



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 04-088

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 326.03 (5m) 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. Section 30.12 (1p), Stats., places limits on the department’s authority to promulgate rules concerning exempt activities. Does the list of “standards” in s. NR 326.08 (1) (c) comply with these limitations?

c. Sections NR 326.08 (1) (c) 2. and 326.09 (1) (c) 2. prohibit the placement of a pier or wharf, or a boat shelter, boat hoist, or boat lift wherever there are public rights features as

defined in s. NR 1.06. This restriction is not expressly authorized in the statute. What is the statutory authority for this restriction?

d. The standard in s. NR 326.08 (1) (c) 6. allows one additional boat slip for each additional full 50 feet of shoreline footage. The word “full” is added to the statutory language, which authorizes one additional boat slip for each additional 50 feet of the riparian owner’s shoreline. The department should follow the statutory language.

e. What is the authority for prohibiting dredging in connection with exempt structures? Section NR 326.09 (1) (c) 17. prohibits dredging under s. 30.20 (1g) (b) 1., Stats., for placement or maintenance of a boat shelter, boat hoist, or boat lift. What is the authority for this prohibition of dredging that is allowed under the statute? See also s. NR 326.10 (2) (c) 4.

2. Form, Style and Placement in Administrative Code

a. The amendments to existing subsections in s. NR 326.03 and the creation of new subsections should be done sequentially in separate SECTIONS.

b. There is no s. NR 326.09 (1) (c) 3. Is this omission intentional?

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

a. It is not clear why s. 30.20 (1g) (b) 2. is cross-referenced in s. NR 326.02.

b. In the definition of “boat slip” in s. NR 326.03 (1g), the phrase “along or adjacent” seems to be redundant. Is adjacent sufficient? Also, a definition or explanation of the term “catwalks” would improve this definition.

c. The defined term in s. NR 326.03 (1k) should be “change of ownership” (emphasis added), which is the term used in s. NR 326.08 (2) (c) 4.

d. The hyphen in s. NR 326.03 (1t) should be deleted.

e. The second sentence of s. NR 326.07 (1) should commence: “If the activity is authorized under a general permit...”

f. It would be useful to add a note after s. NR 326.07 (1) citing the department’s authority for abatement under s. 30.294, Stats.

g. The term “line of navigation” as used in s. NR 326.08 (1) (c) 4. is not defined in either the statute or the rule. The exemption in s. 30.12 (1g) (f) authorizes piers without a permit where the water is three feet deep. Is this the same as the “line of navigation”?

h. The standard in s. NR 326.08 (1) (c) 4. allows a pier that extends into the water out to the line of navigation or the length of the boat using the pier. Is this standard meant to be the shorter or the greater of those two distances? If the length of the pier is measured according to the length of the boat using it, what length of pier is authorized if, for example, the riparian is allowed three boat slips?

i. The standard in s. NR 326.08 (1) (c) 7. is difficult to understand. The standard prohibits a pier or wharf that is a “solid structure,” but all piers and wharves are “solid.”

j. The standard in s. NR 326.08 (1) (c) 9. prohibits a pier or wharf that interrupts the free movement of water so as to cause the “formation of land.” This seems to suggest that pier or wharf may not cause littoral drift that creates deposits above the water level. Is this the case, or should the rule simply prohibit a pier or wharf that causes the deposition of littoral drift?

k. Section NR 326.08 (1) (d) 1. d. should end with “interest.” The additional references are not needed because of the definition in s. NR 326.03 (1b).

l. The hyphen in s. NR 326.08 (1) (d) 1. c. should be deleted.

m. Section NR 326.08 (2) (a) should commence: “Authorization under general permits....”

n. Section NR 326.08 (2) (c) (intro.) should refer to “the general permit under this paragraph....”

o. Section NR 326.08 (2) (c) 3. could be clarified to indicate better what it means to meet the previous two subdivisions. Does this mean that the pier must have a deck and two boat slips?

p. Should s. NR 326.08 (2) (d) (intro.) refer to eligibility for a general permit “under par. (c)”? Also, “any of the following apply” should be inserted before the colon, and all of the subdivisions should end with a period.

q. The title of s. NR 326.08 (3) (e) refers to a municipal marina, but municipal marinas are not addressed in the text of that paragraph. Also, it appears that piers or wharves that may be authorized under individual permit pursuant to s. 30.12 (3m), Stats., are not limited to commercial or municipal marinas.

r. Should s. NR 326.08 (5) prohibit the construction or maintenance of ineligible piers or wharves?

s. The statutory cross-reference to s. 30.12 (3) (a) 6., in s. NR 326.09 (1) (c) 6., appears to be incorrect. That statute does not refer to municipal ordinances.

t. Section NR 326.09 (1) (c) 10. requires a boat shelter to be connected to adjacent uplands by a pier. However, s. 30.12 (1g) (e) allows a boat shelter to be placed adjacent to the riparian owner’s pier or to the shoreline on the riparian owner’s property.

u. Can s. NR 326.09 (1) (c) 12. be clarified by referring to storage facilities permitted “within the boat shelter and above the height of the eaves of the boat shelter”?

v. Should s. NR 326.09 (1) (c) 15. refer to the placement of boat shelters as close as practicable “adjacent to each property or pier”?