



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 04-085

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 term “navigable waterway” is defined in s. 30.01 (4m), Stats. The first sentence of the definition in s. NR 341.03 (8) 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. “Priority navigable waterway” is defined in s. 30.19 (1b) (c), Stats. This term is also defined in s. NR 341.03 (10) of the rule. The definition in the rule differs substantially from the definition in the statute, and appears to include navigable waterways that are not within the scope of the statutory definition.

c. The statute requires a permit for grading or removing topsoil in s. 30.19 (1g) (c), Stats., where the grading or removal is from the bank of a navigable waterway and the area

exposed by the grading or removal will exceed 10,000 square feet. The statute further provides in s. 30.19 (3r) (a) 2., Stats., that the department is required to issue a statewide general permit for such grading or removal. Section NR 341.08 provides a general permit for projects of one acre or more and s. NR 341.085 establishes a general permit for projects of less than one acre. Neither of these rules indicates how the rule relates to the 10,000 square foot statutory requirement for a permit. Further, the “under one acre” general permit applies to grading that affects less than 10,000 square feet, which is not specifically required under the statute. Is the department promulgating this rule under s. 30.19 (3r) (b), Stats.?

d. Pursuant to the statutory method for what constitutes a bank of a navigable waterway for purposes of s. 30.19, Stats., the distance may not exceed 300 feet to the landward side of the ordinary highwater mark for a priority navigable waterway or 75 feet for a nonpriority navigable waterway. However, the rule, in s. NR 341.035, states that the bank is the land area that is a “minimum distance” of 300 feet or 75 feet from the ordinary highwater mark. The statute provides that the area of the bank may exceed these distances, but only if the slope exceeds a certain percentage. The rule should specify clearly that the distance may only be exceeded if the slope exceeds a certain amount. Without this clarification, the rule suggests that the distance of the bank may exceed the 75- or 300-foot minimum, contrary to the statute.

e. The statutory determination of “bank” under s. 30.19 (1d), Stats., extends the bank to the “point” where the slope is measured to be a certain percentage, at least 10% for priority navigable waterways or 12% for nonpriority navigable waterways. That is, a portion of land surface is not a bank if, after exceeding distance limits from a navigable waterway, the slope of the surface is less than the 10% and 12% figures, respectively. The rule in s. NR 341.035 should clarify that the bank extends to the “point” where the slope is greater than the designated percentage. As drafted, the rule suggests that the bank extends to the point where the slope has been less than either 10% or 12% for more than 50 feet. Should this point occur at the beginning of the “more than 50 feet” measurement rather than at the end of this measurement?

2. Form, Style and Placement in Administrative Code

a. The preface to the rule includes a summary of factual data and analytical methodologies. This summary would be more useful to the reader if at least some of the referenced scientific literature were cited and if a brief description on how the data on actual field conditions could be accessed.

b. The definitions in s. NR 340.02 (2), (8), and (19) are repealed in the rule. However, the defined terms that are repealed are still used in ch. NR 340.

c. The term defined in s. NR 341.03 (1) should be “agricultural use of land,” so that the defined term is the same as the term as used in s. NR 341.02 (4) (b) and the corresponding statutory exemption in s. 30.19 (1m) (b), Stats.

d. “Area of special natural resource interest” is defined in s. 30.01 (1am), Stats. The department has authority in the statutory definition to add any area “that possesses significant

scientific value.” Is the reference in s. NR 341.03 (2) to an area “identified by the department in s. NR 1.05” meant to identify areas of significant scientific value? However, it is not clear why the term “area of specific natural resource interest” is defined in the rule, because it is not used either in s. 30.19, Stats., or in ch. NR 341.

e. The definition in s. NR 341.03 (6) includes both “highway” and “public highway.” However, only “public highway” is used in the rule. Further, the term is used only a single time in s. NR 341.02 (4) (a). Some thought should be given to simply adding the statutory cross-reference to s. 340.01 (22), Stats., to the exemption in s. NR 341.02 (4) (a). Also, the cross-reference should be stated in the following form: “‘Public highway’ has the meaning given for ‘highway’ in s. 340.01 (22), Stats.”

f. The definition “ordinary highwater mark” in s. NR 341.03 (9) 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?

g. In s. NR 341.04 (intro.), the phrase “all of the” should replace the word “The.”

h. In s. NR 341.05 (2) (c) and (g), the notation “i.e.” should be replaced by the phrase “such as the.”

i. In s. NR 341.08 (3) (e) 4., the Note is substantive and should be placed in the text of the rule. [See also s. NR 341.085 (3) (e) 4.]

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

Should the cross-reference in ss. NR 341.08 (2) and 341.085 (2) be to s. 30.19 (3r) (a) 2., Stats.?

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

a. The last sentence of s. NR 341.02 (1) is a substantive requirement that does not belong in the applicability provision.

b. In the definition of “navigable waterway” in s. NR 341.03 (8), does the term “bank” have the same meaning as that word has in s. NR 341.035?

c. The definition of the “bank” of a navigable waterway in s. NR 341.035 (1) (a) and (b) defines the bank as a “minimum distance” from the ordinary highwater mark. The bank is actually a portion of the land on the shore of a navigable waterway. The distance in the rule defines how much of that land area is included within the bank for purposes of regulation under ch. NR 341. The terminology in the statute [s. 30.19 (1) (b), Stats.] would be more appropriate.

d. The determination of the bank in s. NR 341.035 (1) (c) excludes areas where the “slope or drainage” is completely interrupted. However, the definition of “completely interrupted” in that rule provision refers only to an area where runoff flows through a vegetated

area for at least 150 feet before reaching any waters of the state. This definition seems to relate only to drainage, but not to slope.

e. The calculation of the area disturbed in s. NR 341.035 (2) (c) refers to the disturbed area between the ordinary highwater mark and the bank. However, the bank commences at the ordinary highwater mark and extends a specified distance as provided in the rule. The disturbed area cannot be between the ordinary highwater mark and the bank.

f. In s. NR 341.04 (3), the landowner is required to give permission to enter the site in the grading proposal. Who must receive this permission?

g. In s. NR 341.05 (1), it would be more accurate to replace the phrase “for grading” with the phrase “for a grading permit.” The entire rule should be reviewed for this proposed change.

h. Should “navigable waterway” replace “water body” in s. NR 341.05 (2) (f)?

i. Section NR 341.05 (2) (h) and (3) make use of the phrases “major grading activities” and “major land disturbing construction activity.” The use of the word “major” is problematic. How will the department differentiate between major and minor activities?

j. The connection between the rule and the statute on endangered and threatened species should be clarified. See s. NR 341.08 (1) (b). The statute addresses the “impact” on an endangered or threatened species only in s. 29.604 (6m), Stats., regarding incidental takes.

k. The rule refers to an incidental take “authorization” under ss. NR 341.08 (1) (b) 2. and 341.085 (1) (b) 2. The statute refers to a permit rather than an authorization.

l. In the provision regarding endangered or threatened species in ss. NR 341.08 (1) (b) and 341.085 (1) (b), the rule refers to the department issuing a general permit. This statement is at odds with the statutory procedure for general permits. Under the statute, the general permit is “issued” by rule, and the individual notifies the department of the intent to proceed with an activity covered by the general permit. An applicant who proposes an activity that is consistent with the general permit may proceed with the activity. The rule suggests that the department is issuing a general permit to an individual in the same manner that an individual permit is issued. Also, in these provisions, the phrase “application shall be deemed incomplete. The” is unnecessary and should be deleted.

m. Should “is” be substituted for “may be” in ss. NR 341.08 (3) (intro.) and 341.085 (3) (intro.)?

n. Should the requirements for an erosion control plan under ss. NR 341.08 (4) and 341.085 (4) include a cross-reference to the erosion control plan provisions of s. NR 341.085? Similarly, should the stormwater management requirements of ss. NR 341.08 (5) and 341.085 (5) cross-reference the stormwater management plan requirement of s. NR 341.06? Finally, in both of these provisions, the word “they” is unnecessary and should be deleted.

o. The reference in s. NR 341.10 (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?

p. The application of the second and third sentences in s. NR 341.10 (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?

q. 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.