Shoreland Zoning

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Shoreland Zoning History ~230 years ago

- Northwest Ordinance established the Public Trust Doctrine saying "The navigable waters … shall be common highways, and forever free."

Shoreland Zoning History ~170 years ago

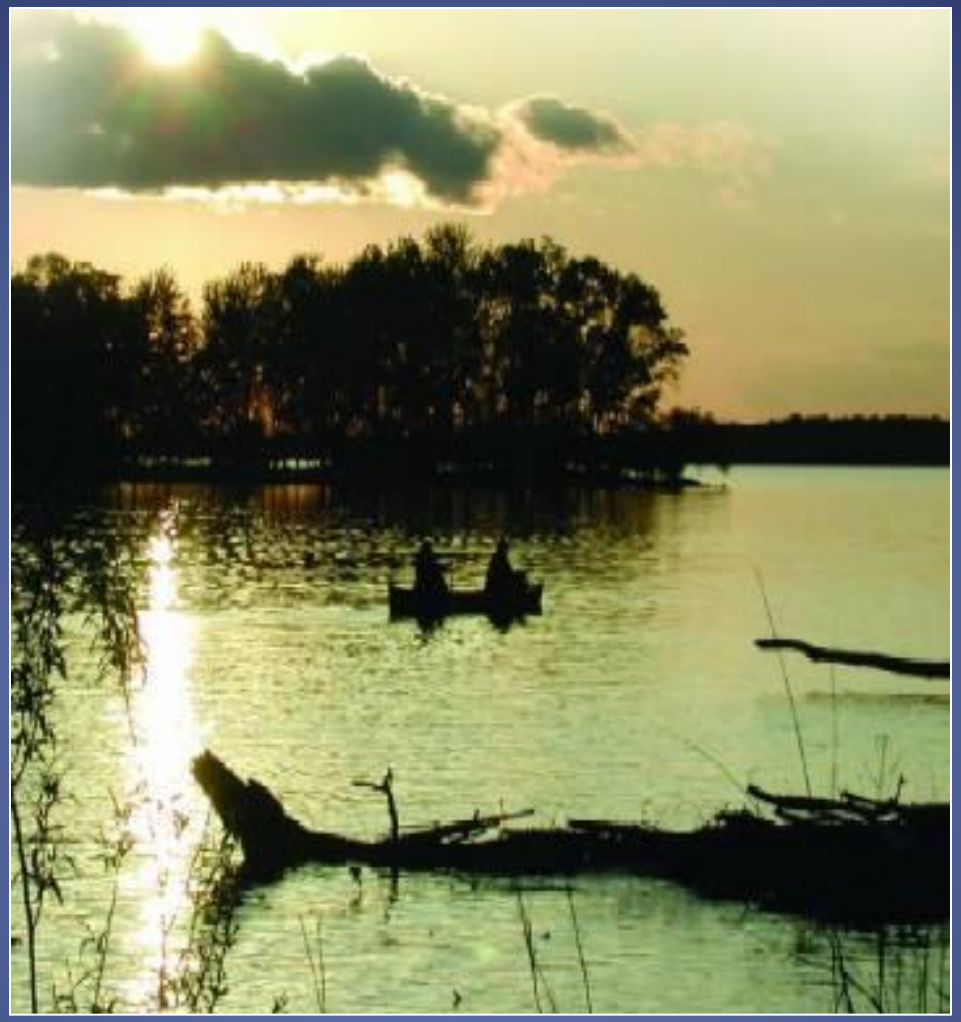
- 1848- WI Constitution also said "The navigable waters … shall be common highways, and forever free."
- 1899- WI Supreme Court agreed that preserving navigable waters was a state obligation

Shoreland Zoning History

- The Wisconsin Constitution, adopted in 1848, says navigable waters are "common highways and forever free"
- This led to "The waters of WI belong to the people of WI" which is the basis of the Public Trust Doctrine
- State of WI has obligation to protect the public's rights in all navigable waters including boating, fishing, swimming & hunting
- Shoreland zoning, adopted in 1966, protects public rights through its purposes
  - Preventing and controlling water pollution is needed for boating and swimming
  - Protecting spawning grounds is needed for good fishing
  - Maintaining shore cover is needed for fishing & hunting

s. 281.31 Wisconsin Statutes

See short videos **Champions of the Public Trust** dnr.wi.gov/topic/waterways/about_us/doctrine.htm



Natural shorelands contain a lush mixture of native grasses, flowers, shrubs and trees that help to filter polluted runoff and provide important habitat for animals in the water and on the land. A mature native buffer represents many years of nature at work and discourages undesirable, exotic plants and animals while attracting songbirds, butterflies, turtles and frogs.

Flourishing shorelands provide some of the most effective protection for the lakes and streams of Wisconsin.

Shoreland Zoning History

- Legislature gave DNR general supervision over WI waters including a statewide shoreland zoning program for all unincorporated areas.
- By 1971, all counties had adopted and were administering a shoreland ordinance.

NR 115 Revision Efforts

- 2002: 28-member Advisory Committee formed to identify and discuss resource specific issues.
- Included county reps and reps from public and private sector.
- 2003: 8 Public listening sessions on initial concepts
- 2005: First proposal taken to 11 public hearings and public comment period
- 1,200 comments during the public hearings & over 11,000 comments during the public comment period.
- 2007: 8 public hearings and public comment period
- 27 comments during public hearings & 1,654 additional comments during the public comment period.
- Over 14,000 comments!

NR 115 Revision Efforts

- Fall 2009 –Consensus on proposed rule by Realtors Assn, Builders Assn, WI Lakes and River Alliance. Legislative hearings. Approved by the WI Natural Resources Board.

- Feb. 1, 2010-Final rule went into effect setting minimum standards. Counties may adopt more protective standards.

Act 55

- Effective - July 14th, 2015
- Changes the authority counties have in the development of a shoreland ordinance that is more restrictive than NR 115 and changed other shoreland zoning standards.
- NR 115 standards designed to be minimum - with Act 55 they are now the minimum and the maximum.

Summary of Act 55 - no longer allowed by law

A **shoreland** zoning ordinance (county, village or city) **may not:**

- regulate a matter more restrictively than the matter is regulated by a shoreland zoning standard.
- require establishment of a vegetative buffer on previously developed land or expansion an existing vegetative buffer.
- Regulate outdoor lighting for residential use.
- Regulate the maintenance, repair, replacement, restoration, rebuilding or remodeling of a nonconforming structure if the activity does not expand the footprint. No approval, fee or mitigation required.

A shoreland zoning ordinance may not:

- Require the inspection or upgrade of the structure before the sale/transfer of the structure may be made.
- Regulate the vertical expansion of a nonconforming structure unless the expansion is greater than 35’ above grade level. No approval, fee or mitigation required.
- Establish standards for impervious surfaces unless the standards provide that a surface is considered pervious if the runoff from the surface is treated by a device or system, or is discharged to an internally drained pervious area that retains the runoff on or off the parcel to allow infiltration into the soil.

No longer allowed by law cont.

- The Dept. may not issue an opinion on whether or not a variance should be granted or denied without the request of a county BOA. (letter or minutes)

- The Dept. may not appeal a BOA decision.

Act 55 – what is allowed/changed by law

- Continued administration of NR 115 standards unaffected by Act 55.
- A vegetative buffer that provides that a 35’ viewing corridor for every 100’ is allowed and the viewing corridor is allowed to run contiguously for the entire maximum width.

Regulating Other Matters

59.692(1d)(b) allows counties to regulate "matters" that are not regulated by a shoreland zoning standard in NR 115. Address the purposes of s. 281.31 – to further the maintenance of safe and healthful conditions; prevent and control water pollution; protect spawning grounds, fish and aquatic life; control building sites, placement of structure and land uses and reserve shore cover and natural beauty.

- Minimum lot sizes, Building setbacks, Vegetation.
- Filling, grading, lagooning, dredging, ditching and excavating, Impervious surfaces, Height and
- Nonconforming structures and uses.

More examples of other matters:

- Dune, escarpment, wetland regulations
- Density Requirements
- Land uses
- Land suitability
- Woodland Cutting

Act 55 - added definitions

- "Shoreland setback area" means an area that is within a certain distance of the ordinary high-water mark in which the construction or placement of structures has been limited or prohibited under an ordinance enacted under this section.
- "Structure" means a principal structure or any accessory structure including a garage, shed, boathouse, sidewalk, stairway, walkway, patio, deck, retaining wall, porch or fire pit.

Interaction with other enabling statutes

- Act 55 affected 59.692
- Act 55 did not impact a county's ability to enact ordinances under 59.69 (general zoning), 87.30 (floodplain zoning), 236 (land division), etc…..
- Each of those statutes identify the purpose, standards and applicability

Zoning related specifically to shorelands not allowed under general zoning

- 59.692(5) states: An ordinance enacted under this section supersedes all provisions of an ordinance enacted under 59.69 that "relates to shorelands".

- So….counties cannot create standards under 59.69 that apply only to land that lies within shoreland zoning where the purpose of the standard is to protect shoreland resources.

Model Ordinance

- Minimum required and maximum allowed

  Certified Ordinance by 10/1/2016

  Submit for review prior to committee mtgs.

  Plan ahead for review time.

NR 115 Shoreland Zoning Standards

- 1. Minimum Lot Sizes
- 2. Building Setbacks
- 3. Vegetation
- 4. Filling, grading, lagooning, dredging, ditching and excavating.
- 5. Impervious Surfaces
- 6. Height
- 7. Nonconforming Structures and Uses

Minimum Lot sizes

- Shoreland zoning ordinance may not require lot sizes larger than the minimum lot size identified in NR 115.05(1)(a)
  - 20,000 square feet and 100’ wide - unsewered
  - 10,000 square feet and 65’ wide – sewered
  - Measurement of average lot width can continue to be defined by the counties.

Small lot sizes = High density development

Effects of lot sizes

300 foot lots

Result on 80 acres lake:
22 homes

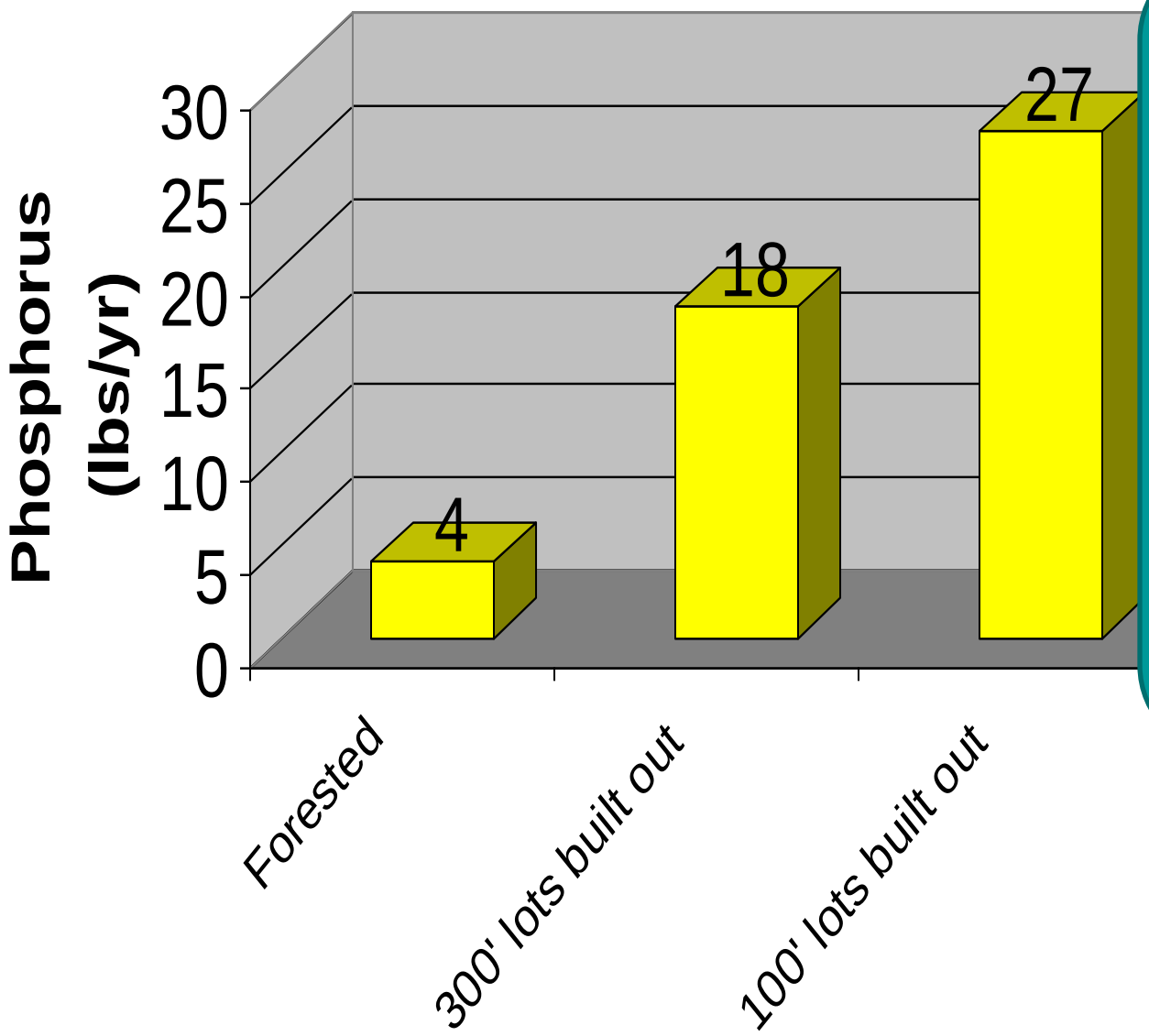
Effects of lot sizes

100 foot lots

Current allowed density

Result on 80 acres lake:
66 homes

More development = More Phosphorus



1 pound of P = 500 pounds of algae

So building homes on 100 foot lots around an 80 acre lot adds 23 extra pounds of P, which can cause over 11,000 pounds of additional algae

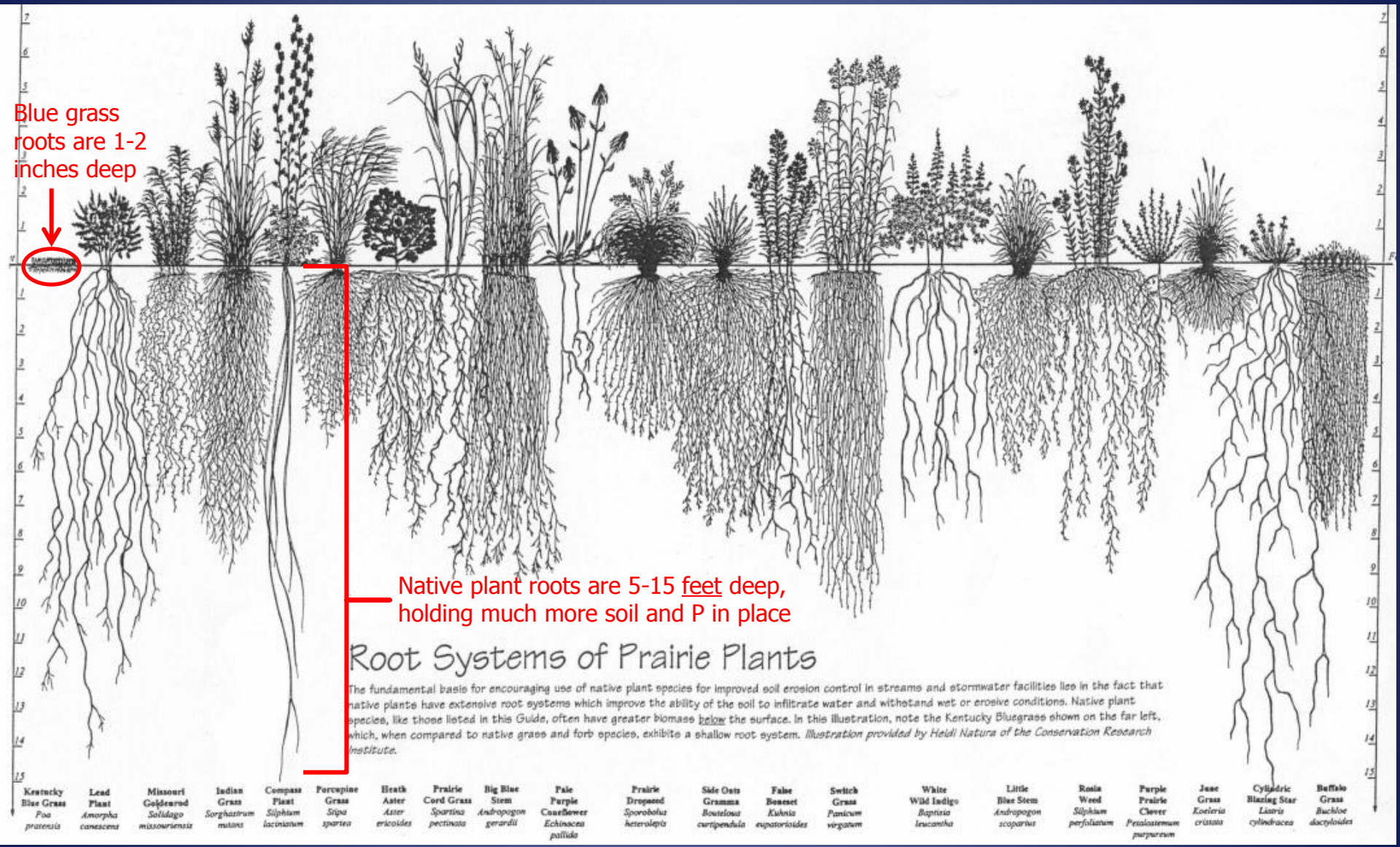
Minimum Lot Size

- Q: Does Act 55 prevent counties from imposing within county shoreland zoning districts any general or overlay zoning ordinance "minimum lot size" requirements that are more restrictive than similar requirements in state shoreland zoning standards (NR 115)?

- A: No. A county may require a larger lot size under another statutory authority (general zoning, farmland preservation, etc) as long as the district and its more restrictive provisions does not only apply because the land in the district is within the shoreland. The provision cannot be created if it specifically applies ONLY because the land at issue is located w/in the shoreland AND it applies *because* the lands lie in the shoreland.

Vegetative Buffers

Shoreline buffers



Blue grass cannot hold as much soil in place as native plants because blue grass has much shorter roots. Blue grass can lead to loss of shoreline, erosion, and sediment covering fish spawning beds.

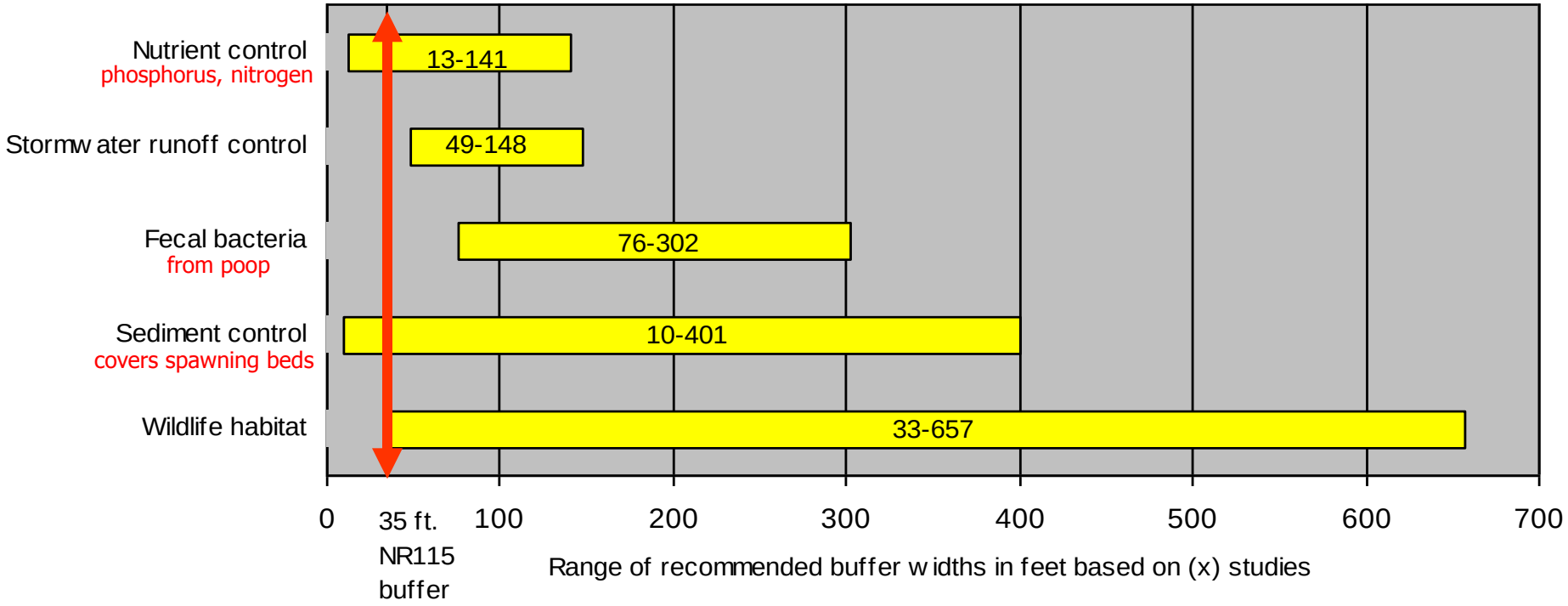
What happens when a shoreline is clear cut?

Developed site in Vermont

- Shoreline bank is destabilized, resulting in loss of land
- Soil erosion covers spawning beds, reduces fish habitat, and feeds algae growth
- Loss of shade leads to warmer water temperatures, especially in streams
- Loss of habitat for birds, frogs and other wildlife
- Loss of natural scenic beauty

What can buffers do if they're big enough?

Recommended Shoreline Buffer Widths
A Research Summary



Review of 52 U.S. studies by Aquatic Resource Consultants, Seattle WA

A 35 foot deep shoreline buffer does not keep bacteria from poop out of the water. In many situations, it doesn't keep P and sediment out of the water, and isn't enough for wildlife.

Buffers affect birds

Shoreline buffers provide habitat for

- Eagles, loons, great blue herons, wood ducks and more

Lawns provide habitat for

- Canada geese

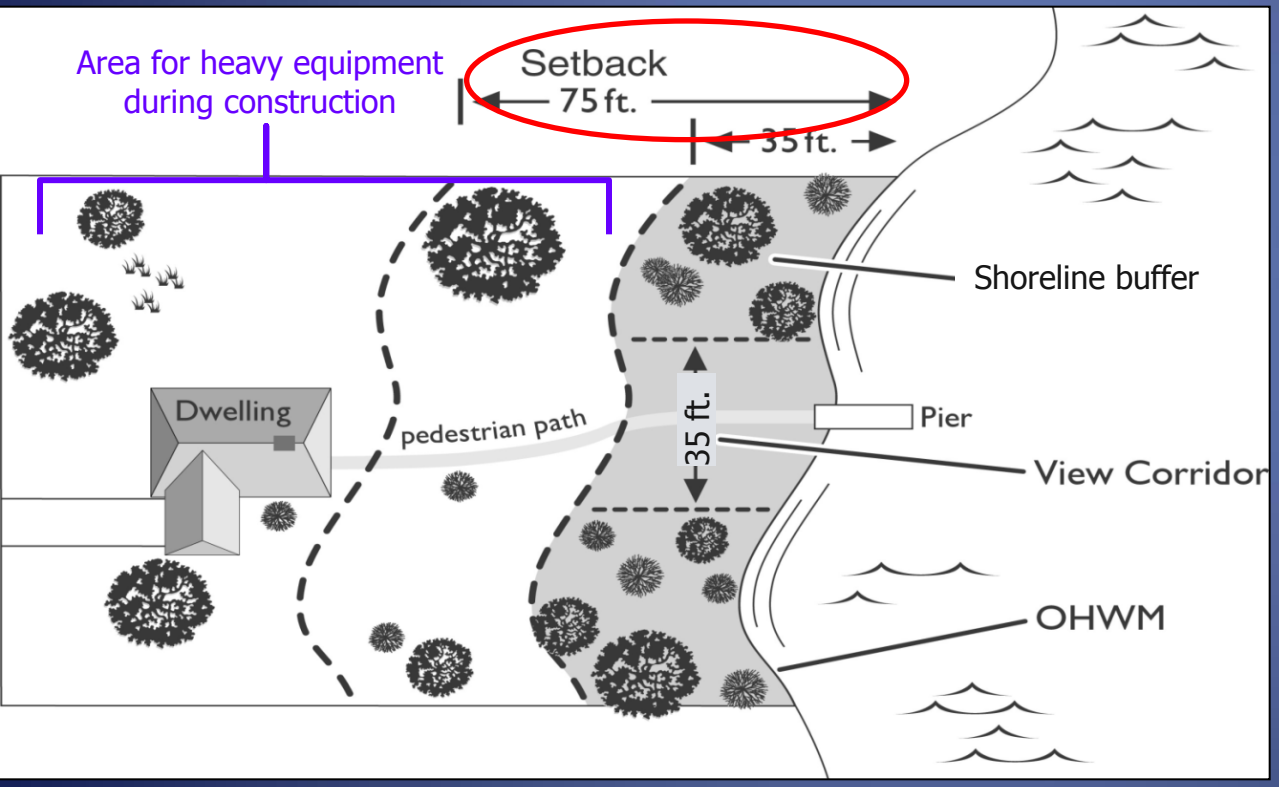
Geese avoid buffers because the buffers can conceal predators such as coyotes, foxes and raccoons

Goose video at youtube.com/watch?v=9Oef1C_kPNI

Vegetative Buffers

- Vegetative buffer zone = area from the OHWM to a minimum of 35’ landward. Cannot establish a larger VBZ as it would be more restrictive than the minimum required
- Viewing corridor 35’ for every 100’ and allowed to run contiguously
- A county shoreland ordinance may not require a person to establish a vegetative buffer on previously developed land and from expanding an existing buffer
  - Establishment of veg. buffer can remain an OPTION for mitigation purposes
  - Open sided structure exemption requirement to establish the vegetative buffer remains in effect

Why shoreline setbacks?



- To keep the home/structure on stable ground
- To keep the shoreline buffer intact during and after home construction
- To reduce pollutant-carrying runoff entering lake or stream
- To maintain habitat for birds and other wildlife, and natural scenic beauty

Building Setbacks

- Required setback is 75’ or an average setback if the proposed development qualifies.

- All structures are required to meet the setback from the OHWM unless they are identified and qualify as an exempt structure.

Structure

- Definition Act 55 – a principal structure or any accessory structure including a garage, shed, boathouse, sidewalk, stairway, walkway, patio, deck, retaining wall, porch or fire pit.

- Statute uses word "including" rather than "means" which means this is an illustrative list – therefore all structures are included. Ex. Barns, silos, swimming pools, etc.

NR 115(1)(b)1m. Exempt Structures

Now have to allow all exempt structures

- Boathouses above the OHWM, located in the access & viewing corridor, do not contain plumbing and are not used for human habitation.
- Open-sided and screened structures that satisfy 59.692(1v). Still have to establish a vegetative buffer.
- Fishing rafts under 30.126
- Broadcast signal receivers

Exempt structures continued

- Utility transmission and distribution lines, etc. well pumphouse covers, POWTS
- Walkways, stairways, or rail systems that are necessary to provide access to the shoreline and area a maximum of 60 inches wide.

Exempt Structures cont.

- Can create requirements for exempt structures as long as they don't effectively prohibit the exempt structure.
- Can't regulate in a less restrictive or more restrictive manner.
- Exempt structures are conforming structures - NOT considered nonconforming structures.

Boathouses

- Can create requirements for boathouses
- The standard that is being regulated is the water setback – a boathouse is exempt from that standard. As long as the requirement doesn't effectively prohibit the boathouse other aspects can be regulated. Size, color, roof pitch, etc.

Exempt -Open-sided structures

- Used for **proposed** structures of 200 sq. ft. or less located within the shoreland setback area that meet all requirements. **Existing** structures within the setback are nonconforming structures unless they are exempt or have been illegally constructed.

- Shoreland setback area means an area that is w/in a certain distance of the OHWM in which construction/placement of structures has been limited or prohibited.

Special Zoning Permission Required

- Part of the structure nearest to the water is located at least 35’ landward from the OHWM
- Total floor area of ALL of the structures in the shoreland setback area will not exceed 200 sq. ft
- The structures has no sides or has open or screened sides.
- County must approve a plan that will be implemented by the owner of the property to preserve/establish a vegetative buffer zone that covers at least **70%** of the half of the shoreland setback that is nearest the water.

Determining if a special permit can be issued

- Add up the existing square footage of all structures within the shoreland setback except for boathouses and stairways/walkways that are considered exempt.
- Open-sided structure worksheet

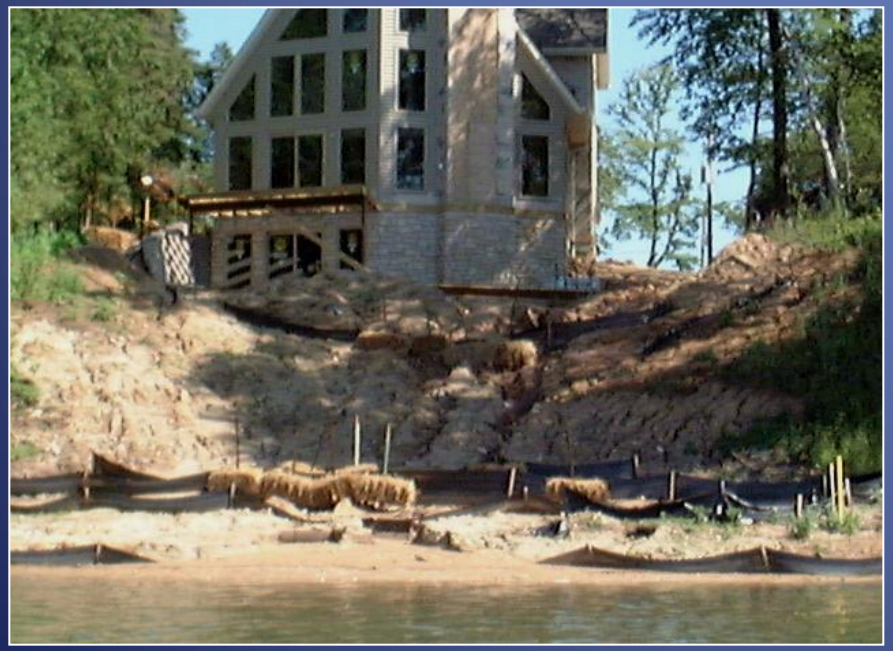
How to measure?

- Definition of structure clearly separates PS and AS
- Measure to the eave-wall of principal structure (NR 115 - closest portion)
- Create language that would allow the construction of functional appurtenances
- Free standing accessory structures such as carports, detached garages, decks, patios, firepits, etc are not able to be authorized at a reduced setback.

Shoreland zoning standards protect property values

Less clear water = Lower waterfront property values

A study of over 1200 waterfront properties in Minnesota found when water clarity went down by 3 feet, waterfront property values around these lakes went down by tens of thousands to millions of dollars

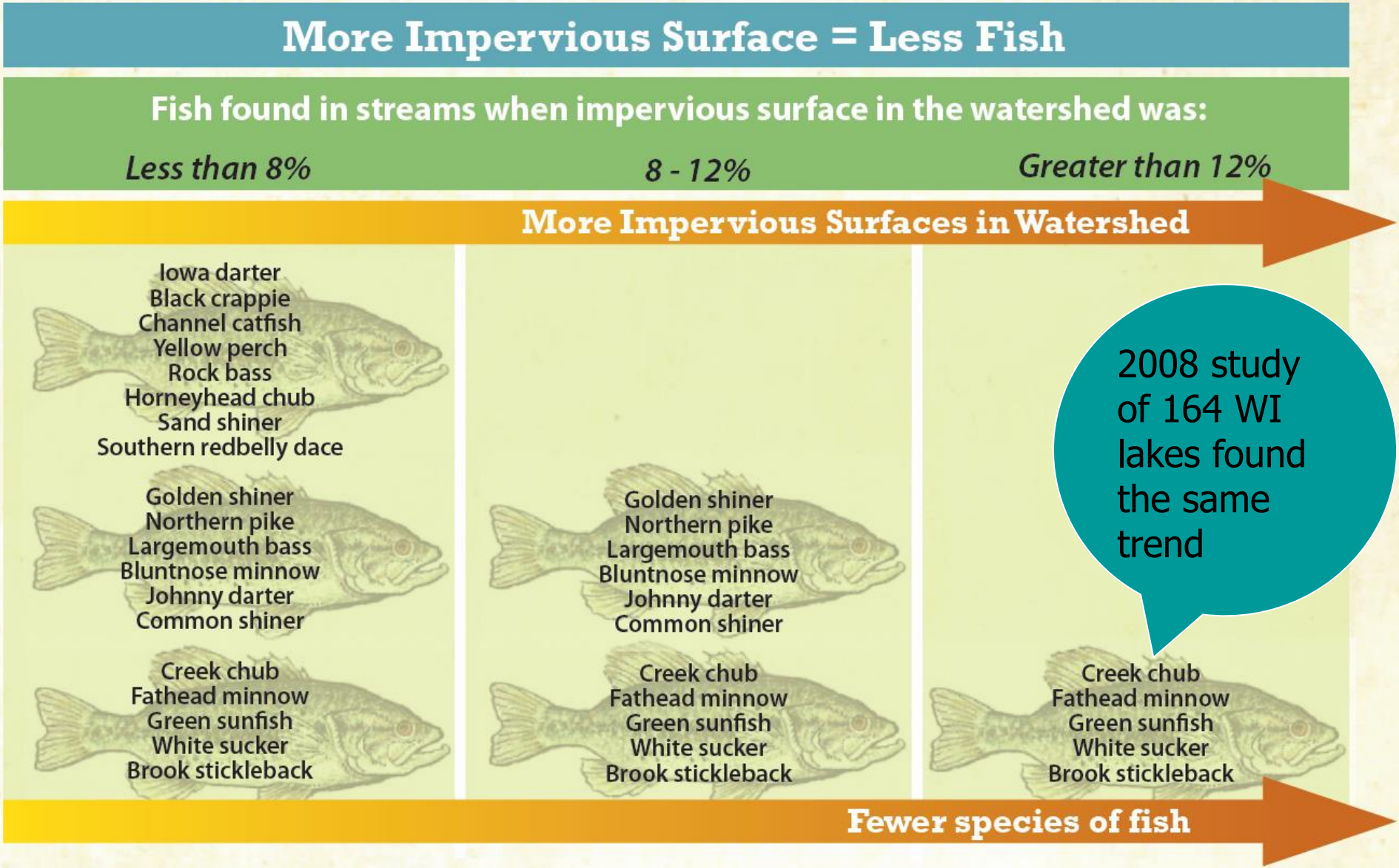


What shoreland practices make water less clear?

- Soil erosion
- Rooftops and pavement close to the water cause runoff that carries pollutants to waterway
- No shoreline buffer to filter runoff

See **Protecting Your Waterfront Investment** at uwsp.edu/cnr-ap/clue/Documents/Water/ShorelandInvestment2013.pdf

Impervious surfaces are hard surfaces like roofs, driveways, parking areas and patios



See **Impervious Surfaces: How They Impact Fish, Wildlife and Waterfront Property Values** – handout and video at uwsp.edu/cnr-ap/clue/Pages/publications-resources/water.aspx

More Impervious Surface = Less Fish

- **More sediments** and algae growth make it difficult for some predator species that hunt by sight to find their food
- **More sediments** cover spawning beds of fish such as walleye and smallmouth bass, depriving eggs of oxygen
- **More runoff** leads to warmer waters that eliminate fish like northern pike & trout

Wisconsin Loons More Likely Found on Lakes with Clearer Water

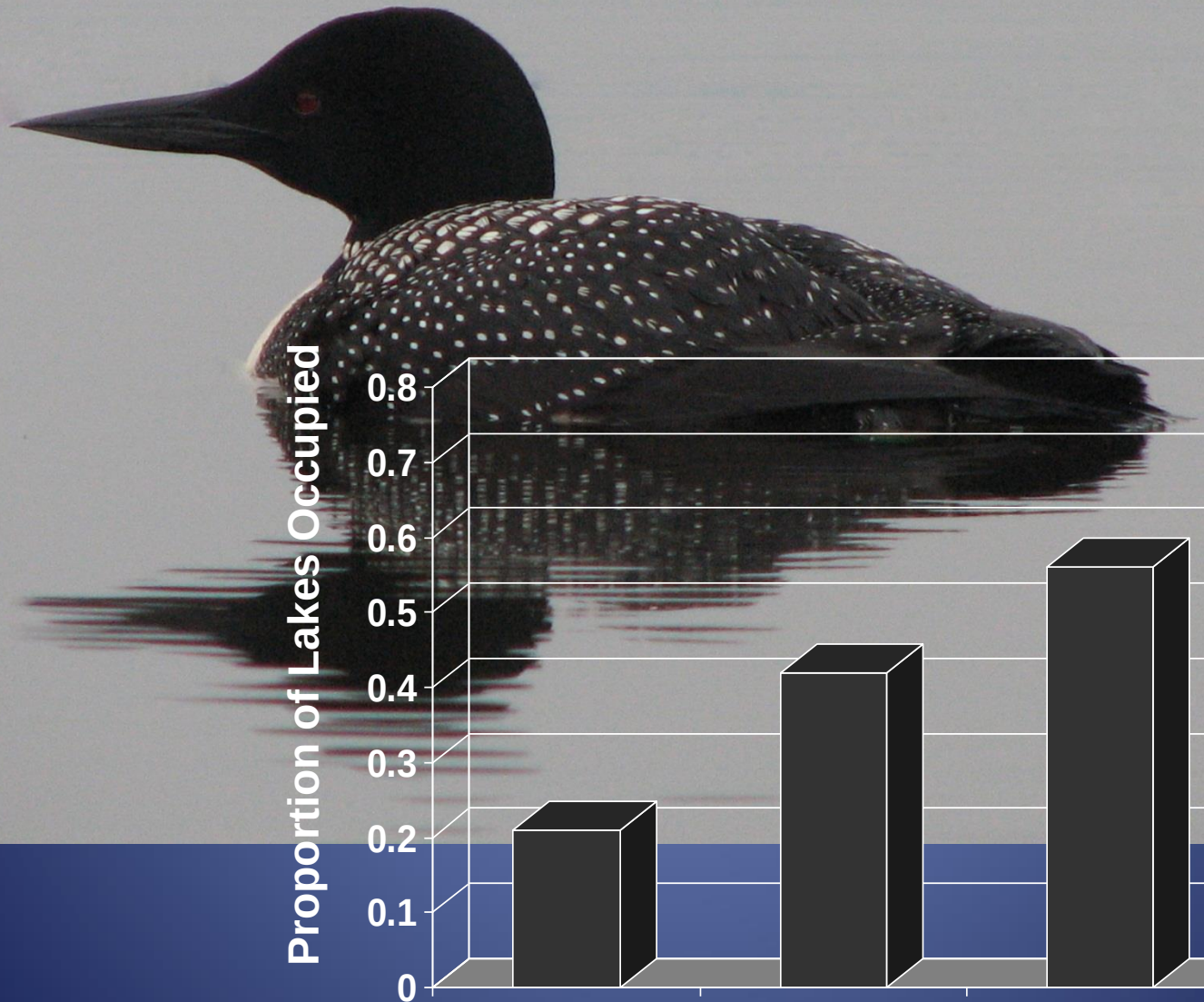


Photo credit
Doug Killian

IS

1. ‘Application.’ Impervious surface standards shall apply to the construction, reconstruction, expansion, replacement or relocation of any impervious surface that is or will be located within 300 feet of the ordinary high water mark of any navigable waterway on any of the following:

a. A riparian lot or parcel.

b. A non-riparian lot or parcel that is located entirely within 300 feet of the ordinary high–water mark of any navigable waterway.(can’t be more restrictive)

Impervious surface standards

What is an impervious surface (IS)?

- An area that releases all or a majority of the precipitation that falls on it

What is the standard?

- Keep the impervious surfaces you have
- For riparian lots, or non-riparian lots that are entirely within 300 feet of the OHWM
  - Up to 15% impervious
  - Between 15% - 30% with mitigation
- Impervious surfaces within 300 feet of OHWM divided by lot area
- County MUST exclude IS that treated by stormwater ponds, rain gardens or other engineered systems

Impervious Surfaces –Act 55

- Counties are required to adopt provisions within their impervious surface standards that allow an impervious surface to be considered pervious if the runoff from the impervious surface is treated by a device or system or is discharged to an internally drained pervious area on or off-site.
  - Exemptions narrowly construed – only entitled to the exemption when it can be demonstrated that the runoff is being treated or is internally drained.
  - Prudent to recognize, when necessary, that a maintenance plan and recorded agreement ensures the systems/area are fully operational and will continue to do so. Protects subsequent property owners.
  - Device/area receiving the runoff fails, the impervious surface is no longer exempt and compliant and is considered impervious.

- Counties that currently have impervious surface standards are required to administer the treated surfaces option now and cannot regulate them in a more restrictive manner.

- Counties that do not have impervious surface standards still have until 10/1/2016 to have a complying ordinance

Height

Why 35’ height standard on shoreline buildings?

Lake of the Ozarks, Missouri

Height

- Purpose is the natural scenic beauty from the water
- Height is regulated to a maximum of 35’ from the OHWM to the 75’ setback
- Encouraged to regulate height beyond the 75’ setback for consistency

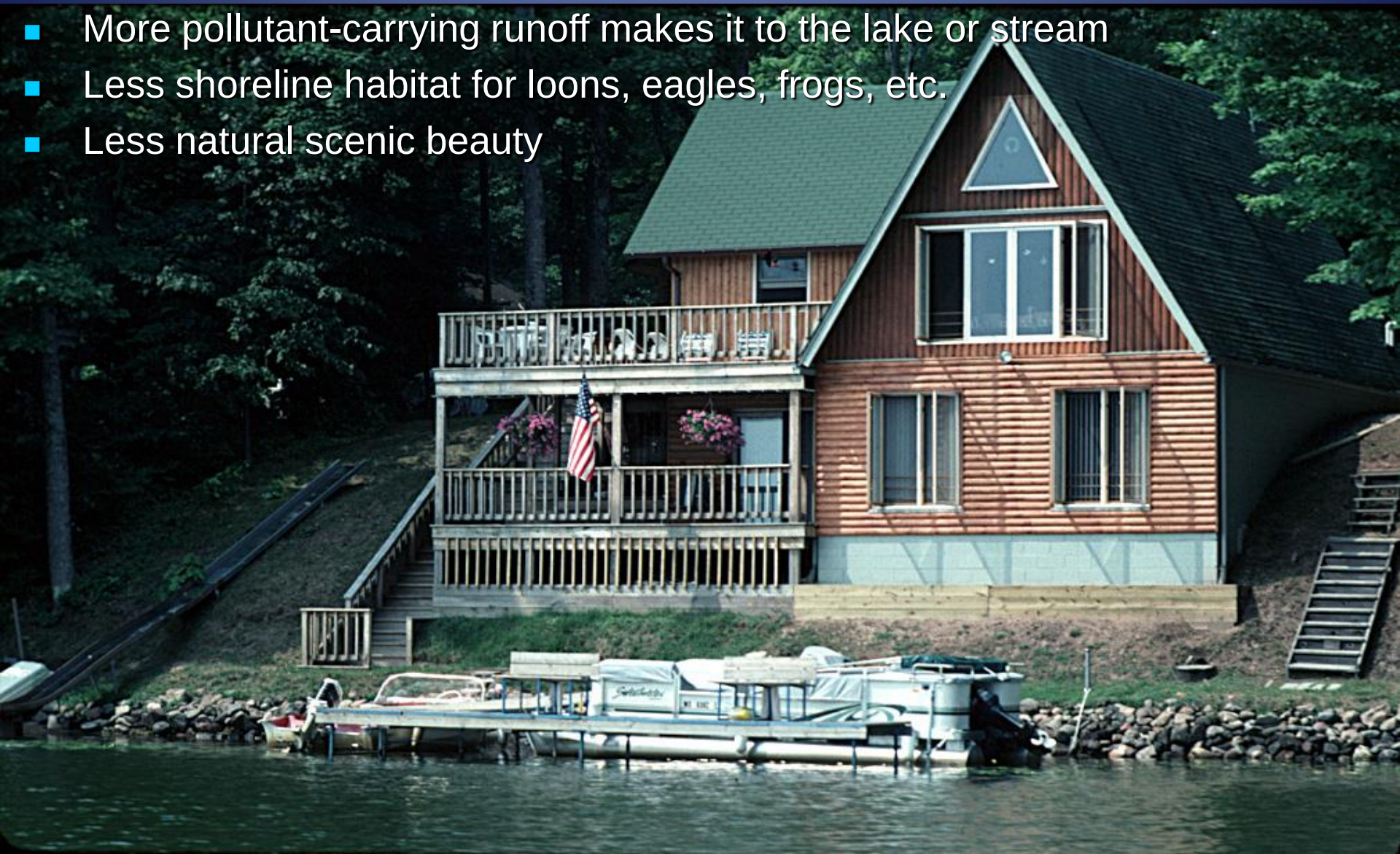
Height - measurement

- To be consistent height should be measured the same way - example model ordinance diagrams.
- Clarify in ordinance where the measurement is: Typically to roof ridge. Chimneys, etc. have not been typically counted in the measurement.
- Q: Can counties require that the measurement be to the lowest natural ground elevation or existing ground elevation whichever is greater (or more restrictive) or is this a finished grade measurement?
- A: A county could measure height in that manner.

Nonconforming Structures and Uses

The closer a structure is to the shoreline …the greater impact it has on the waterway

- More pollutant-carrying runoff makes it to the lake or stream
- Less shoreline habitat for loons, eagles, frogs, etc.
- Less natural scenic beauty



Identification of a NC structure for shoreland zoning purposes?

- A lawfully placed structure that does not comply with the required setback from the ordinary high water mark as identified in NR 115.05(1)(b).
- Structure may also be nonconforming for general zoning, floodplain zoning, etc. but is not affected by the statutory changes under Act 55.

Structures that do not meet the NC definition

- Exempt structures listed in NR 115.05(1)(b)1m
- Structures that meet the required or average setback from OHWM
- Structures that were granted a variance
  - A structure for which a variance was granted under the zoning provisions in effect is not considered non-conforming solely due to the fact that the structure for which the variance was granted fails to comply with the requirement for which the variance was granted. The existence of such a variance does not prevent the structure from being classified as non-conforming if some other characteristics of the use or structure fail to comply with the requirements.
- Structures that have been illegally constructed
  - Structures that were illegally constructed but exceed the ten year limitation for enforcement in 59.692(1t) do not become a legal structure or a nonconforming structure just because enforcement action has not been taken.

Nonconforming Structures - activities now allowed

- Shoreland ordinance cannot regulate the maintenance, repair, replacement, restoration, rebuilding or remodeling of a nonconforming structure if the activity does not expand the footprint. No approval, fee or mitigation required.
  - Includes principal and accessory structures
  - No approval = no permit
  - Floodplain, sanitary, building permits, general zoning permits are all still required

Nonconforming structures – activities allowed cont.

- Vertical expansion of a nonconforming structure without approval, a fee or any mitigation requirements.
  - New definition includes accessory structures therefore vertical expansion of accessory structures is now allowed.
    - 2nd story to a garage
    - Replace patio with an elevated deck
    - Changing roof pitch and side wall height on shed

Nonconforming Principal Structure: activities that still require a permit

- Expansion beyond the setback
- Relocation of NC structure
  - Principal structure is 35’ from OHWM
  - Mitigation required
  - All other ordinance provisions are met
  - No compliant location
- Lateral expansion of 200 square feet if:
  - Principal structure is 35’ from OHWM
  - Mitigation required
  - All other ordinance provisions are met

Questions? Comments?

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