercial and industrial development, the impervious surface standard would be increased to 40% without mitigation and up to 60% with mitigation.

+ Applying impervious surface regulations to only riparian lots and non-riparian lots located entirely within 300 feet of the OHWM. In addition to increasing the impervious surface standards in highly developed areas, the proposed changes would limit the application of the impervious surface standard to only:

- + riparian lots (adjacent to a navigable waterway), and

- + non-riparian lots located entirely within 300 feet of the ordinary high water mark (OHWM)

If any portion of the lot is more than 300 feet away from the OHWM, the impervious surface standards would not apply.

+ Exempting lots that do not drain directly into the lake or river. One of the other significant changes is new definition of "impervious surface." Under this definition, any surfaces that do not drain directly into a lake or river are not considered impervious. In other words, if a surface drains into an off-site stormwater pond, constructed wetlands, or other engineered system, or a surface that drains into an internally drained area, the surface will not be considered "impervious" for purposes of calculating the impervious surface limits.

+ Clarifies that discontinuance "penalty" applies only to nonconforming uses, not nonconforming structures. Under current law, if the use of a nonconforming structure or nonconforming use is discontinued for a period of 12 months, the structure or use must be brought back into conformity with the current zoning ordinance. This was a problem for nonconforming structures that may have been used as a vacation home on a seasonal basis, or that were unoccupied for other reasons for 12 months or more.

Under the proposed changes, only nonconforming uses that are discontinued for a period of 12 months must be brought into compliance with the current zoning ordinance. A nonconforming structure that is vacant for any period of time will not be required to be brought into compliance with the current zoning ordinance, under NR 115.

+ No permit for removal of invasive, damaged or diseased vegetation. Finally, the proposed changes clarify that a permit is not necessary for the removal of invasive, damaged or diseased vegetation within 35 feet of the water. Under current law, some confusion exists as to whether property owners are required to get a permit before cutting or removing such vegetation.

We encourage you to support the proposed changes to NR 115. If you have questions, please contact us at (608) 241-2047.