

CR 88-174



State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

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STATE OF WISCONSIN )  
 )  
DEPARTMENT OF NATURAL RESOURCES )

ss

SEP 5 1990  
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TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETINGS:

I, Bruce B. Braun, Deputy Secretary of the Department of Natural Resources and custodian of the official records of said Department, do hereby certify that the annexed copy of Natural Resources Board Order No. WZ-44-88 was duly approved and adopted by this Department on June 28, 1990. I further certify that said copy has been compared by me with the original on file in this Department and that the same is a true copy thereof, and of the whole of such original.

IN TESTIMONY WHEREOF, I have here-  
unto set my hand and affixed the  
official seal of the Department at  
the Natural Resources Building in  
the City of Madison, this 29<sup>th</sup>  
day of August, 1990.

*Bruce B. Braun*  
Bruce B. Braun, Deputy Secretary

(SEAL)

11-1-90

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

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WZ-44-88

IN THE MATTER of repealing ss. NR 299.02 and 299.04(3); renumbering ss. NR 299.03, 299.04(1), (2), (4) and (5), 299.05 and 299.06; and amending ss. NR 299.01, 299.04(1)(intro.), (b)(intro.), 2. and 6., and 299.06(3) to (7); and creating s. NR 299.02(7) and (9) of the Wisconsin Administrative Code pertaining to water quality certification.

Analysis Prepared by Department of Natural Resources

Statutory Authority: ss. 144.025, 147.01 and 227.11, Stats.  
Statutes Interpreted: ss. 144.025 and 147.01, Stats.

NR 299, Wis. Adm. Code is promulgated under ss. 144.025, 147.01 and 227.11, Stats., to establish procedures and criteria for the application, processing and review of state water quality certifications under provisions of the Federal Water Pollution Control Act, 33 USC ss. 1251 et seq.

Generally, the changes proposed are clarifying and procedural. The revisions are expected to result in water quality certification decisions which are more easily understood by applicants and the public and which are more consistent with other department policy and regulatory decisions. It is also expected that the procedural modifications will result in nominal workload relief for department staff and will simplify application procedures and reduce costs for business and the public. Generally, these changes are proposed:

1. Federal regulations require that state decisions on water quality certification relate to applicable state water quality standards, not other requirements of state law related to public interest, riparian rights, et al. The revisions clarify this point so that department staff do not make water quality certification decisions based on inappropriate legal criteria [See the revision proposed in NR 299.01(2)(a) and (b) and NR 299.05(1)(b)6].
2. It is appropriate to advise applicants about other requirements of state law affecting their projects. In the past, waiver of state water quality certification has in some cases been interpreted as department approval of a project when, in fact, other requirements of state law precluded the project. The proposed revisions are aimed at giving applicants and the public the "right signals" about department authority and project approval. [See the revisions proposed in NR 299.06(3)(d)3.].

3. The department is obligated by NR 1.95 to suggest alternate project locations, construction techniques, etc., to avoid or minimize adverse impacts on wetlands. The department should offer similar advice when other natural resources may be affected by federally authorized activities. [See proposed revisions in NR 299.06(3)(c)3].
4. Applicants will no longer be required to publish notice of DNR decisions to waive or deny water quality certification. We feel it is reasonable to notify the public when the agency has jurisdiction over a project proposal and there will be some change from the status quo. (See changes proposed in NR 299.06.)
5. The proposed amendments modify the criteria for decision making and make these provisions consistent throughout the rule. (See NR 299.01 and NR 299.05).
6. The proposed amendments provide for waivers of certification where the activity subject to certification is a wastewater discharge requiring a NPDES permit. The WPDES program (ch. 147, Stats.) results in issuance of a permit which becomes the federal NPDES permit. Any water quality issues are resolved in that process and automatically become part of the federal permit. (See NR 299.01).
7. The proposed amendments require an applicant for certification to provide information on water dependency and any alternatives which may exist for the project. This information is necessary for completing the environmental review under s. 1.11, Stats., (WEPA) and will also be used when reviewing the project for consistency with the standards in s. NR 299.04. Definitions for "water dependency" and "practicable alternatives" are included. (See NR 299.02 and NR 299.03).
8. The proposed amendments modify the hearing provisions to assure that the issues which were litigated in another forum under separate authority are not collaterally attacked under this rule. [See NR 299.05(5) and (6)].

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SECTION 1. NR 299.01 is amended to read:

NR 299.01 PURPOSE AND POLICY. (1) ~~These rules are~~ This chapter is promulgated under ss. 144.025, 147.01 and ~~227.014~~ 227.11(2)(a), Stats., to establish procedures and criteria for the application, processing and review of state water quality certifications required by the provisions of the federal water pollution control act, 33 USC ss. 1251 et seq.

(2) It is the policy of the department to review, consistent with the requirements of section 1341 of the federal water pollution control act, 33 USC ss. 1251, et seq., all activities which require a federal license or permit which may result in any discharge to waters of the state and to:

(a) Deny ~~or grant conditionally~~ certification for any activity ~~which where~~ the department ~~finds will result in~~ does not have reasonable assurance that any discharge in violation of will comply with effluent limitations or water quality related concerns or any other appropriate requirements of state law as outlined in s. NR ~~299.05~~ 299.04;

(b) Grant or grant conditionally certification for any activity ~~which where~~ the department ~~finds will not result in~~ has reasonable assurance that any discharge in violation of will comply with effluent limitations, water quality related concerns or any other appropriate requirements of state law as outlined in s. NR ~~299.05~~ 299.04; or

(c) Waive certification for any activity which the department finds will result in no discharge, any wastewater discharge associated with an activity which will be regulated by the permit authority under ch. 147, Stats., or any activity that does not fall within the purview of the department's authority.

SECTION 2. NR 299.02 is repealed.

SECTION 3. NR 299.03(1) to (8) is renumbered NR 299.02(1), (2), (4), (8), (6), (3), (10) and (5) respectively.

SECTION 4. NR 299.02(7) AND (9) are created to read:

NR 299.02(7) "Practicable alternatives" means alternatives which are available and capable of being implemented after taking into consideration

cost, available technology, and logistics in light of realistic project purposes.

(9) "Water dependency" means the activity requires location in or adjacent to surface waters or wetlands to fulfill its basic purpose.

SECTION 5. NR 299.04(1) and (2) are renumbered NR 299.03(1) and (2) and, as renumbered, are amended to read:

NR 299.03 Application for certification. (1) No person may conduct any activity which may result in any discharge into the waters of ~~this~~ the state unless the person has received a certification or waiver under this chapter. Unless the licensing or permitting agency or the regional administrator submits an application to the department under 40 CFR s. 121.13, the applicant shall submit to the department a complete description of the activity for which certification is sought, including:

(a) The name and address of the applicant; ~~and~~

(b) A description of the facility or activity and of any discharge which may result from the activity or facility, including, but not limited to: the volume of discharge; the biological, chemical, thermal, and other characteristics of the discharge; a description of the existing physical environment at the site of the discharge; the size of the area affected; the location or locations at which ~~such~~ the discharge may enter the waters of the state; and any environmental impact ~~assessment~~ document information and photographs which have been provided to the licensing or permitting agency; ~~and~~

(c) A description of the function and operation of equipment, facilities, or activities to treat ~~wastes~~ pollutants or other effluents which may be discharged, including specification of the degree of treatment expected to be attained; ~~and~~

(d) The date or dates on which the activity will begin and end, if known, and the date or dates on which the discharge will take place;

(e) A description of the methods being used or proposed to monitor the quality and characteristics of the discharge and the operation of equipment, facilities, or activities employed in the treatment or control of ~~wastes~~ pollutants or other effluents;

(f) Information sufficient to determine whether the proposed activity is water dependent; and

(g) A description of practicable alternatives to the proposed activity and a description of the investigation conducted to determine the viability of such alternatives, including alternative locations, construction design and methods, and operations.

(2) The department shall review the application for completeness within 30 days of receipt of the application. The department shall notify the applicant of any additional ~~materials~~ information reasonably necessary to review the application. An application ~~shall~~ may not be considered complete until the requirements of the Wisconsin environmental policy act, s. 1.11, Stats., have been ~~completed~~ met and until all ~~materials~~ information necessary for associated permits, such as Wisconsin pollution discharge elimination permits under ch. 147, Stats., ~~are~~ has been submitted to the department.

SECTION 6. NR 299.04(3) is repealed.

SECTION 7. NR 299.04(4) and (5) are renumbered NR 299.03(3) and (4), and 299.03(3), as renumbered, is amended to read:

(3) ~~The provisions of sub. (3) notwithstanding, the~~ The applicant shall submit in timely fashion, at any time during the review process, such

additional ~~materials~~ information which the department finds to be reasonably necessary for review of the application.

SECTION 8. NR 299.05 is renumbered NR 299.04 and (1)(intro.) and (b)(intro.), 2. and 6., as renumbered, are amended to read:

NR 299.04 Department review of water quality certification application.

(1) The department shall, within ~~90~~ 60 business days of receipt of the complete application, determine whether it has reasonable assurance that the proposed activity will:

(b) ~~Result in violation of any of~~ Comply with the following applicable water quality standards:

(2) Water quality ~~related~~ based effluent limitations adopted under s. ~~147.05~~ 147.04(5), Stats., and 33 USC s. 1312;

(6) Public interest and public rights standards, ~~as appropriate~~ related to water quality, set forth in ss. 30.03, 30.10, 30.11, 30.12, 30.123, 30.13, 30.15, 30.18, 30.19, 30.195, 30.196, 30.20, 30.202, 30.206, 30.21, 31.02, 31.05, 31.06, 31.07, 31.08, 31.12, 31.13, 31.18, 31.23, 88.31 and 144.025(2)(b), Stats., and made applicable by 33 USC s. 1341(d);

SECTION 9. NR 299.06 is renumbered NR 299.05 and (3) to (7), as renumbered, are amended to read:

(3) The ~~notification~~ department's decision concerning a certification shall include the following:

(a) The name and address of the applicant;

(b) A statement that the department has ~~either~~: made its decision about compliance with related state water quality standards enumerated in s. NR

299.04(1) and denies, grants, grants conditionally or waives certification consistent with that decision.

~~1. Examined the complete application, specifically identifying the number or code affixed to such application, and based its determination upon an evaluation of the information contained in the application which is relevant to water quality considerations; or~~

~~2. Examined other information furnished by the applicant sufficient to permit the department to reach its decision.~~

(c) ~~If a~~ A waiver of certification ~~is made, a~~ shall include: 1. A statement explaining the determination that no discharge will result from the activity or that the activity does not fall within the purview of the department's authority; and

2. A statement advising the licensing or permitting agency and the applicant if the activity proposed requires authorization under requirements of state law administered by the department which are not related to water quality; and, where applicable,

3. Specific recommendations to the federal permitting authority and the applicant for avoidance of waters of the state. When all reasonable alternatives necessarily result in adverse impacts on waters of the state, a waiver may recommend specific project locations, and design and construction techniques which minimize adverse impacts on waters of the state and which minimize overall environmental impacts.

(d) ~~If a~~ A grant or conditional grant of certification ~~is made shall~~ include:

1. A statement that there is a reasonable assurance the activity will be conducted in a manner which will ~~not violate~~ comply with the standards enumerated in s. NR ~~299.05(1)~~ 299.04 and, if appropriate,

2. A statement of conditions which the department deems necessary with respect to the discharge including necessary monitoring requirements.

~~Necessary monitoring~~ Monitoring requirements shall include, but not be limited to, ~~the requirements~~ provisions that:

a. At least 5 ~~working~~ business days prior to the beginning of the discharge, the applicant shall notify the department of its intent to commence the discharge;

b. Within 5 ~~working~~ business days after the completion of the discharge, the applicant shall notify the department of the completion of the discharge;

c. The applicant shall allow the department reasonable entry and access to the discharge site in order to inspect the discharge for compliance with the certification and applicable laws.

3. A statement advising the licensing or permitting agency and the applicant if the activity proposed may require additional authorization under requirements of state law administered by the department which are not related to water quality.

(e) ~~If a~~ A denial of certification ~~is made~~ shall include, a statement explaining why the ~~activity will result in~~ department does not have reasonable assurance that the discharge of pollutants to the waters of the state and ~~detailing will comply with~~ the standards enumerated in s. NR 229.05(1) 299.04, ~~which will be violated~~ and detailing the standards of concern.

(f) ~~Where a public notice is issued under sub. (4) or (5),~~ All grants, conditional grants or denials of certification shall include a statement that unless a written request for a hearing is filed with the department within 30 days after mailing of the notice, the department's decision will become final without public hearing at the end of the 30-day period.

(g) ~~Such~~ All such decisions may also include other information ~~as~~ which the department determines to be appropriate.

(4) Except for applications under chs. 30 and 31, Stats., ~~or as provided in sub. (5)~~, the department shall, ~~at the same time it notifies~~ in the case of a grant or conditional grant of certification:

(a) Notify the applicant, notify the licensing or permitting agency and known interested persons and shall cause of its decision.

(b) Cause notice of its decision to be published by the applicant as a class I notice under ch. 985, Stats. Notice under this subsection shall contain the information required under sub. (3) identify the applicant and his or her address, describe the activity and its location, state the department's determination, and apprise the public of the opportunity to request a hearing under this chapter.

(5) Any person whose substantial interests may be affected by the department's determination may, within 30 days after publication of the notice, request in writing a contested case hearing on the matter under ~~s. 227.064~~ ch. 227, Stats. In any case where a class 1 notice on the application is otherwise required by law or where a contested case hearing on an application for water quality certification will be held under some other specific provision of law, the notice and hearings shall be combined.

(6) Hearings requested under this section shall be contested case hearings ~~and~~ shall be in accordance with the procedure outlined in ch. 227, Stats., and may not deal with issues that were adjudicated under separate authority. The hearing shall be a de novo hearing on the issue of whether the department should grant, grant with conditions, deny or waive water quality certification.

(7)(a) The department's determination shall become final:

1. Upon issuance of the department's decision where no public notice is required, or

2. Upon the expiration of the 30-day period provided under sub. (5) if no person has requested a hearing under that section, or

3. Upon the issuance of the department's decision denying the request for hearing under ~~that section~~ sub. (5), or

4. Upon issuance of the department's decision after hearing.

(b) If a hearing is held under sub. (6), the hearing examiner shall make findings of fact, conclusions of law and a decision, which shall become final when issued in accordance with the procedures in ch. 227, Stats., and this section.

(c) The final decision of the department under par. (a) shall be judicially reviewable as provided under ch. 227, Stats.

The foregoing rules were approved and adopted by the State of Wisconsin Natural Resources Board on June 28, 1990.

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 August 29, 1990

STATE OF WISCONSIN  
DEPARTMENT OF NATURAL RESOURCES

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By Carroll D. Besadny  
Carroll D. Besadny, Secretary

(SEAL)



State of Wisconsin

DEPARTMENT OF NATURAL RESOURCES

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Madison, Wisconsin 53707  
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TDD NO. 608-267-6897

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Revisor of Statutes  
Bureau

Mr. Gary L. Poulson  
Assistant Revisor of Statutes  
119 Martin Luther King, Jr., Blvd.

Dear Mr. Poulson:

Enclosed are two copies, including one certified copy, of State of Wisconsin Natural Resources Board Order No. WZ-44-88. These rules were reviewed by the Assembly Committee on Natural Resources and the Senate Committee on Urban Affairs, Environmental Resources, Utilities and Elections pursuant to s. 227.19, Stats. Summaries of the final regulatory flexibility analysis and comments of the legislative review committees are also enclosed.

You will note that this order takes effect following publication. Kindly publish it in the Administrative Code accordingly.

Sincerely,

  
C. D. Besadny  
Secretary

Enc.