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# Wisconsin Legislative Council

## RULES CLEARINGHOUSE

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### CLEARINGHOUSE RULE 22-013

#### Comments

**[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Council Staff and the Legislative Reference Bureau, dated November 2020.]**

#### 1. Statutory Authority

a. Section NR 300.04 (2) establishes eligibility criteria for exemptions provided under subch. II of ch. 30, Stats. However, in many instances, ch. 30, Stats., provides statutory eligibility criteria for exemptions and authorizes a more limited department review.

For example, the statutes authorize the department to promulgate rules concerning the exemptions under s. 30.12 (1g), Stats., but that authority is limited to: (1) establishing reasonable installation practices for the placement of structures or the deposit of material to minimize environmental impacts; (2) establishing reasonable construction and design requirements for the placement of structures; and (3) establishing reasonable limitations on the location of the placement of structures or the deposit of material at the site affected by the activity. The statutes also specify that those rules may not establish practices or requirements that prohibit the placement of structures or the deposit of material or that render the placement of structures or the deposit of material economically cost-prohibitive. Similar limitations apply to the department’s authority to promulgate rules concerning activities that are exempt under s. 30.20 (1g), Stats.

When including different, and less specific, requirements, the list of eligibility criteria in s. NR 300.04, the department should explain why it does not exceed the scope of its authority to establish conditions for exemptions under ss. 30.12 (1g) and 30.20 (1g), Stats.

In addition, other ch. 30, Stats., exemptions provide more specific statutory eligibility criteria and do not appear to authorize the department to require criteria other than the statutory criteria. For example, the statutes do not appear to authorize the department to promulgate rules imposing conditions with respect to activities exempt under s. 30.12 (1k), Stats.

Relatedly, it is not clear that the statutes authorize the department to require a person to affirmatively confirm that an activity satisfies eligibility criteria before undertaking an exempt activity. For some exemptions, the statutes provide a procedure for voluntary submission of a statement to facilitate expedited department review of eligibility for an exemption for a proposed activity. The statutes do not appear to allow the department to require persons to “confirm”

eligibility outside of those statutory procedures. The department should explain its authority for the above provisions in greater detail.

b. Section NR 300.04 (4) appears to implement the statutory procedure under ss. 30.12 (2r), 30.123 (6r), and 30.20 (1r), Stats., for department review of eligibility for certain exemptions. However, it requires a person to submit items in addition to the information required under the statutes, including “other technical information about the project requested by the department”. Although some additional information may be implied as necessary to implement the statutory review procedure, the department should review and explain whether its request of additional items, including “other technical information”, aligns with the statutory intent relating to the exemptions, as well as whether details on such information, if statutorily authorized, should be specified directly in the rule text.

Similarly, s. NR 300.04 (6) provides an exception to the 15-day window provided in the statutes for department review of a proposed activity, if the department determines that information a person has provided is inaccurate or insufficient. It is not clear that ss. 30.12 (2r), 30.123 (6r), and 30.20 (1r), Stats., authorize such an exception. The department should review and explain whether this provision aligns with the statutory intent of the related statutes.

c. The statutes authorize the department to require permits in lieu of certain categories of exemptions under ch. 30, Stats., if the department has conducted an inspection and determined that site-specific conditions are necessary to prevent certain environmental pollution, material injury to riparian rights, or significant adverse impacts to public rights. Proposed s. NR 300.04 (7) instead appears to authorize the department to require a permit in lieu of any exemption in subch. II of ch. 30, Stats., on the basis that a proposed activity does not meet an “eligibility standard prescribed in statute or rule”, and states that, in doing so, the department “may rely” on an inspection. Because it allows the department to require a permit in lieu of exemption for all rather than only some exemptions, on a broader basis than the statutes allow, and with a voluntary rather than mandatory inspection, that provision appears to exceed the department’s statutory authority. The department should explain its authority for the provision in greater detail.

d. Although s. 281.36 (6) (a), Stats., arguably confers broader authority to interpret requirements for wetlands exemptions than the statutes confer for certain ch. 30 exemptions, discussed above, the proposed rule presents some similar statutory authority questions in the wetlands context. The department should review the proposed provisions relating to wetland exemptions to ensure they are authorized. For example, similar to the discussion above, it is not clear that the department may in all cases require a person proposing an exempt wetlands activity to affirmatively “confirm” that certain eligibility criteria are satisfied, as proposed s. NR 300.05 (1) (intro.) appears to require. Likewise, it is not clear that the department has the authority to require items under s. NR 300.05 (6) that differ from the information specified for submittal under the process under s. 281.36 (4n) (e), Stats. The department should also specifically explain its authority to extend the timeline for reviewing exemption requests under s. 281.36 (4n) (e), Stats., for reasons other than those specified in that statute.

e. In s. NR 300.06, it appears that the department may have applied certain procedures applicable to wetland general permits to general permits issued under ch. 30, Stats. For example, the statutes allow the department to temporarily toll the 30-day review period for wetlands general permits based on adverse weather, but ch. 30, Stats., does not appear to provide analogous authority to do so. If authority to do so cannot be identified, s. NR 300.06 (4) (f) should be revised to clarify

that it applies only to wetlands general permits. The department should review the provision to ensure that the statutes authorize each procedural requirement for both types of general permits, more generally.

f. The department should more specifically explain its authority to provide for the dismissal of a person's request after 30 days under s. NR 300.06 (4) (e) 3. or after 45 days under s. NR 300.07 (4) (a) 6.

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

New SECTIONS should be added to the rule text to repeal chs. NR 301, 305, and 310, as referenced in the enumeration of provisions treated by the proposed rule.

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

a. Section NR 300.01 could be revised for greater clarity. Specifically, consider replacing the word "describes" with "establishes" or "prescribes", or another word that conveys that the chapter sets forth requirements that will have the force and effect of law. In addition, consider replacing the phrase "This includes" with ", including", because "this" should typically be singular when used as a demonstrative pronoun. Finally, in addition to procedures, timelines, and fees for decisions and services, would it be accurate to say that the chapter also enumerates standards or eligibility criteria for exemptions? If so, that could be specified.

b. Is the definition of "application" in s. NR 300.03 (1) necessary in light of the revision to the applicability provision in s. NR 300.02? Although the term "application" is used throughout the chapter, are there instances in which the meaning of the word is unclear in context or otherwise requires definition? If not, the department could consider removing the definition, partly to avoid possible confusion that the phrase "any other information that can reasonably be required from an applicant" might pose with respect to applications for which the statutes or other provisions in this or other rule chapters establish more definitive requirements.

c. In s. NR 300.03 (7), rather than defining a general permit as being "issued" for a single project, would it be more accurate to define a general permit as a permit that is issued to allow a category of regulated activities, but for which the department confirms applicability with respect to individual projects?

d. In s. NR 300.03 (8) (a), should "and" be replaced with "or"?

e. In s. NR 300.04 (2) (intro.), the phrase "if that person can confirm" could be removed or revised to avoid confusion with respect to the process established in s. NR 300.04 (4), in which the department may determine eligibility for a particular exemption. See also the related discussion in comment 1. a., above.

f. In s. NR 300.04 (8), the word "determines" in the phrase "information that determines" could be replaced with "demonstrates" or "shows".

g. Related to the comment regarding s. NR 300.03 (7), in s. NR 300.06 (2), the phrase "person who seeks a general permit" could be revised to be more consistent with the statutory language, which directs the department to issue general permits with statewide application and authorizes a person to "proceed with an activity ... under a general permit", if eligible. [See, e.g., s. 30.206 (1) (a) and (3) (a), Stats.]