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CLEARINGHOUSE RULE 04-065

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. There appears to be a conflict between s. 30.208 (3) (a), Stats., which requires that "interested and potentially interested members of the public" be provided notice within 15 days after the department's completeness determination, and the language added to s. NR 300.04 (4) (a), under which the department provides notice to the applicant within 15 days after the department's completeness determination. The first bulleted statement at the top of page 2, as well as s. NR 310.15 (1) and (3), indicate that the department is delegating to the applicant under s. 30.208 (5) (c), Stats., the requirement that it provide public notice within 15 days of its completeness determination. But because the department is giving itself up to 15 days after its completeness determination to notify the applicant, the rule appears to make it impossible for an applicant who receives the department's notice on the 15th day to comply with the requirement under s. 30.208 (3) (a), Stats., that the public be provided notice within 15 days.

b. In s. NR 300.06 (1), the Note is substantive and should be placed in the text of the rule. Further, given the statutory fees in s. 30.28 (2), Stats., what statutory authority exists for imposing an overall $50 fee for general permits? [See also s. NR 300.06 (2).]

c. Section 30.208 (2), Stats., requires the department initially to determine whether a complete application for a permit or contract has been submitted and, no later than 30 days after the application is submitted, notify the applicant in writing about the initial application of completeness. Presumably, if the application is complete, the department will so inform the applicant within the 30 day period. However, s. NR 310.15 (1) (a) provides that, within 15 days

after the department provides an initial determination of completeness, the department will send the applicant a notice of complete application. This in effect redundantly extends the first 30-day process to a maximum of 45 days. What statutory authority exists for this additional notice? And, if this additional period is used, how can the timelines in s. NR 300.04 (4) (e) and (f) be met?

d. The rule does not amend s. NR 300.05 (1), part of which appears to conflict with s. 30.208 (3), Stats. Under s. NR 300.05 (1), "the department's decision shall be mailed to the applicant within 45 business days after completion of the hearing," but under s. 30.208 (3) (e), Stats., the department must render a final decision "issuing, denying, or modifying the permit or approving the contract" within 30 days after the public hearing is held.

e. The term "navigable waterway" is defined in s. 30.01 (4m), Stats. The first sentence of the definition in s. NR 310.03 (5) adds a requirement that the body of water must have 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.

f. The statutes provide that a person may submit to the department a written statement requesting that the department determine whether a proposed activity is exempt. [For example, see s. 30.12 (2r), Stats.] The written statement must include a description of the proposed activity and site and must give the department consent to enter and inspect the site. The implication of this statutory provision is that the property owner is the person who may seek an exemption determination because that person is the only one who could give the department consent to enter and inspect the site. If this is an accurate interpretation of the statute, what statutory authority exists for s. NR 310.07 (5), which provides a formal process by which a person who is not a property owner engaging in an exempt activity may nonetheless request an exemption determination?

g. Section 30.12 (2r) (b) 2., Stats., requires the department, when a request for an exemption determination has been made, to notify the requester as to whether the activity is exempt. Consequently, in s. NR 310.07 (4), the word "may," in the final sentence, should be replaced by the word "shall."

h. Under s. 30.206 (3) (b), Stats., when the department does not inform an applicant for a general permit within 30 days that additional information or an individual permit is required, the applicant can consider the activity to be authorized and proceed. Section NR 310.10 (3),

Stats., adds five days, changing the 30-day requirement under s. 30.206 (3) (a), Stats., of "not less than 30 days" to "not less than 35 days" that an applicant for a general permit must wait, after having submitted the application and before beginning the activity, "to allow time for mailing between the applicant and the department." Under s. NR 310.11 (5), (8) and (10), the department has 30 days from receipt of the application to notify the applicant if the application is incomplete or ineligible, and the department has notified the applicant "on the date the department mails the written determination to the applicant." Is the five extra days intended to be sufficient for the mailing of both the applicant's notification to the department, as well as the department's notification to the applicant? What if both mailings take three days or more each, or one mailing takes more than five days, and the applicant proceeds with the activity on the 36th day assuming it has been authorized under s. 30.206 (3) (b), Stats.?

i. Section NR 310.17 (4) (a) provides that an individual permit will take effect 30 days after the date the department mails its decision to all parties involved. A similar emergency rule provision was suspended by the Joint Committee for Review of Administrative Rules on June 24, 2004. The suspension was in part based on the committee's view that the provision is not statutorily authorized. If this provision is retained in the rule, the department should explain the statutory authority for the rule.

j. In s. NR 310.18 (5) [the first sub. (5), not the second], pars. (a) to (c) require the Division of Hearings and Appeals, to notify the applicant at least 30 days before the date of the administrative hearing and provide the applicant with the items specified in par. (b). This appears to conflict with s. 31.209 (2) (d), Stats., which requires the Department of Natural Resources, not the Division of Hearings and Appeals, to notify the applicant at least 30 days before the date of the administrative hearing.

k. It appears that the department lacks statutory authority to delegate to the applicant, under s. NR 310.18 (5) (b) 1. d. and e. and (e), the notice requirement of s. 30.209 (2) (d), Stats. However, it is possible that s. 30.208 (5) (c), Stats., which allows the department to delegate to the applicant its notice requirement under s. 30.209 (1m), Stats., is incorrectly referring to sub. (1m), since it appears that the department's statutory notice requirement is in s. 30.209 (2) (d), Stats., rather than sub. (1m).

l. Section NR 310.18 (6) (c) and (d) allow the specified rules to apply "notwithstanding any conflicting statutes or…." If there is statutory authority for this, it should be cited. If not, any conflicting statutes would be applied rather than the rule provisions.

2. Form, Style and Placement in Administrative Code

a. Section NR 310.12 (1) (intro.) should conclude with a semi-colon.

b. In s. NR 310.16 (5) (c) 5. and 8., the phrase "in the hearing examiner's discretion" is not necessary and should be deleted. Further, sub. (5) (d) should be rewritten to read: "The hearing examiner may exclude from the hearing a person who engages in loud, noisy, disruptive, or contemptuous conduct."

c. Section NR 310.18 contains two subdivisions numbered as sub. (5).

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

a. In the last line of s. NR 300.04 (2), the word "have" should be changed to "has" to correctly refer to "all information necessary."

b. Section NR 300.06 (1) deletes statutory references that are not in the current rule. In the current rule, the statute references are s. 30.12 (1g) (c) or (d), Stats. The cross-reference change was made electronically and unilaterally by the Revisor of Statutes under s. 13.93 (2m) (b) 7., Stats. The change does not yet appear in bound volumes of the Administrative Code.

c. In s. NR 310.03 (3), it appears that the reference to "30.12 (7)" should be replaced by reference to "30.123 (7)."

d. In s. NR 310.14 (3) (c), the reference to "sub. (9)" is incorrect.

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

a. In the fiscal estimate and on page 1, in the third and fourth bullets, "public notice" should be changed to "public hearing," since s. 30.208 (3), Stats., requires a public notice of complete application for all completed applications and the difference between 105 and 150 calendar days depends on whether a public hearing is required.

b. Because the first sentence of s. NR 300.04 (2) is amended to include s. 281.37, Stats., the second sentence of s. NR 300.04 (2) is redundant and should be removed.

c. At the beginning of s. NR 310.07 (4) and (5), "Where" should be changed to "When."

d. Section NR 310.14 (1) (c) would be clearer if reworded as follows: "Submission of an application or additional information occurs on the date of receipt by the department office that is specified on the permit application form or accompanying instructions."

e. In s. NR 310.17 (2) (d), it appears that "information" should be inserted after "oral."

f. In s. NR 310.18 (1) (e), "therein" should be replaced with "in the petition." [See s. 1.01 (9) (c), Manual.]

g. In s. NR 310.18 (1) (g), "showing that a stay is necessary to prevent significant adverse impacts or irreversible harm to the environment that is" should be inserted between "A stay" and "requested" to conform with s. 30.209 (1m) (c), Stats.