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CLEARINGHOUSE RULE 98-123

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 September 1998.]

1. Statutory Authority

a. In addition to the authority in s. 95.60 (4s) (e), Stats., the rule appears to be exercising the rule-making authority in s. 95.60 (4s) (b) to (d), Stats. The analysis should reference all of these paragraphs in the list of statutes granting rule-making authority for the rule and should note whether consultation with the Department of Natural Resources (DNR) has occurred.

b. Through the definition of “person,” the rule exempts the fish rearing activities of the DNR (or any other state agency) from all fish farm registration, importation and health inspection requirements. There are at least two lines of argument that this is an incorrect interpretation of the statutes.

First, of the several provisions of s. 95.60, Stats., applicable to any person, the Legislature explicitly exempted the DNR from one. The fact that the Legislature exempted the DNR from a provision applicable to any person strongly suggests that it viewed the DNR as being a person. The fact that the Legislature did not exempt the DNR from the other provisions even more strongly suggests that it intended those provisions to apply to the DNR.

Second, analysis of proposed s. 95.60, Stats., provided to the Legislature indicated that the regulations would apply to the DNR. In particular, a September 9, 1997 Legislative Council Staff memorandum to Senator Kevin Shibilski and Representative Sheryl Albers was distributed on the floor of the Assembly prior to that house’s vote on an amendment to 1997 Assembly Bill 100, the 1997-99 Biennial Budget Bill, affecting the new fish farming regulations. That

memorandum states: “The draft explicitly makes the DNR’s authority to import, raise and stock fish subject to compliance with DATCP health certification requirements.” With regard to fish stocking, the memorandum states: “Again, the DNR is exempt from the permit requirement, but it must comply with the DATCP health certification requirement.” The memorandum does not speak to the applicability of the registration requirement to the DNR. The distribution of this memorandum to all members of the Assembly prior to their vote on this subject strongly argues that the members of that house, at least, understood that they were creating a set of requirements that applied to the DNR, as well as to private fish farms.

c. Section 95.60, Stats., requires that a person who operates a fish farm register the fish farm with the Department of Agriculture, Trade and Consumer Protection (DATCP). Unlike a license or permit, a registration is not a precondition of engaging in an activity, but rather is a declaration of that activity. The Legislative Council Staff memorandum distributed to the Assembly, cited in the preceding comment, described the proposal to create s. 95.60, Stats., as follows: “Under the proposal, no license requirements would apply to fish farms; instead, fish farms would be required to register with the DATCP.” In fact, the act creating s. 95.60, Stats., also repealed the previous DNR license program for private fish hatcheries.

Two provisions of the rule are contrary to this understanding of registration, and treat it instead as a license requirement. First, s. ATCP 10.68 (2) (intro.) states: “. . . no person may operate a fish farm . . . without a registration certificate for that fish farm.” While the DATCP can seek the imposition of the penalties under s. 95.99, Stats., against a person who fails to register a fish farm, the agency does not appear to have the authority to prohibit the operation of the fish farm for failure to register. This provision should be modified to read as a simple registration requirement, parallel to that in s. 95.60 (3m), Stats.

In addition, s. ATCP 10.68 (10) establishes bases for denying, suspending or revoking registrations, which also treat registrations more like licenses, and uses the threat of denial of registration to enforce other regulatory requirements. Since a registration is just a declaration of an activity, the only reasons for denying the registration would seem to be an untrue or inaccurate registration and possibly the failure to pay a required registration fee. Section ATCP 10.68 (10) and related provisions should be modified to reflect the nature of registration as distinct from that of licensure.

In a similar provision, s. ATCP 10.68 (13) (a) states that a registration certificate will be denied if a fish health certificate is not obtained. Again, there is no connection between the requirements for registration and fish health certificates in s. 95.60, Stats. This provision should be modified to read as a simple requirement to obtain a fish health certificate.

Related to the preceding comments, the exemptions from DNR regulation that fish farms enjoy are not contingent on registration with the DATCP. The Note following s. ATCP 10.68 (2) should be modified to reflect this.

d. The creation of s. 95.60, Stats., took effect on October 14, 1997. That section does not include any delay in the applicability of the requirement that fish farms obtain fish health certificates, but s. ATCP 10.68 (13) (a) delays that requirement until January 1, 2002. This delay of more than four years appears unauthorized.

e. Section 95.60 (3), Stats., requires any person who operates a fish farm to obtain an annual fish health certificate, except that the types of fish farms that the rule calls type 1 may rely on health certificates obtained by their suppliers. The rule creates adequate requirements for type 2 fish farms to obtain fish health certificates, but is silent on the matter of type 1 fish farms. The rule should be modified to require that type 1 fish farms either obtain fish health certificates or provide evidence of sufficient fish health certificates provided by the supplier of the farm's fish.

f. Several provisions of the rule [ss. ATCP 10.68 (13) (b) 3. and 11.58 (15) (a) and (b) 4. and (16) (b)] refer to unspecified fish diseases or testing procedures that will be specified by the DATCP on forms. Notes following these provisions state that the specifications on forms constitute department orders. If the items so specified are determined on a case-by-case basis, they would appear to be orders, as the Notes indicate. However, if the items so specified become standard and are applied to an entire class of persons, as evidenced, for example, by being printed on the forms, they constitute policies and must be promulgated as rules. [See also open-ended requirements in ss. ATCP 10.68 (13) (a) and 11.58 (1) (e), (6) (e) and (16) (a).]

2. Form, Style and Placement in Administrative Code

- a. Section ATCP 11.58 (1) contains two paragraphs numbered "(b)."
- b. The usefulness of the Note following s. ATCP 11.58 (2) could be increased by including cross-references to the DNR rules regarding import and stocking permits.
- c. In s. ATCP 11.59 (1), par. (a) should be preceded by the introduction "In this section:".

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

a. Zoological terms ending in the suffix "-idae" are the latinized names of animal families. They are proper nouns and are capitalized. To form a common noun referring to a member of a family, one drops the "-ae" from the zoological family name and writes the word without capitalization; the resulting noun is pluralized by adding an "s." (Adjectives are formed in the same manner.) Thus, "Salmonidae" is the name of the family of fish including salmon and trout; a fish or species of fish of that family is referred to as a salmonid. (See, for example, *Webster's Third New International Dictionary, Unabridged* (1993).) In this rule, the term "salmonidae" should be replaced with the term "salmonid." (Related DATCP rules, such as those concerning cervids, should be similarly corrected. Note, however, that the term "ratite," also used in DATCP rules, derives from a suborder name, Ratitae.)

b. Section ATCP 10.68 (13) (b) 3. does not follow grammatically from the introductory language. It should be modified to read: "That fish at the fish farm are free from any other diseases that . . ."