



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 10-035

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Reference Bureau and the Legislative Council Staff, dated September 2008.]

1. Statutory Authority

Section 283.15 (4) (a) 1. f., Stats., generally provides that the Secretary of the Department of Natural Resources must approve all or part of a requested variance, or modify and approve a requested variance, if the permittee demonstrates that attaining the water quality standard is not feasible because the standard will cause a substantial and widespread adverse social and economic impact in the area where the permittee is located. Section NR 217.18 (1) (b) 3. is a departmental finding that in many cases it will be necessary for owners of stabilization ponds and lagoons to construct a new wastewater treatment plant to comply with phosphorus effluent limitations; construction of these facilities will result in substantial and widespread adverse social and economic impacts in the area served by the existing stabilization pond and lagoon system. Section NR 217.18 (3) (c) also provides that a permittee with a lagoon and stabilization pond that is denied a variance may not be granted a variance for phosphorus based on the criteria in s. 283.15 (4) (a) 1. f., Stats., and using the procedures in ch. NR 200 and s. 283.15, Stats. It appears, although it is not clear, that the rule provision voids the statutory provision regarding variances. If so, what statutory authority exists for the rule provisions?

2. Form, Style and Placement in Administrative Code

a. The rule contains a number of references to the effective date of the rule that do not conform with the preferred drafting style in s. 1.01 (9) (b), Manual. See ss. NR 217.11 (2) and 217.18 (1) (b) (intro.) and (c).

b. The department should review the entire rule and make all references to the “department” lower case, as called for in s. 1.01 (4) Manual. See, for example, ss. NR 217.13 (1) (b) and 217.15 (2). Similarly, “U.S. Geological Survey” should not be capitalized in s. NR 217.13 (2) (b) 1. and 2.

c. The department should review the entire rule and remove the underscoring of text in provisions being created in the administrative code. Only amendments of existing administrative code provisions should contain text that is underscored. See, for example, ss. NR 217.13 (2) (c) 1. and 217.18 (4) (c) 3.

d. Notes should not contain substantive requirements. See s. 1.09 (1), Manual. This drafting style was not followed in the note following s. NR 217.13 (2) (d).

e. A directive to the department should be expressed through the use of “shall” rather than “will” or “should.” See s. 1.01 (2), Manual. This drafting style was not followed in ss. NR 217.13 (3) and 217.17 (1) (b) 1.

f. In the rule preface statement of related statutes or rules, the notation “Stats.” should be inserted after the reference “s. 283.11 (3) (am).”

g. In s. NR 102.06 (2), the introduction should read: “In this section.” and the definitions of the terms in pars. (a) and (b) should be placed in alphabetical order.

h. In s. NR 102.06 (3) (b), the correct cross-reference to sub. (4) is “sub. (4) (a).” Also, in sub. (4) (c), the notation “sub” should be replaced by the notation “sub.”

i. In s. NR 217.01, the stricken-through portions of amended text should precede the underscored portion of the amended text.

j. In s. NR 217.10 (4), the notation “ch.” should be replaced by the notation “chs.”

k. In s. NR 217.11 (2) and (5), only the first word of the defined term should be capitalized.

l. In s. NR 217.15 (1) (c), the introductory material should be numbered subd. 1. and the remaining subdivisions should be renumbered accordingly.

m. In s. NR 217.17 (4) (c) 4. c., the notation “ss.” should be replaced by the notation “s.”

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

a. The references in s. NR 217.11 (intro.) to other provisions in the administrative code that contain applicable definitions should be to the specific provision rather than a chapter, e.g., s. NR 102.03 rather than ch. NR 102.

b. For clarity, should the references to “this section” in s. NR 217.13 (6) (a) be to “this subsection”?

c. Section NR 217.18 (2) (a) refers to a form. The requirements of s. 227.14 (3), Stats., should be met.

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

a. In the second paragraph of item 9 of the rule preface, it appears that the word “of” in the first sentence should be deleted.

b. There should be a period rather than a closed quotation mark at the end of s. NR 102.06 (2) (c).

c. Is the “mean water residence time” in s. NR 102.06 (1) (f) the same as the “mean annual hydraulic residence time” in s. NR 102.06 (4) (c)? If so, the department should use consistent terminology and, as appropriate, define the term. In addition, should the period of time over which the “mean water residence time” in s. NR 102.06 (1) (f) is being measured be specified, e.g., 30 years? Finally, the definition is written in terms of raising the depth of the water by more than two times; two times more than what?

d. Section NR 102.06 (4) (b) (intro.) refers to all “lakes and other surface waters that do not exhibit unidirectional flow.” The list of surface waters in s. NR. 102.06 (4) (b) 1. to 5. only refers to particular types of lakes and not other surface waters. Thus, the need for the reference to “other surface waters” in sub. (4) (intro.) is not apparent.

e. In s. NR 102.06 (5) (c), it appears that the word “that” should be inserted before the phrase “are suitable.”

f. The second note following s. NR 102.06 (7) uses the undefined term “303(d) list.” The department should provide a definition of this term applicable to this subsection. Also, the last sentence of the second note should make consistent use of commas and semicolons.

g. Section NR 217.13 (2) (b) 1. and 2. specifies a flow “determined by the U.S. geological survey using data from a gauging station with a period of record of at least 10 years.” Do these gauging stations have to be located within a particular distance or other measure from the source of the discharge of phosphorus to the flowing stream or river? Also, is it the department’s intent that the U.S. geological survey is the only entity that can determine these flows, or can the survey provide the data that others can use to determine the flows?

h. In s. NR 217.13 (2) (b) 3., it appears that the word “of” should be inserted before the word “flow.”

i. The department should review the following terms to ensure that they are unambiguous and do not require a definition or elaboration:

(1) “Specific upstream location” in s. NR 217.13 (2) (d).

(2) “Adaptive management approaches” in s. NR 217.17 (4) (a) (intro.).

j. Section NR 217.13 (2) (d) Note refers to department “guidance.” The rule should indicate to the reader how this guidance may be obtained.

k. In s. NR 217.13 (8) (intro.), “is” should follow “that.”

l. The abbreviation “WQBEL” that is used in s. NR 217.16 (1) (intro.) should be defined.

m. The phrase “as appropriate, but are not limited to” in s. NR 217.17 (3) (intro.) is redundant and not needed.

n. The department should review the entire rule to ensure the proper spacing in references included in the rule, as illustrated in s. 1.07 (2), Manual. See, for example, the reference to “s. NR 102. 06” in s. NR 217.17 (4) (a) 3., to “subchap.II” in s. NR 217.17 (4) (c) 4. a., and to “s. NR 217. 13” in s. NR 217.18 (3) (a).

o. It is not clear why s. NR 217.18 (3) (c) refers to “procedures” in ch. NR 200 and s. 283.15, Stats., and s. NR 217.18 (3) (d) refers to “procedures and requirements” in the same subsection.