

## Chapter NR 2

## PROCEDURE AND PRACTICE

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Note: Chapter WCD 2 as it existed on March 31, 1973 was repealed, and a new chapter NR 2 was created, Register, March, 1973, No. 207, effective April 1, 1973.

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

**History:** Cr. Register, March, 1973, No. 207, eff. 4-1-73.

**NR 2.02 Definitions for this chapter.** (1) **DEPARTMENT.** Department means the department of natural resources.

(2) **SECRETARY.** Secretary means the secretary of the department of natural resources.

(3) **CONTESTED CASE.** Contested case means a proceeding before the department in which after hearing required by law, the legal rights, duties or privileges of any party thereto are to be determined or directly affected by a decision or order therein and in which the assertion of any such right, duty or privilege is denied or controverted by another party thereto.

**History:** Cr. Register, March, 1973, No. 207, eff. 4-1-73.

**NR 2.03 Service on the department.** All petitions for hearings, petitions for rules, petitions for declaratory rulings, answers and complaints required by any statute or rule shall be served on the secretary, either by delivery to the office of the secretary, or by mailing to the secretary by certified mail, at the following address: P. O. Box 450, Madison, Wisconsin 53701.

**History:** Cr. Register, March, 1973, No. 207, eff. 4-1-73.

**NR 2.04 Service of pleadings.** After a matter has been set for hearing, all further pleadings shall be served by delivery to the Bureau of Legal Services, Department of Natural Resources or by mail addressed at P. O. Box 450, Madison, Wisconsin 53701.

**History:** Cr. Register, March, 1973, No. 207, eff. 4-1-73.

**NR 2.05 Forms of petitions.** Petitions shall conform with the applicable statute as to form, content, number of signatories and verifications. Appropriate forms of petitions in various proceedings shall be as follows:

(1) REVIEW OF SPECIAL ORDERS ISSUED PURSUANT TO SECTIONS 144.025 (2) (d) 1, 144.025 (2) (r) AND 144.35, Wis. Stats.

To the Department of Natural Resources:
The undersigned hereby petitions for a review of the department order dated ..., 19 ..., whereby it was ordered ... The grounds for this petition are ... The modification or change desired is ...
Date ...
Signature ...
Verification ...

(2) ADOPTION, REPEAL OR AMENDMENT OF RULES OR GENERAL ORDERS OF THE DEPARTMENT (section 227.015, Wis. Stats.)

(a) For adoption of general order or rule:

To the Department of Natural Resources:
The undersigned hereby petitions for the adoption of a rule relating to:
The grounds for this petition are...
The 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) ...
Verification ...

(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 petitioners' interest in the request is ...
Date ...
Signatures (5 needed if the petitioner is not a municipality or a corporation) ...
Verification ...

(3) DECLARATORY RULINGS (section 227.06, Wis. Stats.)

To the Department of Natural Resources:
In the matter of the applicability of rule ... (or regulation or statute) to the petitioner (s) ... Said rule provides as follows:
The grounds for this petition are to determine the applicability of the above rule to the petitioner (s) 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(s) upon whom it is sought to make the ruling binding:-----

Date-----

Name-----

Address-----

Signature-----

Verification-----

(4) SIX CITIZEN COMPLAINTS (section 144.537, Wis. Stats.). The complaint and answer in the proceeding shall conform with the requirements of the applicable provisions of chapter 263, Wis. Stats., and the complaint shall specifically contain:

(a) The name, address and description of the activities of the person who is causing or will be causing the alleged or potential environmental pollution.

(b) The facts supporting the contention that alleged or potential environmental pollution is or will be taking place.

(c) A description of the nature of the alleged or potential environmental pollution.

(d) A specific description of the relief sought by the complainants.

(e) Verification and the signatures of the 6 or more citizens filing the complaint.

(f) The name and address of a person within the state authorized to receive the service of answer and other papers on behalf of the complainants.

History: Cr. Register, March, 1973, No. 207, eff. 4-1-73.

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 information as the department 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 by registered or certified mail when deemed appropriate and with the same effect.

**History:** Cr. Register, March, 1973, No. 207, eff. 4-1-73.

**NR 2.065 Contested case designation.** Unless ordered by the examiner, all department contested case hearings are class 1 proceedings under section 227.01 (2), Wis. Stats., except hearings held under sections 30.03, 144.025, 144.35, 144.537 and 144.91, Wis. Stats., and those hearings which modify, revoke or suspend a license as defined in section 227.01 (3), Wis. Stats., issued by the department are class 2 proceedings.

**History:** Emerg. cr. eff. 11-1-76; cr. Register, March, 1977, No. 255, eff. 4-1-77.

**NR 2.07 Place of hearings.** Unless otherwise specifically provided by law or ordered by the department or the secretary, all hearings shall be held at the offices of the Department of Natural Resources, 4610 University Avenue, Madison, Wisconsin.

**History:** Cr. Register, March, 1973, No. 207, eff. 4-1-73.

**NR 2.08 Persons entitled to participate in hearings.** (1) **PERSONS.** In addition to the parties named in the pleadings, divisions of the department, the public intervenor if authorized by section 165.07, Wis. Stats., and any member of the public may participate in all department hearings as parties in interest, including the right to offer testimony and when deemed appropriate by the hearing examiner to cross-examine witnesses.

(2) **APPEARANCE.** A person desiring to participate in a proceeding shall enter his appearance in person by giving his name and address and the name and address of any party he represents and in what capacity he is representing such party.

**History:** Cr. Register, March, 1973, No. 207, eff. 4-1-73.

**NR 2.09 Changes in time or place of hearing; adjournments; failures to appear.** (1) **CHANGES.** Requests for changes in the time and place of a scheduled hearing will be granted only for good cause shown prior to any required newspaper publication of legal notice thereof.

(2) **ADJOURNMENT.** The hearing examiner may adjourn a hearing for good cause shown, the hearing to be reset or reconvened at the discretion of the department on 10 days' notice or at a time certain on stipulation of the parties.

(3) **FAILURE TO APPEAR.** (a) If an applicant for a permit or license fails to appear at a hearing following notice and publication, the department may dismiss the application. If an applicant fails to submit proof of publication and notice as required by statute, the department may dismiss the application and cancel the hearing.

(b) If a respondent in a proceeding fails to appear, the department shall take testimony and issue, modify or rescind the order as may be appropriate.

**History:** Cr. Register, March, 1973, No. 207, eff. 4-1-73.

**NR 2.10 Witnesses and subpoenas.** The hearing examiner may issue subpoenas to compel the attendance of witnesses at hearings or discovery proceedings pursuant to section NR 2.11. A subpoena duces

tecum may be issued if the person requesting such subpoena specifies the documents to be presented by the subpoenaed witness. The provision of the statutes shall govern the payment of witness fees and expenses.

**History:** Cr. Register, March, 1973, No. 207, eff. 4-1-73.

**NR 2.11 Depositions.** The department or any party in any contested hearing or any interested member of the public who certifies to the department that the person will participate as a party in interest in a hearing required by law for which notice has been given by the department may by agreement or subpoena take the deposition of any other party or witness upon due notice to the person to be examined, to all other parties and to the department in the manner provided by section 804.05, Wis. Stats.

**History:** Cr. Register, March, 1973, No. 207, eff. 4-1-73; am. Register, April, 1976, No. 244, eff. 5-1-76.

**NR 2.115 Written interrogatories.** The department or any party in a contested hearing or any interested member of the public who certifies to the department that the person will participate as a party in interest in a hearing required by law for which notice has been given by the department may serve upon any other party which is or will be a party to the hearing or to the department written interrogatories in the manner provided in section 804.08, Wis. Stats.

**History:** Cr. Register, April, 1976, No. 244, eff. 5-1-76.

**NR 2.12 Informal conferences.** (1) **CALL AND PURPOSE.** The department or the hearing examiner may call an informal conference at any time prior to or during the course of a hearing. The purposes of such conferences shall, insofar as applicable, be to consider:

- (a) Simplification of issues;
- (b) Amendments to the pleadings;
- (c) Admissibility of evidence; and
- (d) Such other matters as may aid in the disposition of the matter.

(2) **RECORDING STIPULATIONS.** The hearing examiner may record any stipulations made at such informal conferences, which shall bind the parties thereto in the proceedings.

**History:** Cr. Register, March, 1973, No. 207, eff. 4-1-73.

**NR 2.13 Conduct of hearings.** (1) **PROCEDURE.** The hearing examiner will open the hearing and make a concise statement of its scope and purposes. Appearances then will be entered on the record. If the matter is contested, the examiner then will state the issues in the proceedings. Thereafter, parties may make motions or opening statements.

(2) **OPENING STATEMENTS.** When opening statements are made they shall be confined to:

- (a) A brief summary or outline in clear and concise form of the evidence intended to be offered; and
- (b) A statement of ultimate legal points relied upon.

(3) **ORDER OF PROCEEDING.** Applicants, petitioners and complainants shall proceed first with their evidence.

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

(5) **OBJECTIONS TO EVIDENCE.** Any argument before the examiner 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 be grounds for exclusion from the hearing.

*History: Cr. Register, March, 1973, No. 207, eff. 4-1-73.*

**NR 2.14 Rules of evidence in contested cases.** (1) **RULES.** Rules of evidence in contested cases are governed by section 227.10, Wis. Stats.

(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 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.

(3) **TECHNICAL DATA.** When evidence to be presented consists of technical figures so numerous as to make oral presentation difficult to follow, it may be presented in exhibit form and supplemented and explained by oral testimony.

(4) **PETITIONS, ETC.** Petitions or written communications not admissible as evidence may be filed with the hearing examiner but will not be part of the record.

(5) **EXHIBITS, ETC.** Parties offering documentary exhibits or prepared testimony may be ordered by the hearing examiner to furnish copies to all other parties in advance of the hearings and to provide such reasonable time as the hearing examiner 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 and available for cross-examination.

*History: Cr. Register, March, 1973, No. 207, eff. 4-1-73.*

**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 shall not be filed within such time, the department may proceed to its determination of the case. Extension of time to file briefs may be granted by the hearing examiner 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,

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the record will be closed when such documentary evidence is received by the department or when the specified time for furnishing it has elapsed without its being furnished. The hearing examiner may, upon the request of the stipulating parties, extend the time as originally prescribed for filing such additional evidence.

**History:** Cr. Register, March, 1973, No. 207, eff. 4-1-73.

**2.155 Decisions in contested cases. (1) EXAMINER DECISION.** The hearing examiner shall prepare findings of fact, conclusions of law and decision subsequent to each contested case heard. Said decision shall be the final decision of the department, but may be reviewed in the manner described in NR 2.20.

**(2) SECRETARY DECISION. (a)** Notwithstanding (1) the secretary prior to hearing, may direct that the record be certified to the secretary for decision in accordance with the provisions of section 227.09 (3) (b), Wis. Stats., without an intervening decision by the hearing examiner.

**(b)** Notwithstanding (1) the secretary prior to hearing may direct that the decision be made in accordance with the provisions of section 227.09 (2) or (4), Wis. Stats.

**History:** Cr. Register, December, 1976, No. 252, eff. 1-1-77.

**NR 2.16 Reopening hearings.** When a hearing in a contested case is closed, no further evidence shall be received, except by order of the department reopening a closed contested case for the taking of future evidence upon application of a party showing to the department'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.

**History:** Cr. Register, March, 1973, No. 207, eff. 4-1-73.

**NR 2.17 Transcripts. (1) METHOD AND COPIES.** Hearings in contested cases will be transcribed either stenographically or mechanically. A typed transcript will be made when deemed necessary by the department. If a transcript is made by the department, copies will be furnished to all persons upon request at a reasonable cost. If no transcript is deemed necessary by the department and a party requests that one be prepared, that party shall be responsible for all costs of transcript preparation. In lieu of a transcript the department will provide any person a copy of the tape recording of a public hearing upon request and at a reasonable cost. All requests pursuant to the above provision shall be made in writing and presented to the hearing examiner at the hearing.

**(2) FINANCIAL NEED.** Any person who by affidavit or other appropriate means can establish to the department's satisfaction that the person is impecunious may be provided a copy of a transcript without charge.

**(3) CORRECTIONS.** Any party, within 7 days of the date of mailing of the transcript, may file with the hearing examiner 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 and other parties of record. All parties

will be advised by the hearing examiner of any authorized corrections to the record.

**History:** Cr. Register, March, 1973, No. 207, eff. 4-1-73; am. Register, December, 1976, No. 252, eff. 1-1-77.

**NR 2.18 Briefs.** (1) **TIME FOR BRIEFS.** In contested cases, parties shall indicate on the record after the close of testimony whether they desire to file briefs. The party or parties having the affirmative shall file affirmative briefs within 15 days after date of mailing of transcript. Other parties 8 days thereafter shall file answer briefs, which may be replied to within 5 days. The hearing examiner in his discretion may establish an alternate schedule for the filing of briefs.

(2) **NUMBER.** Five copies of all briefs shall be filed with the department 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 of the record containing such evidence.

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

**History:** Cr. Register, March, 1973, No. 207, eff. 4-1-73.

**NR 2.19 Confidential information.** (1) **APPLICABILITY.** This section applies in those cases where the department is expressly authorized by law to treat information obtained by it as confidential.

(2) **APPLICATION FOR CONFIDENTIAL STATUS.** Any person seeking confidential treatment of information obtained by the department shall file with the department a written application for confidential status containing:

- (a) The name, address and interest of the applicant;
- (b) The specific information for which confidential status is sought;
- (c) The facts alleged to constitute the basis for granting confidential treatment;
- (d) Whether the applicant elects to proceed under subsections (5) or (6) of this section if the department determines that additional facts or information is required.

(3) **DECISION ON APPLICATION.** (a) Any decision issued under this section shall be in writing and shall state the basis for granting confidential status or the reasons for denial of the request. The department may grant or deny the request in whole or in part. The decision shall be final unless an adjudicatory hearing is requested within 14 days following its issuance. If a hearing is requested, the department shall schedule a hearing at which the applicant shall appear and present evidence or testimony supporting its position. The department may also appear and present evidence regarding the application. The hearing will be before a hearing examiner, and testimony shall be under oath and cross-examination allowed. The hearing will not be open to the public. The department shall issue a final decision based upon the record of hearing.

(b) No information for which confidential status was requested shall be disclosed to the public for 30 days following issuance of the final decision under paragraph (a). Information supplied by the

applicant, not otherwise required by the department, shall be treated as confidential. Unless judicial review is requested, the information shall be returned to the applicant following the 30-day period after issuance of the final decision.

(4) **INFORMATION SUFFICIENT.** If the information in the application for confidential status provides an adequate basis for determining confidentiality, the department shall notify the applicant of its decision within 20 days.

(5) **WRITTEN INTERROGATORIES.** When elected under subsection (2) (d), the following procedure shall apply:

(a) The department shall, within 30 days after receiving a request for confidentiality, mail to the applicant a list of written interrogatories the answers to which are necessary for a determination under this section.

(b) If the applicant fails to answer all interrogatories within 30 days, the department shall deny the application.

(c) Within 20 days after receipt of the answers, the department shall notify the applicant of its decision.

(6) **APPEARANCE BEFORE THE DEPARTMENT.** When elected under subsection (2) (d), the following procedure shall apply:

(a) Within 30 days of receipt of the application, the department shall notify the applicant of a time and place to make an appearance before the department. The applicant shall answer questions of the department and may present information and testimony regarding the request for confidentiality. The appearance shall not be open to the public.

(b) Based on the information presented and reports from department personnel reviewing the request for confidentiality, the department shall issue its decision within 20 days after the appearance.

(c) The appearance under this subsection is not a contested case.

**History:** Emerg. cr. eff. 1-1-76; Cr. Register, May, 1976, No. 233, off. 6-1-76.

**NR 2.20 Review of contested case decision.** (1) **FLING.** Any party to a contested case who is adversely affected by a final decision of the department rendered after a public hearing on the matter, may within 10 days after entry of the decision, file a written petition for review by the secretary. Said petition shall specify in detail the grounds for the review, the relief which petitioner seeks and citation to supporting authorities which petitioner feels aids petitioner's case. The secretary shall not delegate the review to anyone who has had prior involvement in either the hearing or decision-making process.

(2) **SERVICE.** Said petition for review shall be served either personally or by registered or certified mail upon the secretary and upon all other 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 not be a prerequisite for appeal or review under sections 227.15 to 227.16, Wis. Stats.

(5) **SUSPENSION OF ORDERS.** The filing of a petition for review shall not suspend or delay the effective date of an order, and the order shall take effect on the date fixed by the department and shall continue in effect unless provisions of the order are specifically suspended or delayed by the secretary in writing. Petition for such suspension of the effective date of an order shall be clearly specified in the petition for review.

**History:** Cr. Register, February, 1976, No. 242, off. 3-1-76.