



# Wisconsin Legislative Council

## RULES CLEARINGHOUSE

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### CLEARINGHOUSE RULE 23-010

#### 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.]**

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

a. In SECTION 2 of the proposed rule, in s. NR 102.045 (1), change “subch. I of chs. NR 207 and 216” to “subch. I of ch. NR 207 and ch. NR 216”.

b. In SECTION 10 of the proposed rule, it may be helpful to indicate that newly created s. NR 207.001 should appear before subch. I of ch. NR 207 in the promulgated administrative code.

c. In SECTION 11 of the proposed rule, in s. NR 207.031 (9) (a) 2., change “NR 102.045 (2) (b) 3. 1. to 3.” to “NR 102.045 (2) (b) 1. to 3.”.

d. In SECTION 15 of the proposed rule, in s. NR 216.008 (7) (a) 2., change the cross-reference “s. NR 216.008 (5)” to “sub. (5)”.

e. In SECTION 15 of the proposed rule, in s. NR 216.008 (8) (a) 2., add a period after both “1” and “3”.

f. Would the proposed rule benefit from an initial applicability clause? [s. 1.03 (3), Manual.] For instance, will the revised anti-degradation policy and procedures apply only to discharges first proposed after the rule takes effect? Or will they be retroactive to pending permit applications?

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

a. In SECTION 2 of the proposed rule, in s. NR 102.045 (4), the cross-reference to s. NR 207.031 (4) (b) might be an error. Should the cross-reference be to s. NR 207.031 (6) (b) instead?

b. In SECTION 11 of the proposed rule, in s. NR 207.021 (6), the cross-reference to s. NR 207.031 (6) (a) might be an error. Should the cross-reference be to s. NR 207.031 (8) (a) instead?

c. The proposed rule in two places refers to forms that an applicant must submit. [See s. NR 207.031 (1) in SECTION 11 and s. NR 216.008 (4) (a) in SECTION 15.] Add notes indicating how an applicant may obtain the forms. [s. 1.12 (3), Manual.]

d. In SECTION 11 of the proposed rule, s. NR 207.031 (8) (a) 3. d. requires the use of procedures under s. NR 106.05 to determine whether a proposed discharge will exceed a given threshold. The procedures under s. NR 106.05, however, apply only to a discharge of toxic or organoleptic substances. It is not clear whether the department must follow the procedures under s. NR 106.05 when making a determination under s. NR 207.031 (8) for a discharge that does **not** contain toxic or organoleptic substances.

e. In SECTION 11 of the proposed rule, s. NR 207.031 (8) (a) 3. e. contains the cross-reference “under subd. 2.” Subdivision 2. applies only to a discharge in a TMDL. Is the cross-reference meant to be limited in that regard? Or should it instead be something like “under this subdivision”?

f. In SECTION 11 of the proposed rule, in s. NR 207.031 (8) (c) 3. c., the cross-reference to the procedure under s. NR 102.12 (3) is unclear. The cross-reference is located in a provision about all Great Lakes system waters. However, the cross-referenced provision applies only to the waters of the Lake Superior basin. It is not clear whether the applicant must follow the procedure under s. NR 102.12 (3) if the proposed discharge does **not** involve the waters of the Lake Superior basin.

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

a. Throughout the proposed rule, the terms “stormwater” and “storm water” are each used numerous times. If these terms are synonymous, consider adopting uniform usage.

b. In SECTION 2 of the proposed rule, in s. NR 102.045 (2) (c) 2. c., the meaning of “unidirectional flow waters that have an upstream low flow of zero” is not clear. Can some unidirectional flow waters have an upstream flow? If not, could this be shortened to just “unidirectional flow waters”? If some unidirectional flow waters can have an upstream flow, what is a “low flow of zero”? Is that the same as “no upstream flow”?

c. In SECTION 2 of the proposed rule, s. NR 102.045 (6) refers to “persistent, bioaccumulative chemicals of concern”. The term “bioaccumulative chemical of concern” is defined, but “persistent, bioaccumulative chemicals of concern” is not. Is that latter term meant to be a subset of “bioaccumulative chemicals of concern”? If so, it should be defined.

d. In SECTION 10 of the proposed rule, the following comments refer to the definitions in s. NR 207.001:

- (1) In sub. (5), would changing “as established under” to “as defined in” add clarity?
- (2) In sub. (9), consider using “limitation” instead of “limitations” in both places because the singular form of a word is generally preferred. [s. 1.05 (1)(c), Manual.]

e. In SECTION 11 of the proposed rule, the following comments refer to the definitions in s. NR 207.021:

- (1) In sub. (3):
  - (a) In par. (a), the definition of “increased discharge” refers to a “change” in concentration, level, or loading of a substance. It is not clear whether this would apply only to an increase in concentration, level, or loading, or whether it would apply also to a decrease in concentration, level, or loading. Consider clarifying the definition in that respect. Compare, for example, the definition

of “increased discharge” in s. NR 216.008 (3) (d), as created by SECTION 15 of the proposed rule. In relevant part, that definition means “a change ... that would reasonably increase the discharge of pollutants...”. In that definition, it is clear that a change that would decrease the discharge of pollutants would not be an “increased discharge”.

(b) In par. (b) 1. c., add a “serial” or “Oxford” comma after the word “levels”. [s. 1.06 (1) (b), Manual.]

(2) In sub. (4):

(a) Convert subds. 1. to 4. into pars. (a) to (d).

(b) In par. (c) (formerly subd. 3.), changing “to discharge pollutants” to “to a discharge of pollutants” would be grammatically preferable.

(c) In par. (d) (formerly subd. 4.), the phrase “reauthorization of a previously permitted discharge that does not currently have permit coverage” is not clear. Does this mean a discharge that once was covered by a permit, but the permit is no longer valid? If so, is it correct that issuing a new permit for the discharge is considered a “reauthorization”?

f. In two places in the proposed rule, the following phrase appears: “the department shall determine whether any proposed lowering of water quality has been prevented or lessened”. [See s. NR 207.031 (1) in SECTION 11 and s. NR 216.008 (4) (a) in SECTION 15.] This phrase is difficult to understand, particularly because it combines the prospective (“proposed”) with the past (“prevented or lessened”). Is the intent that these provisions require the department to consider whether the permit applicant has taken steps to mitigate the negative effects of a proposed discharge on water quality? Also, what is the ramification of a determination that a proposed lowering of water quality has or has not been prevented or lessened?

g. The proposed rule in two places includes the following cursory requirement: “The department shall seek and consider public input”. [See s. NR 207.031 (1) in SECTION 11 and s. NR 216.008 (4) (a) in SECTION 15.] In related provisions, the proposed rule includes more specific and robust public input requirements. [See s. NR 207.031 (9) (c) and (d) in SECTION 11 and s. NR 216.008 (8) (c) and (d) in SECTION 15.] Is there a need to retain the two cursory requirements? If so, it would be useful to include a cross-reference, such as the following: “The department shall seek and consider public input pursuant to sub. (9) (c) and (d)”.

h. In SECTION 11 of the proposed rule, s. NR 207.031 (6) (a) refers to “state outstanding resource waters”. In SECTION 15 of the proposed rule, s. NR 216.008 (7) (b) (intro.) refers to “outstanding resource waters”. Assuming these refer to the same bodies of water, usage should be consistent. “Outstanding resource waters” is the term used in s. NR 102.10 and may be preferable for that reason.

i. In SECTION 11 of the proposed rule, in s. NR 207.031 (8) (c) 3. a., remove the comma after “applicant”.

j. In SECTION 11 of the proposed rule, in s. NR 207.041 (1) (intro.), is the meaning of the phrase “conveyance of coverage” clear? It is not used elsewhere in ch. NR 207 (other than the title of s. NR 207.041 (2)).

k. In SECTION 15 of the proposed rule, in s. NR 216.008 (7) (e), changing “demonstrate antidegradation requirements” to “demonstrate that antidegradation requirements” may add clarity.

l. In SECTION 15 of the proposed rule, in s. NR 216.008 (8) (d), the meaning of the phrase “for approval or denial of a permit to discharge” at the end of the final sentence is not clear. Can it be removed without changing the meaning of that sentence?