Crossings and deposits over frozen waters under ss. 30.12 and 30.29, Wis. Stats.

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

Description and Need

Section 30.29, Wis. Stats. prohibits the operation of motorized vehicles on the bed or exposed bed of a navigable water. However, the statute provides a number of exemptions to this prohibition, one of which allows for the operation of motorized vehicles on or over frozen waters. Staff in the Bureau of Watershed Management frequently encounter situations where the public, wish to not only cross or operate motorized vehicles on frozen waters but they also want to temporarily place structures or deposits on or over frozen waters to facilitate construction projects, recreational activities or forest management activities. Under s. 30.12 (1)(a) and (b), Wis. Stats., no person may "deposit any material or place any structure upon the bed of any navigable water…" without a permit from the department or authorization by the legislature.

Consequently, it is unclear in reading s. 30.12(1)(a) and (b), Wis. Stats., whether the temporary placement of structures on or over frozen waters constitutes placement of a structure on the bed of a waterway and requires approval from the department While the department developed a legal opinion back in the 1970's that clarifies the department's jurisdiction, the department has never developed formal guidance on this topic. To promote consistency this guidance is intended to formalize agency policy and practices that were described in the legal opinion from 1970's and provide staff guidance for how to respond to inquiries from the public. This guidance will also identify and discuss some of the more common scenarios staff encounter, which were not addressed in the legal opinion from the 1970's. However, this guidance will not address the temporary placement of structures in wetlands under s. 281.36, Wis. Stats.

Interpretation of the Statutory Provisions

Operation of motorized vehicles is prohibited in the State of Wisconsin on the bed or exposed bed of waters of the State. The Legislature has created some exemptions to this prohibition, including the operation of motorized vehicles on or over frozen water. Case law has also recognized that travel on frozen bodies of water is an incident of the right of navigation. See e.g. Munninghoff v. Wis. Cons. Comm., 255 Wis. 252, 260 (1948). However, the temporary placement of structures on or over the frozen water, particularly if those temporary structures are facilitating access, has not been addressed in the statutes or the case law. Typically the placement of structures on the bed of a navigable waterway requires approval from the Department under s. 30.12, Wis. Stats., but the statute is unclear as to whether or not the placement of temporary structures on or across frozen waters constitutes placement of a structure on the bed of a waterway and thus would be regulated under s. 30.12, Wis. Stats.

Every year temporary structures or deposits are placed on frozen waters. These temporary structures may facilitate construction projects, such as the installation of riprap or dredging, access for forestry management activities, the construction of ice roads, or other recreational activities, such as race events. Frequently staff and members of the public question whether or not the department can regulate these temporary structures. In the mid-1970's legal staff with the Department consulted with the Attorney General's office regarding the temporary placement of sand on the ice to facilitate automobile races and then developed two legal opinions for department staff. The department has reviewed these legal opinions and found that the statutory provisions discussed in that opinion remain valid today and the analysis can be applied to a number of other situations the department frequently encounters today.

In short, the temporary placement of structures on or over frozen waters does not constitute the placement of a structure on the bed of a navigable water and would not require a permit from the department under s. 30.12, Wis. Stats. However, if the structures are not removed prior to ice thaw and the structures sink to the bed of the waterway, the temporary structures may then be regulated by the department and at that point constitute a violation of s. 30.12, Wis. Stats and s. 29.601(3)(a), Wis. Stats., which prohibits the deposition of materials into waters of the State.

Procedural Recommendations

When staff receive an inquiry or learn of the potential placement of a temporary structure on or over frozen waters, staff should be proactive and discuss conditions for the placement of temporary structures to avoid situations where these temporary structures may become violations. Specifically, staff should inquire into the following:

1. What is the purpose of the temporary structure or deposit?
2. How long will the structure or deposit be in place?
3. How will the structure or deposit be removed prior to ice thaw?

Staff needs to evaluate the placement of these temporary structures on a case by case basis. For temporary deposits of sand, soils, wood chips, gravel or other such material, staff should recommend that the materials be placed on a mat to enable proper removal of the materials. Also if the structure will be placed over frozen waters for a sufficient period of time, where it is likely that the structure could be in place even when the ice begins to thaw, then staff should recommend that the structure be permitted by the department. Similarly, if the staff are concerned that there is not an adequate plan or sufficient measures being taken for removal of the structure prior to ice thaw, then staff also should recommend that the structure obtain a permit from the department prior to placement.

Common Inquiries

Some of the more common inquiries from the public include the placement of temporary structures or deposits over frozen waters for the construction of forestry crossings, the temporary storage of materials for construction projects, such as riprap or dredging, or for the placement of rock or sand for ice roads, racing events or other recreational activities. This section of the guidance will discuss in greater detail each of these and provide more specific recommendations.

Forestry Crossings

In the Wisconsin's Forestry Best Management Practices for Water Quality, it is recommended that the operation of wheeled and tracked equipment near streams and wetlands be limited to when the ground is frozen or dry. Additionally, temporary forest roads that are only constructed for short-term use, such as a timber harvest, are to be used only when the ground is frozen or firm and all stream crossing structures must be removed once the project is done.

Typically temporary stream crossings such as the placement of timber mats, pole fords or portable bridges are placed over frozen waters to facilitate access for timber harvests or other forest management activities. These temporary structures would not require permits from the department as long as the structures are removed before ice thaw. If the timber harvest or other forest management activities cannot be completed and the structure is not removed prior to ice thaw, then staff should recommend that the structures be permitted prior to placement. The department has established a general permit to expedite projects that can meet specified standard or conditions to protect fish and wildlife habitat and maintain flood flows. Please see http://dnr.wi.gov/topic/Waterways/water_levels_crossings/temp_stream_cross.html for more information on temporary in-stream crossings for forestry activities.

Construction Projects

Construction projects near the shore or below the ordinary high water mark may require, in some circumstances, access over frozen waters. Staff often receive inquiries or complaints about the storage or placement of material on the frozen waters. Such projects typically include shoreline protection or dredging projects, where rock or dredge spoils are temporarily stored on frozen waters during construction. Staff should discuss with the contractor or applicant that adequate measure are being taken to not only remove the materials during ice thaw, but in the case of dredge spoils, that the materials are contained with proper erosion control devices to ensure that as much of the material may be removed as possible. Staff should suggest that the material be placed on a mat to enable adequate removal of the material. Also staff should consider potential contamination levels in any dredge spoil to determine if further conditions or limits on the storage of the material on the frozen water is necessary to protect water quality or fish and wildlife habitat and public health and safety.

Concerns have been raised by adjacent or nearby riparian property owners when the temporary storage of these materials is placed within their riparian zone. While riparian's have the exclusive right to place structures on the bed within their riparian zone, the temporary storage of materials on frozen waters does not constitute the placement of a structure on the bed. Consequently, the temporary storage of materials on frozen waters is no different than the temporary placement of ice fishing shanties. These structures may be placed within someone's riparian zone but again must be removed prior to ice thaw.

Deposits Associated With Ice Roads or Racing

It is also common for staff to receive inquiries for the temporary placement of material over frozen waters to facilitate the construction of ice roads, for racing events or for other similar recreational activities. Typically, the material placed for these purposes include gravel or sand and may be placed for very short periods of time to accommodate specific events, or for an entire winter for an ice road. Staff should consider whether these temporary deposits may break

down or will be tracked into the ice and become difficult or impossible to remove and should suggest that the material be placed on a mat to enable adequate removal of the material.

As with temporary deposits for construction projects, concerns may be raised by nearby riparians. Again, this temporary storage does not constitute placement of a structure on the bed. Deposits associated with the construction of ice roads often begin at a public access point, such as a boat launch or right of way. If material is placed on an area of exposed bed at or adjacent to one of these public access points, then the riparian owner's permission is needed.

Conclusions

Staff in the Bureau of Watershed Management frequently encounter situations where the public wishes to not only cross or operate motorized vehicles on frozen waters, but they also want to temporarily place structures or deposits on or over frozen waters to facilitate construction projects, recreational activities or forest management activities. Under s. 30.12 (1)(a) and (b), Wis. Stats., no person may "deposit any material or place any structure upon the bed of any navigable water…" without a permit from the department or authorization by the legislature. However, the question commonly arises whether the temporary placement of structures on or over frozen waters constitutes placement of a structure on the bed of a waterway requiring approval from the department.

The temporary placement of structures on or over frozen waters does not constitute the placement of a structure on the bed of a navigable water and would not require a permit from the department under s. 30.12, Wis. Stats. However, if the structures are not removed prior to ice thaw and the structures sink to the bed of the waterway, the temporary structures may then be regulated by the department and at that point constitute a violation of s. 30.12, Wis. Stats and s. 29.601(3)(a), Wis. Stats., which prohibit the deposition of materials into waters of the State. However, staff should be proactive and discuss conditions for the placement of temporary structures to avoid situations where these temporary structures may become violations.

Assigned staff: Heidi Kennedy

Approved:

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Pam Biersach, Bureau Director, Watershed Management Date

Contact (608) 261-6430 or heidi.kennedy@wisconsin.gov for further information.

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