

Chapter NR 2

PROCEDURE AND PRACTICE

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Note: Chapter WCD 2 as it existed on March 31, 1973 was repealed, and a new chapter NR 2 was created, Register, March, 1973, No. 207, effective April 1, 1973.

NR 2.01 Application of rules. These rules shall apply in all proceedings and hearings before the department of natural resources except as specifically provided otherwise.

History: Cr. Register, March, 1973, No. 207, eff. 4-1-73.

NR 2.02 Definitions. (1) DEPARTMENT. Department means the department of natural resources.

(2) SECRETARY. Secretary means the secretary of the department of natural resources.

(3) CONTESTED CASE. Contested case has the meaning specified in s. 227.01, Stats.

(4) NONCONTESTED CASE. A noncontested case means any proceeding before the department which is not a contested case.

History: Cr. Register, March, 1973, No. 207, eff. 4-1-73; r. and recr. (3) and cr. (4), Register, March, 1984, No. 339, eff. 4-1-84.

NR 2.03 Service on the department. All petitions for hearings, petitions for rules, petitions for declaratory rulings, answers and complaints required by any statute or rule shall be served on the secretary, either by delivery to the office of the secretary, or by mailing to the secretary by certified mail, at the following address: P. O. Box 7921, Madison, Wisconsin 53707.

Note: The office of the secretary is located on the 5th floor of GEF 2, 101 S. Webster St., Madison, WI.

History: Cr. Register, March, 1973, No. 207, eff. 4-1-73; am. Register, March, 1978, No. 267, eff. 4-1-78.

NR 2.04 Service of pleadings. After a matter has been set for a contested case hearing, all pleadings and papers shall be served by delivery or by mail to the division of hearings and appeals, the bureau of legal services, department of natural resources, and to all identified parties.

Note: The Division of Hearings and Appeals is located at 6300 University Avenue, Suite 200, Madison, WI 53705. The department's Bureau of

Legal Services is located on the fifth floor of GEF 2, 101 S. Webster St., Madison, WI, mailing address: Box 7921, Madison, WI 53707.

History: Cr. Register, March, 1973, No. 207, eff. 4-1-73; am. Register, March, 1978, No. 267, eff. 4-1-78; am. Register, March, 1984, No. 339, eff. 4-1-84.

NR 2.05 Forms of petitions. Petitions shall conform with the applicable statute as to form, content, number of signatories and verifications. All petitions shall be filed within the time specified by statute or administrative code, or, where no time is specified, within 30 days of the date of the order or decision to be reviewed. Petitions are deemed filed upon receipt by the department. The department may request additional information concerning any petition or request filed under this section. The department may deny any such petition or request where the information required or requested under this section is not provided. Forms of petitions in various proceedings shall follow the formats below:

(1) REVIEW OF ORDERS. The following form shall be used in seeking review of orders issued pursuant to ss. 144.025 (2) (d) 1., 144.025 (2) (k), 144.025 (2) (r), 144.423 (1), 144.47 (1), 144.73 (1), 144.76 (4) and (7) (c), 144.83 (4) (c) and 144.91 (1), Stats.

To the Department of Natural Resources:

The undersigned hereby petitions for a review of the department order dated _____, 19 ____, whereby it was ordered _____

_____. The grounds for this petition are _____

_____. The modification or change desired is _____
Date _____
Signature _____
Verification _____

(2) ADOPTION, REPEAL OR AMENDMENT OF RULES OR GENERAL ORDERS OF THE DEPARTMENT. The following form shall be used in petitioning for rules pursuant to s. 227.12, Stats.

(a) For adoption of general order or rule:

To the Department of Natural Resources:

The undersigned hereby petitions for the adoption of a rule relating to: _____

The grounds for this petition are _____

The petitions' interest in the request is _____

The authority of the department to act is _____

Date _____

Signatures (5 needed unless petitioner is a municipality or corporation) _____

(b) For amendment of a general order or rule: To the Department of Natural Resources:

The undersigned hereby petitions for the amendment of rule number _____ which provides as follows:

The grounds for this petition are _____

The modification or change desired is _____

The petitioners' interest in the request is _____

Date _____

Signatures (5 needed unless petitioner is a municipality or a corporation) _____

(3) DECLARATORY RULINGS. The following form shall be used in petitioning for declaratory rulings pursuant to s. 227.41, Stats.

To the Department of Natural Resources:

In the matter of the applicability of rule _____ (or regulation or statute) to the petitioner _____ Said rule provides as follows: _____

The grounds for this petition are to determine the applicability of the above rule to the petitioner because of the following state of facts: _____

The reasons for the requested ruling are _____

The following are the names and addresses of all other persons other than the petitioner upon whom it is sought to make the ruling binding: _____

Date _____
Name _____
Address _____
Signature _____
Verification _____

(4) SIX CITIZEN COMPLAINTS. The complaint and answer in the proceeding shall conform with the requirements of the applicable provisions of ch. 802, Stats. The following form shall be used in filing 6 citizen complaints pursuant to s. 144.975, Stats.;

To the Department of Natural Resources:

(Name)

(Address)

is causing or will cause alleged or potential environmental pollution, caused by the activities described herein: _____

The facts supporting the contention that alleged or potential environmental pollution is or will take place are as follows: _____

The nature of the alleged or potential environmental pollution is: _____

The specific relief sought by the complainants is: _____

Name and address of a person within the state authorized to receive service of the answer and other papers on behalf of the complainants:

(Name)

(Address)

Signatures of 6 or more citizens

Verifications

(5) HEARINGS UNDER S. 227.42, STATS. The request for a hearing to be treated as a contested case under s. 227.42, Stats., shall be in writing, and served upon the secretary within 30 days after the department action or inaction complained of, or within the time specified by the statute or administrative rule which accords a right to a hearing. The following form shall be used in requesting such a hearing:

To the Department of Natural Resources:

The undersigned hereby requests that a hearing be treated as a contested case under s. 227.42, Stats.

The agency action or inaction which is the basis for the request for a hearing is: _____

The substantial interest injured or threatened with injury by agency action or inaction is: _____

The evidence of legislative intent that the interest is to be protected is as follows: _____

The injury to the person requesting the hearing is different in kind or degree from injury to the general public caused by agency action or inaction because: _____

There is a dispute of material fact, and the disputed facts are: _____

The statute or administrative rule other than s. 227.42, Stats., which accords a right to a hearing is: _____

(Signature)

(Address)

History: Cr. Register, March, 1973, No. 207, eff. 4-1-73; am. (intro), (1), (2) and (3), r. and recr. (4), cr. (5), Register, March, 1984, No. 339, eff. 4-1-84; correction in (2) (intro.), (3) and (5) made under s. 13.93 (2m) (b) 7, Stats., Register, January, 1987, No. 373.

NR 2.06 Notice of hearing. (1) FORM. Notice of hearing shall be in writing, with a title identifying the matter to be set for hearing, and where appropriate, contain a docket number.

(2) CONTENT. The notice of hearing shall contain the following information:

- (a) Date, time and location of the hearing.
- (b) The statutory authority for the hearing.
- (c) A short summary of the matter to be considered.

(d) Such other information as the department or the hearing examiner may deem appropriate.

(3) SERVICE. Except as otherwise specifically required, service of notice of hearing may be made by personal delivery or by mailing a copy thereof to the last known post office address of the person to be served in a sealed envelope with first class postage prepaid thereon and shall be deemed to have been served upon deposit thereof in the U.S. mails. The department may require service by registered or certified mail when deemed appropriate and with the same effect.

History: Cr. Register, March, 1973, No. 207, eff. 4-1-73; am. (2) (d), Register, March, 1984, No. 339, eff. 4-1-84.

NR 2.065 Contested case designation. (1) Except as provided in sub. (2) or unless otherwise ordered by the department or hearing examiner, all department contested case hearings are class 1 proceedings under s. 227.01 (2), Stats.

(2) Hearings held under ss. 30.03, 144.025, 144.423 (1), 144.44 (8), 144.465, 144.47 (1), 144.725, 144.73 (1), 144.76 (4) and (7) (c), 144.83 (4) (c), 144.91, 144.965, 144.975 and 227.42, Stats., and hearings which revoke or suspend a

department-issued license as defined in s. 227.01 (3), Stats., are class 2 proceedings.

History: Emerg. cr. eff. 11-1-76; cr. Register, March, 1977, No. 255, eff. 4-1-77; am. Register, March, 1984, No. 339, eff. 4-1-84; correction in (2) made under s. 13.93 (2m) (b) 7, Stats., Register, January, 1987, No. 373.

NR 2.07 Place of hearings. Unless otherwise specifically provided by law, all hearings shall be held at the offices of the department of natural resources, the division of hearings and appeals, or at the time, date and place designated by the department or the hearing examiner in the hearing notice.

Note: The offices of the department of natural resources are located at 101 S. Webster, Madison, WI. The offices of the Division of Hearings and Appeals are located at 6300 University Avenue, Madison, WI.

History: Cr. Register, March, 1973, No. 207, eff. 4-1-73; am. Register, March, 1984, No. 339, eff. 4-1-84.

NR 2.08 Persons entitled to participate in contested case hearings. (1) In addition to the parties named in the pleadings, divisions of the department, the public intervenor if authorized by s. 165.07, Stats., and any member of the public may participate in any department contested case hearing.

(2) Any person desiring to participate in a department contested case hearing, whether on his or her own behalf or as an authorized agent or attorney, shall enter an appearance in person by giving his or her name and address, the name and address of any party being represented, and the capacity in which he or she is representing such party. A person may enter his or her appearance either prior to or at the commencement of a contested case hearing.

(3) Any person entering an appearance under sub. (2) may examine and cross-examine witnesses and may present testimony and other evidence. Such person shall be served with a copy of the department's order.

(4) Any documents concerning a contested case hearing filed with an agency prior to issuance of a final decision in the case shall be served on all persons entering appearances under sub. (2).

(5) The department or the hearing examiner may require persons who wish to be considered as parties at a contested case hearing to attend a prehearing conference. The department or the hearing examiner may issue a preliminary certification of parties at such a prehearing conference.

(6) The department or the hearing examiner shall prepare a list of persons who are certified as parties and set forth such list in the department's order. For purposes of certifying parties under s. 227.47, Stats., and this section, the department or the hearing examiner shall consider the following criteria:

- (a) Nature of agency proceeding;
- (b) Nature and effect of decision made; and

(c) Nature of participation by those involved in the proceeding, including attendance at hearings, cross-examination of witnesses, and submission of briefs.

(7) Persons certified as parties shall be served with exhibits, pleadings, correspondence and other documents submitted by parties after issuance of the decision, including those specified in ss. 227.44 (7), 227.49, and 227.50 (2),

Stats. Such persons shall also be served with petitions for rehearing and petitions for judicial review.

History: Cr. Register, March, 1973, No. 207, eff. 4-1-73; am. (2), Register, July, 1978, No. 271, eff. 8-1-78; r. and recr. Register, March, 1984, No. 339, eff. 4-1-84; correction in (6) (intro.) and (7) made under s. 13.93 (2m) (b) 7, Stats., Register, January, 1987, No. 373.

NR 2.085 Environmental impact statements. (1) When an environmental impact statement has been written on a proposed action for which a contested case hearing is held, all evidence regarding compliance with s. 1.11, Stats., shall be taken at that hearing unless otherwise provided by statute.

(2) In the absence of specific authority for a contested case hearing on a proposed action for which an environmental impact statement has been written, a contested case hearing shall be held on the proposed action if a petition for a hearing meeting the requirements of s. 227.42, Stats., is received by the department unless otherwise provided by statute.

(3) If a contested case hearing will be held on a proposed action for which an environmental impact statement has been drafted, the informational hearing provided for by s. NR 150.23 (1) shall be combined with the contested case hearing if circumstances and statutes allow. At a combined hearing, the informational portion shall precede the contested portion.

(4) If no contested case hearing will be held on a proposed action for which an environmental impact statement has been drafted, any person may petition for an opportunity to cross examine the person who is responsible for a specific portion of the environmental impact statement or present witnesses or evidence at the public informational hearing held under s. NR 150.23 (1). The petition shall include a statement of position on the action or proposal and specific statements and issues that are desired to be cross examined or presented. Petitions for opportunity to cross examine shall be filed with the department within 20 days after the notice of the environmental impact statement is published under s. NR 150.23 (1) (c) 2. The notice under s. NR 150.23 (1) (c) 2., published in conformance with s. NR 150.23 (1) (c) 1., shall include a statement that the failure to file the petition provided for in this subsection shall preclude the opportunity to cross examine.

History: Cr. Register, June, 1985, No. 354, eff. 7-1-85; am. Register, January, 1987, No. 373, eff. 2-1-87.

NR 2.09 Changes in time or place of hearing; adjournments; failures to appear. (1) **CHANGES.** Requests for changes in the time and place of a scheduled hearing will be granted only for good cause shown prior to any required newspaper publication of legal notice thereof.

(2) **ADJOURNMENT.** The department or the hearing examiner may adjourn a hearing for good cause shown, the hearing to be reset or reconvened at the discretion of the department or the hearing examiner or at a time and place set by the department or the hearing examiner on the record of the hearing prior to adjournment.

(3) **FAILURE TO APPEAR.** (a) If an applicant for a permit or license fails to appear at a hearing following due notice, the department or the hearing examiner may dismiss the Register, February, 1996, No. 482

application unless the applicant shows good cause for the failure to appear. If an applicant fails to submit proof of publication and notice as required by statute, the department or the hearing examiner may dismiss the application and cancel the hearing.

(b) If a respondent in an enforcement proceeding fails to appear, the department or the hearing examiner shall take testimony and issue, modify or rescind the order as may be appropriate.

(c) If a petitioner in a proceeding fails to appear, the department or the hearing examiner may dismiss the petition unless the petitioner shows good cause for the failure to appear.

History: Cr. Register, March, 1973, No. 207, eff. 4-1-73; am. (2) and (3), cr. (3) (c), Register, March, 1984, No. 339, eff. 4-1-84.

NR 2.10 Witnesses and subpoenas in contested cases. The department or the hearing examiner may issue subpoenas to compel the attendance of witnesses at hearings or discovery proceedings under s. NR 2.11. A subpoena requiring the production of material may be issued if the person requesting such subpoena specifies the documents to be presented by the subpoenaed witness. Sections 814.67, 885.06 and 885.07, Stats., shall govern the payment of witness fees and expenses.

History: Cr. Register, March, 1973, No. 207, eff. 4-1-73; am. Register, March, 1984, No. 339, eff. 4-1-84.

NR 2.105 Witnesses in noncontested cases. Subpoenas may be issued by the department to compel the attendance of witnesses at hearings in noncontested cases, except rules hearings. Witnesses subpoenaed in such cases are entitled to payment of witness fees and expenses, as provided in ss. 814.67, 885.06 and 885.07, Stats.

History: Cr. Register, March, 1984, No. 339, eff. 4-1-84.

NR 2.11 Preservation of testimony and discovery of evidence. The department or any party in a contested case hearing may obtain discovery and preserve testimony as provided by ch. 804, Stats. For good cause, the hearing examiner may allow a shorter or longer time for discovery or preserving testimony than is allowed by ch. 804, Stats. For good cause shown, the hearing examiner may issue orders to protect persons or parties from annoyance, embarrassment, oppression or undue burden, as provided in s. 804.01 (3), Stats. The hearing examiner may also issue orders to compel discovery. Discovery and preservation of testimony are not available in noncontested case hearings.

History: Cr. Register, March, 1973, No. 207, eff. 4-1-73; am. Register, April, 1976, No. 244, eff. 5-1-76; am. Register, March 1978, No. 267, eff. 4-1-78; am. Register, March, 1984, No. 339, eff. 4-1-84.

NR 2.12 Informal conferences. (1) **CALL AND PURPOSE.** The department or the hearing examiner may call an informal conference at any time prior to or during the course of a hearing, and may require the attendance of all persons who are or wish to be certified as parties to the proceeding. The purposes of such conferences shall, insofar as applicable, be to consider:

- (a) Clarification of issues;
- (b) Amendments to the pleadings;
- (c) Admissibility of evidence;

(d) The possibility of obtaining admissions or stipulations of fact and of documents which will avoid unnecessary proof;

(e) The limitation of the number of witnesses;

(f) The identification of all parties to the proceeding; and

(g) Such other matters as may aid in the disposition of the matter.

(2) **RECORDING STIPULATIONS.** The hearing examiner may record any stipulations made at such informal conferences, which shall bind the parties thereto in the proceedings.

(3) **DECISION ON BRIEFS.** If an informal conference is held and the parties agree that there is no material dispute of fact raised by the pleadings, the hearing examiner or department may cancel the hearing and may decide the matter on the basis of briefs submitted by the parties.

History: Cr. Register, March, 1973, No. 207, eff. 4-1-73; am. (1) and cr. (3), Register, March, 1984, No. 339, eff. 4-1-84.

NR 2.13 Conduct of contested case hearings. (1) PROCEDURE. The hearing examiner shall open the hearing and make a concise statement of its scope and purposes. Appearances shall be entered on the record. The hearing examiner then shall state the issues in the proceedings. Thereafter, parties may make motions or opening statements.

(2) **OPENING STATEMENTS.** When opening statements are made they shall be confined to:

(a) A brief summary or outline in clear and concise form of the evidence intended to be offered; and

(b) A statement of ultimate legal points relied upon.

(3) **ORDER OF PROCEEDING.** (a) In proceedings where the department has issued an order or proposed order and the order recipient requests a hearing on the matter, the department shall proceed first with the presentation of evidence and shall have the burden of proof.

(b) Unless otherwise ordered by the department or the hearing examiner, in proceedings where a person has been granted a hearing under s. 227.42, Stats., or where persons have filed a complaint under s. 144.975, Stats., such persons shall proceed first with the presentation of evidence and shall have the burden of proof.

(4) **OFF RECORD.** Proceedings may be conducted off the record only when the hearing examiner permits. If a discussion off the record is deemed pertinent by the hearing examiner, he may summarize it on the record.

(5) **OBJECTIONS TO EVIDENCE.** Any argument before the examiner on objections to receipt of evidence or on motions to strike will be recorded and parties will be afforded the opportunity to make an offer of proof.

(6) **CONTEMPT.** Contemptuous conduct at a hearing shall be grounds for exclusion from the hearing.

History: Cr. Register, March, 1973, No. 207, eff. 4-1-73; r. and recr. (3), Register, June, 1979, No. 282, eff. 7-1-79; am. (1), r. and recr. (3), Register, March, 1984, No. 339, eff. 4-1-84; correction in (3) (b) made under s. 13.93 (2m) (b) 7, Stats., Register, January, 1987, No. 373.

NR 2.135 Conduct of noncontested case hearings. (1) NOTICE. At least 10 days notice shall be given of the time, date and place of a noncontested case hearing.

(2) **PROCEDURE.** (a) The presiding officer will open the hearing and make a concise statement of its scope and purposes. Appearances may be entered on the record. Divisions of the department, the public intervenor if authorized by s. 165.07, Stats., and any other person may participate in any department noncontested case hearing. Any person desiring to participate in a department noncontested case hearing, whether on his or her own behalf or as an authorized agent or attorney, shall enter an appearance in person by giving his or her name and address, the name and address of any person being represented, and the capacity in which he or she is representing such person. The hearing may be recorded by use of an electronic recording device.

(b) Persons entering an appearance may make statements, offer evidence or ask questions concerning the matter being heard. Such statements need not be made under oath. Cross-examination of those who speak is not permitted, but clarifying questions of those who speak may be allowed by the presiding officer. The presiding officer shall determine the order in which people may speak, and may continue the hearing on another date or limit the length of the presentations if it appears there will not be enough time for all who wish to speak, or if the presentations are unduly repetitious.

(c) Statements may be submitted in oral or written form. Any person may submit a written statement within the time period allowed by the presiding officer.

(3) **PARTIES.** The presiding officer shall prepare a list of persons who are certified as parties and set forth such list in the department's decision, if one is issued. For purposes of certifying parties under s. 227.47, Stats., and this subsection, the presiding officer shall consider the following criteria:

1. Nature of agency proceeding;

2. Nature and effect of decision made; and

3. Nature of participation by those involved in the proceeding, including attendance at hearings and presentation of oral or written statements.

(4) **TRANSCRIPTS.** Typed transcripts of noncontested case hearings will be prepared upon request and receipt of payment. The person requesting the transcript is responsible for all reasonable costs incurred by the department in transcribing the record and preparing the transcript. If more than one person requests a transcript, the department may divide the costs of preparation equally among all such persons. In lieu of a typed transcript, the department may provide any person requesting a transcript with a copy of the tape recording of the hearing, or other record if not recorded on an electronic recording device, upon payment of a reasonable fee.

(5) **APPLICABILITY.** The procedures in this section govern all noncontested case hearings held by the department, except rules hearings, which shall be conducted in accordance with s. 227.18, Stats. This section is applicable to

hearings on environmental impact statements, unless it conflicts with the requirements of ch. NR 150.

History: Cr. Register, March, 1984, No. 339, eff. 4-1-84; corrections in (3) (intro.) and (5) made under s. 13.93 (2m) (b) 7, Stats., Register, January, 1987, No. 373.

NR 2.14 Rules of evidence in contested cases. (1) RULES. Rules of evidence in contested cases are governed by s. 227.45, Stats.

(2) **ADMISSIBILITY.** Evidence submitted at the time of hearing need not be limited to matters set forth in pleadings, petitions or applications. If variances of this nature occur, then the pleadings, petitions or applications shall be considered amended by the record. The hearing examiner may, in his discretion, grant such continuances as may be necessary to give other parties adequate time to prepare evidence to rebut that involved in any such variances.

(3) **TECHNICAL DATA.** When evidence to be presented consists of technical figures so numerous as to make oral presentation difficult to follow, it may be presented in exhibit form and supplemented and explained by oral testimony.

(4) **PETITIONS.** Petitions or written communications not admissible as evidence may be filed with the hearing examiner but will not be part of the record.

(5) **EXHIBITS.** Parties offering documentary exhibits or prepared testimony may be ordered by the hearing examiner to furnish copies to all other parties in advance of the hearings and to provide such reasonable time as the hearing examiner may order to enable review of the prepared written testimony and exhibits. Upon compliance therewith, such written testimony and exhibits may be admitted in evidence as though given orally, providing the authors thereof are present and available for cross-examination.

(6) An environmental impact statement and all comments received by the department on it prior to the contested case hearing shall be received into the record of the contested case hearing under ss. 908.03 (6) and (8) and 227.45, Stats. The environmental impact statement and comments received on it shall be considered along with hearing testimony in making a decision on the merits of the proposed action, and in making findings on compliance with s. 1.11, Stats. Testimony regarding the content of the environmental impact statement or cross-examination of persons responsible for specific portions of the environmental impact statement shall be allowed. No person may use an environmental impact statement or any portion thereof as the exclusive means of meeting a burden of proof of any statutory requirements for an approval, license or permit in a contested proceeding except upon stipulation of the parties.

(7) **ENVIRONMENTAL ASSESSMENT.** An environmental assessment and all comments received by the department on it prior to the contested case hearing shall be received into the record of the contested case hearing under ss. 908.03 (6) and (8) and 227.45, Stats. The environmental assessment and comments received on it shall be considered along with hearing testimony in making a decision on the merits of the proposed action, and in making findings on compliance with s. 1.11, Stats. Testimony regarding the

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content of the environmental assessment or cross-examination of persons responsible for specific portions of the environmental assessment shall be allowed. No person may use an environmental assessment or any portion thereof as the exclusive means of meeting a burden of proof of any statutory requirements for an approval, license or permit in a contested proceeding except upon stipulation of the parties.

History: Cr. Register, March, 1973, No. 207, eff. 4-1-73; am. (1) and cr. (6), Register, March, 1984, No. 339, eff. 4-1-84; r. and recr. (6), Register, June, 1985, No. 354, eff. 7-1-85; am. (6), cr. (7), Register, January, 1987, No. 373, eff. 2-1-87; corrections in (1) made under s. 13.93, (2m) (b) 7, Stats., Register, January, 1987, No. 373.

NR 2.15 Close of hearing. (1) CLOSING AND BRIEFS. A hearing in a contested case shall be closed upon completion of the submission of all evidence and expiration of the period fixed for filing of briefs. If the time for filing briefs has expired and the brief of one or more parties is not filed within such time, the department or hearing examiner may proceed to the determination of the case. Extension of time to file briefs may be granted by the department or the hearing examiner upon good cause shown.

(2) **ADDITIONAL EVIDENCE.** If by stipulation of the parties, documentary evidence is permitted to be submitted after the close of testimony, the record will be closed when such documentary evidence is received by the department or when the specified time for furnishing it has elapsed without its being furnished. The hearing examiner may, upon the request of the stipulating parties, extend the time as originally prescribed for filing such additional evidence.

History: Cr. Register, March, 1973, No. 207, eff. 4-1-73; am. (1) Register, March, 1984, No. 339, eff. 4-1-84.

NR 2.155 Decisions in contested cases. (1) EXAMINER DECISION. The hearing examiner shall prepare findings of fact, conclusions of law and decision subsequent to each contested case heard. Unless the department petitions for judicial review as provided in s. 227.46 (8), Stats., the decision shall be the final decision of the department, but may be reviewed in the manner described in s. NR 2.20. Every decision shall include findings regarding compliance with the requirements of s. 1.11, Stats.

(2) **SECRETARY DECISION.** (a) Notwithstanding sub. (1) the secretary, prior to hearing, may direct that the record be certified to the secretary or secretary's designee for decision in accordance with the provisions of s. 227.46 (3) (b), Stats., without an intervening decision by the hearing examiner.

(b) Notwithstanding sub. (1) the secretary prior to hearing may direct that the decision be made in accordance with the provisions of s. 227.46 (2) or (4), Stats.

History: Cr. Register, December, 1976, No. 252, eff. 1-1-77; emerg. am. (2) (a), eff. 10-1-82; am. (2) (a), Register, May, 1983, No. 329, eff. 6-1-83; am. (1), Register, June, 1985, No. 354, eff. 7-1-85; am. (1), Register, September, 1986, No. 369, eff. 10-1-86.

NR 2.157 Decisions in noncontested cases. (1) DECISIONS WHEN AN ENVIRONMENTAL IMPACT STATEMENT OR ENVIRONMENTAL ASSESSMENT IS COMPLETED. The department may not commence, engage in, fund, approve, conditionally approve or disapprove an action that has been the subject of a department prepared environmental assessment or environmental impact statement until it has

made a written findings of fact, conclusions of law and decision. The decision shall include findings on whether:

(a) The department has considered the environmental impact statement or environmental assessment and comments received on it;

(b) The department has complied with the requirements of ch. NR 150 and s. 1.11, Stats., and

(c) Consistent with social, economic and other essential considerations, the department has adopted all practical means to avoid or minimize environmental harm, or if not, why.

(2) **OTHER DECISIONS.** The department shall include a finding regarding compliance with s. 1.11, Stats., and ch. NR 150 in all written decisions.

History: Cr. Register, January, 1987, No. 373, eff. 2-1-87.

NR 2.16 Reopening hearings. When a hearing in a contested case is closed, no further evidence shall be received, except by order of the department or the hearing examiner reopening a closed contested case for the taking of further evidence upon application of a party showing to the department's or the hearing examiner's satisfaction that the evidence is newly discovered or was not available at the time of the hearing and that the evidence is necessary for a just disposition of the case.

History: Cr. Register, March, 1973, No. 207, eff. 4-1-73; am. Register, March, 1984, No. 339, eff. 4-1-84.

NR 2.17 Transcripts in contested cases. (1) METHOD AND COPIES. Hearings shall be recorded either stenographically or electronically. A typed transcript shall be made when deemed necessary by the department or the hearing examiner. If a transcript is made by the department or the division of hearings and appeals, copies shall be furnished to all persons upon request and payment of a reasonable fee, as determined by the department or the division of hearings and appeals. If no transcript is deemed necessary by the department or the hearing examiner and a party requests that one be prepared, that party shall be responsible for all costs of transcript preparation. If several parties request transcripts, the department may divide the costs of transcription equally among the parties. In lieu of a transcript the department or the division of hearings and appeals may provide any person requesting a transcript with a copy of the tape recording of the hearing upon payment of a reasonable fee. All requests for transcripts shall be made in writing and sent to the hearing examiner who presided at the hearing.

(2) **FINANCIAL NEED.** Any person who by affidavit or other appropriate means can establish to the satisfaction of the department or the administrator of the division of hearings and appeals that the person is impecunious and has a legal need may be provided with a copy of a transcript without charge.

(3) **CORRECTIONS.** Any party, within 7 days of the date of mailing of the transcript, may file with the hearing examiner a notice in writing of any claimed error therein, and shall mail a copy of such notice to each party of record. Other parties may contest any claimed error within 12 days of the date of the mailing of the transcript by so notifying the hearing examiner and other parties of re-

cord. All parties will be advised by the hearing examiner of any authorized corrections to the record.

History: Cr. Register, March, 1973, No. 207, eff. 4-1-73; am. Register, December, 1976, No. 252, eff. 1-1-77; am. (1) and (2), Register, March, 1984, No. 339, eff. 4-1-84.

NR 2.18 Briefs. (1) TIME FOR BRIEFS. In contested cases, parties shall indicate on the record after the close of testimony at the hearing whether they desire to file briefs. The hearing examiner may establish a schedule for the filing of briefs. The party or parties having the burden of proof shall file the first brief. Other parties may then file response briefs, which may be replied to. In the alternative, the hearing examiner may direct that briefs of all parties be filed simultaneously.

(2) **NUMBER.** Five copies of all briefs shall be filed with the department together with a certification showing when and upon whom copies have been served. Briefs which contain a summary of evidence or facts relied upon shall include reference to specific pages of the record containing such evidence.

(3) **EFFECT OF EARLY FILING.** The filing of briefs in less time than allowed shall not change the due dates for the remaining briefs.

History: Cr. Register, March, 1973, No. 207, eff. 4-1-73; am., (1), Register, March, 1984, No. 339, eff. 4-1-84.

NR 2.19 Confidential status. (1) APPLICABILITY. This section establishes a procedure which shall apply to requests made to the department to treat as confidential, information in possession of the department or being requested by the department.

(2) **RESPONSIBILITY FOR ESTABLISHING CONFIDENTIALITY.** The burden of establishing the need for confidential treatment of any information shall be on the person requesting such treatment of the information.

(3) **APPLICATION FOR CONFIDENTIAL STATUS.** Any person seeking confidential treatment of information shall file with the department a written application for confidential status containing in affidavit form:

(a) The name and address of the applicant;

(b) The position of the individual filing the application;

(c) The specific type of information for which confidential status is sought;

(d) The facts and supporting legal authority believed to constitute a basis for obtaining confidential treatment of the information.

(4) **ADDITIONAL INFORMATION.** Within 21 days of the receipt of a complete application, the department shall mail to the applicant a list of written interrogatories the answers to which are necessary for a determination under this section. If an extension has not been granted and if the applicant fails to answer all the interrogatories within 30 days, the department shall deny the application. The department may also deny the application if the applicant fails to provide the information requested in the interrogatories. If a determination under this section can be made solely on the basis of information appearing in the application, written interrogatories may be waived by the department. The responses to the interrogatories shall be

treated as confidential if a request for such treatment from the applicant accompanies the responses.

(5) **PRELIMINARY DECISION.** (a) Within 30 days of receipt of a complete application in instances in which interrogatories have been waived, or within 30 days of receipt by the department of the information requested in the interrogatories, the department shall issue a written preliminary decision on the request for confidentiality. The preliminary decision shall include:

1. A finding which identifies the type of information sought to be assigned confidential status, and
2. A determination of whether the department has the authority to compel submittal of the information, and
3. If such authority exists, a determination of whether the department is authorized by law to assign confidential status to the type of information at issue, and
4. The decision to deny or to grant the request in whole or in part.

(b) A preliminary decision to assign confidential status must be made pursuant to one of the following:

1. Section 144.33, Stats., or
2. Section 144.433, Stats., or
3. Section 144.70, Stats., or
4. Section 144.925, Stats., or
5. Section 147.08 (2) (c), Stats., or

6. Upon a finding consistent with the ruling in *State ex rel. Youmans v. Owens* (1965), 28 Wis.2d 672, that confidential treatment of the information is in the public interest, or

7. Other specific statutory or common law right to confidential treatment of information.

(c) A preliminary decision made pursuant to s. 147.08 (2) (c), Stats., or *Youmans* shall also include answers to the following questions:

1. How many people have knowledge of the supposedly "secret" information? Will disclosure increase that number to a significant degree?
2. Does the contested information have any value to the possessor? To a competitor? Is that value substantial?
3. What damage, if any, would the possessor of the secret suffer from its disclosure? What advantages would its competitors reap from disclosure?
4. What benefits are likely to flow from disclosure? To whom? Are they significant? In this connection, what is the public "need" for disclosure? Can it be satisfied in any other way?

(d) The definition of "trade secret" in s. 943.205 (2), Stats., is adopted to apply to determinations made pursuant to s. 147.08 (2) (c), Stats.

(e) A preliminary decision to approve the request in whole or in part shall be published by the department as a class 1 notice in the official state newspaper, and such other notice as the department deems appropriate shall be provided. The applicant or any interested member of the

public may obtain an adjudicatory hearing on the preliminary decision to grant the request in whole or in part by petitioning the department for such a hearing within 10 days of publication of the notice. If the preliminary decision is to deny the request, the applicant shall be notified in writing of the decision by the department, and shall have 15 days from the date of mailing of the decision to petition the department for an adjudicatory hearing on the preliminary decision.

(6) **HEARING ON THE PRELIMINARY DECISION.** (a) If a timely request is received, the department shall provide a hearing at which the applicant, the department and any other interested party may appear and present evidence or testimony supporting its position. A class 1 notice of the hearing shall be published by the department in the official state newspaper, and such other notice as the department deems appropriate shall be provided.

(b) The hearing shall be before a hearing examiner and testimony shall be under oath and subject to cross-examination. The burden of establishing the confidential status shall be with the applicant.

(c) The hearing examiner shall exercise discretion to determine which individuals may have access to information alleged to be confidential and shall exercise the authority provided by law to impose protective measures and conditions for inspection necessary to safeguard confidentiality of the information during and after the hearing.

(7) **FINAL DECISION.** If no hearing is requested within the time provided, the preliminary decision shall become final. If a hearing is requested, the decision of the hearing examiner shall be the final decision of the department, but may be reviewed in the manner prescribed by s. NR 2.20. The decision of the hearing examiner shall be in writing, shall include findings of fact and conclusions of law, and shall be provided to all parties to the hearing.

(8) **INTERIM CONFIDENTIAL STATUS.** No information for which confidential status was requested shall be open to public scrutiny until 40 days after issuance of the final decision. Additional information supplied by the applicant to support the request for confidentiality shall be treated as confidential. Unless judicial review is requested, this additional information shall be returned to the applicant following the 30-day period for filing a petition for judicial review.

(9) In any contested case hearing the hearing examiner, in determining the merits of a request for trade secret protection or confidential treatment of information which arises during the course of the hearing, shall render a ruling on the request only after receiving answers to the questions appearing in sub. (5) (c) 1., 2., 3. and 4.

History: Emerg. cr. eff. 1-1-75; Cr. Register, May, 1975, No. 233, eff. 6-1-75; r. and recr. Register, July, 1978, No. 271, eff. 8-1-78; am. (5) (b) and (c), Register, March, 1984, No. 339, eff. 4-1-84.

NR 2.195 Public records and information. (1) It is vital that the public receive factual information on the affairs of state government through all forms of communication. Whether the information is requested by media representatives or individual citizens, department employees shall assist in securing facts necessary to allow understanding of and participation in government and government agencies.

(2) (a) All department employes are authorized to answer questions within their competency, whether these are asked by the public or by representatives of the news media. Employes, in turn, are responsible for the factual accuracy of the information they provide. Requests to inspect department records shall be referred to the custodian of the records.

(b) The following are the only exceptions to this "freedom-of-information" policy. Employes may not release information within the 6 stated exceptions without prior approval from the bureau of legal services. The exceptions are:

1. Law enforcement, auditing or other investigational information that might prejudice later court cases or quasi-judicial hearings;

2. Comment on a case before, during or after court or quasi-judicial hearings prior to a decision (except as a witness);

3. Financial, medical, social or personal histories and disciplinary data which may unduly damage reputations;

4. Discussions of personalities in personnel actions or in training sessions for state employes;

5. Information of a confidential nature that might inhibit private competitive rights, the investment of state funds or the state's bargaining power in acquisition and disposal of land and facilities;

6. Information specifically excluded from public inspection by law. (See s. NR 2.19).

(3) In cases where the district, area or bureau directors are concerned that the public interest in withholding inspection outweighs the public interest in permitting it, the file or requested information shall be provided to the secretary, deputy secretary or division administrator for review with the bureau of legal services and for determination.

(4) District, area and bureau directors are designated as custodians of their respective department district, area and central office records and files and are delegated the responsibility for them as well as the authority to provide copies or inspection as provided herein.

(5) (a) Requests for copies of records and files shall be complied with unless the records fall within the categories in sub. (2) (b). The requestor shall pay the copying charge for 10 or more pages. For 9 or less pages, there shall be no charge. Copies shall be provided to the requestor as soon as possible.

(b) When a request requires a large amount of copy work, the requestor shall make an advance payment of the copying charge and be informed that there will be an approximate processing period of 2 weeks. Unusually large requests may take longer than 2 weeks. When the copying work takes 3 or more hours, the person requesting the records shall pay the department an amount equivalent to the salary (including fringe benefits) of the person doing the copying work, prorated for the amount of time the work takes. The person requesting the records

may pay the charge for the employe's salary after the work is completed.

(6) (a) All formal meetings of state agencies and bodies, including advisory councils, will be open to the communication media and to the public, except where the matters under discussion fall in the categories listed in s. 19.85, Stats.

(b) Department employes are authorized and encouraged to participate in information activities contributing to a better understanding of the functions of state government, including radio and television programs, speeches, group contacts and magazine articles.

History: Cr. Register, April, 1980, No. 292, eff. 5-1-80, am. (1) to (6) (a), r. and reer. (6) (b), Register, March, 1984, No. 339, eff. 4-1-84.

NR 2.20 Review of contested case decision. (1) FILING. Any party to a contested case who is adversely affected by a final decision rendered after a contested case hearing on the matter may, within 20 days after entry of the decision, file a written petition for review by the secretary or the secretary's designee. The petition shall specify in detail the grounds for the review, the relief which petitioner seeks and citation to supporting authorities which petitioner feels aids petitioner's case. The secretary may not delegate the review to anyone who has had prior involvement in either the hearing or decision-making process.

(2) **SERVICE.** The petition for review under this section shall be served either personally or by registered or certified mail upon the secretary, the hearing examiner and upon all parties to the action.

(3) **DECISION.** Within 14 days of the receipt of the petition, the secretary shall decide whether or not to grant the requested review. If the secretary decides to grant the review, the secretary may order the filing of briefs, presentation of oral argument, or a rehearing of all or part of the evidence presented at the original public hearing (or any combination thereof).

(4) **APPEAL.** A petition for review pursuant to this section shall not be a prerequisite for appeal or review under ss. 227.52 to 227.53, Stats.

(5) **SUSPENSION OF ORDERS.** The filing of a petition for review under this section does not suspend or delay the effective date of an order, and the order shall take effect on the date of the order unless another date is set by the department or the hearing examiner, and shall continue in effect unless provisions of the order are specifically suspended or delayed by the secretary in writing. Petition for suspension of the effective date of an order shall be clearly specified in the petition for review under this section.

(6) **EFFECT ON JUDICIAL REVIEW.** An action pending under this section may not in any manner affect or extend the time limits for filing actions in circuit court for review under ss. 227.52 and 227.53, Stats.

History: Cr. Register, February, 1976, No. 242, eff. 3-1-76; am. (1), (2) and (5), cr. (6), Register, March, 1984, No. 339, eff. 4-1-84; correction in (4) and (6) made under s. 13.93 (2m) (b) 7, Stats., Register, January, 1987, No. 373.