

The attached guidance, “**Use of explosives in waterways**”, was developed for use by Department staff in the Bureau of Watershed Management when assisting regional wardens in making a decision whether to allow someone to utilize explosives in a waters of the State.

The use of explosives in waters of the State falls within the Department’s jurisdiction under Ch. 29.601, Wis. Stats. Except for raising dead bodies, clearing a channel or breaking a log or ice jam, it is forbidden to utilize explosives in waters of the state when it would result in the take, capture or killing of fish or wildlife. This document is intended to assist staff in the Watershed Management Bureau in understanding the statute, what factors should be considered and their role in evaluating the use of explosives in waterways.

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

Comments related to this draft guidance document should be sent to Heidi Kennedy, via e-mail at [heidi.kennedy@wisconsin.gov](mailto:heidi.kennedy@wisconsin.gov) or by phone (608) 261-6430.

# Use of explosives in waters of the state

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Watershed Management  
P .O. Box 7921  
Madison, WI 53707-7921

## Description:

The use of explosives in waters of the State is prohibited if it will result in the taking, capturing or killing of fish and game. However, the use of explosives is allowed under a few narrow circumstances. Section 29.601, Wis. Stats. allows for the use of explosives when raising dead bodies, clearing a channel, or removing an ice or log jam with department authorization. However, the statute provides little guidance on who or what program is responsible for issuing those authorizations and what factors should be considered. This guidance will not address the use of explosives in wetlands, which may require approval from the Department under s. 281.36, Wis. Stats. and from the U.S. Army Corps of Engineers.

## Need:

Over the years the department has received numerous requests to utilize explosives in waterways but no formal guidance has been developed for the Waterway and Wetland Protection or Dam Safety and Floodplain Sections. The intent of this document is to help clarify the roles and responsibilities for Water Management Specialists and Water Management Engineers when there are requests from the public and the factors staff should consider in consultation with Law Enforcement.

## Statutory Provision:

### 29. 601 Noxious Substances

(1) EXPLOSIVES; STUPEFACTIVES

(a) No person may do any of the following:

1. Take, capture, or kill fish or game of any variety in any waters of this state by means of dynamite or other explosives or poisonous or stupefying substances or devices.
2. Place in any waters of this state explosives which might cause the destruction of fish or game, except when authorized by the department for the purpose of raising dead bodies, clearing a channel or breaking a log or ice jam.

3. Have in the possession or under the control of the person, upon any waters of this state, any dynamite or other explosives or poisonous or stupefying substances for the purposes of taking, catching or killing fish or game.

(b)Whoever violates this subsection shall be fined not more than \$500 or imprisoned for not more than 90 days or both.

## **Implementation:**

While, the statutory provisions in s. 29.601, Wis. Stats. are vague as to who within the department authorizes the use of explosives and the manner of that approval, the Bureau of Law Enforcement is typically responsible for the enforcement of fish and game violations under section 29 of the Wisconsin Statutes. Consequently, the appropriate staff person from the Bureau of Law Enforcement will authorize the use of explosives in waters of the state, but will typically seek guidance from staff in the Bureau of Fisheries, Wildlife, Natural Heritage Conservation, Waterways and Wetland Section and Dam Safety and Floodplain Management Section prior to authorization.

Most requests for the use of explosives is to clear an ice jam or clear a channel to prevent flooding or damage to adjacent structures and for the removal of a dam, bridge abutment, beaver dam or other similar obstruction. Staff with the Waterways and Wetland Protection Section, Dam Safety and Floodplain Management Section and Bureau of Environmental Analysis and Sustainability must work closely with Conservation Wardens and assist with the review of the Natural Heritage Inventory and Archeological/Historical maps to determine if sensitive resources will be impacted and assist with obtaining comments from other programmatic experts in the Fisheries, Wildlife and Natural Heritage Inventory programs.

## **Factors to Consider**

When the Waterways and Wetland Section, Dam Safety and Floodplain Section, or Bureau of Environmental Analysis and Sustainability learn of the potential use of explosives in waters of the state or are contacted by Law Enforcement staff about a potential situation where explosives in waters of the state, staff should consider the following factors.

### **FACTORS**

1. Submittal – The entity requesting authorization from the department should provide in writing to Law Enforcement the purpose, proposed date and time and the location for the proposed use of explosives along with a map that shows the proposed location(s) for detonation of the explosives and property ownership in the area.

2. Licensing – The Department of Safety and Professional Services requires any person, who prepares an explosive charge or conducts blasting to be licensed under section SPS 305.20, Wis. Adm. Code. To ensure safety and reduce any potential environmental damage, Law Enforcement should verify that the explosives will be set by a licensed professional and in accordance with the blasting regulations in SPS 307, Wis. Adm. Code.
3. Purpose of the project- The statute allows the use of explosives to raise dead bodies, clear a channel or to remove an ice or log jam. If the proposed use of explosives is for any other use, other than those specified in the Statute, then the legislature did not grant the department the authority to authorize the use of explosives in those situations and other alternatives must be pursued.

Although, it is unclear what the legislature meant with the term “clear a channel”, it is recommended that the term “clear a channel” mean the use of explosives to create access through ice or log jams for navigational purposes or to reduce flooding and normalize water levels. Explosives may also be used to clear a channel of obstructions in the waterway such as the removal of a dam, beaver dam or bridge abutment. The definition should not be construed to mean the use of the explosives to expand or enlarge waters of the state or to deepen a waters of state for the creation of a pond, ditch or other connected enlargement. For further clarification, the definition of “clearing a channel” would not apply to the creation of a navigational channel in lakes.

Staff in the Waterway and Wetland Protection Section, Dam Safety and Floodplain Management Section and Bureau of Environmental Analysis and Sustainability should assist Law Enforcement in interpreting the statute and determining whether or not the purpose of the project is being conducted for one of the purposes allowed by the statute.

4. Consideration of Impacts – Staff should assist the local Conservation Warden in contacting the appropriate Fisheries and Wildlife Biologist to determine the potential impacts of the project on fish and game. Further, staff should assist the Conservation Warden with reviewing the Natural Heritage Inventory and determining whether there are Archeological/Historical hits that may be impacted by the project and assist the Conservation Warden in following up with the appropriate staff if these potentially sensitive resources may be impacted.

The public trust doctrine requires that staff consider the impacts from the proposed use of explosives on fish and wildlife and the resulting disturbance to or habitat loss in the waters of the state after the project is complete. Staff should presume that the use of explosives in any water of the state that has flowing or standing water will cause the destruction of some fish and game species, particularly if the water is known to harbor endangered or threatened species. Further, even if the channel has no flowing water and is completely iced over; game species could be hibernating near the location proposed for use of

explosives. Consequently, the use of explosives should be limited to those rare circumstances where it is known that the waters do not contain fish or game species.

Staff should also consider the size of the existing waterbody and the proposed disturbance to the bed, banks and other nearby structures, such as bridges, culverts or dams. The use of explosives to break up ice jams on large river systems also requires some consideration of the potential impacts to downstream property owners, particularly if there is a dam located downstream and riparian or waterway users. Additionally when explosives are utilized for the removal of a dam or bridge abutment staff should work with the applicant or owner to ensure any debris is removed from the waterway. In the case of beaver dam removal with explosives, staff should work with the applicant or owner to determine potential actions to eliminate the need to remove beaver dams at that location in the future.

5. Site evaluation – While there are no statutory timeframes provided in S. 29.601, Stats., staff should attempt to visit the proposed site as soon possible after receipt of the request to evaluate potential impacts from the proposed project and then once again after the project complete to ascertain whether any stabilization measures are necessary.
6. Notifications - If the explosives are detonated near any residential, commercial or institutional buildings or if the explosives will be utilized upstream of a dam, the entity proposing to use explosives should contact the adjacent property owners and the downstream dam owner before and after the use of explosives to determine whether any damage was sustained to these structures and should contact federal agencies, such as US Army Corps of Engineers and US Coast Guard to determine any federal authorizations that might be necessary. Additionally, the entity shall provide proof of contact with local unit of government, and County Emergency government. In many cases, these requests will have to be expedited to mitigate flooding and staff should notify their immediate supervisor and regional management.

## **Conclusion**

Authorization for the use of explosives in waters of the state is limited to circumstances where it is allowed in section 29.601, Wis. Stats. Those circumstances include the use of explosives for raising dead bodies, clearing a channel, and removing an ice or log jam. The statute requires department authorization prior to the detonation of explosives but is vague as to who is responsible for issuing those authorizations and what factors should be considered. The purpose of this guidance is to outline the responsibilities and factors staff should consider when it receives a request for authorization to utilize explosives in waters of the state. Authorizations for the use of explosives in waterways

requires close consultation with policy staff in Central Office, Law Enforcement, and staff from the Bureaus of Fisheries and Wildlife.

**Assigned staff:** Heidi Kennedy

Approved:

DRAFT

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Pam Biersach, Bureau Director, Watershed Management Date

**Contact (608) 261-6430 or [heidi.kennedy@wisconsin.gov](mailto:heidi.kennedy@wisconsin.gov) for further information.**

**Disclaimers:** This document is intended solely as guidance and does not include 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 manner addressed by this guidance will be made by applying the governing statutes and administrative rules to the relevant facts.

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