



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 04-86

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 October 2002.]

1. Statutory Authority

The term “navigable waterway” is defined in s. 30.01 (4m), Stats. The first sentence of the definition in s. NR 343.03 (9) adds a requirement that the body of water must have a defined bed and banks. The definition in the rule also adds a second sentence regarding the ability of the body of water to float a boat. The statutory definition of “navigable waterway” is “any body of water which is navigable under the laws of this state.” Both bed and banks and floating a boat are part of the “laws” of this state that determine whether a waterway is navigable. Therefore, it appears that this additional information does not add anything to the legal sufficiency of the definition in the rule. However, the definition in the statute provides virtually no information on how to determine whether a particular body of water is navigable. The department may wish to consider defining “navigable waterway” by a cross-reference to the statute, but adding to the rule a comprehensive procedure on determinations of navigability. Another approach would be to add a note after the rule definition that cross-references the statutory definition, with an extensive description of the law of navigability in this state.

2. Form, Style and Placement in Administrative Code

a. In s. NR 343.02 (3) (intro.), the phrase “any of the following” should be inserted after the word “to.”

b. In s. NR 343.04 (intro.), the words “All of” should be inserted before the word “The.” In sub. (5), the phrase “all of the following” should be inserted after the word “describing.”

c. In s. NR 343.05 (2) (b), the phrase “(permanent vertical reference)” should be deleted. Parentheses should not be used in rules. [See Manual 1.01 (6), Manual.] The department may wish to consider replacing this phrase with the phrase “, including a permanent vertical reference,” or adding a note that explains that a reference benchmark means a permanent vertical reference. Also, see s. NR 343.07 (3) (d) 6. In sub. (2) (f), the notation “i.e.,” should be deleted and replaced with “including.”

d. In s. NR 343.07 (3) (a) 1., the word “meets” should be changed to “shall meet.” In sub. (3) (a) 2. and 3., the word “is” should be changed to “shall be.” In sub. (3) (a) 4., the word “Mining.” should be deleted and the phrase “is not” should be replaced with “may not be.” In sub. (3) (b), “is” should be replaced by “shall be” and the word “will” should be replaced with “shall.” In sub. (3) (c) (intro.), “is not” should be changed to “may not be,” and the phrase “meets the standards of subds. 1. to 5.” should be replaced with the phrase “shall meet all of the following standards?”. In sub. (3) (d) (intro.), “storm events” should be changed to the singular “a storm event” and the phrase “meets the standards in subds. 1. to 8.” should be changed to “shall meet all of the following standards?”. In sub. (3) (d) 1., the phrase “is no” should be changed to “may not be.” In sub. (3) (d) 2., 3., and 5., “is not” should be changed to “may not be.” In sub. (3) (d) 4., “shall” should be changed to “may.” In sub. (3) (d) 7., “will” should be changed to “may.” In sub. (3) (d) 8. “will” should be changed to “shall.” In sub. (3) (d) 9., “is not” should be changed to “may not be,” and the second instance of the word “is” should be changed to “shall be.”

e. In s. NR 343.07 (3) (c), the subdivision titles should be enclosed in single quotation. [See s. 1.05 (2) (e), Manual.]

f. In s. NR 343.08, the phrase “is required to” should be replaced with “shall” and “a” should be inserted before “pond.”

g. In s. NR 343.10 (2) in the second sentence, the first instance of the phrase “will be” should be changed to “is” and the second instance of “will be” should be changed to “may be” or “shall be.”

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

a. According to the note to s. NR 343.03 (1), the definition of “agricultural land use” is “equivalent to the definition in s. 30.40 (1), Stats., and differs from the definition in chs. NR 151 and 216 only in that beekeeping is included and tree nurseries are not included.” However, the definition in ch. NR 151 includes additional items not referenced by the rule (such as “placing land in federal programs in return for payments in kind; and owning land, at least 35 acres of which are enrolled in the conservation reserve program under 16 USC 3831 to 3836,” see ss. NR

151.015 (1), 151.002 (2), and s. 281.16 (1), Stats.) Also, there does not appear to be a definition of “agricultural land use” in ch. NR 216.

b. The definition of “ordinary high water mark” in s. NR 343.03 (10) is identical to some and differs from other definitions in department rules. [See s. NR 115.03 (6) for an example of a different definition.] Is there any reason why the same definition should not be used throughout all department rules?

c. The definition of “storm event” is different than the description of a “storm event” as used in other department rules. [See ss. NR 151.12 (5) (b) 2. a. and 151.24 (4) (b) 1. as examples.] Is there a reason why the definition in the rule is so different?

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

a. In the Summary of Factual Data and Analytical Methodologies section of the summary prepared by the department, it appears that the first instance of the word “Standards” should be changed to “Standard.”

b. In s. NR 343.01 (intro.), a comma should be inserted after “chapter.”

c. In s. NR 343.01 and throughout the rule, it is often unclear what a “pond” is referring to; in s. 343.07, the rule differentiates between stormwater ponds and other types of ponds, but the rest of the rule uses the general and undefined term “pond” when it appears that “stormwater management pond” would be the appropriate term. Can the department be more specific about which types of ponds different rule sections apply to, or should the word “pond” be changed to “stormwater management pond” throughout the entire rule? [See s. 30.19 (1g) (am), Stats.]

d. In s. NR 343.02 (1) (intro.), can the department be more specific about who “any person” may include? Also, the phrase “any constructed portion of an artificial waterbody” is vague; can the department be more specific about what this refers to? In addition, instead of “ch. NR 310,” a more specific citation should be used. In sub. (1) (b), a comma should be inserted between “waterway” and “including.” In sub. (2), can the department specify who “Any person responsible for the site regulated by this chapter” includes? In sub. (3) (f), the word “is” should be inserted after the word “and.” In the note after sub. (3) (f), it appears that the word “and” should be changed to “or.” [See s. 30.19 (1m), Stats.]

e. In s. NR 343.03 (7), the word “it” should be deleted.

f. Section NR 343.04 refers to a “pond or artificial water body proposal.” It appears that it would be more accurate to say “an application for a general permit or individual permit” rather than a “proposal.” This problem also occurs in s. NR 343.05. In sub. (1), the reference to “ownership” is vague; would it be accurate to specify “ownership of a project site”? In sub. (4), more explanation should be given about what a “plan drawing sheet” refers to and should include.

g. In s. NR 343.05 (2) (intro.), the phrase “required under s. NR 343.04 (5) (e)” should be inserted after the word “map.”

h. In s. NR 343.06, the word “a” should be inserted after the word “for.” The phrase “inspect and maintain practices in accordance with s. NR 216.48 (4)” should be changed to “follow the reporting and monitoring requirements in s. NR 216.48 (4).”

i. In s. NR 343.07 (2), “30.19 (3r)” should be changed to the more specific “30.19 (1r) (a) 1. and (b)” because the rule does not apply to general permits for activities under s. 30.19 (1g) (c). [See ss. NR 343.01 and 343.02.] In sub. (3) (intro.), the phrase “all of the” should be inserted after “meets” and “, as follows:” should replace the final period. In sub. (4), should “for” replace “or”? The rule should mention that an individual permit may be required for activities that are not exempt and are not subject to a general permit. [See s. 30.19 (4) (a), Stats.]

j. In s. NR 343.08, the word “a” should be inserted before the word “pond.”

k. In s. NR 343.09, can the department provide a more specific cite instead of “ch. NR 310”? Also, the word “where” should be changed to “if” and the phrase “has determined” should be changed to “determines.” In addition, the phrase “The applicant of a site denied or revoked coverage under the general permit” is awkward and should be rewritten. Also, the title and substance of s. NR 343.09 refer to “revocation” of a general permit. Is there a procedure in place for an applicant to contest revocation of coverage under a general permit that can be included or referenced in the rule?

l. In s. NR 343.10 (1), instead of “The department may require the applicant of any pond or artificial water body site covered by a general permit...to apply for and obtain an individual permit,” it would be more accurate to say that “The department may require a person who has applied for authorization to proceed under a general permit to apply for and obtain an individual permit.” [See s. 30.206 (3r) (a), Stats.] Also, in sub. (5), it appears that the more specific cite “s. 30.19 (4) (c), Stats.,” should be used instead of “s. 30.19 (4), Stats.,” and “may” should be changed to “shall.”

m. The reference in s. NR 343.13 (1) to noncompliance with the cited provisions possibly resulting in a forfeiture appears to preclude a fine or imprisonment, as authorized under s. 30.12 (5). Is that the department’s intent?

n. The second sentence in s. NR 343.13 (1) would be clearer if the phrase “authorized under” was inserted before “a general permit” in the second sentence.

o. The application of the second and third sentences in s. NR 343.13 (1) for an activity authorized under a general permit when the only violation was a failure to follow procedural requirements is not clear. One reading of these two sentences is that the second sentence would apply to this situation only if there was good cause shown for the failure to follow procedural requirements. Is that the department’s intent?

p. In s. NR 343.10 (2), the department should clarify “within 30 days.” What events is the 30 days counted from?

q. In s. NR 343.13 (4), why is an activity that is authorized under an exemption not included? In addition, can the department clarify what the phrase “or otherwise authorized under this chapter” refers to?

r. The following comments pertain to the waterway general permit application attached to the rule:

1. On the first page in the section entitled “Activity,” a space should be inserted before the words “the” and “type” and between the words “obtained” and “on.”
2. On the third page in the section entitled “Permit Conditions,” the word “the” should be inserted before the word “telephone” in item 2.
3. On the third page in the section entitled “Findings of Fact,” the word “Section” should be replaced by the notation “s.” in item 3.