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## WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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### CLEARINGHOUSE RULE 04-084

#### 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

The term “navigable waterway” is defined in s. 30.01 (4m), Stats. The first sentence of the definition in s. NR 320.03 (9) 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.

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

- a. The second note following s. NR 320.08 (1) (c) 11. appears to contain substantive requirements, contrary to the preferred drafting style. [See s. 1.09 (1), Manual.]
- b. Section NR 320.09 should have a title. [See s. 1.05 (1), Manual.]

c. The definition “ordinary highwater mark” in s. NR 320.03 (10) is identical to some and differs from other definitions of that term in department rules. See s. NR 115.03 (6) for an example of a different definition period. Is there any reason why the same definition should not be used throughout all department rules?

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

a. In the summary accompanying the rule, the list of statutes authorizing rule-making includes ss. 30.12 and 30.123, Stats. These references are vague as many provisions in these sections do not explicitly authorize rule-making and deal with other subject matter. The department should identify the specific provisions within these sections that explicitly authorize this rule-making.

b. In the summary accompanying the rule, the list of statutes interpreted by the rule should include the following statutes: s. 30.20 (1g) (b) 1., Stats., due to its interpretation in s. NR 320.08 (1) (c) 9. and (d) 5.; and ss. 30.15, 30.292, 30.294, and 30.298, Stats., due to their interpretation in s. NR 320.09 (3). In addition, this list of statutes interpreted by the rule cites s. 30.12, Stats. Since there are many provisions in this statute that are not interpreted in the rule, for example, exemptions for fish cribs and boat shelters, the department should identify the specific provisions within s. 30.12, Stats., that the rule interprets.

c. The department should review the current text of s. NR 320.02 (2) and (3) relating to municipal and state highway bridges to determine if these provisions should be amended to contain references to ss. 30.1235 and 30.2022, Stats., which are new statutes relating to the construction and maintenance of highway bridges and of bridges by the Department of Transportation.

d. Should the reference in s. NR 320.08 (3) (c) to s. 30.123 (2), Stats., be to s. 30.123 (8) (c), Stats.?

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

a. The federal regulatory analysis in the summary accompanying the rule states that “(a)n individual permit from the [U.S. Army Corps of Engineers] is required, unless Wisconsin regulates the project in its entirety under ch. 30, Stats., in which case the project is authorized by the Corps under general permit GP-01-WI or GP-LOP-WI.” It is not clear from this statement how the Corps will regulate a project that is exempt under s. 30.123, Stats., such as the replacement of a culvert with an inside diameter not exceeding 24 inches.

b. Under the amendment to the definition of “regional flood” in s. NR 320.03 (12), one type of regional flood is a flood representative of large floods known to have generally occurred in Wisconsin. This broad definition is potentially ambiguous and open to varying interpretations. Can the department be more specific?

c. Since the standards listed in s. NR 320.08 (1) (c) establish which type of culvert replacements are eligible for the exemption under s. 30.123 (6) (e), Stats., should the list of

standards include the requirement that the replacement culvert does not exceed 24 inches in diameter? The reference to the size of the culvert in the title to s. NR 320.08 (1) (c) does not establish this requirement as a title to any unit of a rule is not part of the substance of the rule itself. [See s. 1.05 (1), Manual.] Throughout the section, titles should also be incorporated into the text in some manner; also see s. NR 320.08 (2) (c).

d. Section NR 320.08 (1) (c) 8. refers to fill material being free of “fines.” Should this term be defined to ensure the consistent application of the rule?

e. Under s. NR 320.08 (1) (e), activities that do not meet the standards in par. (c) or (d) or are determined ineligible for an exemption by the department require a general permit or an individual permit. It is not clear why this provision includes a reference to a general permit since standards in par. (c) or (d) refer only to the replacement of culverts whereas the general permit provisions in s. NR 320.08 (2) only apply to permits for clear span bridges and not for any type of culvert replacement.

f. Section NR 320.08 (1) (e) specifically addresses activities that are determined ineligible for an exemption by the department. If the department intends to exercise its authority to require a general or individual permit under s. 30.123 (6m), Stats., for a culvert replacement that otherwise qualifies for an exemption, then the department should consider adding a provision in the rule that implements this authority.

g. In s. NR 320.08 (2) (c) 12., should the “or” after “Wisconsin,” be “and”?

h. The reference in s. NR 320.09 (1) to noncompliance with the cited provisions possibly resulting in a forfeiture appears to preclude a fine or imprisonment, as authorized under s. 30.12 (5). Is that the department’s intent?

i. The second sentence in s. NR 320.09 (1) would be clearer if the phrase “authorized under” was inserted before “a general permit” in the second sentence.

j. The application of the second and third sentences in s. NR 320.09 (1) for an activity authorized under a general permit when the only violation was a failure to follow procedural requirements is not clear. One reading of these two sentences is that the second sentence would apply to this situation only if there was good cause shown for the failure to follow procedural requirements. Is that the department’s intent?

k. The following comments pertain to the waterway general permit application attached to the rule:

1. On the first page in the section entitled “Activity,” a space should be inserted before the words “the” and “type” and between the words “obtained” and “on.”
2. On the third page in the section entitled “Permit Conditions,” the word “the” should be inserted before the word “telephone” in item 2.
3. On the third page in the section entitled “Findings of Fact,” the word “Section” should be replaced by the notation “s.” in item 3.