



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 04-063

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 terms “boathouse” and “fixed houseboat” are defined in the statutes. It would be useful to add a reference to these definitions in the description of statutory authority in the summary prepared by the department.

b. An exception is provided in s. 30.121 (3g), Stats., for boathouses or fixed houseboats with certain historical or cultural value. The statute provides an exception for repair or maintenance of a boathouse or fixed houseboat “if the boathouse or fixed houseboat has a historic or cultural value, as determined by the state historical society or a local or county historical society...” The rule, in s. NR 325.10 (3) (c) requires that the boathouse or fixed houseboat must have been designated as a national, state, or local historical landmark. This requirement seems to be substantially narrower than the statutory exception. The statute is not limited to landmark designations.

c. Section NR 325.10 (3) (d) requires the owner to provide the department with documentation that the waterway enlargement has been authorized by the department. The statutory exception applies if the single-story boathouse is over an “authorized waterway enlargement” but does not require the individual to provide this information. Is the department in a better position than the individual to determine whether it has authorized the waterway enlargement? Will the department deny the certification if the owner is unable to provide the documentation?

d. Section NR 325.09 (1) (c) states that “decks, walkways, or piers” that are attached to or adjacent to a boathouse or fixed houseboat are considered part of the boathouse or fixed houseboat. However, the treatment of these objects as part of the boathouse or fixed houseboat does not appear to be supported by the statutory definitions in s. NR 30.01 (1d) and (1r). Also, this provision limits the repairs that may be done to a pier, deck, or walkway if adjacent to or attached to a boathouse or fixed houseboat. This limit does not appear to be supported by statutory authority.

e. For damaged boathouses, s. NR 325.09 (2) (c) limits repair and reconstruction to the “specific portions” of the boathouse which were damaged. In some instances, it may be standard construction practice to replace an entire damaged portion of a boathouse, such as a roof. Is it the intent of this provision to limit exempt repairs to a damaged boathouse to patches on the damaged portions? If so, what is the statutory authority for that limitation?

f. The statute authorizes construction repair or maintenance of a commercial boathouse if specific conditions in s. 30.121 (3w), Stats., are met. The rule, in s. NR 325.09 (3) adds to the requirements that must be met in order for a commercial boathouse to be eligible for an exception. The additional requirements of the rule are new substantive requirements rather than clarifications or implementation of the statutory requirements. What is the statutory authority for this provision of the rule?

2. Form, Style and Placement in Administrative Code

a. In s. NR 325.09 (2) (intro.) and (3) (intro.), the phrase “all of” should be inserted after the word “meet.”

b. The sequence of SECTIONS 13 and 14 should be reversed.

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

a. The term “navigable waterway” is defined in s. 30.01 (4m), Stats. The first sentence of the definition in s. NR 325.03 (7k) 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. The definition of “ordinary high water mark” 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. An application form is referenced in s. NR 325.10 (1) (intro.) and (3) (intro.). The department should comply with the requirements of s. 227.14 (3), Stats., regarding forms.

d. The cross-reference in s. NR 325.10 (3) (e) should be to sub. (3r) rather than to sub. (3w).

e. The appeal process under s. 227.42, Stats., is referenced in s. NR 325.08 (4). Should this cross-reference be replaced by a reference to s. 30.209, Stats., and the review procedures under ch. NR 310?

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

a. The reference to the “adjacent property” in s. NR 325.10 (3) (a) could be clarified. Does this mean the property that is adjacent to the waterway? Or the property that is adjacent to the property where the houseboat or boathouse is located?

b. It is not clear whether the information required under s. NR 325.10 (3) (b) relates to the owner or to the property where the houseboat or boathouse is located. For example, the owner’s primary residence may be elsewhere -- should the address of the owner’s primary residence be provided?

c. It is not clear why the rule in s. NR 325.10 (3) (b) requires a fire number to be provided “if available.” Either a property has a fire number or it does not. Does this mean that the owner is not required to provide the fire number if the owner does not know the fire number?

d. Section NR 325.10 (3) (b) also requires the owner to provide the owner’s telephone number. Is this the telephone number for the property where the boathouse or fixed houseboat is located, or some other telephone number belonging to the owner?

e. Does the limit in s. NR 325.09 (1) (a) preclude some types of repair, such as applying a new layer of roofing or adding a layer of siding? Is this the intent of the rule? Also, is it the intent of the rule under s. NR 325.09 (1) (b) to prohibit the addition of railings that may be necessary for safety?