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# WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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## CLEARINGHOUSE RULE 01-144

### Comments

**[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]**

#### **1. Statutory Authority**

Given the vague references to the statutes that the rule interprets and the statutes that authorize promulgation of the rule in the analysis accompanying the rule, it cannot be determined whether the statutes that require the approvals covered by the rule are sufficiently flexible to allow the use of the general permits created by the rule. Additional comments on the statutory authority and statutes interpreted are presented below in item 4. a.

#### **2. Form, Style and Placement in Administrative Code**

a. The department should review the entire rule to ensure that it conforms with the preferred drafting style for the use of parentheses. [See s. 1.01 (6), Manual.] Material in parentheses should instead be set apart by commas or incorporated into notes and the plural of a noun with the “s” in parentheses should be avoided. See, for example, s. NR 353.03 (5).

b. A slashed alternative should not be used in a rule. [See s. 1.01 (9) (a), Manual.] This style was not followed in a number of provisions in the rule, including ss. NR 353.03 (11), (12) (intro.), (a) and (b) and 353.10 (1) (b).

c. Substantive provisions should never be incorporated as part of a definition. [See s. 1.01 (7) (b), Manual.] The style was not followed in the last sentences in s. NR 353.03 (11) and (12) (a) and (b).

d. Notes should not include substantive requirements, as they are not part of the substantive law created by the rule. [See s. 1.09 (1), Manual.] The style was not followed in a number of the notes included in the rule, including the notes after s. NR 353.04 (1) (h) and (2) (b).

e. The department should review the entire rule to ensure that its treatment of mandatory and permissive actions are consistent with the preferred drafting style. [See s. 1.01 (2), Manual.] In particular, in specifying a permissive action, “may” should be used rather than “should.” Also, “shall” should be used instead of “must.” See, for example, ss. NR 353.05 (intro.), 353.06 (2) (e) and 353.08 (1) (g).

f. The terms defined in s. NR 353.03 (8) and (9) should be reversed so that they appear in alphabetical order.

g. The verb in s. NR 353.05 (3) should be expressed as the participle “Constructing” at the beginning rather than the past tense verb “constructed,” to be in parallel construction with the other subsections in s. NR 353.05.

h. The department should rewrite s. NR 353.07 to reflect the sequencing of the determinations called for in that section. The determination under sub. (1) precedes determinations or actions under subs. (2) to (5). In addition, as drafted, the introductory clause with the phrase “the department shall determine” is redundant with the phrase “the department shall determine” in sub. (3). Finally, sub. (2) (intro.) should contain the phrase “do any of the following” before the colon; and pars. (a) to (c) should end with periods. A similar change is needed in s. NR 353.09 (2) (intro.) and (a).

i. Section NR 353.08 (1) (intro.) should be made an introduction to the entire section and the paragraphs in sub. (1) should be renumbered as subsections since, as drafted, there is no sub. (2) in s. NR 353.08.

j. Since the requirement for access in s. NR 353.10 (4) appears to be a condition for the department to approve maintenance activities on preexisting wetland conservation projects under s. NR 353.10, sub. (4) should be incorporated into the conditions under s. NR 353.10 (1).

k. The titles of the subsections in s. NR 353.05 do not conform with the drafting style set forth in s. 1.05 (2) (c), Manual.

l. The defined term “post settlement deposition” should be used in s. NR 353.05 (4) rather than the term “post European settlement deposition.”

m. The second sentence in s. NR 353.03 (11) is not a complete sentence as it does not include a subject.

### **3. Conflict With or Duplication of Existing Rules**

Given the vague references in the analysis accompanying the rule to the statutory authority for the rule and the statutes interpreted by the rule and the lack of references in the rule to existing department rules that may relate to the processing and granting of approvals of activities affecting wetlands, it is not possible to determine if these other rules conflict with or duplicate the proposed rule or if they will be applied in tandem with the rule. Examples of these existing rules include the time limits for the department to act on permits and approvals specified in s. NR 300.04, the fees for permits and approvals in s. NR 300.06 and the wetland water quality standards in ch. NR 103.

### **4. Adequacy of References to Related Statutes, Rules and Forms**

a. In the analysis accompanying the rule, the list of the statutes that authorize promulgation of the rule and of the statutes that the rule interprets are unduly broad and vague. The list of statutes that authorize promulgation of the rule should contain explicit authority for rule-making. The list of statutes interpreted by the rule appears to be too narrow as it only references ch. 30, Stats., whereas the statutes identified for authorizing promulgation of the rule include other statutory chapters, i.e., chs. 23, 29, 31 and 281, Stats. In addition, the rule identifies specific provisions in other statutory chapters which are not included in the list of statutes being interpreted in the analysis. See, for example, the reference to ch. 87, Stats., in s. NR 353.02, the reference to s. 44.40, Stats., in s. NR 353.04 (1) (g), and the reference to s. 88.91 (1), Stats., in s. NR 353.06 (2) (g).

b. The references in ss. NR 353.02 and 353.11 (1) to chapters in the statutes and the Administrative Code are vague. The department should provide citations to specific statutes and rules.

c. The reference in s. NR 353.03 (2) to s. NR 353.05 (2) appears to be an error as s. NR 353.05 (2) does not identify any information which should be submitted in an application. Should this be a reference to s. NR 353.06 (2)?

d. The department should review the entire rule and replace vague references to related rules or statutes with specific citations. Examples of vague references include the references to “applicable provisions of law,” in s. NR 353.03 (2), “all other necessary approvals,” in s. NR 353.08 (1) (d), “applicable laws” in s. NR 353.09 (1) and “applicable statutes” in s. NR 353.11 (2).

e. The reference in s. NR 353.04 (1) (e) to s. NR 102.04 should be to s. NR 102.04 (3) (a).

f. The rule incorporates standards by reference. See s. NR 353.05 (intro.) and (3). Consent for incorporation of the standards must be obtained from the Revisor of Statutes and the Attorney General pursuant to s. 227.21 (2) (a), Stats. In addition, the analysis accompanying the rule should, but does not, indicate that this consent has been given either prior to this rule promulgation or concurrently with this rule promulgation.

g. The reference in s. NR 353.06 (2) (g) to s. 88.91, Stats., should be to s. 88.91 (1), Stats.

h. The reference to the Wisconsin Natural Heritage Inventory in s. NR 353.08 (1) (h) is vague. The department should indicate where a copy of the inventory may be obtained or viewed.

i. The reference in s. NR 353.07 (4) to a general wetland conservation permit under s. NR 353.05 should refer to a general wetland conservation permit under s. NR 353.04. Section NR 353.05 specifies the activities that are included in wetland conservation activities but does not delineate the requirements for a general wetland conservation permit.

j. Since the cross-reference in s. NR 353.10 (3) appears to be to the provision in which the maintenance plan is approved by the department, sub. (3) should use the phrase “under sub. (1) (d)” instead of “in sub. (1).”

### **5. Clarity, Grammar, Punctuation and Use of Plain Language**

a. The rule contains a number of redundant and unnecessary phrases including “but are not limited to” in s. NR 353.03 (4) and “navigable-in-fact” rather than “navigable” in s. NR 353.04 (1) (d).

b. Section NR 353.03 (5) refers to a “wetland site.” If a “wetland site” is different than a “wetland,” the department should include a definition of “wetland site” in the rule. If there is no difference between these terms, then the term “wetland” should be used consistently throughout the rule. Similarly, if a “wetland complex,” as used in s. NR 353.04 (1) (b), is different from a “wetland,” then the department should define “wetland complex” in the rule.

c. The adjectives “an undisturbed or degraded” should precede “wetland” in the first sentence in s. NR 353.03 (5).

d. The last sentence in the definition of “enhancement” in s. NR 353.03 (5) contains terms that are either redundant or potentially ambiguous and should either be deleted or incorporated directly into the definition of “enhancement.” Similarly, the second sentence in the definition of “protection and maintenance” in s. NR 353.03 (11) should be deleted or incorporated into the definition of that term.

e. The definition of “wetland conservation” in s. NR 353.03 (14) refers to preservation activities. This definition should either refer to protection and maintenance activities, a defined term, or the rule should create a definition of preservation.

f. A comma should be inserted after “enhancement” in s. NR 353.03 (14).

g. The reference in s. NR 353.04 (1) (c) to a proposed activity that is “maintenance or repair of structures permitted under this chapter” is potentially ambiguous. Does this provision refer to the maintenance or repair of a previously permitted activity specified in s. NR 353.05 or

is it meant to apply to the maintenance of a preexisting wetland conservation project under s. NR 353.10? In addition, the distinction between “maintenance” and “repair” is not apparent. Will one term suffice?

h. The sentence in s. NR 353.04 (1) (e) is incomplete and, thus, grammatically incorrect. In addition, in this paragraph, the phrase “as defined in s. NR 102.04 (3) (a)” should be set off by commas.

i. The department should review the entire rule to ensure that all provisions are drafted clearly in the present tense and the active voice. [See s. 1.01 (1), Manual.] Examples of provisions that are potentially ambiguous because they are not in the active voice include the substantive provisions in the notes following s. NR 353.04 (1) (h) and the second and third sentences in s. NR 353.10 (1) (b).

j. In s. NR 353.04 (2) (a), “dominates” should be in the plural form “dominate.”

k. How will an applicant know that s. NR 353.04 will not preclude projects that may result in adverse impacts to small patches of intact native plant communities pursuant to the note following s. NR 353.04 (2) (b)?

l. The department should define acronyms used in the rule. See, for example, “NRCS” in s. NR 353.05 (intro.) and (3), “USDA” and “USEPA” in s. NR 353.05 (6) and “USGS” in s. NR 353.06 (2) (a).

m. The phrase “in addition to the information listed in s. NR 353.04” at the beginning of s. NR 353.06 (2) (intro.) is inconsistent with the requirement under s. NR 353.06 (2) (d) that the applicant provide information on a form supplied by the department that indicates how the project will meet the eligibility requirements listed in s. NR 353.04. Will the department’s form identify all information that the department seeks from an applicant?

n. How does the department want the location of the project site on a USGS quad map to be provided on the form supplied by the department under s. NR 353.06 (2) (a)? Should the quad map be copied onto the form or should it be attached to the form? Also, should “quad map” be defined to avoid any ambiguity over which maps are acceptable to the department?

o. A comma should follow “conservation” in s. NR 353.07 (2) (intro.).

p. The phrase “If sub. (1) is met” in s. NR 353.07 (3) and (4) is potentially ambiguous. Is sub. (1) met when the department engages in the act of making the determination or when the department has determined that the project’s purpose is wetland conservation?

q. The department should use consistent terminology for referring to the permits issued under ch. NR 353.08. Section NR 353.08 (1) refers to approvals issued under ch. NR 353 and s. NR 353.09 (1) refers to general wetland conservation permits, permits for maintenance of preexisting wetland conservation projects, and individual wetland conservation permits.

r. Since s. NR 353.08 (1) establishes conditions that apply to “All approvals issued under this chapter,” they will also apply to permits for the maintenance of preexisting wetland conservation projects approved under s. NR 353.10. Is that the department’s intent?

s. The rationale for the July 1, 1991 cutoff for preexisting wetland conservation project maintenance activities under s. NR 353.10 is not apparent from the text of the rule. To assist readers of the rule, the department may wish to consider adding a comment in either the analysis accompanying the rule or a note following s. NR 353.10 (1) that provides a brief explanation of the reason that the department prescribed the July 1, 1991 cutoff date for these projects.

t. As drafted, maintenance activities on a wetland conservation project constructed on or after July 1, 1991 will be subject to either a general wetland conservation permit or an individual wetland conservation permit. If that is not the department’s intent, the department should clarify the rule to specify the treatment of these maintenance activities.

u. The department should reconcile the terminology used to refer to components of the submittals made by an owner of a wetland conservation project constructed prior to July 1, 1991 who wishes to conduct maintenance activities on the project. Section NR 353.10 (1) (a) refers to submittal of a description and a diagram and par. (b) refers to submittal of a plan. In referring to these submittals, s. NR 353.10 (1) (c) refers to “plans under pars. (a) and (b),” and s. NR 353.10 (1) (d) and (3) refer to the “plan.”

v. Section NR 353.11 (1) refers to prosecutions of violations of ch. NR 353 by the department under the specified statutes. In this context, “prosecute” is an inappropriate verb, since the common reference in Wisconsin judicial proceedings is to prosecution by either district attorneys or the Department of Justice.

w. Section NR 353.11 (3) refers to violations of an approval or contract issued relating to a project under ch. NR 353. Since ch. NR 353 only addresses permits for wetland conservation projects and the enforcement of those permits, the reference in s. NR 353.11 (3) to an approval or contract is potentially ambiguous.

## **7. Compliance With Permit Action Deadline Requirements**

Since the rule appears to establish the requirement for a business to obtain a permit, the rule should comply with s. 227.116 (1), Stats., and specify the number of business days within which the department will review and make a determination on a permit application. The rule does not specify the number of business days the department will take to review and make a determination on a general wetland conservation permit, permit for maintenance of a preexisting wetland conservation project or an individual wetland conservation permit.