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## WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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### CLEARINGHOUSE RULE 07-111

#### 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 January 2005.]**

#### 1. Statutory Authority

Section 281.15 (2), Stats., directs the department to undertake specified activities whenever it adopts or revises any water quality criteria for waters of the state. Since the summary accompanying the rule does not identify whether or how the department has addressed each of the items in sub. (2), it is not possible for a reader of the rule to determine if the department has complied with s. 281.15 (2), Stats.

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

a. Section NR 102.03 (intro.) should read: “In this subchapter;”. [See, also, ss. NR 102.22 (intro.) and 106.52 (intro.).]

b. In s. NR 102.03 (1), the phrase “for the purposes of this chapter” is unnecessary as s. NR 102.22 (2) contains a separate definition of “ambient temperature” for purposes of subch. II in ch. NR 102.

c. The phrase “for the purposes of this subchapter” in s. NR 102.22 (2) is redundant and should be removed as the applicability of this definition is already established in s. NR 102.22 (intro.). [See, also, s. NR 106.52 (1).]

d. The preferred drafting style is to not use parenthetical material within the text of the rule. This style was not followed, for example, in ss. NR 102.22 (7) and 106.72 (2) (a).

e. The phrase “as defined in s. NR 102.22 (4)” in s. NR 102.28 is redundant and should be removed as the applicability of the definition of “cold shock” in s. NR 102.22 (4) is established in s. NR 102.22 (intro.). [See, also, s. NR 106.56 (8).]

f. Section NR 102.27 (3) anticipates that future modifications for site-specific conditions may be promulgated. However, the open-ended nature of the subsection may confuse some readers. A note to the provision would be helpful in describing to a reader that future modifications may be listed in this provision.

g. The preferred drafting style is to not place examples in the substantive text of a rule. Instead they should be placed in a note following the appropriate text. This style was not followed for the example placed in the definition of “biologically based design flow” in s. NR 106.52 (2).

h. Since titles of subunits in the administrative code do not have legal affect, the department should define or explain the meaning of the abbreviations Qs and Qe in s. NR 106.53 (1) and (2) in the text of the rule rather than in subsection titles.

i. In s. NR 106.55 (6), the first sentence does not grammatically lead into the following subunits. Thus, the first sentence should be renumbered as par. (a); the remaining paragraphs should be appropriately renumbered; and internal cross-references should be corrected. [See, also, sub. (7) and s. NR 106.72.]

j. In s. NR 106.55 (8) (a), the use of the notation “etc.” should be avoided. [See s. 1.01 (9) (c), Manual.]

k. Section NR 106.71 (intro.) should be rewritten to read: “The definitions of terms and meanings of abbreviations provided in ss. NR 205.03 and 205.04 apply to this subchapter. Also, in this subchapter:”.

l. Since 2007 Wisconsin Act 20 transferred the responsibilities of the Office of the Revisor of Statutes to the Legislative Reference Bureau, the request by the department in the rule for the Revisor to insert a date should instead request that the Legislative Reference Bureau insert the specified date. See, for example, ss. NR 106.60 and NR 106.71 (3) and (4).

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

a. In the summary accompanying the rule, the references to the statutes providing authority for the rule are broad and should be to the specific provision authorizing rule-making. For example, the reference to s. 281.15, Stats., should be to s. 281.15 (1), Stats.

b. In s. NR 102.26 (3) (b), the references should be to “sub. (1)” and “sub. (2).” [See, also, sub. (3) (e).]

c. In s. NR 106.56 (10) (a) 10., the series of cross-references should read: “ss. NR 102.23 (4) and 104.02 (1) and (3) (b) 1.”. It appears that the second occurrence of “104.02 (1)” either is added unnecessarily or is an incorrect cross-reference. In sub. (12), the notation “s.” should be replaced by the notation “subs.”

d. In s. NR 106.58, the first cross-reference should read: “subs. (5), (6), and (7).”

e. The reference to a WPDES permit issued under ch. 283, Stats., in s. NR 106.52 (13) is broad. Does the department mean an individual permit issued under s. 283.31, Stats., or a general permit issued under s. 283.35, Stats.? Similarly, the reference to any public comment pursuant to ch. 283, Stats., in s. NR 106.57 is vague.

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

a. The phrase “the following uses and criteria” in s. NR 102.04 (2) is potentially ambiguous as this provision does not follow the normal style of having a list following an introductory clause that ends in a colon. The department should consider revising this provision to reference the specific uses and criteria in subs. (3) to (7).

b. The reference to the “chief criterion for determining the suitability of a water for recreational use” in s. NR 102.04 (5) (a) suggests that other criteria may be used for making this determination. Can the department specify what these other criteria may be?

c. The reference to surface waters suitable for supporting “public health and welfare” in s. NR 102.04 (7) is broad and potentially ambiguous. Can the department be more specific? For example, s. NR 102.04 (8) (a) refers to use for public drinking water supply.

d. The temperature standard for Great Lakes communities in s. NR 102.23 (5) references the definition of “Great Lakes” in s. NR 102.22 (6) and the water quality criteria for Great Lakes in s. NR 102.25 (5). Under s. 281.15 (1), Stats., a water quality standard must consist of the designated use and the applicable water quality criteria. It is not apparent in s. NR 102.23 (5) which uses of the Great Lakes the temperature water quality standard applies to.

e. The term “7Q10” used in the legend following Table 2 in s. NR 102.25 (2) should be defined.

f. Where can a person seeking to develop a site-specific ambient temperature obtain the data used to derive the default ambient temperature identified in s. NR 102.26 (1) (a)? Is it in the technical support document that the department is required to prepare under s. 281.15 (2) (e), Stats.? Similarly, where may a person obtain the data used to derive a water quality criterion that is necessary to make the demonstration called for on site-specific water quality criteria in s. NR 102.27 (1)?

g. In s. NR 102.26 (1) (b), the word “the” should be inserted before the word “present” in the last sentence of the paragraph.

h. The rule contains a number of provisions written in the passive voice which may reduce the clarity of the rule. The department should review the entire rule and convert provisions in the passive voice, as appropriate, to the active voice to ensure consistent application of the rule. See, for example, ss. NR 102.26 (3) (intro.), and 106.56 (2) (intro.) and (10) (d).

i. In s. NR 106.50, “for temperature” should follow “surface water quality standards” in the second sentence.

j. In s. NR 106.55 (5) (b), the second sentence should begin with “The.”

k. The monitoring and reporting requirements that the department may establish in a WPDES permit under s. NR 106.56 (11) are quite broad. If the department intends that these requirements should be limited to temperature-related monitoring and reporting, then this subsection should be limited accordingly.

l. The department should review the entire rule to ensure that references in it to water quality criteria and water quality standards are appropriate and consistent. For example, s. NR 106.59 (2) (intro.) refers to thermal water quality criteria, whereas s. NR 106.59 (2) (c) refers to applicable water quality standards. Should both of those provisions refer only to water quality criteria or only to water quality standards?

m. In s. NR 106.72 (1) (d), the word “an” should be replaced by the word “and.”