



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 02-004

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.]

2. Form, Style and Placement in Administrative Code

a. In SECTION 1 of the rule, some indication should be provided, in the treatment clause or in a note, of where the new subchapter title is to go--presumably before s. NR 102.01. Similarly, SECTION 18 should indicate the intended location of the title for subch. II--presumably following s. NR 102.14. However, note that it is not necessary to “reserve” space for future additions to the Wisconsin Administrative Code, as is done in the Code of Federal Regulations. The department could delay the creation of these subchapters until it is ready to create the text of subch. II. (Also, see SECTION 25.)

b. SECTION 4 of the rule renumbers the definitions in s. NR 102.03 (1) to (9) so that they are in alphabetical order. However, it appears that the terms defined in subs. (8) and (9) are not used in ch. NR 102. Therefore, those subsections could be repealed. The remaining terms are in alphabetical order.

c. The changes that are being made to s. NR 102.04 (title) should be shown by the use of strike-throughs and underscoring.

d. Titles to rule provisions are not a part of the rule and so the text of a rule should not rely on a title to convey meaning. For this reason, the titles of s. NR 102.04 (2m) (a) to (d) should be incorporated in the text. For example, s. NR 102.04 (2m) (a) could begin as follows: “The lakes and flowages category includes . . .”; or “Lakes and flowages include . . .”

e. In s. NR 102.04 (3) (a), the final period should be shown without underscoring. In s. NR 102.04 (3) (d) and (e), the periods following the italicized titles should be shown without either strike-throughs or underscoring and the periods following the parenthetical material should be stricken.

f. The treatment clause of SECTION 10 of the rule should read: “NR 102.04 (4) (intro.) and (a) are renumbered NR 102.04 (4) (a) (intro.) and 1. and amended to read:”. In the text of that SECTION, the citation “NR 102.04 (4) (a) (title),” should not be underscored.

g. The treatment clause of SECTION 13 of the rule should read: “NR 102.04 (4) (e) (title) and (intro.) are renumbered NR 102.04 (4) (b) (title) and (intro.) and amended to read:”.

h. Since there currently is no s. NR 104.03, it cannot be repealed and recreated. Therefore, SECTION 20 should be divided into three SECTIONS--one that repeals and recreates ss. NR 104.01 and 104.02, one that creates s. NR 104.03, and one that repeals and recreates s. NR 104.04.

i. It is suggested that Table 1 in ch. NR 104 be formatted in a way that numbers individual table entries. This will facilitate future insertion, deletion, and amendment of individual items in the table without the need to reproduce the entire table. For models, see the tables in current ch. NR 104, which simply number the table entries sequentially, or the tables in ch. NR 10, which integrate the numbering system of the Wisconsin Administrative Code into the tables.

j. Some explanation of Table 1 in ch. NR 104 is needed. The meanings of the column headings should be given. While some (e.g., County, Receiving Water and Reach Description) are fairly self-explanatory, others (e.g., Facility, Region and GMU) are not. In particular, with regard to the Classification column, which of the several classification systems described in ch. NR 102 is being used in this table? The meaning of the Effective Dates column is reasonably clear, but the column may be inappropriately titled, since two entries refer to flood stages rather than dates. Also, a key to the codes used in the Classification, Region, and, possibly, GMU columns is needed.

k. The tabular material in s. NR 104.03 should be put into numbered tables with title, key, and other features of a table. The comments above relating to Table 1 would apply generally to these tables also.

l. The rule should indicate where to place the new title for subch. I of ch. NR 106. Conceivably, it could be before s. NR 106.01, before s. NR 106.03, or either before or after s. NR 106.04. If it is placed before s. NR 106.01, then current references to “this chapter,” for example in ss. NR 106.02 and 106.03, will need to be changed to “this subchapter.” If the title is placed in any other location, then it will be necessary to revise the sections preceding the subchapter title to ensure that they are applicable to the entire chapter.

m. There are no definitions provided for subch. III of ch. NR 106, but there is no lack of technical terminology warranting definition in that subchapter. Definitions should be placed in s. NR 106.03 or a new section for definitions should be created following s. NR 106.41.

n. The term “limited fish and aquatic life” in s. NR 106.41 appears to refer to the limited forage fish waters and limited aquatic life waters categories established in ch. NR 102, but it is nowhere defined as such. The rule should either define the term or use the two terms to which it refers.

o. Section NR 106.43 is largely redundant with s. NR 106.42. The two sections should be combined.

p. Sections NR 106.44 (1) and 106.45 (1) refer to site specific limitations. How and under what circumstances are site specific limitations determined? What rule provisions outline this process? If the rules provide for this, these sections should cross-reference the applicable sections; if the rules do not provide for this but this is a practice of the department, that would seem to indicate a major gap in the rules that should be filled.

q. The provisions of ss. NR 106.44 (2) and 106.45 (2) are identical and could be combined into a subsection of s. NR 106.42. This would also make clear that the limits for toxic and organoleptic substances are in addition to *all* limits established under subch. III, including site specific limits.

r. Section NR 106.46 (1) should be written as follows: “Except as provided in sub. (4), this section applies to streams that are not listed in ch. NR 104 and that have $Q_{7,10}$ flows of 0.01 cfs or less in the absence of wastewater discharges.”

s. Section NR 106.46 (4) relates to how use designations are made and so appears more appropriate for inclusion in ch. NR 104.

t. The numbers of the subsections of s. NR 106.48 should be written in parentheses.

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

a. The second sentence of s. NR 102.04 (1) (intro.) would read more clearly if the phrase “including the mixing zone” were set off by commas. In par. (a), immediately following, the comma after the word “water” should be repealed (with a strike-through). Also, in pars. (a) to (c), the words “as to” should be repealed and replaced by “that,” and in par. (d) the word “which” should be replaced by the word “that.”

b. Section NR 102.04 (2m) (intro.) indicates that the hydrologic categories of surface waters described in that subsection are exclusive: “all surface waters belong to one of the following” However, that subsection states that wastewater effluent channels are a subset of streams, with the result that wastewater channels belong to two categories. This should be clarified.

Also, the second sentence of s. NR 102.04 (2m) (intro.) is explanatory rather than substantive and should be placed in a note. The explanation provided by that sentence might be clearer if it included a statement that the hydrologic categories are separate from and in addition to the fish and aquatic life categories created and described in sub. (3) of that section.

Finally, with regard to s. NR 102.04 (2m) (intro.), can some indication be given of how and where the classification of waters into these categories is made and what significance the classifications have? The same comment applies to the fish and aquatic life categories created and described in sub. (3) of that section. Answers to these questions would help the reader understand the design of chs. NR 102 to 106. Except where it takes the form of a substantive requirement, this information (if included) should be placed in notes.

c. The rule makes a terminology change, substituting the term “fish and aquatic life” for the term “fish and other aquatic life.” Since fish *are* aquatic life, the current term seems more defensible, at least on grammatical grounds. Another alternative would be the simpler term “aquatic life.” Whatever term the department chooses, it should use that term consistently. The rule retains some instances of “fish and other aquatic life,” for example in s. NR 102.04 (3) (a) and (c).

d. Section NR 102.04 (3) (intro.) states that “[a]ll surface waters shall belong to one of the fish and aquatic life subcategories” However, s. NR 102.13 states that only those “surface waters not included in [outstanding resource waters, exceptional resource waters, Great Lakes system waters, or certain other listed waters] are fish and aquatic life waters.” This conflict should be resolved. In addition, the conflict points out the need for further explanation of the various categories and their application.

e. The stricken sentence in s. NR 102.04 (3) (intro.), regarding the categories described in pars. (a) to (c), seems to compliment the new sentence, regarding the categories described in pars. (d) and (e), and not conflict with it. It would seem that retaining the current sentence, in addition to creating the new one, would give more explanation to the readers.

f. In s. NR 102.04 (4) (c) 2., what constitutes “cold temperatures”?

g. In s. NR 102.04 (5) (b), “do” should be replaced by “does.”

h. In s. NR 102.04 (6), the comma following the underscored word “communities” should be omitted--it is not in the current rule. Also, the phrase, “as described in sub. (3),” in the same sentence, is not necessary and could be stricken as part of this rule revision.

i. Section NR 104.01 states that the purpose of ch. NR 104 is to establish uses and designated standards for surface waters. However, surface water quality standards consist of a designated use of a water body and criteria that must be met in the water body to support the designated use. Chapter NR 102 establishes the use categories for surface waters and the criteria applicable to each use category. It appears, then, that the purpose of ch. NR 104 is to designate the uses for which individual water bodies will be protected. If this characterization is correct, it would be appropriate to remove the term “designated standards” from the current title of ch. NR 104, from s. NR 104.01 and from other provisions of that chapter. In addition, it would be appropriate to review the entire chapter, including the provisions of current subch. II, to ensure that provisions describing uses of surface waters and water quality criteria specific to those uses are moved to ch. NR 102. In particular, much of s. NR 104.03 appears to consist of criteria. Also, care should be taken to ensure that the term “standard” is not used where “criterion” is meant.

j. Section NR 104.03 (title), **Other variances applicable to state surface waters**, implies that there are more such variances than those in that section. Is that the case? If not, the word “other” should be omitted from the title.

k. The addition of the word “standards” to the title of ch. NR 106 seems inappropriate. Again, a water quality standard consists of a designated use of a water and water quality criteria that must be met to support that use, established in chs. NR 102 and 104. Discharge limits are set that ensure that applicable standards are not violated. Discharge limits are set categorically, by industry, in the NR 200 series, and on a water quality basis, for situations where the categorical limits are insufficient, in ch. NR 106. This scheme does not include a concept of “effluent standards,” as this new title suggests. Furthermore, the section titles in ch. NR 106 refer to limits, not standards. Consequently, the word “standards” should be omitted from the title of ch. NR 106.

l. In the first sentence of s. NR 106.41, the word “which” should be replaced by the word “that.”

m. In s. NR 106.48 (intro.), “any of” or “all of” should be inserted before “the following,” depending on what is intended.

n. In s. NR 106.48 (4), what does “exceed” mean? Does this mean that the numerical value of the discharge may not be greater than that of discharges under the referenced limits or does it mean that the limits may not be more stringent, producing lower numerical discharge numbers?