

The attached draft guidance entitled “**2015 Act 55 Replacement Culvert Exemption**” was developed to help Department of Natural Resources staff understand and apply statutory exemptions for projects related to culvert replacement.

S. 30.123(2), Wis. Stats., requires a permit to construct, place, or maintain a culvert in, on, or over navigable waters. Effective July 14, 2015, 2015 Wisconsin Act 55 revised s. 30.123, Wis. Stats., by amending one permit exemption and repealing another.

This guidance will help Department staff understand and consistently apply the various requirements when making decisions regarding construction, placement and maintenance of Replacement Culverts under s. 30.123(6)(d) and (6r), Wis. Stats.

This guidance does not address:

- Construction and maintenance of culverts by WI Department of Transportation (DOT) as regulated under ss. 30.123(6)(b) and 30.2022, Wis. Stats.
- Municipal highway culverts as regulated under ss. 84.01(23) and 30.123(7)(d) and ch. TRANS 207, Wis. Admin. Code.
- Culverts that are dams
- Farm drainage ditch culverts

This draft guidance was developed by staff from the Department’s Bureau of Watershed Management and has been reviewed internally. The Department is now soliciting comments from external stakeholders. Once the 21 day notice period is complete, the Department will consider all comments, revise the guidance if needed, and make a copy of the final guidance available to the appropriate internal and external stakeholders.

Comments related to this draft guidance should be provided to Martye Griffin via e-mail at [dnrwywrzguidance@wisconsin.gov](mailto:dnrwywrzguidance@wisconsin.gov) .



**BUREAU OF WATERSHED MANAGEMENT  
PROGRAM GUIDANCE**

**Waterway Wetland Protection**

**2015 Act 55 Replacement Culvert Exemption**

Effective Date: **Date**  
Guidance #: WW-2016-006

*Notice: This document is intended solely as guidance, and does not contain any mandatory requirements except where requirements found in statute or administrative rule are referenced. This guidance does not establish or affect legal rights or obligations, and is not finally determinative of any of the issues addressed. This guidance does not create any rights enforceable by any party in litigation with the State of Wisconsin or the Department of Natural Resources. Any regulatory decisions made by the Department of Natural Resources in any matter addressed by this guidance will be made by applying the governing statutes and administrative rules to the relevant facts.*

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APPROVED:

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Pam Biersach, Director  
Bureau of Watershed Management

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Date

1 **A. Statement of Problem Being Addressed and Scope of Guidance**

2  
3 We created this guidance to improve consistency when applying requirements and  
4 making decisions for Exemption Determination Requests (EDRs) under s. 30.123(6)(d)  
5 and (6r), Wis. Stats., regarding construction, placement and maintenance of Replacement  
6 Culverts. This guidance applies to exemption decisions regarding culverts replaced on  
7 private property as well as culverts replaced as part of a [Department led project under](#)  
8 [MC 1755.1](#). This guidance should help ensure that consistent information is conveyed  
9 through the DNR website, e-permit submittals, and statewide general permit creation and  
10 modification.

11  
12 The guidance will help property owners, consultants, and DNR staff answer the following  
13 questions:

- 14 ✓ Do I need a permit to replace my Existing Culvert?
- 15 ✓ Do any size requirements or other requirements or standards apply when  
16 replacing my culvert?
- 17 ✓ Do I need to follow ch. NR 320, Wis. Admin. Code, when replacing my Existing  
18 Culvert?

19  
20 This guidance does not address:

- 21 ✓ **Construction and maintenance of culverts by WI Department of**  
22 **Transportation (DOT)** as regulated under ss. 30.123(6)(b) and 30.2022, Wis.  
23 Stats.
- 24 ✓ **Municipal highway culverts** as regulated under ss. 84.01(23) and 30.123(7)(d)  
25 and ch. TRANS 207, Wis. Admin. Code.
- 26 ✓ **Culverts that are dams**
  - 27 ➤ [The [“Unauthorized Dams” guidance signed in 2014](#) remains valid and  
28 should be used for any structures, including culverts, that are unauthorized  
29 dams. [The Culvert Replacement or Dam Authorization Checklist](#) should  
30 be used to help determine if a culvert is a dam.]
- 31 ✓ **Farm drainage ditch culverts**
  - 32 ➤ [The [draft “Agricultural Exemption”](#) guidance addresses farm drainage  
33 ditch culverts]

34  
35 This guidance does **not** apply to the reconstruction or replacement of Existing Culverts in  
36 Wild Rivers under s. 30.26, Wis. Stats., unless the replacement meets the requirements  
37 under [s. 30.26\(5m\)3., Wis. Stats.](#), and s. [NR 302.04\(5\)](#), Wis. Admin. Code.

38  
39  
40  
41 **B. Background**

42  
43 S. 30.123(2), Wis. Stats., requires a permit to construct, place, or maintain a culvert in,  
44 on, or over navigable waters. Effective July 14, 2015, [2015 Wisconsin Act 55](#) revised s.  
45 30.123, Wis. Stats., by amending one permit exemption and repealing another. Act 55  
46 changed s. 30.123 in 4 ways:

- 47 1) It modified the sub. (6)(d) exemption that applies to certain Replacement  
48 Culverts<sup>1</sup>
- 49 2) It repealed the sub. (6)(e) exemption for Replacement Culverts with diameters 24”  
50 or less
- 51 3) It created sub. (6p) related to permit costs when a permit is required under sub.  
52 (6m) for an otherwise exempt Replacement Culvert<sup>2</sup>
- 53 4) It created sub. (9), which requires municipalities to retain a record whenever they  
54 replace an Existing Culvert with a Replacement Culvert exempt under sub.(6)<sup>3</sup>

55

### 56 C. Discussion

57

58 The changes to s. 30.123 enacted in Act 55 apply to replacement of culverts in, on, or  
59 over navigable waters. If the waterway was navigable when 2015 Act 55 took effect July  
60 14<sup>th</sup>, 2015, the exemption applies to Replacement Culverts placed in, on, or over that  
61 waterway after that date. Culvert replacement that results in a discharge of fill to a  
62 wetland is exempt from s. 30.123 permits under Act 55, but a wetland permit would still  
63 be required under s. 281.36.

64

#### 65 *Are both the Existing and Replacement structures culverts?*

66

67 The plain statutory language in s. 30.123(6)(d) limits the exemption to replacing a *culvert*  
68 with a *culvert*, so we must first confirm that the Existing Culvert that is being removed  
69 and the Replacement Culvert being constructed, placed, or maintained are both culverts.

70

71 “Culvert” is not defined in the statute (s. 30.123, Wis. Stats.) or administrative rules (ch.  
72 NR 320, Wis. Admin. Code). If the statute and rules do not define a term, standard  
73 statutory construction precepts allow the Department to use and apply any ‘term of art’  
74 definition used in industry, projects, etc. or a standard dictionary definition. The generally

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<sup>1</sup> [30.123\(6\)\(d\)](#) (d) The construction or placement and the maintenance of a replacement culvert that is placed in substantially the same location as the culvert being replaced if the replacement culvert is constructed or placed using best management practices to comply with water quality standards under subch. II of ch. 281.

<sup>2</sup> [30.123\(6p\)](#) (6p) Costs. If the department requires a person who replaces a culvert to apply for an individual permit or seek authorization under a general permit under sub. (6m), notwithstanding the exemptions under sub. (6)(d), and if the department includes conditions in the individual permit or under the general permit that are different than the conditions in the permit issued for the culvert being replaced, the department may not impose a fee for the individual permit or for authorization under the general permit and shall reimburse that person, from the appropriation under s. [20.370\(8\)\(ma\)](#), for his or her reasonable costs incurred in complying with the different conditions in the permit.

<sup>3</sup> [30.123\(9\)](#) (9) Records. A city, village, town, or county that replaces a culvert and that is exempt from the permitting requirements under sub. (6) shall make and retain a record of the replacement of the culvert. The record shall include all of the following information:

(a) The date on which the replacement culvert was constructed or placed.

(b) The dimensions of the replacement culvert.

(c) The location of the replacement culvert.

75 accepted definition of a culvert is a structure, usually a pipe that is sized hydraulically to  
76 allow water to flow under a road, railroad, trail, embankment, or similar obstruction from  
77 one side to the other side. Culverts are distinguished from bridges by being covered with  
78 an embankment and generally composed of structural material around the entire  
79 perimeter with some exceptions such as a pipe-arch or bottomless culvert which may  
80 utilize the natural streambed as the bottom.

81  
82 ***Does the exemption apply to any Replacement Culvert replacing any Existing Culvert?***

83  
84 Yes, if the Replacement Culvert meets the statutory exemption standards. Before s.  
85 30.123 was amended by 2015 Act 55, the sub. (6)(d) exemption only applied when  
86 replacing Existing Culverts that had obtained permits. The amendment to sub. (6)(d)  
87 deleted the requirement that the Existing Culvert had to be a permitted culvert; the  
88 exemption now applies when replacing any Existing Culvert in, on, or over navigable  
89 waters so long as the Replacement Culvert complies with the standards in sub. (6)(d).<sup>4</sup>

90  
91 The amendment of sub. (6)(d) and repeal of sub. (6)(e) effectively broadens Wis. Admin  
92 Code NR 320.06(1)(d) to apply its exemption and its Best Management Practices (BMP)  
93 standards when replacing any existing culvert, not just a previously permitted culvert.  
94 The amended sub. (6)(d) effectively creates a safe harbor to replace most Existing  
95 Culverts in, on, or over navigable waters without needing a s. 30.123 permit for the  
96 Replacement Culvert. The new statute only requires that the exempt Replacement Culvert  
97 must:

- 98 1) Be placed in substantially the same location as the culvert being replaced and  
99 2) Be constructed or placed using best management practices (BMPs) to comply  
100 with water quality standards under subch. II of ch. 281, Wis. Stats.

101  
102 2015 Act 55 repealed an exemption under sub. (6)(e) that allowed the replacement of  
103 culverts with an inside diameter of 2 ft. or less. Now most Existing Culverts can be  
104 replaced and the Replacement Culverts do not need a s. 30.123 permit, regardless of the  
105 size of the Existing Culverts or Replacement Culverts.

106  
107 The amendment to sub. (6)(d) and repeal of sub. (6)(e) also effectively repealed all  
108 existing standards for Replacement Culverts except for the sub. (6)(d) requirements.  
109 Before 2015 Act 55 took effect, standards for Replacement Culverts to replace Existing  
110 Culverts less than or equal to 24 inches in diameter were codified in s. NR 320.06(1)(c),  
111 Wis. Admin Code. Those standards included locational criteria related to culvert  
112 placement in areas with Public Rights Features (sensitive areas and specially identified  
113 locations identified for outstanding fish and wildlife habitat, water quality, navigation,  
114 etc.) and standards related to upstream ponding and perched culverts. The amendment of  
115 sub. (6)(d) and repeal of sub. (6)(e) effectively eliminates Wis. Admin Code NR  
116 320.06(1)(c).

117  

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<sup>4</sup> The s. 30.123(6)(d) exemption applies to all culverts except DOT culverts. DOT culverts are already exempt from permitting requirements under s. 30.123(6)(b) (unchanged by 2015 Act 55), which requires all DOT culverts to be placed in accordance with s. 30.2022, Wis. Stats.

118 2015 Act 55 also creates a new subsection related to permit fees and other costs  
119 associated with a Replacement Culvert. The new s. 30.123(6p), Wis. Stats., requires that  
120 if the Department invokes s. 30.123(6m) to require a general or individual permit in lieu  
121 of an exemption *and* the permit includes “conditions that are different than the conditions  
122 in the *permit issued* for the culvert being replaced, DNR may not impose a permit fee and  
123 must reimburse the applicant for *reasonable* costs incurred to comply with the different  
124 conditions in the new permit.” The plain language of sub. (6p) limits the requirement for  
125 a fee waiver and reimbursement of reasonable costs *only* to situations where there is a  
126 “*permit issued* for the culvert being replaced.” This means that sub. (6p) does *not* apply  
127 when an Existing Culvert has no permit. The permit fee is waived and reasonable costs  
128 reimbursed only when all the following apply:

- 129
- 130 1. The Existing Culvert has a permit;
  - 131 2. The Replacement Culvert qualifies for the sub. (6)(b), exemption;
  - 132 3. DNR requires a general or individual permit under sub. (6m);
  - 133 4. The person replacing the Existing Culvert incurs reasonable costs in complying  
134 with Replacement Culvert permit conditions that differ from Existing Culvert  
135 permit conditions.
- 136

137 2015 Act 55 also creates a new record keeping requirement in s. 30.123(9) that applies to  
138 local municipalities that replace a culvert that is exempt under 30.123(6).

139

#### 140 **D. Guidance**

141

##### 142 **Applicability**

143

144 ***How should staff respond when asked or when assessing whether a permit is needed to***  
145 ***construct, place or maintain a culvert to replace an existing culvert?***

146

147 The appropriate response is that a s. 30.123 permit is not needed to replace any Existing  
148 Culvert in, on, or over navigable waters whether or not the Existing Culvert required or  
149 has a s. 30.123 permit. Even unpermitted culverts may be replaced under the sub. (6)(d)  
150 exemption if the Replacement Culvert meets the sub. (6)(d) standards.

151

152 Keep in mind an exempt culvert must be a *Replacement* Culvert. Except where it may be  
153 impossible to ascertain an existing culvert existed (e.g., Existing Culvert destroyed by  
154 flooding and is no longer there), the sub. (6)(d) exemption should apply *only* when a  
155 culvert is being placed at a site which already has an Existing Culvert in place that  
156 currently functions as a culvert and meets the definition of a culvert. If the existing  
157 culvert is non-functioning (e.g., completely crushed and not meeting the definition of a  
158 culvert - not allowing water to flow freely from one side to another through the structure)  
159 replacing a non-functioning culvert will be treated as placing a brand new culvert that  
160 needs a permit. We will not treat the project as placing a Replacement Culvert, exempt  
161 from permitting under sub. (6)(d), unless the person seeking to place the Replacement  
162 Culvert can demonstrate that the existing culvert actually was allowing water to flow

163 freely through the pipe within the previous calendar year (either through photo  
164 documentation or other evidence). For situations where a culvert has completely failed or  
165 blown out and an existing culvert is not in place, again we will allow the person seeking  
166 to place the Replacement Culvert the chance to demonstrate that an existing culvert was  
167 in place and functioning within the previous calendar year.

168  
169 But unless you have reason to believe a site has no Existing Culvert and the Replacement  
170 Culvert is really a brand new culvert installation, inform the public that:

- 171
- 172 ✓ The new law (s. 30.123(6)(d)) exempts replacement and maintenance of a  
173 Replacement Culvert, not maintenance of an Existing Culvert.
  - 174 ✓ The new law (s. 30.123(2)) still requires a permit to maintain an existing culvert  
175 (if no permit exists). So you need a permit to maintain, but not to replace, an  
176 Existing Culvert.
- 177

178 This means that if there is an Existing Culvert that has no permit, it must be replaced  
179 before it can be maintained to be considered under the exemption. The standard  
180 dictionary definition of Maintenance is “the process or act of maintaining or preserving  
181 something”. For the purposes of this exemption, we will not consider cleaning out a  
182 culvert (removing debris, etc.) maintenance. For the purposes of this exemption, lining a  
183 culvert will be considered replacement and not maintenance since the Replacement  
184 Culvert (in this case the liner) is placed without the Existing Culvert being removed.

185  
186 DNR cannot require a person to submit an Exemption Determination Request (EDR)  
187 form, and a person need not provide DNR any information before proceeding under the  
188 sub. (6)(d) exemption. But many people prefer to submit EDR forms rather than proceed  
189 under the exemption only to later find out the exemption does not apply. If they submit  
190 an EDR form, the Department is required by statute to ascertain whether the Replacement  
191 Culvert in the applicant’s plans meets the BMPs (further explained in this guidance) and  
192 other standards required to be exempt from permitting under sub. (6)(d).

193  
194 ***How should staff interpret the new statutory standards to determine if the placement of***  
195 ***a Replacement Culvert for an Existing Culvert is exempt?***

196 In brief, sub. (6)(d) allows most Existing Culvert to be replaced with a Replacement  
197 Culvert that complies with the sub. (6)(d) standards without needing a s. 30.123 permit.  
198 2015 Act 55 does not specify a date by which all Existing Culverts must have been in  
199 place to qualify for exempt replacement (e.g., “culvert placed before MM/DD/YY”). The  
200 absence of a ‘placed before’ date in the statutory exemption means that any Existing  
201 Culvert may be replaced by constructing, placing, and maintaining a Replacement  
202 Culvert, and the Replacement Culvert will not need a s. 30.12 or 30.123 permit if it is  
203 meets the sub. (6)(b) standards. This is the case even if the Existing Culvert needs but  
204 lacks a s. 30.12 or 30.123 permit or was placed in violation of a s. 30.12 or 30.123  
205 permit.

206 The amended exemption in sub. (6)(d) does not exempt the *Existing* Culvert. This means  
207 DNR could ask the owner of an Existing Culvert that needed a permit but was placed  
208 without one (before or after 2015 Act 55) to apply for an after-the-fact permit or face  
209 enforcement to have the Existing Culvert removed. But immediately after removing the  
210 illegal Existing Culvert, the sub. (6)(d) exemption would allow the owner to construct,  
211 place, and maintain an exempt Replacement Culvert. In such an unusual situation, an  
212 unpermitted structure could be *replaced* without a permit.

213

214 Even though a Replacement Culvert may be exempt under state law, it may need a U.S.  
215 Army Corps of Engineers (USACE) permit if it is placed in, on, or over a waterbody or  
216 wetland that is a Water of the U.S. Currently, *replacement* of an *authorized Existing*  
217 Culvert will likely constitute a non-reporting activity in a USACE General Permit, but if  
218 an Existing Culvert was never authorized by the USACE or the Department, it would be a  
219 reporting activity that requires USACE approval. Additionally the law does not exempt a  
220 Replacement Culvert from the need for a review or authorization of floodplain effects by  
221 the local municipality.

## 222 *Exemption Standards*

223

224 A Replacement Culvert must meet 2 statutory standards to be exempt under sub. (6)(d):

225 **The first standard is:**

226 **1. It must be “placed in substantially the same location as the culvert being**  
227 **replaced”**

228

229 Neither the statute nor rules define “substantially same location.” Consistent with  
230 accepted rules of statutory construction, when there is no statutory definition of a term  
231 used in the statute the Department typically uses a standard dictionary definition to aid  
232 our interpretation. The standard dictionary definition of location is “a particular place or  
233 position,” so for a Replacement Culvert to be exempt under sub. (6)(d), it must be placed  
234 in substantially the same place, position, or footprint that the Existing Culvert was in  
235 before replacement. This place or position or footprint may include the substantially same  
236 elevation, angle, point on waterbody, etc. of the Existing Culvert being replaced.

237

238 Many times a Replacement Culvert should be replaced in the same footprint and location  
239 to qualify for the exemption. However, sometimes the location of a Replacement Culvert  
240 should be modified so that it is not replaced in the exact same place or position of the  
241 Existing Culvert, but still meets the exemption standard of “substantially the same  
242 location.”

243

244 For example, sometimes an Existing Culvert in its current location is placed incorrectly  
245 (e.g. perched) and may be causing problems on the landscape (e.g., flooding adjacent  
246 property) or problems in the waterway (e.g. upstream ponding and sediment deposition,  
247 downstream scouring, increased velocities). If replacing the culvert in the same place or  
248 position (e.g., elevation) would continue or exacerbate the problem, we should agree with  
249 and encourage replacement in the same place on the waterbody but with changes to the  
250 position (e.g., elevation, angle, skew, etc.) of the culvert to both satisfy the exemption

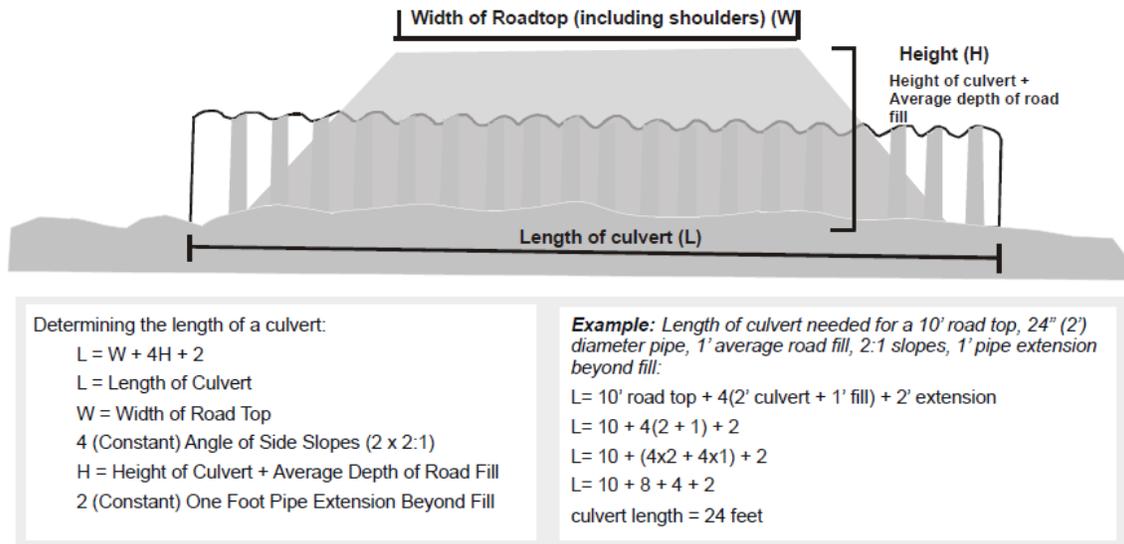
251 standard of “substantially the same location” and properly place the culvert to eliminate  
252 or minimize the existing problem.

253

254 A second example is where an existing waterway crossing is being modified (e.g., a  
255 narrow crossing being widened). S. 30.123(6)(d), the statutory provision that exempts  
256 Replacement Culverts, is intended to allow owners of Existing Culverts to “keep what  
257 they have” and continue existing activities in “substantially the same location” without  
258 the need to apply for a s. 30.123 permit. To meet that intent, when modifications require a  
259 longer or wider Replacement Culvert to meet BMPs for a safe and stable waterway  
260 crossing, we should examine why the crossing is being modified. Statutory exemptions  
261 must be narrowly construed, but if the purpose of the sizing changes is to meet BMPs for  
262 a Culvert Replacement to allow continuation of an existing use of the crossing and the  
263 crossing is just being modified (like a road widening, etc.) we can consider such sizing  
264 changes as replacement in “substantially the same” location.

265 Conversely, the requirements of “substantially the same location” for the sub. (6)(d)  
266 culvert replacement exemption should be more narrowly construed if: (1) the project and  
267 needed sizing changes require a culvert so long that the waterway crossing becomes an  
268 enclosure regulated under s. 30.196, Wis. Stats., How long is too long? To help staff in  
269 guiding the length of a culvert, we can use the sizing guidelines listed in s. NR 320.08(3)  
270 and reproduced here for ease of implementation.

271



272

273

274 In addition, the culvert replacement exemption should also be narrowly construed if (2)  
275 the longer or wider Replacement Culvert and waterway crossing changes are needed to

276 change the waterway crossing to a different or expanded use. An example of this would  
277 be an ATV crossing needing to be expanded to accommodate a larger motor vehicle  
278 crossing for logging.

279 In these 2 cases where the change in size of the waterway crossing is due to a different or  
280 expanded use or the change in length is beyond what is needed to accommodate the size  
281 of the crossing and results in an enclosure a permit application under s. 30.196 or 30.123  
282 would be required.

283 Please note that both examples illustrated above also apply in situations where there is a  
284 need to replace 1 culvert with 2 culverts (placed side by side to facilitate low flows as  
285 well as larger rain or snowmelt events) and vice versa and not just the sizing of the  
286 culvert.

287  
288 Some culvert replacement projects may propose discharging fill into wetlands or  
289 placement in a mapped floodplain that need permits or authorizations from other  
290 Department programs or local, state, or federal agencies. The s. 30.123(6)(d) exemption  
291 only exempts a culvert replacement from s. 30.123 permit requirements. It does not  
292 exempt a culvert replacement from the need for any other permits or authorizations,  
293 including permits required under ch. 281, Wis. Stats., to discharge wetland fill needed to  
294 meet culvert installation BMPs. Also note that if any proposed changes result in the  
295 culvert functioning as a dam, the culvert would need authorization under ch. 31, Wis.  
296 Stats.

297

298 **The second standard is:**

299 **2. “Replacement culvert is constructed or placed using best management**  
300 **practices to comply with water quality standards under subch. II of ch. 281”<sup>5</sup>**

301

302 The current best management practices that the Department recommends or requires for  
303 culverts apply when constructing forest roads across streams. These BMPs employ  
304 methods to keep sediment out of the waterway and preserve the waterway’s physical  
305 characteristics (clarity, temperature, etc.).Chapter 5 of Wisconsin Forestry Best  
306 management Practices for Water Quality Field Manual  
307 [<http://dnr.wi.gov/files/pdf/pubs/fr/fr0093.pdf>] gives examples of accepted BMPs for  
308 physical water quality standards for culvert installations.

309

310 Until the department uses its rule making authority under s. [30.123\(6s\)](#) to establish  
311 “reasonable installation practices” (e.g. BMPs) for exempt culverts under s. 30.123(6),  
312 that are not limited to forest road crossings, it is still important to assess whether the  
313 proposed culvert replacement complies with water quality standards to ensure minimal

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<sup>5</sup> Subchapter II of ch. 281, Wis. Stats., or more specifically s. 281.15, authorizes the department to create water quality standards and criteria for waters of the state. The state currently has water quality standards and criteria for chemical and physical properties of water. Chemical standards include pH, dissolved oxygen, nutrients, and various chemical pollutants. Physical standards include turbidity and temperature.

314 impacts to the public interest, which is the purpose of implementing BMPs. To assure  
315 that water quality standards are met we can use the standards in s. NR 320.06(1)(d) as a  
316 guide. Using the s. NR 320.06(1)(d) standards as a guide, we will consider the following  
317 types of practices as the type of BMPs that must be implemented for the culvert  
318 replacement to meet the statutory exemption:

319

320 **Construction Timing:** Once waterway work begins (below the ordinary high  
321 water mark (OHWM)), all construction activities in those waterways must be  
322 continuous to the greatest extent practicable until the work is completed and the  
323 site is stabilized. If periods of inactivity are unavoidable, the site must be  
324 temporarily stabilized until the work is resumed and completed.

325

326 **Timing Restrictions:** To minimize adverse impacts on fish movement, fish  
327 spawning, and egg incubation periods, work below the OHWM may not occur  
328 during the following time periods:

329

- September 15th to May 15th for all trout streams.

330

- March 1st through June 15th for ALL other waters.

331

*The timing restrictions listed may be waived or modified by the Department  
332 Fisheries Biologist.*

333

334 **Wetlands:** Vegetation, material, soil stockpiles, or equipment cannot be stored in  
335 wetlands (even on a temporary basis). The project needs to be constructed in a  
336 manner that will maintain natural hydrology in the wetland complex. *If the project  
337 includes any wetland fill, approval from DNR and the U.S. Army Corps of  
338 Engineers (ACOE) is required.*

339

340 **Erosion and Sediment Control Practices:** The project site shall implement  
341 erosion and sediment control measures that adequately control or prevent erosion,  
342 and prevent damage to waterways and wetlands as outlined in [NR 151](#), Wis. Adm.  
343 Code. All erosion control measures must meet or exceed the [WDNR Technical  
344 Standards](#).

345

346 **Culvert Placement/Installation Practices**

347

- Both ends of the culvert should be installed below the bed of the waterway

348

- Culverts should be designed to prevent washout. This can be done by  
349 taking into account the following BMPs:

350

- Culverts should be long enough so road fill does not extend  
351 beyond the ends of the culvert.

352

- The culvert should extend at least one foot beyond the fill.

353

- Culvert ends can be protected with rock riprap to protect for scour  
354 and riprap placement should include an adequate filter layer like a  
355 filter fabric.

356

- All grading, excavation and disturbance will be confined to the minimum  
357 area necessary for the placement of the structure.

358

- Construction equipment should not operate on the bed of the stream,  
359 below the OHWM, except for that which is necessary for the placement of

- 360 the structure.
- 361 • Unless the waterway is dry for the duration of the construction activities,
  - 362 you must install a cofferdam upstream and down-stream of your project
  - 363 area. The coffer dam needs to be installed in conjunction with a method to
  - 364 maintain downstream flow.
  - 365 • Cofferdams and temporary diversion channels must be constructed of non-
  - 366 erodible material and secured with rock/ rock-bags at the bottom of the
  - 367 channel and top of the banks. No earthen cofferdams are permitted.
  - 368 • Pump intakes and discharges shall prevent impacts to fisheries, wildlife,
  - 369 and their habitat, and must be placed to prevent the disturbance, removal
  - 370 and/or scour of bed material.
  - 371 • Temporary bypass structures used to maintain streamflow (i.e. diversion
  - 372 channel, pump bypass system, diverting to one culvert at a time, etc.) need
  - 373 to be adequately sized to prevent damage from upstream flooding and
  - 374 downstream siltation, wash-out, or scouring.
  - 375 • Construction and dewatering activities shall be accomplished in such a
  - 376 manner as to prevent erosion and siltation into surface waters and
  - 377 wetlands.
  - 378 • Remove all coffer dams in such a way that minimizes the release of
  - 379 sediment and other downstream impacts. Conventional practice is to
  - 380 remove the downstream coffer dam first then slowly remove the upstream
  - 381 coffer dam. When no longer needed, restore any bypass channel to
  - 382 original condition.
  - 383 • Unless it is an emergency situation, avoid construction during periods of
  - 384 high water to avoid flooding the construction site.

385

386 **Suitable Fill Material:** All fill must consist of clean suitable soil material, as

387 defined by s. NR 500.03(214), Wis. Admin. Code, free from hazardous

388 substances as defined by s. 289.01(11), Wis. Stats., and free from solid waste as

389 defined by ss. 289.01(11) and (33), Wis. Stats.

390

391 **Dredging:** Any dredging necessary to bury the culvert will be limited to the

392 greatest extent possible and deposition of sand, gravel, or stone will only occur

393 immediately underneath and within 2 feet of the culvert. The width and depth of

394 the water-way must not be altered.

395

396 **Site Maintenance:** The replacement stream culvert must be maintained in good

397 condition. Remove accumulated brush, debris or other obstructions that are

398 trapped in or underneath the structure regularly.

399

400 **Invasive Species:** All equipment or portions of equipment used for the culvert

401 replacement should be decontaminated for invasive species and viruses before and

402 after use following the most recent Department approved BMPs to avoid the

403 spread of invasive species. These protocols and practices can be found on the

404 Department website at <http://dnr.wi.gov/topic/Invasives/bmp.html> and at

405 <http://dnr.wi.gov/topic/Invasives/documents/EquipOper.pdf>

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Additional BMPs for culvert installations can be found in:

- *The Wisconsin Forestry Best management Practices for Water Quality Field Manual*. [<http://dnr.wi.gov/files/pdf/pubs/fr/fr0093.pdf> ] which gives examples of accepted BMPs for physical standards for culvert installations.
- *Wetland And Waterway General Permit For Municipalities To Construct, Reconstruct Or Maintain Highways, Bridges, Arches And Culverts - WDNR-GP2-2012* [<http://dnr.wi.gov/topic/sectors/documents/WDNR-GP2-2012.pdf>] which gives examples of accepted standard practices to minimize environmental impact for road culvert installations in Section 1 titled “Eligibility Standards’
- *Stream Culverts Best Management Practices (Sept. 2015)* [<http://dnr.wi.gov/topic/Sectors/documents/BMPsForCulverts.pdf>] gives examples of typical best management practices that are needed to protect water quality at culvert replacement project sites.

422 **A replacement is exempt if these accepted standard practices are met.**

423 **Exemption ‘Kick out’**

424 As with many statutory exemptions, occasionally the Department is concerned about  
425 potential significant adverse impacts to public rights and interests, environmental  
426 pollution, or material injury to the riparian rights of any riparian owner if the replacement  
427 is not done properly. If the Department wants a change to the location (which includes  
428 elevation, angle, etc.) or size, etc. of the replacement culvert to address its concerns, the  
429 Department can require a permit in lieu of the exemption for the proposed replacement  
430 provided we meet the requirements of 30.123(6m).

431 For example, changes to land use, flood flows, or navigational patterns, since a culvert  
432 was originally placed, may cause concerns about the Replacement Culvert’s potential to  
433 significantly and adversely affect the 3 factors above. In cases, where an existing culvert  
434 is known to be causing problems, the initial placement specifications may be  
435 inappropriate and in need of modifications. In those cases, to ensure that the Replacement  
436 Culvert won’t be an in-kind replacement and in order to solve the problem the existing  
437 culvert may be presenting, the Department may require a permit application for the  
438 Replacement Culvert in lieu of the exemption if sub. (6m) requirements are met. For  
439 example, one of the requirements under s. 30.123(6m) is “significant adverse impacts to  
440 the public rights and interests”. If an undersized culvert is creating a backwater area on a  
441 trout stream that could have thermal impacts to fish species, we may be able to require a  
442 permit for the replacement if we feel the impact is having a significant impact on fish  
443 habitat. But keep in mind that if the Existing Culvert HAD A PERMIT and the  
444 Department is now requiring a permit for the Replacement Culvert under sub. (6m )that  
445 will have different conditions in the permit than the permit previously issued for the  
446 culvert being replaced, s. 30.123(6p) requires the Department to waive the permit fee and

447 pay some reasonable costs to comply with the conditions of the Replacement Culvert  
448 permit (see Permit Fee section for more information on reasonable cost).

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453 **Enforcement**

454

455 With regard to enforcement, the amendment to s. 30.123(6)(d) has created an unusual  
456 situation in which an unpermitted structure may be *replaced* without obtaining a permit  
457 for the Existing or Replacement Culvert. This means enforcement against *any* Existing  
458 Culvert – even one that needed but never had a permit or one that failed to comply with  
459 the conditions of a permit it had – may be ineffective, because even if a court ordered the  
460 owner of an Existing Culvert to obtain a permit or remove the Existing Culvert, the  
461 owner could simply remove the Existing Culvert and install an identical Replacement  
462 Culvert in the same location without a permit so long as the Replacement Culvert  
463 complied with the sub. (6)(d) exemption. If sub. (6m) requirements are met; the  
464 Department could require a permit in lieu of the exemption for the Replacement Culvert.

465

466 If the Existing Culvert had a permit, the Department could not charge a permit fee and  
467 could be liable for some costs of the Replacement Culvert under sub. (6p) (see permit fee  
468 section below).

469

470 As explained above, the sub. (6)(d) permit exemption applies only to a Replacement  
471 Culvert, which means there must be an Existing Culvert that is being replaced at the site.  
472 The exemption does *not* affect enforcement against any Initial Culvert installed at a site  
473 where no Existing Culvert was in place within one year before the Initial Culvert was  
474 installed. This means, when we first learn a culvert was placed without a s. 30.123  
475 permit *and* we have reason to think that there was no Existing Culvert we will:

476

a) discuss the background with the person placing it and/or check aerials, maps, etc.  
477 for any evidence a culvert existed at the site within one year before the new  
478 culvert was installed/proposed to be installed. At sites where a culvert failed and  
479 they replaced it within one year after it failed we will exercise discretion and  
480 consider the new culvert as a “Replacement Culvert”.

481

b) If we are satisfied a culvert existed in the same location within one year of the  
482 failure, we’d treat the current or proposed culvert as a Replacement Culvert,  
483 ensure it is in the same location, and meets all other sub. (6)(d) requirements to be  
484 exempt.

485

c) If we are not satisfied a culvert existed within one year of the failure and we don’t  
486 see the Existing Culvert in photos or maps, but the person placing the culvert  
487 claim that one existed, we could ask for any photos, invoices, plans,  
488 correspondence, or other evidence they may have of the earlier Existing Culvert  
489 and when it was removed.

490

i. If there is good evidence, treat the current or proposed culvert as a  
491 Replacement Culvert.

491

ii. If there is not good evidence but the person placing the culvert continues  
492

493 to claims it is a Replacement and not Initial Culvert, we will consider it an  
494 Initial Culvert and require a s. 30.123 permit application.  
495

496

497

497 ***What law applies when the Department has already begun enforcement against a***  
498 ***person who placed a culvert without a s. 30.123(2) permit?***

499

500 Effective July 14, 2015, 2015 Act 55 amended sub. (6)(d), repealed (6)(e), and created  
501 (6p) and (9). The statutory changes are substantive, and Act 55 did not specify an  
502 “effective” or “applicability” date, so the changes apply starting July 14<sup>th</sup> and are not  
503 retroactive. In addition, s. 990.04, Stats., provides that the repeal (or amendment) of a  
504 statute shall not impair any civil liability for offense committed, forfeitures incurred, or  
505 rights of action accrued under the statute before it was repealed (or amended).  
506

507

507 1. *Unpermitted Initial Culvert placed before, on, or after July 14, 2015:* If the  
508 culvert placed without a permit was an Initial Culvert (i.e., did not replace an  
509 Existing Culvert), neither the original nor amended sub. (6)(d) exemption  
510 applies regardless of when the Initial Culvert was placed. You may continue  
511 enforcement in the usual manner. The violations and any ATF permit you have  
512 or will issue to resolve those violations will remain valid. If enforcement has not  
513 concluded, advise the District Attorney or Assistant Attorney General  
514 prosecuting the case of 2015 Act 55, the provisions in s. 30.123 that changed,  
515 and s. 990.04, Stats.  
516

517

517 2. *Unpermitted Replacement Culvert placed before July 14, 2015:* If the  
518 unpermitted culvert was a Replacement Culvert for a permitted Existing Culvert  
519 the original sub. (6)(d) exemption would apply if the Replacement Culvert  
520 complied with the conditions of the permit that had been issued for the Existing  
521 Culvert. If it did not, the original sub. (6)(d) exemption would not apply and the  
522 Replacement Culvert would have needed a permit when placed unless it would  
523 have been exempt under the now repealed sub. (6)(e) that allowed unpermitted  
524 replacement of an Existing Culvert with an inside diameter or 24 inches or less.  
525 If the Replacement Culvert did not qualify for the original sub. (6)(d) or (e)  
526 permit exemptions, you may proceed as under No. 1 above.  
527

528

528 3. *Unpermitted Replacement Culvert placed on or after July 14, 2015:* Because the  
529 Existing Culvert does not need to have been permitted for the amended sub.  
530 (6)(d) to apply, if the Replacement Culvert was placed on or after July 14, 2015,  
531 you need to evaluate whether it is exempt under the amended sub. (6)(d)  
532 exemption and if so, whether we have concerns that may warrant us asking the

533 person placing the culvert to apply for a permit as provided in sub. (6m) (See  
534 earlier discussion on sub. (6m) in this guidance).  
535

536 An important thing to keep in mind in these 3 scenarios is that once an Existing Culvert is  
537 in place, the person who placed it could refuse or surrender an ATF permit, remove the  
538 unpermitted Existing Culvert, and place an unpermitted Replacement Culvert under the  
539 new sub. (6)(d) exemption that met the sub. (6)(d) requirements.

540

541 **Permit Fees**

542

543 2015 Act 55 creates a new statutory section s. 30.123(6p). Sub. (6p) provides that if the  
544 Department requires a permit under sub. (6m) for a Replacement Culvert otherwise  
545 exempt under sub. (6)(d), it must waive permit fees and reimburse an applicant the  
546 reasonable costs of complying with conditions in the new permit that differ from  
547 conditions in the permit issued earlier for the Existing Culvert. The plain language of sub.  
548 (6p) limits the requirement to waive permit fees and reimburse reasonable costs to  
549 comply with different permit conditions to situations where: (a) the Existing Culvert  
550 already had a permit; (b) the Replacement Culvert qualifies for the sub. (6)(d) exemption  
551 but the Department is requiring a permit under sub. (6m); and the person replacing the  
552 Existing Culvert incurs reasonable costs in complying with Replacement Culvert permit  
553 conditions that differ from the Existing Culvert permit conditions.

554

555 ***What is considered 'reasonable cost'?***

556

557 The Department interprets Reasonable cost to include items that incur an actual cost like  
558 mobilizing equipment, equipment rental and operator rate, culvert purchase if a different  
559 size culvert is required, etc. It does not include the costs to create access, or hardship  
560 costs related to the requirement to obtain a new permit for an already permitted culvert.  
561 In a reimbursement situation, the Department should require the applicant to show us the  
562 estimated cost prior to purchase of any new materials and installation of the new culvert.  
563

564

565 If the Department is faced with reimbursing a permittee for the costs related to comply  
566 with new permit conditions, the State retains the right instead to opt to undertake the  
567 work themselves in placing the culvert instead of reimbursing the permittee. The state  
568 could also instead opt to get a competitive bid for cost and contract the work out.

569

570

571 **Other**

572

572 ***What law applies to applications for culvert replacement in process? Does it matter***

