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## WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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### CLEARINGHOUSE RULE 04-087

#### 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

a. The term “navigable waterway” is defined in s. 30.01 (4m), Stats. The first sentence of the definition in s. NR 345.03 (6) 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.

b. In s. NR 345.04 (1) (c) 2., in order to be exempt from permit requirements, “dredging may not be located where there are public rights features as defined in s. NR 1.06.” The term “public rights features” is a new term that is neither included nor defined in ch. 30, Stats., and appears to be substantially broader than the term “public rights and interests” provided in s. 30.12 (2m) (a), Stats. In addition, prohibiting dredging in locations of public rights features is not included in the criteria for allowable exemptions under s. 30.20 (1g) (b) or (1k), Stats. Can

the department clarify why it is using this term in the rule? [For similar reasons, see also s. NR 345.04 (2) (c) 2. and (d) 2.]

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

a. The fiscal estimate attached to the rule is for ch. NR 341; this should be replaced by a fiscal estimate for ch. NR 345.

b. In s. NR 345.04 (1) (b), the phrase “all of” should be inserted after the word “meets.”

c. In s. NR 345.04 (2) (c) (intro.), the phrase “all of” should be inserted after the word “to” and the period should be changed to a colon. In sub. (2) (d) (intro.), the phrase “all of” should be inserted after the second instance of the word “to” and the period should be changed to a colon.

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

The definition of “ordinary high water mark” in s. NR 345.03 (7) 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?

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

a. In s. NR 345.03 (2), the quotation mark at the end of the sentence should be deleted. In sub. (4), “waterways” should be singular and the first comma should be replaced by a semi-colon.

b. In s. NR 345.04 (1) (a), can the department provide a more specific citation instead of “ch. NR 310”? In sub. (1) (b), “s. 30.20 (1g)” should be changed to “s. 30.20 (1g) (b).” Also, it appears that sub. “(2)” should be changed to “(1).” [See s. 30.20 (1), Stats.] In the standards listed under sub. (1) (c) 1. to 7., why is the standard in s. 30.20 (1g) (b) 1., Stats., not included in the rule? In sub. (1) (c) 4., can the department provide a more specific cite instead of “ch. NR 500”?

c. Section NR 345.04 (1) (c) 6. refers to the Best Management Practices Handbook. However, in sub. (2) (c) 7., the rule refers to the “most current version” of the Best Management Practices Handbook. These references should be made consistent.

d. In s. NR 345.04 (2) (a), can the department provide a more specific citation instead of “ch. NR 310”?

e. In s. NR 345.04 (2) (c) (intro.), a comma should be inserted after the word “gas.” In sub. (2) (c) 3., the phrase “that is” should be inserted after the word “stream.” Also, the phrase “dredging may occur only to cross a navigable stream no more than 35 feet across” sounds as though dredging is only allowed to enable crossing a stream. Can the department clarify the intent of this subsection? In sub. (2) (c) 12., the term “floodway” should be defined in the rule.

In sub. (2) (c) 13., can the department provide a more specific citation instead of “ch. NR 500”? In sub. (2) (c) 16., the word “adequately” should either be deleted or explained in the rule. This problem also occurs in sub. (2) (d) 8. Also, the latter two subdivisions should be compared for consistency concerning when equipment must be decontaminated. Should equipment be decontaminated in both provisions before being used or both before and after being used?

f. In s. NR 345.04 (2) (d) (intro.), in the list of limitations for dredging authorized by a general permit under s. NR 345.04 (2) (d) 1. to 8., why is the limitation in s. 30.20 (1t) (am), Stats., not included in this list? In sub. (2) (d) 4., a more specific cite to “ch. ATCP 48” should be provided.

g. In s. NR 345.04 (2) (e), activities which do not meet the standards in par. (c) or (d) “or a general permit issued by the department” require an individual permit or contract. This is confusing because the standards in par. (c) or (d) are the general permit standards, so if an applicant does not meet those standards, presumably the applicant should not be issued a general permit. Could an applicant qualify for another type of general permit? If so, that should be specified in the rule. Also, 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. 30.20 (1g), Stats.]

h. In s. NR 345.04 (3) (a), can the department provide a more specific citation instead of “ch. NR 310”?

i. The reference in s. NR 345.05 (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?

j. The second sentence in s. NR 345.05 (1) would be clearer if the phrase “authorized under” was inserted before “a general permit” in the second sentence.

k. The application of the second and third sentences in s. NR 345.05 (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?

l. In s. NR 345.05 (2), can the department provide a specific citation for the procedures in ch. NR 301? In sub. (4), the department should clarify what the phrase “or otherwise authorized under this chapter” means.

m. 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.