

**NOTICE TO PRESIDING OFFICERS
OF PROPOSED RULEMAKING**

Pursuant to s. 227.19, Stats., notice is hereby given that final draft rules are being submitted to the presiding officer of each house of the legislature. The rules being submitted are:

Natural Resources Board Order No. LS-5-02

Legislative Council Rules Clearinghouse Number 02-046

Subject of Rules Department procedures for
Administrative Hearings

Date of Transmittal to Presiding Officers August 28, 2002

Send a copy of any correspondence or notices pertaining to this rule to:

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An electronic copy of the proposed rule may be obtained by contacting Ms. Turner

REPORT TO LEGISLATURE

NR 2, Wis. Adm. Code
Department procedures for administrative hearings

Board Order No. LS-5-02
Clearinghouse Rule No. 02-046

Statement of Need

The primary content of ch. NR 2 consists of procedures for obtaining and conducting both contested case and non-contested case administrative hearings. It also contains the Department's procedures for maintaining public records and assigning confidential status to records. The rule has not been updated since 1984. Changes due to technology and evolving administrative law practice warrant an update at this time.

Non-contested case hearings, variously referred to as legislative or informational hearings, are conducted by Department staff. Contested case hearings, which resemble trials with evidence taken under oath and subject to cross-examination, have been conducted for the Department by the Department of Administration, Division of Hearings and Appeals since 1979. Administrative law judges for the Division of Hearings and Appeals render the decisions in contested case hearings. However, those decisions are legally considered to be final decisions of the Department of Natural Resources. While administrative law judges conduct the contested case hearings, the Department and the Division of Hearings and Appeals have always agreed that the decision whether a hearing request should be granted is legally the responsibility of the Department. The proposed administrative code codifies this understanding. Two other proposed additions that reflect long-standing practice deal with how non-contested case declaratory rulings are held and how pre-hearing conferences can affect the outcome of a hearing.

The proposed rules modify the procedures for petitioning the Department for a hearing. Under the proposed modifications, petitions submitted by facsimile is being added. The date petitions are considered to have been made is being proposed to be the date received by the Department. While this approach is legally acceptable, it is less common than – for mailed petitions – the date the petition was mailed. With present technology and the internal Departmental practice of stamp-dating mail on receipt, this procedure should reduce disputes regarding when service on the Department was accomplished. Service of pleadings in contested case hearings tracks the Division of Hearings and Appeals preference of using the day of mailing.

Two provisions are proposed with respect to contested case hearing procedures. One clarifies that responsibilities of parties with respect to burdens of proof and the order of providing evidence. The second places limitations on the extent of discovery in normal situations, but allows for additional discovery at the discretion of the administrative law judge who is presiding over the case.

Finally, the Department is proposing changes in the procedures for making confidential determinations. The proposed changes mostly relate to elimination of a preliminary determination. That procedure is administratively cumbersome while having engendered almost no public interest since first appearing in the code.

Modifications as a Result of Public Hearing

No modifications were made as a result of public hearing.

Appearances at the Public Hearing and Their Position

There were no appearances at the public hearing.

Response to Legislative Council Rules Clearinghouse Report

The recommendations were accepted, but the following are responses to specific comments:

1. For reasons identified and a subsequent comment, s. NR 2.12(3), has been relocated to s. NR 2.13(1). The referenced section of s. 227.45(6) reads: (6) A party may conduct cross-examinations reasonably required for a full and true disclosure of the facts." The newly created s. NR 2.13(3) does not preclude "parties" from conducting cross-examination. Rather it states that persons who did not choose to become parties at an earlier date identified in the public notice may participate in the hearing, but may not conduct cross-examination. The new language codifies the common practice of the Division of Hearings and Appeals. In complex cases, a prehearing conference is often held at which persons who desire to participate in the hearing as parties need to appear and so state. Following the prehearing conference, an order is issued by the administrative law judge, applicable to all parties, which governs matters such a prehearing motions, witness identification and discovery. It would be unfair to those who do appear at the prehearing conference and abide by the judge's order if others could bypass the prehearing, not abide by the prehearing order, yet participate at the hearing as a full party. The practice as now set forth in the rule has been used successfully by the Division of Hearings and Appeals for a number of years without complaint.

2.b. Non-contested case hearings will not be conducted by administrative law judges. The Department does not have administrative law judges; it relies on the Division of Hearings and Appeals to provide administrative law judges when needed. The Division does not provide administrative law judges for non-contested case hearings. Further, the nature of non-contested case hearings is such that administrative law judges are not needed.

2.d. The Department concurs with the comment. Subsection NR 2.13(3) has been moved to the end of s. NR 2.13(1). Subsection (4) has been renumbered as sub. (3) and the title has been changed from "Motions" to "Prehearing motions". Also, the title to s. NR 2.13 has been changed to include reference to the language in the newly renumbered sub. (3).

4.a. The Department agrees that, as written, the definition is confusing. While "contested case" is defined by statute, "non-contested case" is a phrase that does not appear in ch. 227, Stats. As a term, it is used by the Department in ch. NR 2 only with respect to hearings that are not contested case hearings. Accordingly the existing definition is being retained to define the phrase "noncontested case hearing" rather than "noncontested case".

4.e. This comment is borne out of natural confusion associated with the use of the term "party" in two different ways in ch. NR 2, which, in turn, reflects two different uses in the statute. At the outset of a hearing, any person who desires to participate as a party to a contested case hearing may do so, provided that person qualifies under provisions of the operative law. This is the use of the term "party" in s. NR 2.08. The purpose of the procedure in s. 227.47(1), Stats., is to identify, for purposes of judicial review, those persons who have actually participated through the course of the hearing. Quite commonly, persons who have identified themselves as parties at the

outset of hearings, have failed to participate to the extent to qualify as a party to be certified for a judicial review. The procedure required by s. 227.47(1), Stats., for determination of who is on the list is quite extensively described in s. NR 2.155(1). The Department worked with the Division of Hearings and Appeals to determine whether two different terms could be used to describe the different uses of the word "party". However, given the widespread usage of the term in both situations, we decided on the present approach.

4.f. The third sentence of s. 227.47(1), Stats., reads: "Every proposed or final decision shall include a list of names and addresses of all persons who appeared before the agency in the proceeding who are considered parties for purposes of review under s. 227.53." Several recent decisions by the Wisconsin Court of Appeals have made clear that s. 227.47, Stats., applies only to contested case hearings.

Final Regulatory Flexibility Analysis

Fewer than 50 contested case hearings are conducted yearly, many of which have no participation by small businesses. The rule is not expected to meaningfully increase the cost of participation in contested case hearings, and may decrease the costs in many cases, especially those in which discovery is limited. That limitation could be overridden by an order of the administrative law judge.

ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD
REPEALING, RENUMBERING AND AMENDING, AMENDING AND CREATING RULES

The State of Wisconsin Natural Resources Board proposes an order to repeal NR 2.105, 2.135(3), 2.19(9) and 2.195(2)(b); to renumber and amend NR 2.02(1) to (4), 2.11, 2.12(3) and 2.195(2)(a); to amend NR 2.01, 2.03 to 2.05, 2.06 to 2.09, 2.10, 2.11(title), 2.12(title), (1) and (2), 2.13(1) and (3)(title), (b) and (4) to (6), 2.135(2)(a) and (b) and (5), 2.14(2) and (4) to (7), 2.15, 2.155, 2.157, 2.16, 2.17(1) and (3), 2.18, 2.19(4), (5)(a), (b), (c)(intro.), (d) and (e) and (6) to (8), 2.195(1), (3) to (6)(a) and 2.20; to create NR 2.02(1) to (4) and (7), 2.055, 2.095, 2.11(2) to (5), 2.115, 2.12(3) and (4), 2.13(3)(intro.), (c) and (d) and 2.155(3) relating to department procedures for administrative hearings

LS-5-02

Analysis Prepared by Department of Natural Resources

Statutory authority: s. 227.11(2), Stats.

Statutes interpreted: ss. 30.03, 227.12, 227.41, 227.42, 227.44, 227.45, 227.46, 227.47, 281.17(3) and (5), 281.19, 281.20, 285.83 (1), 289.95, 289.97 (1), 291.87, 291.89, 291.95 (1), 292.11 (4) and (7) (c), 293.15 (3), 293.83, 299.21 and 299.91, Stats.

The proposed rules modify the procedures for petitioning the Department for a hearing. Under the proposed modifications, petitions submitted by facsimile is being added. The date that service on the Department by mailing is considered to have been made is changed to the date received by the Department.

Two provisions are proposed with respect to contested case hearing procedures. One clarifies the responsibilities of parties with respect to burdens of proof and the order of providing evidence. The second places limitations on the extent of discovery in normal situations, but allows for additional discovery at the discretion of the administrative law judge who is presiding over the case.

Finally, the Department is proposing changes in the procedures for making confidential determinations. The proposed changes mostly relate to elimination of a preliminary determination.

SECTION 1. NR 2.01 is amended to read:

NR 2.01 Application of rules. ~~These rules~~ This chapter shall apply in all proceedings and hearings before the department of natural resources except as specifically provided otherwise.

SECTION 1m. NR 2.02 (intro.) is created to read:

NR 2.02 Definitions. In this chapter:

SECTION 2. NR 2.02 (1) to (4) are renumbered NR 2.02(6), (9), (5) and (8), respectively, and as renumbered are amended to read:

NR 2.02(5) ~~CONTESTED CASE.~~ "Contested case" has the meaning specified in s. 227.01(3) (intro.), Stats.

(6) ~~DEPARTMENT.~~ "Department" means the department of natural resources.

(8) ~~NONCONTESTED CASE.~~ "Noncontested case hearing" means any ~~proceeding~~ hearing before the department which is not a contested case hearing.

(9) ~~SECRETARY.~~ "Secretary" means the secretary of the department of natural resources.

SECTION 3. NR 2.02(1) to (4) and (7) are created to read:

NR 2.02 Definitions. (1) "Administrative law judge" means a hearing examiner employed by the department of administration division of hearings and appeals.

(2) "Class 1 proceeding" has the meaning specified in s. 227.01(3)(a), Stats.

(3) "Class 2 proceeding" has the meaning specified in s. 227.01(3)(b), Stats.

(4) "Class 3 proceeding" has the meaning specified in s. 227.01(3)(c), Stats.

(7) "Division of hearing and appeals" means the department of administration division of hearings and appeals.

SECTION 4. NR 2.03 to 2.05 are amended to read:

NR 2.03 Service on the department. All petitions for hearings, petitions for rules, petitions for declaratory rulings, petitions for review of contested case decisions under s. NR 2.20, answers and complaints required by any statute or rule shall be served on the ~~secretary, either~~ department by personal delivery to the office of the secretary, or by mailing to the secretary by certified mail, at the following address: P. O. Box 7921, Madison, Wisconsin 53707-7921, or by facsimile transmission to the secretary at (608) 266-6983. If the petition is served by facsimile transmission, a copy of the petition shall be mailed to the secretary by regular mail within one week of service. Service by mailing shall be deemed to have been made on the date the petition is received by the department. Service by facsimile received after 4:30 P.M. shall be deemed to have been made on the following day.

Note: In re Proposed Incorporation of Pewaukee, 72 Wis. 2d 593 (1976) and Schroedel Corp. v. State Highway Commission, 192 Wis. 2d 424 (1968) indicate that when service by mail is authorized, and in the absence of specific language to the contrary, service is complete upon timely mailing. This rule is intended to specify that service is complete upon receipt by the department.

Note: The office of the secretary is located on the 5th floor of GEF 2, at 101 S. Webster St., 5th floor, Madison, WI.

NR 2.04 Service of pleadings. After a matter has been set for a contested case hearing, all pleadings and papers shall be served by delivery or by mail to on the division of hearings and appeals, the department's bureau of legal services, department of natural resources, and to all identified parties. Unless otherwise provided for by the division of hearings and appeals, service shall be made by personal delivery or by mailing. Service by mail shall be complete on mailing.

Note: How service of pleadings is accomplished under s. NR 2.04 differs from how service of petitions is accomplished under s. NR 2.03.

Note: The Division of Hearings and Appeals is located at 5005 University Avenue, Suite 201, PO Box 7875, Madison, WI 53703-7875. The department's Bureau of Legal Services is located on the fifth floor of GEF 2, 101 S. Webster St., 5th floor, Madison, WI, mailing address: Box 7921, Madison, WI 53707.

NR 2.05 Forms of petitions. Petitions shall conform with the applicable statute as to form, content, number of signatories and verifications. All petitions shall be filed served within the time specified by statute or administrative ~~code~~ rule, or, where no time is specified, within 30 days of the date of the order or decision to be reviewed. Petitions are deemed filed upon receipt by the department. The

department may request additional information concerning any petition or request ~~filed~~ served under this section. The department may deny any ~~such~~ petition or request where the information required or requested under this section is not provided. Forms of petitions in various proceedings shall follow the following formats ~~below~~:

(1) REVIEW OF ORDERS. The following form shall be used in seeking review of orders issued pursuant to ss. 281.19 (2) (a), (4), (5), 285.13(2), 285.83 (1), 289.97 (1), 291.95 (1), 292.11 (4) and (7) (c), 293.15 (3) and 293.83 (1), Stats.

To the Department of Natural Resources:

The undersigned hereby petitions for a review of the department order dated _____, 20 __, whereby it was ordered _____.

The grounds for this petition are _____

The modification or change desired is _____

Date _____

Signature _____

Verification _____

(2) (title) ~~ADOPTION PROMULGATION, REPEAL OR AMENDMENT OF RULES OR GENERAL ORDERS OF THE DEPARTMENT.~~ The following form shall be used in petitioning for rules pursuant to s. 227.12, Stats.

(a) For ~~adoption promulgation~~ of a ~~general order or rule~~:

To the Department of Natural Resources:

The undersigned hereby petitions for the ~~adoption~~ promulgation of a rule relating to: _____

The grounds for this petition are _____

The ~~petitioner's~~ petitioners' interest in the request is _____

The authority of the department to act is _____

Date _____

Signatures (5 needed unless petitioner is a municipality or ~~corporation~~ an association which is representative of a farm, labor, business or professional group)

(b) For amendment of a ~~general order or rule~~:

To the Department of Natural Resources:

The undersigned hereby petitions for the amendment of rule number _____ which provides as follows: _____

The grounds for this petition are _____

The modification or change desired is _____

The ~~petitioner's~~ petitioners' interest in the request is _____

Date _____

Signatures (5 needed unless petitioner is a municipality or ~~a corporation~~ an association which is representative of a farm, labor, business or professional group)

(3) DECLARATORY RULINGS. The following form shall be used in petitioning for declaratory rulings pursuant to s. 227.41, Stats.

To the Department of Natural Resources:

In the matter of the applicability of the following statute or rule _____ (or regulation or statute) to the petitioner _____ Said The statute or rule provides as follows:

The grounds for this petition are to determine the applicability of the above ~~rule to the petitioner~~ provision because of the following state of facts: _____

The reasons for the requested ruling are _____

The following are the names and addresses of all other persons other than the petitioner upon whom it is sought to make the ruling binding: _____

Date _____
Name _____
Address _____
Signature _____
Verification _____

(4) SIX CITIZEN COMPLAINTS. The complaint and answer in the proceeding shall conform with the requirements of the applicable provisions of ch. 802, Stats. The following form shall be used in filing 6 citizen complaints pursuant to s. 299.91, Stats.;

To the Department of Natural Resources:

_____ (Name) _____ (Address)

is causing or will cause alleged or potential environmental pollution, caused by the activities described herein:

The facts supporting the contention that alleged or potential environmental pollution is or will take place are as follows:

The nature of the alleged or potential environmental pollution is:

The specific relief sought by the complainants is:

Name and address of a person within the state authorized to receive service of the answer and other papers on behalf of the complainants:

(Name) (Address)

Signatures of 6 or more citizens Verifications

(5) HEARINGS UNDER S. 227.42, STATS. The request for a hearing to be treated as a contested case under s. 227.42, Stats., shall be in writing, and served upon the secretary within 30 days after the department action or inaction complained of, or within the time specified by the statute or administrative rule which accords a right to a hearing. The following form shall be used in requesting ~~such~~ a hearing under s. 227.42, Stats.:

To the Department of Natural Resources:

The undersigned hereby requests that a hearing be ~~treated~~ held as a contested case under s. 227.42, Stats.

The agency action or inaction which is the basis for the request for a hearing is:

The substantial interest injured or threatened with injury by agency action or inaction is:

The basis for a finding that there is no evidence of legislative intent that the interest is not to be protected is ~~as follows~~: _____

The injury to the person requesting the hearing is different in kind or degree from injury to the general public caused by the agency action or inaction because:

There is a dispute of material fact, and the disputed facts are:

The statute or administrative rule other than s. 227.42, Stats., if any, which accords a right to a hearing is:

(Signature) (Address)

SECTION 5. NR 2.055 is created to read:

NR 2.055 Determination of jurisdiction. After receipt of a petition for a contested case hearing, the department shall determine whether the petition meets the jurisdictional requirements of the statutes and rules under which the petition is filed. The department shall transmit to the division of hearings and appeals under s. 227.43, Stats., only petitions or portions thereof which the department determines meet the applicable jurisdictional requirements.

SECTION 6. NR 2.06 to 2.09 are amended to read:

NR 2.06 Notice of hearing. (1) FORM. Notice of hearing shall be in writing, with a title identifying the matter ~~to be set for hearing~~, and where appropriate, contain a docket number.

(2) CONTENT. The notice of hearing shall contain the following information:

- (a) Date, time and location of the hearing.
- (b) The statutory authority for the hearing.
- (c) A short summary of the matter to be considered.

(d) ~~Such other~~ Other information as the department or the ~~hearing examiner~~ administrative law judge may deem appropriate.

(3) SERVICE. Except as otherwise specifically required, service of notice of hearing may be made by personal delivery or by mailing a copy thereof to the last known post office address of the person to be served in a sealed envelope with first class postage prepaid thereon and shall be deemed to have been served upon deposit thereof in the U.S. mails. The department may require service of notice of hearing by registered or certified mail or by publication when deemed appropriate and consistent with the requirements of s. 227.44(1), Stats. with the same effect.

NR 2.065 Contested case designation. (1) Except as provided in sub. (2) or unless otherwise ~~ordered~~ determined by the department or ~~hearing examiner~~ administrative law judge, all department contested case hearings are class 1 proceedings under s. 227.01 (3), Stats.

(2) Hearings held under ss. 30.03, ~~227.42~~, 281.17(3) and (5), 281.19, 281.20, 285.83 (1), 289.95, 289.97 (1), 291.87, 291.89, 291.95 (1), 292.11 (4) and (7) (c), 293.15 (3), 293.83, and 299.21 ~~and 299.04~~, Stats., and hearings which revoke or suspend a department-issued license as defined in s. 227.01 (5), Stats., are class 2 proceedings.

NR 2.07 Place of hearings. Unless otherwise specifically provided by law, all contested case hearings shall be held at the offices of ~~the department of natural resources~~, the division of hearings and appeals, or at the time, date and place designated by the ~~department or the hearing examiner~~ administrative law judge in the hearing notice.

Note: ~~The offices of the department of natural resources are located at 101 S. Webster, Madison, WI.~~ The offices of the Division of Hearings and Appeals are located at 5005 University Avenue, Madison, WI.

NR 2.08 Persons entitled to participate in contested case hearings. (1) In addition to the parties, ~~named in the pleadings, divisions of the department, the public intervenor if authorized by s. 165.07, 1995 Stats., and~~ any member of the public may participate in any department contested case hearing.

Note: ~~The office of public intervenor was eliminated by the legislature in 1997.~~

(2) Any person desiring to participate in a department contested case hearing, whether on his or her own behalf or as an authorized agent or attorney, shall enter an appearance in person by giving his or her name and address, the name and address of any ~~party~~ person being represented, and the capacity in which he or she is representing ~~such party~~ the person. A person may enter his or her appearance either prior to or at the commencement of a contested case hearing.

~~(3) Any person entering an appearance under sub. (2) may examine and cross-examine witnesses and may present testimony and other evidence. Such person shall be served with a copy of the department's order.~~

~~(4) Any documents concerning a contested case hearing filed with an agency, the department or the administrative law judge prior to issuance of a final decision in the case shall be served by the person filing the documents on all persons entering appearances under sub. (2) who are identified as parties under sub. (6).~~

~~(5) The department or the hearing examiner administrative law judge may require persons who wish to be considered as parties at a contested case hearing to attend a prehearing conference. In such a circumstance, the notice of the prehearing conference shall be published in the same manner as is required for notice of hearing. If the notice of hearing is not required to be published, the administrative law judge may cause to be published a notice of the prehearing conference as a class 1 notice under ch. 985, Stats., in the official newspaper designated under s. 985.04 or 985.05, Stats., or, if none exists, in a newspaper likely to give notice in the area affected. The department or the hearing examiner administrative law judge may issue a preliminary certification of, under sub. (6) identify parties at such a prehearing conference. One notice may be used for both the prehearing conference and the hearing.~~

~~(6) The department or the hearing examiner administrative law judge shall prepare identify and maintain a list of persons who are certified recognized as parties and set forth such list in the department's order. For purposes of certifying parties under s. 227.47, Stats., and this section, the department or the hearing examiner shall consider the following criteria: to the contested case hearing. A person does not need to be represented by legal counsel to be a party to or participate in a contested case hearing. This list may be adjusted by the department or the administrative law judge as necessary through the course of the hearing. The list of parties required by s. NR 2.155(3), for purposes of review under s. 227.53, Stats., may differ from the list required by this section.~~

~~(a) Nature of agency proceeding;~~

~~(b) Nature and effect of decision made; and~~

~~(c) Nature of participation by those involved in the proceeding, including attendance at hearings, cross-examination of witnesses, and submission of briefs.~~

~~(7) Persons certified listed as parties under s. 227.47, Stats., and s. NR 2.155(3), shall be served with exhibits, pleadings, correspondence and other documents submitted by parties after issuance of the decision, including those documents specified in ss. 227.44 (7), 227.49, and 227.50 (2), Stats. Such The persons shall also be served with petitions for rehearing and petitions for judicial review.~~

NR 2.085 Environmental impact statements. (1) When an environmental impact statement has been ~~written~~ prepared on a proposed action for which a contested case hearing is held, all evidence regarding compliance with s. 1.11, Stats., shall be taken at that hearing unless otherwise provided by statute.

(2) In the absence of specific authority for a contested case hearing on a proposed action for which an environmental impact statement has been ~~written~~ prepared, a contested case hearing shall be held on the proposed action if a petition for a hearing meeting the requirements of s. 227.42, Stats., is received by the department unless otherwise provided by statute.

(3) If a contested case hearing will be held on a proposed action for which an environmental impact statement has been ~~drafted~~ prepared, the informational hearing provided for by s. NR 150.23 (1) shall be combined with the contested case hearing if circumstances and statutes allow. At a combined hearing, the informational portion shall precede the contested portion.

(4) If no contested case hearing will be held on a proposed action for which an environmental impact statement has been ~~drafted~~ prepared, or if a statute requires that the environmental impact statement process be completed prior to a contested case hearing on the proposed action, any person may petition for an opportunity to cross examine the person who is responsible for a specific portion of the environmental impact statement or present witnesses or evidence at the public informational hearing held under s. NR 150.23 (1). The petition shall include a statement of position on the action or proposal and specific statements and issues that are desired to be cross examined or presented. Petitions for opportunity to cross examine shall be filed with the department within 20 days after the notice of the environmental impact statement is published under s. NR 150.23 (1) (c) 2. The notice under s. NR 150.23 (1) (c) 2., published in conformance with s. NR 150.23 (1) (c) 1., shall include a statement that the failure to file the petition provided for in this subsection shall preclude the opportunity to cross examine.

NR 2.09 Changes in time or place of hearing; adjournments; failures to appear. (1) ~~CHANGES. Requests for changes in the time and or place of a scheduled hearing will may be granted by the department or administrative law judge only for good cause shown prior to any required newspaper publication of legal notice thereof. A request received after a required newspaper publication or legal notice may be rescheduled only if the person requesting the change bears the cost of republication of the notice and the administrative law judge deems the change appropriate under the circumstances presented.~~

(2) ~~ADJOURNMENT. The department or the hearing examiner administrative law judge may adjourn a hearing for good cause shown, the hearing to be reset or reconvened at the discretion of the department or the hearing examiner administrative law judge or at a time and place set by the department or the hearing examiner administrative law judge on the record of the hearing prior to adjournment.~~

(3) ~~FAILURE TO APPEAR. (a) If an applicant for a permit or license fails to appear at a hearing following due notice, the department or the hearing examiner administrative law judge may dismiss the application unless the applicant shows good cause for the failure to appear. If an applicant fails to submit proof of publication and notice as required by statute, the department or the hearing examiner administrative law judge may dismiss the application and cancel the hearing.~~

(b) ~~If a respondent in an enforcement proceeding fails to appear, the department or the hearing examiner administrative law judge shall take testimony and issue, modify or rescind the order as may be appropriate.~~

(c) ~~If a petitioner in a proceeding fails to appear, the department or the hearing examiner administrative law judge may dismiss the petition unless the petitioner shows good cause for the failure to appear.~~

SECTION 7. NR 2.095 is created to read:

NR 2.095 Declaratory ruling hearings. When a petition for a declaratory ruling is granted under s. 227.41, Stats., the hearing shall be conducted as a noncontested case. The declaratory ruling may be based upon information presented at the hearing and other information available to the department to assist in rendering the declaratory ruling.

SECTION 8. NR 2.10 is amended to read:

NR 2.10 Witnesses and subpoenas in contested cases. The department, ~~or the hearing examiner administrative law judge, on the judge's own motion or at the request of a party, or any attorney of record for a party in a contested case hearing may issue subpoenas to compel the attendance of witnesses at contested case hearings or discovery proceedings under s. NR 2.11. A subpoena requiring the production of material documents may be issued if the person requesting such~~ issuing the subpoena specifies the documents to be presented by the subpoenaed witness. Sections 814.67, 885.06 and

885.07, Stats., shall govern the payment of witness fees and expenses. For good cause shown, the administrative law judge may issue orders to protect persons or parties from annoyance, embarrassment, oppression or undue burden, as provided in s. 804.01 (3), Stats.

SECTION 9. NR 2.105 is repealed.

SECTION 10. NR 2.11(title) is amended to read:

NR 2.11 Preservation of testimony and discovery of evidence in contested case hearings.

SECTION 11. NR 2.11 is renumbered NR 2.11(1) and, as renumbered, is amended to read:

NR 2.11(1)(title) DISCOVERY IN CLASS 2 PROCEEDINGS. The department or any party in a ~~contested case hearing~~ class 2 proceeding may obtain prehearing discovery and preserve testimony as provided by under ch. 804, Stats. For good cause, the ~~hearing examiner~~ administrative law judge may allow a shorter or longer time for discovery or preserving testimony than is allowed by ch. 804, Stats. For good cause shown, the ~~hearing examiner~~ administrative law judge may issue orders to protect persons or parties from annoyance, embarrassment, oppression or undue burden, as provided in s. 804.01 (3), Stats. The ~~hearing examiner~~ administrative law judge may also issue orders to compel discovery. ~~Discovery and preservation of testimony are not available in noncontested case hearings.~~

SECTION 12. NR 2.11(2) to (5) are created to read:

NR 2.11(2) DISCOVERY IN CLASS 1 AND 3 PROCEEDINGS. For good cause shown, the department or the administrative law judge may allow prehearing discovery and the preservation of evidence in any class 1 proceeding or class 3 proceeding as provided under ch. 804, Stats. Any order allowing discovery or the preservation of evidence may include any reasonable limitations on the scope and extent of discovery as the department or the administrative law judge deems appropriate under the circumstances. In class 1 proceedings and class 3 proceedings, the taking and preservation of evidence shall be permitted with respect to a witness in any of the following:

- (a) Who is beyond reach of a subpoena for the hearing.
- (b) Who is about to go out of the state, not intending to return in time for the hearing.
- (c) Who is so sick, infirm or aged as to make it probable that the witness will not be able to attend the hearing.
- (d) Who is a member of the legislature, if any committee of the same or the house of which the witness is a member is in session, provided the witness waives his or her privilege.

(3) LIMITATION ON INTERROGATORIES. In all contested cases, no more than 25 written interrogatories may be served by a party on each other party, unless otherwise agreed by the parties or ordered by the department or the administrative law judge. Subparts of interrogatories shall be considered as separate interrogatories.

(4) LIMITATION ON DEPOSITIONS. In all contested cases, the actual examination by a party of any deponent during a deposition may not exceed 6 hours, unless otherwise agreed by the parties or ordered by the department or the administrative law judge.

(5) COMPLETION OF DISCOVERY. In all contested cases, all discovery shall be completed at least 7 days prior to the date on which the hearing is scheduled to begin, unless otherwise agreed by the parties or ordered by the department or the administrative law judge.

SECTION 13. NR 2.115 is created to read:

NR 2.115 Alternative dispute resolution. (1) ALTERNATIVE SETTLEMENT RECOMMENDED. The administrative law judge or the department may, with or without a motion having been filed, upon determining that an action or proceeding is an appropriate one in which to consider a settlement alternative, recommend that the parties select a settlement alternative under s. 802.12, Stats., as a means to attempt settlement. Unless all parties consent, the pursuit of settlement alternatives may not delay the setting of the hearing date or other matters addressed in any scheduling order or conference.

(2) ADMISSIBILITY. Except for binding arbitration, all settlement alternatives are compromise negotiations for purposes of s. 904.08, Stats., and mediation for purposes of s. 904.085, Stats., and are not admissible in contested case hearings conducted under this chapter.

SECTION 14. NR 2.12(title), (1) and (2) are amended to read:

NR 2.12 (title) Informal conferences, prehearing conferences and motions. (1) CALL AND PURPOSE. The department or the ~~hearing examiner~~ administrative law judge may call an informal conference or prehearing conference at any time prior to or during the course of a hearing, and may require the attendance of all persons who are or wish to be ~~certified as~~ parties to the proceeding, under s. NR 2.08. The purposes of ~~such the~~ conferences shall, ~~insofar as applicable,~~ be to consider, insofar as applicable:

- (a) Clarification of issues; .
- (b) Amendments to the pleadings; .
- (c) Admissibility of evidence; .
- (d) The possibility of obtaining admissions or stipulations of fact and of documents which will avoid unnecessary proof; .
- (e) The identification of witnesses and limitation of the number of witnesses; .
- (f) The identification of all parties to the proceeding; ~~and~~ .
- (g) ~~Such other~~ The scope and conduct of prehearing discovery.
- (h) The exchange of exhibits by all parties prior to the hearing.
- (i) Filing of prehearing motions.
- (j) Other matters as may aid in the disposition of the matter.

(2) RECORDING STIPULATIONS. The ~~hearing examiner may~~ administrative law judge shall record any stipulations made at ~~such informal conferences~~ the conference, which the judge intends shall bind the parties ~~thereto~~ in the proceedings.

SECTION 15. NR 2.12(3) is renumbered NR 2.12(4) and, as renumbered, is amended to read:

NR 2.12(4) DECISION ON BRIEFS. If an informal conference is held and the parties agree that there is no material dispute of fact raised by the pleadings, the ~~hearing examiner~~ administrative law judge or department may cancel the hearing and may decide the matter on the basis of briefs submitted by the parties.

SECTION 16. NR 2.12(3) is created to read:

NR 2.12(3) PREHEARING MOTIONS. All motions, notices of motions, and any supporting papers which can reasonably be made prior to the hearing shall be served upon all parties and filed with the administrative law judge at least 7 days prior to the date on which the hearing is scheduled to begin, unless otherwise ordered by the department or the administrative law judge.

SECTION 17. NR 2.13(1) and (3)(title) are amended to read:

NR 2.13(1) PROCEDURE. The ~~hearing examiner~~ administrative law judge shall open the hearing and make a concise statement of its scope and purposes. Appearances shall be entered on the record. The ~~hearing examiner~~ administrative law judge then shall state the issues in the proceedings. Thereafter, parties may make ~~motions or~~ opening statements. Persons who are not identified as parties by the department or the administrative law judge at any prehearing conference for which notice was provided under s. NR 2.08(5) may participate in the contested case hearing but may not examine or cross examine witnesses at the hearing unless otherwise ordered by the department or the administrative law judge.

(3)(title) ORDER OF PROCEEDING AND BURDEN OF PROOF.

SECTION 18. NR 2.13(3)(intro.) is created to read:

NR 2.13(3)(intro.) Unless otherwise ordered by the administrative law judge:

SECTION 19. NR 2.13(3)(b) is amended to read:

NR 2.13(3)(b) ~~Unless otherwise ordered by the department or the hearing examiner, in~~ In proceedings ~~where~~ in which a person has been granted a review hearing under s. 227.42, 283.63 or 285.81, Stats., or ~~where~~ in which persons have filed a complaint under s. 299.91, Stats., ~~such those~~ persons shall proceed first with the presentation of evidence and shall have the burden of proof.

SECTION 20. NR 2.13(3)(c) and (d) are created to read:

NR 2.13(3)(c) Notwithstanding par. (b), in a de novo proceeding under a statute other than s. 283.63, 285.81 or 299.91, Stats., involving issuance of a license, permit or approval, the applicant for the license, permit or approval shall proceed first with the presentation of evidence and shall have the burden of proof.

(d) In all other proceedings not identified in pars. (a) to (c), the administrative law judge shall determine the order of proceeding and who has the burden of proof.

SECTION 21. NR 2.13(4) to (6) are amended to read:

NR 2.13(4) OFF RECORD. Proceedings may be conducted off the record only when the ~~hearing examiner~~ administrative law judge permits. If a discussion off the record is deemed pertinent by the ~~hearing examiner, he~~ administrative law judge, the judge may summarize it on the record.

(5) OBJECTIONS TO EVIDENCE. Any argument before the ~~examiner~~ administrative law judge on objections to receipt of evidence or on motions to strike will be recorded and parties will be afforded the opportunity to make an offer of proof.

(6) CONTEMPT. Contemptuous conduct at a hearing ~~shall~~ may be grounds for exclusion from the hearing or such other remedy as the administrative law judge shall impose by law.

SECTION 22. NR 2.135(2)(a) and (b) and are amended to read:

NR 2.135(2) PROCEDURE. (a) The presiding officer will open the hearing and make a concise statement of its scope and purposes. Appearances may be entered on the record. ~~Divisions of the department, the public intervenor if authorized by s. 165.07, 1995 Stats., and any other~~ Any person may participate in any department noncontested case hearing. Any person desiring to participate in a department noncontested case hearing, whether on his or her own behalf or as an authorized agent or attorney, shall enter an appearance in person by giving his or her name and address, the name and address of any person being represented, and the capacity in which he or she is representing such the person. The hearing may be recorded by use of an electronic recording device.

~~Note: The office of public intervenor was eliminated by the legislature in 1997.~~

(b) Persons entering an appearance may make statements, offer evidence or ask questions concerning the matter being heard. ~~Such statements~~ Statements need not be made under oath unless required by the department. Cross-examination of those who speak is not permitted, but clarifying questions of those who speak may be allowed by the presiding officer. The presiding officer shall determine the order in which people may speak, and may continue the hearing on another date or limit the length of the presentations if it appears there will not be enough time for all who wish to speak, or if the presentations are unduly repetitious.

SECTION 23. NR 2.135(3) is repealed.

SECTION 24. NR 2.135(5) is amended to read:

NR 2.135(5) APPLICABILITY. The procedures in this section govern all noncontested case hearings held by the department, except rules hearings, which shall be conducted in accordance with s. 227.18, Stats. This section is applicable to hearings on environmental impact statements, unless it conflicts with the requirements of s. NR 2.085 or ch. NR 150.

SECTION 25. NR 2.14(2) and (4) to (7) are amended to read:

NR 2.14(2) ADMISSIBILITY. Evidence submitted at the time of hearing need not be limited to matters set forth in pleadings, petitions or applications. If variances of this nature occur, then the pleadings, petitions or applications shall be considered amended by the record. The ~~hearing examiner~~ administrative law judge may, ~~in his discretion,~~ grant such continuances as may be necessary to give other parties adequate time to prepare evidence to rebut that involved in any such variances.

(4) PETITIONS. Petitions or written communications not admissible as evidence may be filed with the ~~hearing examiner~~ administrative law judge but will not be part of the record.

(5) EXHIBITS. Parties offering documentary exhibits or prepared testimony may be ~~ordered~~ required by the ~~hearing examiner~~ administrative law judge to furnish copies to all other parties in advance of the hearings and to provide such reasonable time as the ~~hearing examiner~~ administrative law judge may order to enable review of the prepared written testimony and exhibits. Upon compliance ~~therewith~~, ~~such~~ written testimony and exhibits may be admitted in evidence as though given orally, providing the authors ~~thereof~~ are present at the hearing and available for cross-examination.

(6)(title) ENVIRONMENTAL IMPACT STATEMENT. An environmental impact statement and all comments received by the department on it prior to the contested case hearing shall be received into the record of the contested case hearing under ss. 908.03 (6) and (8) and 227.45, Stats. The environmental impact statement and comments received on it shall be considered along with hearing testimony in making a decision on the merits of the proposed action, and in making findings on compliance with s. 1.11, Stats. Testimony regarding the content of the environmental impact statement or cross-examination of persons responsible for specific portions of the environmental impact statement shall be allowed, except as otherwise provided by law. No person may use an environmental impact statement or any portion thereof as the exclusive means of meeting a burden of proof of any statutory requirements for an approval, license or permit in a contested proceeding except upon stipulation of the parties.

(7) ENVIRONMENTAL ASSESSMENT. An environmental assessment and all comments received by the department on it prior to the contested case hearing shall be received into the record of the contested case hearing under ss. 908.03 (6) and (8) and 227.45, Stats. The environmental assessment and comments received on it shall be considered along with hearing testimony in making a decision on the merits of the proposed action, and in making findings on compliance with s. 1.11, Stats. Testimony regarding the content of the environmental assessment or cross-examination of persons responsible for specific portions of the environmental assessment shall be allowed, except as otherwise provided by law. No person may use an environmental assessment or any portion thereof as the exclusive means of meeting a burden of proof of any statutory requirements for an approval, license or permit in a contested proceeding except upon stipulation of the parties.

SECTION 26. NR 2.15 and 2.155 are amended to read:

NR 2.15 Close of hearing. (1) CLOSING AND BRIEFS. A hearing in a contested case shall be closed upon completion of the submission of all evidence and expiration of the period fixed for filing of briefs. If the time for filing briefs has expired and the brief of one or more parties is not filed within ~~such~~ that time, the department or ~~hearing examiner~~ administrative law judge may proceed to the determination of the case. Extension of time to file briefs may be granted by the department or the ~~hearing examiner~~ administrative law judge upon good cause shown.

(2) ADDITIONAL EVIDENCE. If by stipulation of the parties, documentary evidence is permitted to be submitted after the close of testimony, the record will be closed when ~~such~~ the documentary evidence is received by the department or when the specified time for furnishing it has elapsed without its being furnished. The ~~hearing examiner~~ administrative law judge may, upon the request of the stipulating parties, extend the time as originally prescribed for filing ~~such~~ the additional evidence.

NR 2.155 Decisions in contested cases. (1)(title) ~~EXAMINER~~ ADMINISTRATIVE LAW JUDGE DECISION. The ~~hearing examiner~~ administrative law judge shall prepare findings of fact, conclusions of law and decision subsequent to each contested case heard. Unless the department petitions for judicial review as provided in s. 227.46 (8), Stats., the decision shall be the final decision of the department, but may be reviewed in the manner described in s. NR 2.20. Every decision shall include findings regarding compliance with the requirements of s. 1.11, Stats., to the extent compliance with s. 1.11, Stats., was at issue in the contested case.

(2) SECRETARY DECISION. (a) Notwithstanding sub. (1), the secretary, prior to hearing, may direct that the record be certified to the secretary or secretary's designee for decision in accordance with the provisions of s. 227.46 (3) (b), Stats., without an intervening decision by the ~~hearing examiner~~ administrative law judge.

(b) Notwithstanding sub. (1), the secretary, prior to hearing, may direct that the decision be made in accordance with the provisions of s. 227.46 (2) or (4), Stats.

SECTION 27. NR 2.155(3) is created to read:

NR 2.155(3) PARTIES. Pursuant to s. 227.47, Stats., the administrative law judge under sub. (1), or the secretary or secretary's designee under sub. (2), shall include in the decision a list of the names and addresses of all persons who appeared at the hearing and who are considered parties for purposes of review under s. 227.53, Stats. This list may differ from the list of parties prepared under s. NR 2.08, and shall be based on all of the following criteria:

(a) Nature of agency proceeding.

(b) Nature and effect of decision made.

(c) Nature of participation by those involved in the proceeding, including attendance at hearings and presentation of oral or written statements.

SECTION 28. NR 2.157 and 2.16 are amended to read:

NR 2.157 Decisions in noncontested cases. (1) DECISIONS WHEN AN ENVIRONMENTAL IMPACT STATEMENT OR ENVIRONMENTAL ASSESSMENT IS COMPLETED. ~~The~~ For any decision arising out of a noncontested case hearing, the department may not commence, engage in, fund, approve, conditionally approve or disapprove an action that has been the subject of a department prepared environmental assessment or environmental impact statement until it has made a written findings of fact, conclusions of law and decision on compliance with s. 1.11, Stats. The decision shall include findings on all of the following whether:

(a) The department has considered the environmental impact statement or environmental assessment and comments received on it;

(b) The department has complied with the requirements of ch. NR 150 and s. 1.11, Stats., ~~and~~

(c) Consistent with social, economic and other essential considerations, the department has adopted all practical means within its authority to avoid or minimize environmental harm, or if not, why.

(2) OTHER DECISIONS. The department shall include a finding regarding compliance with s. 1.11, Stats., and ch. NR 150 in all written decisions, for which a noncontested case hearing has been held.

NR 2.16 Reopening hearings. When a hearing in a contested case is closed, no further evidence ~~shall~~ may be received, except by order of the department or the ~~hearing examiner~~ administrative law judge reopening a closed contested case for the taking of further evidence upon application of a party showing to the department's or the ~~hearing examiner's~~ administrative law judge's satisfaction that the evidence is newly discovered or was not available at the time of the hearing and that the evidence is necessary for a just disposition of the case.

SECTION 29. NR 2.17 (1) and (3) are amended to read:

NR 2.17(1) METHOD AND COPIES. Hearings shall be recorded either stenographically or electronically. A typed transcript shall be made when deemed necessary by the department or the ~~hearing examiner~~ administrative law judge. If a transcript is made by the department or the division of hearings and appeals, copies shall be furnished to all persons upon request and payment of a reasonable fee, as determined by the department or the division of hearings and appeals. If no transcript is deemed necessary by the department or the ~~hearing examiner~~ administrative law judge and a party requests that one be prepared, that party shall be responsible for all costs of transcript preparation. If several parties request transcripts, the department may divide the costs of transcription equally among the parties. In lieu of a transcript the department or the division of hearings and appeals may provide any person requesting a transcript with a copy of the tape recording of the hearing upon payment of a reasonable fee. All requests for transcripts shall be made in writing and sent to the ~~hearing examiner~~ administrative law judge who presided at the hearing.

(3) CORRECTIONS. Any party, within 7 days of the date of mailing of the transcript, may file with the ~~hearing examiner~~ administrative law judge a notice in writing of any claimed error therein, and shall mail a copy of such notice to each party of record. Other parties may contest any claimed error within 12 days of the date of the mailing of the transcript by so notifying the ~~hearing examiner~~ administrative law judge and other parties of record. All parties will be advised by the ~~hearing examiner~~ administrative law judge of any authorized corrections to the record.

SECTION 30. NR 2.18 is amended to read:

NR 2.18 Briefs. (1) TIME FOR BRIEFS. In contested cases, parties shall indicate on the record after the close of testimony at the hearing whether they desire to file briefs. The ~~hearing examiner~~ administrative law judge may establish a schedule for the filing of briefs. The party or parties having the burden of proof shall file the first brief. Other parties may then file response briefs, which may be replied to. In the alternative, the ~~hearing examiner~~ administrative law judge may direct that briefs of all parties be filed simultaneously.

(2) NUMBER. ~~Five copies~~ Unless otherwise provided for by the administrative law judge, one copy of all briefs shall be filed with the ~~department~~ division of hearings and appeals together with a certification showing when and upon whom copies have been served. Briefs which contain a summary of evidence or facts relied upon shall include reference to specific pages portions of the record containing ~~such the~~ evidence.

(3) EFFECT OF EARLY FILING. The filing of briefs in less time than allowed ~~shall~~ does not change the due dates for the remaining briefs.

SECTION 31. NR 2.19(4), (5)(a), (b), (c)(intro.), (d) and (e) and (6) to (8) are amended to read:

NR 2.19(4) ADDITIONAL INFORMATION. Within ~~24~~ 30 days of the receipt of a ~~complete~~ an application, the department shall mail to the applicant a ~~list of written interrogatories~~ set of questions, ~~the answers to which are~~ if necessary for a determination under this section. If an extension has not been granted and if the applicant fails to answer all the ~~interrogatories~~ questions in affidavit form within 30 days, the department shall deny the application. ~~The department may also deny the application if the applicant fails to provide the information requested in the interrogatories. If a determination under this section can be made solely on the basis of information appearing in the application, written interrogatories may be waived by the department.~~ The responses to the ~~interrogatories~~ questions shall be treated as confidential if a request for such treatment from the applicant accompanies the responses, and if the applicant demonstrates that the responses are entitled to confidential treatment under this section.

(5)(title) ~~PRELIMINARY~~ DECISION. (a) Within ~~30~~ 60 days of receipt of a complete application ~~in instances in which interrogatories have been waived~~, or within ~~30~~ 60 days of receipt by the department of

the information requested in ~~the interrogatories~~ questions asked pursuant to sub. (4), the department shall issue a written ~~preliminary~~ decision on the request for confidentiality. The ~~preliminary~~ decision shall include all of the following:

1. A finding which identifies the type of information sought to be assigned confidential status, ~~and~~
2. A determination of whether the department has the authority to compel submittal of the information, ~~and~~
3. If ~~such~~ the authority exists, a determination of whether the department is authorized by law to assign confidential status to the type of information at issue, ~~and~~
4. The decision to deny or to grant the request in whole or in part.

(b) A ~~preliminary~~ decision to assign confidential status ~~must~~ shall be made pursuant to one of the following:

1. Section 285.70, Stats. ~~or~~
2. Section 289.09, Stats. ~~or~~
3. Section 291.15, Stats. ~~or~~
4. Section 293.47, Stats. ~~or~~
5. Section 283.55, Stats. ~~or~~
6. Upon a finding consistent with the ruling in *State ex rel. Youmans v. Owens* (1965), 28 Wis. 2d 672, that confidential treatment of the information is in the public interest, ~~or~~
7. Other specific statutory or common law right to confidential treatment of information.

(c)(intro.) A ~~preliminary~~ decision made pursuant to ~~s. 283.55, Stats., or~~ *Youmans* shall also include answers to the following questions:

(d) The definition of "trade secret" in s. ~~943.205 (2)~~ 134.90(1), Stats., is adopted to apply to determinations made pursuant to s. 283.55, Stats.

(e) A ~~preliminary~~ decision to approve the request in whole or in part shall be published by the department as a class 1 notice in the official state newspaper, and such other notice as the department deems appropriate shall be provided. The applicant or any interested member of the public may obtain an adjudicatory hearing on the ~~preliminary~~ decision to grant the request in whole or in part by petitioning the department for such a hearing within 10 days of publication of the notice. If the ~~preliminary~~ decision is to deny the request, the applicant shall be notified in writing of the decision by the department, and shall have 15 days from the date of mailing of the decision to petition the department for an adjudicatory hearing on the ~~preliminary~~ decision. A decision to grant confidential status may state a term for which confidential status is granted. Upon expiration of the stated term, the confidential status shall terminate, unless it is renewed upon proper application.

(6)(title) HEARING ON THE ~~PRELIMINARY~~ DECISION. (a) ~~If a timely request is received, the department shall provide a hearing at which the applicant, grants a request under s. 227.42, Stats., for a contested case hearing on the decision to grant or deny confidential status,~~ the department and any other interested party may appear and present evidence or testimony supporting its position. A class 1 notice of the hearing shall be published by the department in the official state newspaper, and ~~such~~ other notice as the department deems appropriate shall be provided.

(b) The hearing shall be before ~~a hearing examiner~~ an administrative law judge and testimony shall be under oath and subject to cross-examination. The burden of establishing the confidential status shall be with the applicant who sought confidential status for the information which is the subject of the hearing.

(c) The ~~hearing examiner~~ administrative law judge shall exercise discretion to determine which individuals may have access to information alleged to be confidential and shall exercise the authority provided by law to impose protective measures and conditions for inspection necessary to safeguard confidentiality of the information during and after the hearing.

(7)(title) ~~FINAL DECISION FOLLOWING HEARING. If no hearing is requested within the time provided, the preliminary decision shall become final. If a hearing is requested held, the decision of the hearing examiner~~ administrative law judge shall be the final decision of the department, but may be reviewed in the manner prescribed by s. NR 2.20. The decision of the ~~hearing examiner~~ administrative law judge shall be in writing, shall include findings of fact and conclusions of law, and shall be provided to all parties to the hearing.

(8) INTERIM CONFIDENTIAL STATUS. ~~No information~~ Information for which confidential status was requested shall has been requested shall be kept confidential by the department while it makes its decision under this section. Information for which confidential status has been denied may not be open to public scrutiny until 40 days after issuance of the ~~final decision~~ denial. If the denial is appealed, the information may not be open to public scrutiny until 40 days after completion of all appeals. Additional information supplied by the applicant to support the request for confidentiality shall be treated as confidential if the applicant so requests and the applicant demonstrates that the additional information is entitled to confidential treatment under this section. ~~Unless judicial review is requested, this additional information shall be returned to the applicant following the 30-day period for filing a petition for judicial review.~~

SECTION 32. NR 2.19(9) is repealed.

SECTION 33. NR 2.195(2)(a) is renumbered NR 2.195(2) and, as renumbered, is amended to read:

~~NR 2.195(2)(a) All department~~ Department are authorized to answer questions within their competency, whether these are asked by the public or by representatives of the news media. Employees, ~~in turn,~~ are responsible for the factual accuracy of the information they provide. Requests to inspect department records shall be referred to the custodian of the records.

SECTION 34. NR 2.195(2)(b) is repealed.

SECTION 35. NR 2.195(3) to (6)(a) are amended to read:

NR 2.195(3) In cases where the ~~district-area~~ regional or bureau directors are concerned that the public interest in withholding inspection outweighs the public interest in permitting it, the file or requested information shall be provided to the secretary, deputy secretary or division administrator for review with the bureau of legal services and for determination.

(4) ~~District-area~~ Regional and bureau directors are designated as custodians of their respective department ~~district-area~~ regional and central office records and files and are delegated the responsibility for them as well as the authority to provide copies or inspection as provided herein.

(5)(a) Requests for copies of records and files shall be complied with unless the records fall within the categories in sub. (2) (b). The requestor shall pay the copying charge for 10 or more pages. For 9 or ~~less~~ fewer pages, there shall be no charge. Copies shall be provided to the requestor as soon as possible.

(b) When a request requires a large amount of copy work, ~~the requestor shall make department~~ may require an advance payment of the copying charge and be shall informed inform the person requesting the copy work that there will be an approximate processing period of 2 weeks. Unusually large requests may take longer than 2 weeks. When the copying work takes 3 or more hours, the person requesting the records shall pay the department an amount equivalent to the salary, (including fringe benefits), of the person doing the copying work, prorated for the amount of time the work takes. The person requesting the records may pay the charge for the employee's salary after the work is completed.

(6)(a) All ~~formal~~ meetings of ~~state agencies and~~ governmental bodies, including advisory councils, will be open to the communication media and to the public, except where the matters under discussion fall in the categories listed in s. 19.85, Stats.

SECTION 36. NR 2.20 is amended to read:

NR 2.20 Review of contested case decision. (1) FILING. Any party to a contested case who is adversely affected by a final decision rendered after a contested case hearing on the matter may, within 20 days after ~~entry~~ issuance of the decision, file a written petition for review by the secretary or the secretary's designee. The petition shall specify in detail the grounds for the review, the relief which petitioner seeks and citation to supporting authorities which petitioner ~~feels~~ believes aids petitioner's case. The secretary may not delegate the review to anyone who has had prior involvement in either the hearing or decision-making process.

(2) SERVICE. The petition for review under this section shall be served ~~either personally or by registered or certified mail upon~~ on the secretary, the hearing examiner as provided for in s. NR 2.03. Copies of the petition for review shall be served by regular mail upon the administrative law judge and upon all parties to the action.

(3) DECISION. Within 14 days of the receipt of the petition, the secretary shall decide whether or not to grant the requested review. If the secretary decides to grant the review, the secretary may order the filing of briefs, presentation of oral argument, or a rehearing of all or part of the evidence presented at the original public hearing, (or any combination thereof).

(4) APPEAL. A petition for review pursuant to this section ~~shall~~ is not be a prerequisite for appeal or review under ss. 227.52 to 227.53, Stats.

(5)(title) ~~ORDERS DECISIONS.~~ SUSPENSION OF ORDERS DECISIONS. The filing of a petition for review under this section does not suspend or delay the effective date of ~~an order a decision,~~ an order decision, and the ~~order decision~~ order decision shall take effect on the date of the ~~order decision~~ order decision unless another date is set by the department or the ~~hearing examiner~~ administrative law judge, and shall continue in effect unless provisions of the ~~order decision~~ order decision are specifically suspended or delayed by the secretary in writing. Petition for suspension of the effective date of ~~an order a decision~~ an order decision shall be clearly specified in the petition for review under this section.

(6) EFFECT ON JUDICIAL REVIEW. An action pending under this section ~~may~~ does not in any manner affect or extend the time limits for filing actions in circuit court for review under ss. 227.52 and 227.53, Stats.

The foregoing rules were approved and adopted by the State of Wisconsin Natural Resources Board on August 14, 2002.

The rules shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22(2)(intro.), Stats.

Dated at Madison, Wisconsin _____

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By _____
Darrell Bazzell, Secretary

(SEAL)



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

Ronald Sklansky
Clearinghouse Director

Richard Sweet
Clearinghouse Assistant Director

Terry C. Anderson
Legislative Council Director

Laura D. Rose
Legislative Council Deputy Director

CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

CLEARINGHOUSE RULE 02-046

AN ORDER to repeal NR 2.105, 2.135 (3), 2.19 (9) and 2.195 (2) (b); to renumber and amend NR 2.02 (1) to (4), 2.11, 2.12 (3) and 2.195 (2) (a); to amend NR 2.01, 2.03 to 2.05, 2.06 to 2.09, 2.10, 2.11 (title), 2.12 (title), (1) and (2), 2.13 (1) and (3) (title) and (b) and (4) to (6), 2.135 (2) (a) and (b) and (5), 2.14 (2) and (4) to (7), 2.15, 2.155, 2.157, 2.16, 2.17 (1) and (3), 2.18, 2.19 (4), (5) (a), (b), (c) (intro.), (d) and (e) and (6) to (8), 2.195 (1), (3) to (6) and 2.20; and to create NR 2.02 (1) to (4) and (7), 2.055, 2.095, 2.11 (2) to (5), 2.115, 2.12 (3) and (4), 2.13 (3) (intro.), (c) and (d) and 2.155 (3), relating to department procedures for administrative hearings.

Submitted by **DEPARTMENT OF NATURAL RESOURCES**

04-08-02 RECEIVED BY LEGISLATIVE COUNCIL.

05-06-02 REPORT SENT TO AGENCY.

RNS:MO:ksm;tlu

LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

Comment Attached YES NO

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

Comment Attached YES NO

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

Comment Attached YES NO

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS
[s. 227.15 (2) (e)]

Comment Attached YES NO

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

Comment Attached YES NO

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL
REGULATIONS [s. 227.15 (2) (g)]

Comment Attached YES NO

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

Comment Attached YES NO



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 02-046

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

Newly created s. NR 2.12 (3) excludes persons not identified as parties at noticed prehearing conferences from examining or cross-examining witnesses at "the hearing." This new subsection appears to govern who has the right to examine and cross-examine at all hearings. If so, it appears to conflict with s. 227.45 (6), Stats., which gives parties in contested cases the right to conduct cross-examinations "reasonably required for a full and true disclosure of the facts."

2. Form, Style and Placement in Administrative Code

a. In s. NR 2.01, "This chapter" should replace "These rules." The extent of the applicability of definitions in s. NR 2.02 should be clearly stated, e.g., by a phrase such as "In this chapter:" preceding the definitions. [See s. 1.02 (7), Manual.]

b. Will a noncontested case hearing ever be held before an administrative law judge? If so, the definition in s. NR 2.02 (7) should be changed to reflect this.

c. There are instances of words that are run together. For example, see "notto" in s. NR 2.05 (5). Also, see s. NR 2.157 (1) (intro.).

d. In general, newly created s. NR 2.12 (3) and (4) do not seem to belong within s. NR 2.12, which is titled "Informal conferences and prehearing conferences." These subsections are

more relevant to whether examination and cross-examination are permitted at, and when and how motions should be served prior to, hearings that take place *subsequent* to informal and prehearing conferences. If retained in s. NR 2.12, a new section title should be considered.

e. The form for declaratory rulings under s. NR 2.05 (3) has a couple phrases that are not stricken or underlined, but yet are not a part of the current form. After "In the matter of the applicability of" the current form has the word "rule" where the proposed form has the words "the following statute or rule." In the following sentence, the current form has the word "rule" where the proposed form has the words "statute or rule."

f. Section NR 2.10 has some words that are not underlined, but yet are not a part of the current rule. Beginning in the second line, it appears that the following should be underlined: "administrative law judge, on the judge's own motion or at the request of a party, or any attorney of record for a party in a contested case hearing." In the fourth line, it appears that the following should be underlined: "contested case." In the fifth line, it appears that the following should be underlined: "documents." In the sixth line, it appears that the following should be underlined: "issuing the."

g. In s. NR 2.12 (1) (e), it appears that the following should be underlined: "identification of witnesses and".

h. In s. NR 2.135 (2) (a), fourth line, "Any" should be underlined.

i. In the title of s. NR 2.19 (7), "FOLLOWING HEARING" should be underlined.

j. The entire paragraph of s. NR 2.19 (8) is missing appropriate striking and underlining for the words that have been deleted and added. For example, the first sentence replaces "was requested shall be open" in the current rule with "has been requested shall be kept confidential." The rest of the sentence is also different than the rest of the first sentence in the current rule, and the same holds true for the rest of the paragraph.

k. The rule replaces "employes" with "employees" in s. NR 2.195 (1), (2), (5) (b) and (6) (b), but these subsections in the current rules do not use this spelling for employees."

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

a. Section NR 2.02 (8) changes the definition of "noncontested *case*" from a "*proceeding* before the department which is not a contested case" to a "*hearing* before the department" Is a hearing always held in a noncontested case? If not, perhaps "proceeding" is a more accurate term. Also, while the word "proceeding" can be used to describe either a case of a hearing, a "hearing" takes place after a case has begun and before a decision, and thus should not replace "proceeding" in the definition of "noncontested case" under s. NR 2.02 (8).

b. In s. NR 2.05 (2) (a), it is suggested that "promulgation" be substituted for "adoption" in two places.

c. In s. NR 2.05 (5), towards the end of that form, after “The injury to the person requesting the hearing is different in kind or degree from injury to the general public caused by,” “the” should be inserted before “agency action or inaction . . . ,” so as to conform the meaning with that of s. 227.42 (1) (c), Stats.

d. Section NR 2.06 (3) adds “publication” to the ways in which the department can require notice of hearing to be served. Section 227.44 (1), Stats., however, states that, for contested cases: “*Except in the case of an emergency*, reasonable notice shall consist of *mailing* notice to known interested parties at least 10 days prior to the hearing.” [Emphasis added.] Therefore, it appears that the rule should limit the department’s ability to authorize service by publication to emergencies, with respect to known interested parties in contested cases.

e. The last sentence of s. NR 2.08 (6) states: “The list of parties required by s. NR 2.155 (3), for purposes of review under s. 227.53, Stats., may differ from the list required by this section.” This raises two questions:

- (1) The last sentence of s. 227.47 (1), Stats., states: “The agency shall by rule establish a procedure for determination of parties.” What is the procedure required by s. 227.47 (1), Stats., for determination of who is on the list for purposes of s. NR 2.08 (6)?
- (2) Given that the third sentence of s. 227.47 (1), Stats., requires *every* proposed or final decision to include a list of the names and addresses of all persons who appeared before the agency in the proceeding who are considered parties for purposes of review under s. 227.53, Stats. (i.e., “persons affirmatively demonstrating active interest in the proceedings” according to the annotation following s. 277.53, Stats.), why would there be a difference between the lists in ss. NR 2.155 (3) and 2.08 (6)?

f. The rule repeals current s. NR 2.135 (3), which requires a list of persons certified as parties for *noncontested* case hearings, although this requirement appears to be statutory. [See the third sentence of s. 227.47 (1), Stats.]

g. Because s. NR 2.20 (2) is amended to require that petitions for review be served on the secretary as provided for in s. NR 2.03, it appears that “petitions for review” should be included among the petitions listed at the beginning of s. NR 2.03. Also, since the title of s. NR 2.03 is “**Service on the department**,” should the language of both ss. NR 2.20 (2) and NR 2.03 refer to service on the *department* rather than service on the *secretary*?

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

a. The analysis states in the last sentence of the first paragraph: “The date petitions are considered to have been made *s being proposed to be*” [Emphasis added to show a phrase that contains a typo (“s”) and could be shortened to “is changed to”] More importantly, it would be clearer to replace the words “petitions are” in that sentence to “that service on the

department by mailing is” to reflect that, in s. NR 2.03, it is “service by mailing” which is defined as not occurring until the date the department receives the petition.

b. Should the analysis in the rule mention other substantive provisions in the rule, such as the possibility that lists of parties may differ for the same case under s. NR 2.08 (6), that publication is added to the ways that the department can require notice of hearing to be served under s. NR 2.06 (3), that persons not identified as parties at noticed prehearing conferences can be excluded from examining or cross-examining witnesses at subsequent hearings under s. NR 2.12 (3), and that authority for recommending alternative dispute resolution is created under s. NR 2.115?

c. In the last sentence of s. NR 2.05 (5), suggest deleting “a hearing:” and adding “that a hearing be held as a contested case:”, since the form that follows is not for use in requesting a hearing as part of a noncontested case.

d. In s. NR 2.13 (6), “shall” should be changed to “may.”

e. In s. NR 2.14 (5), third line, “and to provide reasonable time as the administrative law judge may order” sounds awkward. Perhaps insert “whatever” between “provide” and “reasonable.” Also, “therewith” in line five and “thereof” in line six should be deleted. [See s. 1.01 (8) (c), Manual.]

f. In s. NR 2.157 (1) (intro.), last sentence, “whether” should be deleted before the colon, and perhaps inserted into each of the following paragraphs as appropriate.