

A GUIDE TO NAVIGABILITY AND ORDINARY HIGH WATER MARK DETERMINATIONS IN WISCONSIN

**Resources and guidelines for determining the boundary
between public waterways and privately owned land.**



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GUIDE OVERVIEW

This overview guide is intended for a broad audience. It describes the procedures, timelines, and fees for regulatory decisions that establish boundaries between public waterways and privately owned land in Wisconsin. Specifically, this guide explains navigability and ordinary high water mark (OHWM) determinations.

Navigability and OHWM determinations establish whether the Wisconsin Department of Natural Resources (DNR) has jurisdiction in (1) projects that may impact the waterway, including shoreline erosion control, pier placement, dredging, etc. and (2) assisting local governments with zoning decisions.

Under the public trust doctrine, navigable waterways are public resources, and the public has the right to utilize them for navigation, hunting, fishing, swimming, and other forms of recreation. Establishing navigable waterways and OHWMs is critical to protecting those rights.





WHAT ARE NAVIGABILITY AND ORDINARY HIGH WATER MARK DETERMINATIONS?

Navigability and OHWM determinations establish whether and to what extent DNR has jurisdiction over waterways in Wisconsin.

A **navigable waterway** is defined as any waterway that has a defined bed and bank, and upon which it is possible to float a canoe or small watercraft on an annually recurring basis. For example, if a waterway is distinct enough to float a small watercraft during annual spring thaws, then it would be considered a "navigable waterway" for the purposes of this definition.

A landowner or lessee may determine their rights to use the water next to their property by establishing the boundary of DNR's regulatory authority between private property and the public waterway. Establishing this boundary, called the **Ordinary High Water Mark, or OHWM**, may be especially important when it comes to a landowner who seeks to build a pier or a boathouse (see Wis. Stat. ch. 30 to see more projects where a permit is required).

An OHWM is defined as "the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation or other easily recognized characteristics." Note that OHWMs look different depending on the type of waterbody under review. In other words, OHWMs on coastal shorelines differ from inlake bed shorelines, which differ from streambanks.

The Public Trust Doctrine

The **public trust doctrine** provides that navigable waters be held in trust by the state for the benefit of the public. The doctrine is derived from the Wisconsin Constitution and requires the Legislature to serve as a trustee for Wisconsinites' rights to navigate and enjoy recreational activities in the waters of the state.

Stream Access Laws

People utilizing Wisconsin's rivers and streams shall follow the "**keep your feet wet**" test established by the Wisconsin Supreme Court and codified in Wis. Stat. § 30.134.

This test provides that members of the public may use any exposed shore area of a river or stream without the permission of the landowner only if it is necessary to get around an obstruction (i.e. trees, rocks, shallow water for boaters, or deep water for waders). This bypass should be by the shortest possible route.

Note that the "keep your feet wet" test only applies to rivers and streams, not lakes.



DETERMINATIONS & CONFIRMATIONS

NAVIGABILITY & OHWM DETERMINATIONS

As discussed on page 2, navigability and OHWM determinations establish whether DNR and local governments have jurisdiction over projects that impact the waterways. DNR Waterways staff are available upon request to make navigability and OHWM **determinations** to establish this boundary.

NAVIGABILITY & OHWM CONFIRMATIONS

The DNR has also developed the **Navigable Waterway Determination Program** for independent third parties to assist with preliminary navigability and/or OHWM determinations. Preliminary determinations made by third parties are cheaper (and potentially faster) than determinations made directly by the DNR. That being said, preliminary determinations made by third parties must be reviewed and confirmed by DNR staff. Preliminary determinations that DNR concurs with are called **confirmations**.

If DNR concurs with a preliminary determination made by an independent third party, DNR's confirmation shall also include the (1) exact location and (2) summarize the information used to make the determination.

If DNR disagrees with a preliminary determination made by an independent party, DNR may (1) request information from the third party, or (2) conduct a site inspection to make the final determination.

NAVIGABILITY-IN-FACT DETERMINATION

An individual who wishes to dispute a navigability determination or confirmation may challenge it by requesting that DNR complete a **navigability-in-fact determination**. A navigability-in-fact determination is made using a small watercraft to confirm the navigability of the waterway. Note that the requester will be subject to additional fees (see page 5) and must comply with the declaratory ruling process specified in Wis. Stat. § 227.41.

Length of Validity

Navigability determinations and confirmations are valid **in perpetuity**.

OHWM determinations and confirmations are valid for a period of **5 years**.

If you want to challenge a determination...

You may challenge a determination if you or DNR can demonstrate natural processes or other factors significantly changed the hydrology at the site and caused the characteristics of a navigable waterway to be **substantially altered** since the prior determination.

Note: Challenges may be more applicable to navigability determinations because they're valid in perpetuity. OHWM determinations, on the other hand, will only be valid for 5 years anyways.





REQUESTING A SERVICE



dnr.wisconsin.gov/permits/water

An individual or corporation shall provide all the information requested on the electronic form and accompanying instructions. They may request determinations through (1) DNR's electronic permitting system **or** (2) other submittal processes specified by DNR.

GENERAL MINIMUM REQUIREMENTS FOR CONFIRMATIONS

<u>NAVIGABILITY</u> SUBMITTAL REQUIREMENTS	<u>OHWM</u> SUBMITTAL REQUIREMENTS
<ul style="list-style-type: none">• The exact location of the preliminary determination• Summary of findings and preliminary result• Historical data<ul style="list-style-type: none">◦ EX: aerial imagery, topography, and survey data• Current topographic information• Hydrologic conditions<ul style="list-style-type: none">◦ EX: bank height, bed width, and water depth.• Weather conditions prior to gathering field data.• Biological characteristics of the waterway• Other information specified by the department	<ul style="list-style-type: none">• The exact location of the preliminary determination• Summary of findings and preliminary result• Vegetation types above and below the preliminary OHWM• Factors affecting the location of the ordinary high water mark<ul style="list-style-type: none">◦ Ex: structures, shore protection, and shore configuration• Weather conditions prior to gathering field data• Distance from OHWM to water's edge• Preliminary OHWM elevation and benchmark information• Other information specified by the department

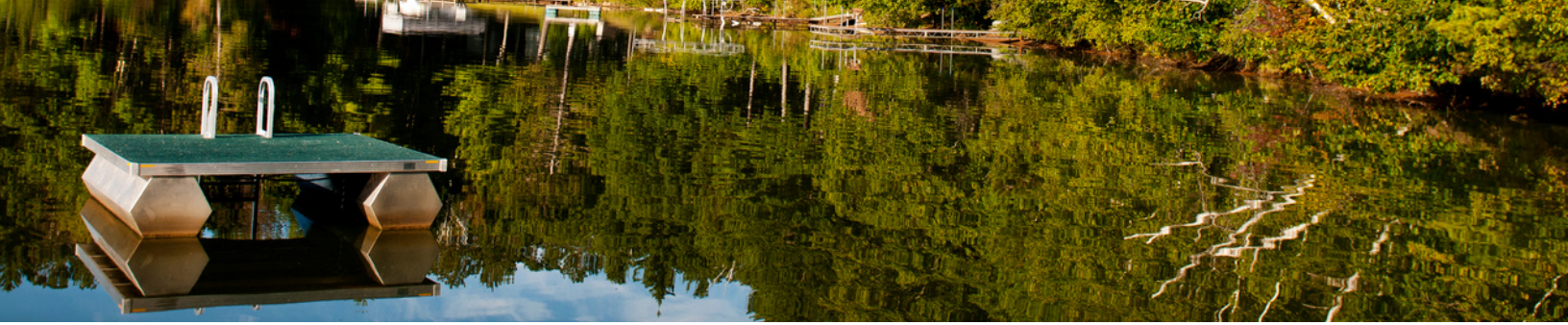
DISMISSALS

DNR may dismiss service requests that do not have proper site indicators or lack information to meet the minimum submittal requirements. DNR may request additional information but may not ask for additional information more than once. The *general timeline* (see page 5) will be on hold until this additional information request is satisfied.

EXPEDITED SERVICE

DNR may charge a supplemental fee if the applicant requests in writing that the service be provided within a time period that is shorter than the time limit (see page 5) for that type of service **AND** DNR verifies that it will be able to comply with the expedited request.







SERVICE APPLICATION FEES

TYPE OF APPLICATION FEE	COST
OHWB Determination	\$200*
Navigability Determination	\$200**
BOTH OHWB and Navigability Determinations	\$300**
OHWB Confirmation	\$100
Navigability Confirmation	\$100
Navigability-in-fact Determination	\$800
Additional Expedited Service Fee	\$3,500


*For each project boundary **For each waterway within a project boundary

ADDITIONAL RESOURCES

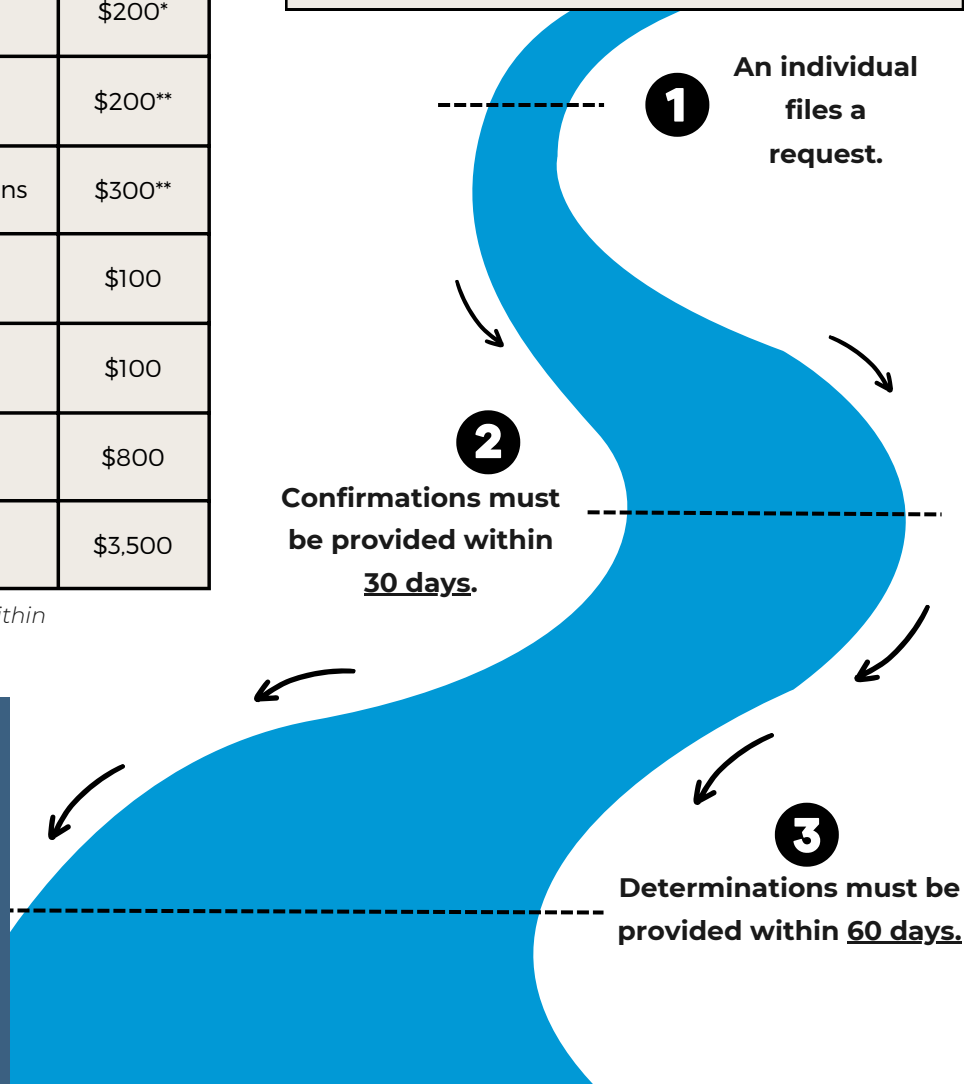
 **DNR Waterway Jurisdiction Determinations**
<https://dnr.wisconsin.gov/topic/Waterways>

 **DNR Navigability Determinations Factsheet**
<https://widnr.widen.net/s/kgptdgttkd/nav-det-factsheet>

 **DNR OHWB Factsheet**
<https://p.widencdn.net/f06g6i/OHWBFactsheet>

 **Wis. Admin. Code NR 300**
https://docs.legis.wisconsin.gov/code/admin_code/nr/300

GENERAL TIMELINE



TIMELINE EXCEPTIONS

If adverse weather conditions or other conditions at the site prevent DNR from conducting an accurate on-site inspection in sufficient time to comply with the timeline, DNR shall give notice to the person that the department will do so as soon as possible.