

***2004 ANNUAL REPORT
LEGISLATIVE COUNCIL
RULES CLEARINGHOUSE***

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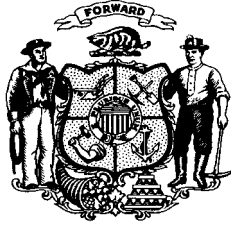
February 2005

State of Wisconsin
JOINT LEGISLATIVE COUNCIL

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ALAN LASEE
President, State Senate

STEVE WIECKERT
Representative, State Assembly



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Terry C. Anderson
Director
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Deputy Director

February 2005

The Honorable James E. Doyle
Governor
Room 112 East
State Capitol
Madison, WI 53701

Dear Governor Doyle:

This report of the calendar year 2004 activity of the Legislative Council Rules Clearinghouse is submitted to you pursuant to s. 277.15 (5), Stats.

Sincerely,

Terry C. Anderson
Director

TCA:tlu

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s. 13.81, Stats.

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This 22-member committee consists of the majority and minority party leadership of both houses of the Legislature, the co-chairs and ranking minority members of the Joint Committee on Finance, and 5 Senators and 5 Representatives appointed as are members of standing committees. [s. 13.81, Stats.]

WISCONSIN LEGISLATIVE COUNCIL STAFF
2004 ANNUAL REPORT ON THE
LEGISLATIVE COUNCIL RULES CLEARINGHOUSE*

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* This Report was prepared by Ronald Sklansky, Director, and Richard Sweet, Assistant Director, Rules Clearinghouse, Legislative Council.

FUNCTION OF THE LEGISLATIVE COUNCIL
RULES CLEARINGHOUSE

REVIEW OF RULES

Legislative review of proposed administrative rules begins with the submission of a rule to the Legislative Council Rules Clearinghouse. Section 227.15, Stats., requires that, prior to any public hearing on a proposed rule or prior to notification of the presiding officer of each house of the Legislature if no hearing is held, an agency must submit the proposed rule to the Legislative Council Rules Clearinghouse for staff review. (See the *Administrative Rules Procedures Manual* (January 2005), prepared by the Legislative Council and the Revisor of Statutes Bureau, for more information on drafting, promulgating and reviewing administrative rules.)

The Legislative Council is provided 20 working days, following receipt of a proposed rule, to prepare a report on its review of the rule. However, with the consent of the Director of the Legislative Council, the review period may be extended for an additional 20 working days.

Upon receipt of a proposed administrative rule, a Clearinghouse rule number is assigned and submission of the rule is recorded in the *Bulletin of Proceedings* of the Wisconsin Legislature. Two numbered rule jackets, one for the Assembly and one for the Senate, are prepared.

The Director of the Rules Clearinghouse assigns the rule to a Legislative Council staff member for review and preparation of the statutorily required report. The staff member generally prepares the report within 10 working days and transmits the report to the Director or Assistant Director for final review. When the report on the proposed rule is completed, the staff returns the rule jackets and the Clearinghouse report containing the results of the review to the agency. [See *Appendix I* for a sample Clearinghouse report.]

In accordance with s. 227.15, Stats., the Clearinghouse report:

1. Reviews the statutory authority under which the agency intends to adopt the rule.
2. Reviews the proposed rule for form, style and placement in the Wisconsin Administrative Code.
3. Reviews the proposed rule to avoid conflict with, or duplication of, existing rules.
4. Reviews the proposed rule to ensure that it provides adequate references to related statutes, rules and forms.
5. Reviews the language of the proposed rule for clarity, grammar and punctuation and to ensure the use of plain language.

6. Reviews the proposed rule to determine potential conflicts and to make comparisons with related federal regulations.

7. Reviews the proposed rule to determine whether the agency has specified the number of business days within which the agency will review and make a determination on an application for a business permit.

As part of this review process, staff of the Legislative Council is directed to ensure that procedures for the promulgation of the rule are followed, as required by ch. 227, Stats., and to streamline and simplify the rule-making process.

OTHER RELATED RESPONSIBILITIES

Other primary rule review responsibilities of the Legislative Council include:

1. Working with and assisting the appropriate legislative committees throughout the rule-making process.

2. Notifying the Joint Committee for Review of Administrative Rules (JCRAR) and appropriate committees of the Legislature whenever the rule-making authority of an agency is eliminated or significantly changed by the repeal, amendment or creation of a statute, by the interpretive decision of a court of competent jurisdiction or for any other reason.

3. Assisting the public in resolving problems related to administrative rules. This function includes providing information, identifying agency personnel who may be contacted in relation to rule-making functions, describing locations where copies of rules, proposed rules and forms are available and encouraging and assisting participation in the rule-making process.

4. Creating and maintaining an Internet site that includes a copy of each proposed rule in a format that allows the site to be searched using keywords.

The final responsibility of the Legislative Council is the submission of an annual report to the chief clerk of each house of the Legislature and to the Governor summarizing any action taken by the staff and making recommendations to streamline the rule-making process and eliminate obsolete, duplicative and conflicting rules. This report is the *25th Annual Report* submitted by the Legislative Council and covers the staff's activities during calendar year 2004. It has been preceded by an initial report to the 1979 Legislature, which covered the staff's activities from November 2, 1979 to April 1, 1980 (i.e., from the effective date of Ch. 34, Laws of 1979, which initiated the omnibus rule review process, to the end of Floorperiod IV of the 1979 Session) and annual reports for calendar years 1980 to 2003.

RECORDKEEPING SYSTEM

The Legislature's *Bulletin of Proceedings* is used for recording actions relating to the review of administrative rules. The Legislative Council, the Senate and Assembly Chief Clerks and the Legislative Reference Bureau cooperate in a computerized recordkeeping system.

Commencing with the 1979 Session, action on administrative rules has been shown in a separate part of the *Bulletin of Proceedings*.

Under this system, each proposed rule is assigned a number and entered in the computer by the staff of the Legislative Council. A copy of the Clearinghouse report is placed in a Senate and Assembly rule jacket (similar to bill jackets) and the rule is then transmitted to the agency promulgating the rule for its review. After transmittal, all legislative actions taken on the rule are entered on the face of the jacket and are reported to the chief clerk of each house. The chief clerk enters the actions in the computerized system, thereby compiling a history of all legislative actions taken on the rule.

At the beginning of each biennial session, the administrative rule portion of the *Bulletin of Proceedings* is updated by deletion of all records relating to rules which, in the preceding session, have become effective, have been withdrawn or have been permanently objected to by law. Also removed from the *Bulletin of Proceedings* annually and withdrawn from the rule-making process is any proposed rule that, in accordance with s. 227.14 (6) (c), Stats., has been pending for at least four years, but no more than five years, after the date of its receipt by the Legislative Council under s. 227.15 (1), Stats. The final *Bulletin of Proceedings* printed for the preceding session then serves as the permanent record of the disposition of those rules. The remaining rules, which are still in the promulgation process, are carried over into the new *Bulletin of Proceedings* for the following biennial session.

Access to rules and agency reports over the Internet became available in 2001 for all rules initiated after 2000. These materials may be found at the Legislative Council's website, www.legis.state.wi.us/lc.

2004 ACTIVITIES OF THE RULES CLEARINGHOUSE

During 2004, 142 proposed administrative rules were submitted to the Legislative Council by 18 state agencies.

As of December 31, 2004, Clearinghouse reports had been completed on 133 of the 142 proposed rules and nine rules were in the process of review. In addition to the 133 rule reports completed on 2004 rules, reports were prepared in 2004 on nine rules received in late 2003. Of the 142 reports completed in 2004, no rule required an extension of the review process by the Director of the Legislative Council. Clearinghouse activities in 2004 are summarized below:

Rules Received in 2004		142
Withdrawn	0	
No report required	0	
Pending	9	
		-9
2004 Reports Completed		133
2003 Reports Completed in January 2004		+9
Total Reports in 2004		142

The table below shows that, from November 2, 1979 (the beginning of the omnibus rule review process) through December 31, 2004, the Clearinghouse has received 5,268 rule submissions and completed reviews on 5,172 proposed rules. Of the total rule submissions, 87 were exempt from the reporting process for various reasons and 9 were under review at the end of 2004.

<i>Year</i>	<i>Received</i>	<i>Completed</i>	<i>Exempt</i>
1979	70	45	12
1980	252	227	24
1981	252	234	9
1982	251	254	3
1983	222	220	4
1984	255	247	2
1985	213	206	4
1986	251	252	4
1987	182	186	1
1988	219	216	5
1989	212	208	1
1990	264	254	3
1991	199	205	2
1992	225	228	0
1993	241	232	1
1994	225	234	0
1995	236	224	2
1996	194	201	1
1997	158	159	1
1998	208	200	2
1999	170	177	1
2000	189	176	1
2001	157	158	1
2002	155	160	1
2003	126	127	2
2004	142	142	0
Total	5,268	5,172	87

In 2004, rules were received from the following 18 state agencies:

Number of Proposed Rules, by Submitting Agency

Department of Administration	2
Department of Agriculture, Trade and Consumer Protection	7
Department of Commerce	14
Department of Employee Trust Funds	2
Department of Financial Institutions	5
Department of Health and Family Services	11
Department of Justice	1
Department of Natural Resources	41
Department of Public Instruction	5
Department of Regulation and Licensing	16
Department of Revenue	5
Department of Transportation	13
Department of Veterans Affairs	4
Department of Workforce Development	6
Office of Commissioner of Insurance	6
Office of State Employment Relations	2
Public Service Commission	1
State Public Defender	1
Total	142

Although the statistics presented in this report give some indication of the workload of the Legislative Council staff in reviewing proposed administrative rules, it should be noted that rules vary in length. Similarly, Clearinghouse reports vary from completion of a simple checklist to large reports. In summary, for all rule reports completed in 2004, the Legislative Council staff commented on:

1. The *statutory authority* of a proposed administrative rule on 38 occasions.
2. The *form, style and placement* of proposed administrative rules in the Wisconsin Administrative Code on 101 occasions.
3. A *conflict* with, or *duplication* of, existing rules on 10 occasions.
4. The *adequacy of references* of proposed administrative rules to related statutes, rules and forms on 53 occasions.
5. *Clarity, grammar, punctuation and use of plain language* in proposed administrative rules on 110 occasions.

6. The *potential conflicts* of proposed administrative rules with, and their comparability to, related federal regulations on one occasion. In addition, the Legislative Council staff has adopted a policy of noting when proposed rules are based on federal “*guidelines*,” which do not have the force of law, as opposed to rules based on federal “*regulations*,” which do have the force of law and with which the state may have a legal obligation to comply.

7. The *permit action deadline requirement* on no occasions.

WORKING WITH AND ASSISTING COMMITTEES

A Legislative Council staff attorney or analyst works with each standing committee and statutory committees, except Joint Finance. When a committee has a proposed rule referred to it by the presiding officer of the house, the staff member will participate in the committee’s oversight.

During 2004, legislative committees held hearings or requested meetings on **32 proposed rules**. Modifications to rules were either requested or received in the legislative review of **21 proposed rules**. **Four rules** were objected to by committees.

As a result of committee activities, **four rule objections** were subject to JCRAR jurisdiction in 2004. The JCRAR objected to two rules; requested modifications to one rule; and lost jurisdiction over a rule when it was withdrawn by the promulgating agency.

The table below reviews legislative committee activity in the review of proposed administrative rules beginning on November 2, 1979 and ending on December 31, 2004.

LEGISLATIVE REVIEW OF PROPOSED ADMINISTRATIVE RULES (November 2, 1979 Through December 31, 2004)*						
Year	Rules Submitted	Rules Subject to Modification	Committee Review Objections	JCRAR Rule Objections	Enacted Laws Following Rule Objections	Enactments by Session Law and Other Description of Bills Introduced Following Rule Objections
11/2/79–80	322	18	5	1	0	No bill introduced, rule withdrawn
1981	252	29	10	4	4	Chapters 20 (SEC. 1561), 26, 31 and 180, Laws of 1981
1982	251	31	4	1	1	1983 Wisconsin Act 94
1983	222	30	5	0	0	—
1984	255	26	2	2	2	1983 Wisconsin Act 310 and 1985 Wisconsin Act 29 (SEC. 826)
1985	213	37	8	3	2	◆ 1985 Wisconsin Act 29 (SECS. 1059r and 2238ng to 2238or) ◆ 1985 Assembly Bill 460, passed and vetoed; override failed
1986	251	30	1	0	0	—
1987	182	30	5	0	0	—
1988	219	38	4	0	0	—
1989	212	22	6	2	0	◆ 1989 Senate Bill 89 and 1989 Assembly Bill 171 (failed to pass) ◆ 1989 Senate Bill 248 and 1989 Assembly Bill 457 (failed to pass)
1990	264	29	2	1	0	◆ 1991 Senate Bill 24 and 1991 Assembly Bill 71 (failed to pass)

LEGISLATIVE REVIEW OF PROPOSED ADMINISTRATIVE RULES (November 2, 1979 Through December 31, 2004)*						
Year	Rules Submitted	Rules Subject to Modification	Committee Review Objections	JCRAR Rule Objections	Enacted Laws Following Rule Objections	Enactments by Session Law and Other Description of Bills Introduced Following Rule Objections
1991	199	19	5	1	0	♦ 1991 Senate Bill 442 and 1991 Assembly Bill 840 (failed to pass after rule objected to withdrawn by agency)
1992	225	33	3	2	1	♦ 1993 Wisconsin Act 9 ♦ 1993 Senate Bill 3 and 1993 Assembly Bill 17 (failed to pass)
1993	241	24	1	0	0	—
1994	225	29	3	0	0	—
1995	236	19	0	0	0	—
1996	194	19	1	1	1	♦ 1997 Assembly Bill 5 and 1997 Senate Bill 20 (failed to pass) ♦ 1997 Wisconsin Act 237 (SECS. 320s, 322d and 322e)
1997	158	19	6	0	0	—
1998	208	15	0	0	0	—
1999	170	18	2	1	0	—
2000	189	20	2	1	1	♦ 1999 Wisconsin Act 178
2001	157	14	5	2	0	♦ 2001 Assembly Bill 18 and Senate Bill 2 (failed to pass); ♦ 2001 Assembly Bill 524 and Senate Bill 267 (failed to pass) ♦ 2001 Assembly Bill 697 and Senate Bill 361 (failed to pass)
2002	155	35	2	1	0	♦ 2003 Assembly Bill 25 and Senate Bill 19 (failed to pass)
2003	126	20	2	2	0	♦ 2003 Assembly Bill 253 and Senate Bill 123 (failed to pass) ♦ 2003 Wisconsin Act 240
2004	142	21	4	2	1	Bills to be introduced in 2005 Session
TOTAL	5,268	725	88	27	13	(PLUS ONE BILL PASSED AND VETOED; VETO NOT OVERRIDDEN)

* The general system of legislative review of proposed administrative rules, primarily embodied in ss. 227.15 and 227.19, Stats., took effect on November 2, 1979, as part of Ch. 34, Laws of 1979.

ELECTRONIC ACCESS

In 2001, the Legislature, through its service agencies, began providing electronic access to all proposed administrative rules submitted to the Clearinghouse. The system mirrors the process already in place for legislative proposals. That is, interested persons are able to use the

Internet to search for proposed rules directly or to link to them from the Legislature's Bulletin of Proceedings. The site holds the initial version of the proposed rule, the Clearinghouse report on the proposed rule, all modified versions of the proposed rule submitted to the Legislature, and the related agency report to the Legislature. Electronic access is available for proposed rules submitted to the Clearinghouse after the year 2000.

NOTICE OF CHANGE IN RULE-MAKING AUTHORITY

To date, no court decisions or changes in legislation have been brought to the attention of the Legislative Council staff that would require notification of JCRAR or appropriate standing committees of a change in, or the elimination of, agency rule-making authority.

ASSISTING ADMINISTRATIVE AGENCIES

The Legislative Council staff has responded to numerous questions from agency personnel, relating to both the process and the law governing legislative review of proposed rules.

PUBLIC LIAISON

To date, the Legislative Council staff has received minimal requests from the public. These infrequent questions have either concerned aspects of the rule review procedure or have related to the status of specific rules.

ADDITIONAL ACTIVITIES

On May 4, 2004, the Co-Chairs of the Joint Legislative Council directed the Legislative Council staff to examine current laws relating to the procedures used for the promulgation of administrative rules and to develop proposed legislation that modifies current statutory language, codifies practices used in the process, coordinates statutory changes made in the 2003 Session of the Legislature, and makes minor substantive changes to the law.

In order to fulfill this request, the Legislative Council staff sought comments from rule-promulgating state agencies, the chief clerks of the Legislature, and the Revisor of Statutes. It is intended that a bill will be introduced in the 2005-06 Session that will respond to many of the comments the Legislative Council staff received as well as to issues noted by the experience of the Legislative Council staff itself.

RS:RNS;jal:tlu;rv;ksm

APPENDIX 1
SAMPLE CLEARINGHOUSE REPORT



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

CLEARINGHOUSE RULE **04-064**

AN ORDER to repeal and recreate NR 323, relating to fish and wildlife habitat structures in navigable waterways.

Submitted by **DEPARTMENT OF NATURAL RESOURCES**

06-15-2004 RECEIVED BY LEGISLATIVE COUNCIL.

07-14-2004 REPORT SENT TO AGENCY.

RNS:JES

LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

Comment Attached YES NO

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

Comment Attached YES NO

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

Comment Attached YES NO

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS [s. 227.15 (2) (e)]

Comment Attached YES NO

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

Comment Attached YES NO

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL REGULATIONS [s. 227.15 (2) (g)]

Comment Attached YES NO

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

Comment Attached YES NO



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 04-064

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.]

I. Statutory Authority

a. While there is value in placing a definition of “navigable waterway” in the Administrative Code, the definition of “navigable waterway” in s. NR 323.03 (8) does not appear to conform with the current statutory definition of navigability and court interpretations of this term. In particular, the test for navigability developed by the Wisconsin Supreme Court in *De Gayner and Co. v. DNR*, 70 Wis. 2d 936, 236 N.W.2d 217 (1975), refers to a navigable body of water as being water that is capable of floating the lightest boat or skiff available for recreational use. The definition in sub. (8) states that a navigable body of water is one that is capable of floating the lightest boat or skiff used for recreation or *any other purpose* [emphasis added].... Also, the definition in sub. (8) applies to both lakes and streams, whereas the float test in the second sentence in sub. (8) is based upon the *De Gayner* test of navigability, which only applied to streams. The test of navigability for a lake is articulated in a different court case, *Baker et al. v. Voss*, 217 Wis. 15, 259 N.W. 413 (1935).

In addition, the definition of “navigable waterway” in s. 30.01 (4m), Stats., 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.

See also the comment below on the placement of this definition.

b. Section NR 323.04 (1) (c) 5. requires a riparian to report the placement of a fish habitat structure to the local department fisheries biologist within 30 days after placement. Assuming that the treatment of s. 30.12, Stats., by 2003 Wisconsin Act 118 is constitutional and

not a violation of the Public Trust Doctrine, then this requirement for the reporting of the placement of exempt fish habitat structures appears to exceed the department's rule-making authority specified in s. 30.12 (1p), Stats. Subsection (1p) limits the department's authority to promulgate rules concerning exempt activities under sub. (1g), including the placement of a fish habitat structure on the bed of a navigable water under sub. (1g) (c), to rules that *only* relate to reasonable installation practices, reasonable construction and design requirements, and reasonable limitations on the location of the placement of the structures or the deposit of materials at the site affected by the activity.

c. Section NR 323.04 (1) (c) 7. prohibits dredging under s. 30.20 (1g) (b) 1., Stats., for the placement of an exempt fish habitat structure. Similarly, s. NR 323.05 (1) (c) 6. prohibits dredging under this statute for the placement of an exempt nesting structure, if the dredging exceeds one cubic yard. These restrictions do not appear to be supported by the department's rule-making authority under s. 30.20 (1k), Stats., assuming that the treatment of s. 30.20 by 2003 Wisconsin Act 118 is constitutional and does not violate the Public Trust Doctrine. Under s. 30.20 (1k) (a), the department may promulgate rules concerning exempt activities under sub. (1g), including removal of material from the bed of a navigable water necessary to place or maintain a structure exempt from any permitting requirements, such as exempt fish habitat and wildlife habitat structures, that *only* do any of the following: establish reasonable procedures for undertaking the removal of material to minimize the environmental impact; or establish reasonable limitations on the location of the removal of material at the site affected by the activity. Furthermore, s. 30.20 (1k) (b) establishes that the rules establishing reasonable procedures for the undertaking of the removal of the material under par. (a) may not establish procedures that prohibit undertaking the removal of the material or that render the undertaking economically cost-prohibitive.

2. Form, Style and Placement in Administrative Code

a. The summary accompanying the rule does not contain any of the following information required by 2003 Wisconsin Acts 118 and 145: analysis or identification of supporting documents that the department used in support of its determination of the proposed rule's effect on small business, a determination on whether the rule will have a significant fiscal effect on the private sector, and if so, the anticipated costs that will be incurred by the private sector in complying with the rule, and a statement as to whether the rule affects small business. There are several headings in the summary that do not have any material after them.

b. Since the definition of "navigable waterway" in s. NR 323.03 (8) has broader application than only to the regulation of fish and wildlife habitat structures in navigable waterways, the department should consider placing the definition of this term in a more generally applicable chapter of its rules, such as ch. NR 1, and then referencing that definition in ch. NR 323.03.

c. The rule defines "similar device" in s. NR 323.03 (12) and then does not use this defined term elsewhere in the rule. The department should either use this term elsewhere in the rule or delete the definition.

d. The phrase "as defined in s. 30.01 (1am), Stats., and identified by the department in s. NR 1.05" in ss. NR 323.04 (1) (c) 1. and 323.05 (1) (c) 1. is redundant with the definition of "area of special natural resource interest" in s. NR 323.03 (1) and should be deleted.

e. The use of “must” in ss. NR 323.04 (1) (c) 4. and 323.05 (1) (c) 4. does not conform with preferred drafting style. [See s. 1.01 (2), Manual.]

f. There are several instances in the rule of introductory material that should end with a colon. For example, see s. NR 323.04 (1) (d) (intro.) and (f) (intro.)

g. Sections NR 323.04 (1) (i) and 323.05 (1) (d) should have titles, as titles are provided for the other paragraphs in these subsections. [See s. 1.05 (6), Manual.]

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

a. In the summary accompanying the rule, the list of statutes authorizing rule-making should not include s. 30.12 (1), Stats., as this subsection does not explicitly authorize rule-making. This list should include s. 30.20 (1k), Stats., due to the provisions on dredging in ss. NR 323.04 (1) (c) 7. and 323.05 (1) (c) 6.

b. In the summary accompanying the rule, the list of statutes interpreted by the rule should include the following statutes: s. 30.10 (1) and (2), Stats., due to the definition of “navigable waterway” in s. NR 323.03 (8); s. 30.20 (1g) (b) 1., Stats., due to the provisions on dredging in ss. NR 323.04 (1) (c) 7. and 323.05 (1) (c) 6; and ss. 30.15, 30.292, 30.294, and 30.298, Stats., due to their interpretation in s. NR 323.06 (3). In addition, this list of statutes interpreted includes a reference to s. 30.20 (1g) (b) 2., Stats., though the provision in the rule that interprets this statute, other than the statement on applicability in s. NR 323.02, is not apparent.

c. Should the reference in s. NR 323.02 to s. 30.20 (1g) (b) 2., Stats., be to s. 30.20 (1g) (b) 1.? Also, the purpose statement in s. NR 323.01 should have cross-references that are consistent with the cross-references in s. NR 323.02.

d. The reference in s. NR 323.03 (1) to s. NR 1.05 is vague. Based on the text of s. NR 1.05 in Clearinghouse Rule 04-066, should the reference be to s. NR 1.05 (4).

e. The references to ch. NR 310 in ss. NR 323.04 (1) (a), (2) (a), and (3) (a) and NR 323.05 (1) (a), (2) (a), and (3) (a) are vague. Can the department be more specific?

f. The rule incorporates two alternative requirements for the design and placement of wing deflectors in s. NR 323.04 (1) (f) 1. that are set forth in the cited books. Consent for incorporation of these requirements must be obtained from the Revisor of Statutes and Attorney General pursuant to s. 227.21 (2) (a), Stats. The summary accompanying the rule should, but does not, indicate that this consent has been given.

g. The reference in s. NR 323.04 (3) (c) to the standards for an individual permit should be to s. 30.12 (3m) (c), Stats., rather than s. 30.12 (3m), Stats.

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

a. The federal regulatory analysis in the summary accompanying the rule states that “(a)n individual permit from the [U.S. Army Corps of Engineers] is required, unless Wisconsin regulates the project in its entirety under ch. 30, Stats., in which case the project is authorized by the Corps under general permit GP-01-WI or GP-LOP-WI.” It is not clear from this statement

how the Corps will regulate a project that is exempt under s. 30.12 (1g) (c), Stats., such as a fish crib subject to s. NR 323.04 (1) (d).

b. The note following s. NR 323.03 (1) would be more useful to a reader of the rule if the specific types of areas that possess significant scientific value were listed rather than the general reference listed in item (c) in this note.

c. Should “and” be “or” in s. NR 323.03 (2)? Such a change would provide a reference to “biological or inert materials,” as also given in s. NR 323.03 (5) and (12).

d. The department should review the definition of “nesting structure” in s. NR 323.03 (9) to determine if a nesting structure should be defined as a type of wildlife habitat structure. As drafted, it is not clear if references to “wildlife habitat structure” in the rule include a reference to nesting structures. See, for example, ss. NR 323.05 (4) and 323.06 (4).

e. The definition of “similar device” in s. NR 323.03 (12) includes the undefined terms “stake beds” and “low barriers.” The department should review this definition and its use in the rule to determine if these terms should be defined to ensure the consistent application of the rule.

f. Section NR 323.03 (6) refers to a “half log” whereas s. NR 323.03 (12) refers to a “half-log.” The department should use consistent spelling of this term.

g. Section NR 323.04 (1) (c) 3. refers to “the riparian’s zone of interest, as determined by one of the methods outlined in s. NR 326.04.” This provision is ambiguous because s. NR 326.04 does not explicitly refer to a “riparian’s zone of interest.” Does the department intend that this zone refer to the apportionment of riparian rights between adjacent riparians, as set forth in s. NR 326.07? In addition, the pier standards in s. NR 326.04 (1) and the riparian rights determinations in s. NR 326.07 generally extend to the “line of navigation,” as defined in s. NR 326.03 (4). This line is, in general, the three-foot contour of water depth. The apparent requirement that a fish habitat structure be placed within the line of navigation may conflict with other provisions in the rule. For example, fish cribs must be placed in at least 10 feet of water under s. NR 323.04 (1) (d) 1.

h. To assist a reader of the rule in filing the report required under s. NR 323.04 (1) (c) 5., the department should consider adding a note after that subdivision that indicates how a riparian may contact “the local department fisheries biologist” to file the required report.

i. The use of “prescriptions” in s. NR 323.04 (1) (f) 1. is potentially confusing. Would another term, such as “recommendations,” be clearer.

j. The department should review the entire rule and revise it to be drafted in the active voice, consistent with the preferred drafting style. [See s. 1.01 (1), Manual.] Examples of provisions in the passive voice include ss. NR 323.04 (3) (c) and 323.05 (1) (a).

k. The note following s. NR 323.05 (3) (c) is not clear. Is this note intended to apply to the standards in s. NR 323.05 (1) (c), (2) (c), and (3) (c), or just (3) (c)? Also, what is meant by the reference to a “comparable procedure” in the note? Since the procedures are apparently not identical, how do they differ?

l. How is the surface area of a nesting structure measured to determine whether it exceeds the 25 square feet limitation in s. NR 323.05 (1) (c) 7.? Does this surface area include the surface area of a vertical pole supporting a horizontal platform?

m. Sections NR 323.04 (1) (i) and 323.05 (1) (d) relate to a fish habitat structure or wildlife habitat structure that is not eligible for an exemption under s. 30.12 (1g), Stats. If the department intends to exercise its authority to require a general or individual permit under s. 30.12 (2m), Stats., for a structure that otherwise qualifies for an exemption, then the department should consider adding a provision to the rule that implements this authority.

n. The reference in s. NR 323.06 (1) to the 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?

o. The second sentence in s. NR 323.06 (1) would be clearer if the phrase "authorized under" was inserted before "a general permit" in the second sentence.

p. The application of the second and third sentences in s. NR 323.06 (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?

APPENDIX 2

PROCESSING INSTRUCTIONS TO AGENCY HEADS



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

Ronald Sklansky
Clearinghouse Director

Terry C. Anderson
Legislative Council Director

Richard Sweet
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Legislative Council Deputy Director

PROCESSING INSTRUCTIONS TO AGENCY HEADS

[ENCLOSED ARE THE SENATE AND ASSEMBLY RULE JACKETS CONTAINING THE LEGISLATIVE COUNCIL CLEARINGHOUSE REPORT. AN ADDITIONAL COPY OF THE CLEARINGHOUSE REPORT IS ENCLOSED FOR YOUR FILES.]

PLEASE NOTE: Your agency must complete the following steps in the legislative process of administrative rule review:

1. On the appropriate line on the face of both clearinghouse rule jackets, enter, in column 1, the appropriate date and, in column 2, "Report Received by Agency."
2. On the appropriate line or lines on the face of both clearinghouse rule jackets, enter, in column 1, the appropriate date or dates and, in column 2, "Public Hearing Held" OR "Public Hearing Not Required."
3. Enclose in both clearinghouse rule jackets, in triplicate, the notice and report required by s. 227.19 (2) and (3), Stats. [The report includes the rule in final draft form.]
4. Notify the presiding officer of the Senate and Assembly that the rule is in final draft form by hand delivering the Senate clearinghouse rule jacket to the Senate Chief Clerk and the Assembly clearinghouse rule jacket to the Assembly Chief Clerk. At the time of this submission, on the appropriate line on the face of the clearinghouse rule jacket, each Chief Clerk will enter, in column 1, the appropriate date and, in column 2, "Report Received from Agency." Each clearinghouse rule jacket will be promptly delivered to each presiding officer for referral of the notice and report to a standing committee in each house.
5. If the agency does not proceed with the rule-making process on this rule, on the appropriate line on the face of both clearinghouse rule jackets, enter, in column 1, the appropriate date and, in column 2, "Rule Draft Withdrawn by Agency" and hand deliver the Senate clearinghouse rule jacket to the Senate Chief Clerk and the Assembly clearinghouse rule jacket to the Assembly Chief Clerk.

FOR YOUR INFORMATION: A record of all actions taken on administrative rules is contained in the Bulletin of Proceedings of the Wisconsin Legislature. The clearinghouse rule jackets will be retained by the Legislature as a permanent record.

[See reverse side for jacket sample.]

