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CLEARINGHOUSE RULE 00-025

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. The definition of “best management practice” in s. NR 153.002 (5) differs from s. 281.65 (2) (a), Stats., in that the statutory definition is limited to those practices identified in an areawide water quality management plan. The department does not have the authority to modify the statutory definition in this manner. The enumeration of an additional type of practice is a permissible expansion of the statutory definition, as long as it is based on practices identified in areawide water quality management plans.

b. The last sentence of s. NR 153.12 (2) (c) purports to establish duties of the Land and Water Conservation Board. While these duties are imposed on that board by statute, the Department of Natural Resources (DNR) does not have the authority to state this as a requirement of its rules. This sentence should be placed in a note or omitted.

2. Form, Style and Placement in Administrative Code

a. Sections NR 153.001 to 153.017 should constitute subch. I of ch. NR 153. The title of the subchapter could be “GENERAL PROVISIONS” and the remaining subchapters should be renumbered accordingly.

b. In s. NR 153.002 (27), a reference is made to the natural resources conservation service field office technical guide. The department should ensure that the requirements of s.

227.21, Stats., are met. Also, the word “rule” should be replaced by the word “section.” (The entire rule should be reviewed for this change.)

c. The rule frequently makes incorrect use of the introduction format. [See s. 1.03 (8), Manual.] If the material that follows an introduction does not flow grammatically as a continuation of a sentence started in the introduction or, in limited circumstances, does not flow conceptually from an idea introduced in introduction, it should be placed in a separately numbered unit of the rule. For example, s. NR 153.004 (intro.) should be numbered s. NR 153.004 (1). As a corollary, each item that follows introductory language should be a grammatical (or conceptual) continuation of that language. For example, s. NR 153.007 (5) (f) does not follow grammatically from the introduction. It should be modified to read as follows: “In cases where the acquisition will prevent further degradation of water quality, the degree to which the acquisition is cost-effective, relative to the threat of further degradation to the site.” In addition, when introducing a list of requirements or conditions, the introduction should indicate whether it is referring to *all* or *any* of the requirements or conditions that follow by concluding with a phrase such as “all the following” or “any of the following.” For example, s. NR 153.004 (1) (intro.) should end with the phrase: “. . . a participating government unit shall do all of the following:”. For another example, s. NR 153.13 (2) (intro.) should read: “An application shall include all of the following:”.

d. In s. NR 153.003 (intro.), the phrase “unit of government” should be replaced by the defined term “governmental unit.” (The entire rule should be reviewed for the consistent use of defined terms.)

e. In s. NR 153.004 (3) (a) and (c), the commas should be replaced by the word “or.”

f. In s. NR 153.005 (3) (c), the phrase “shall apply” should be replaced by the word “applies.”

g. Section NR 153.005 (5) should refer to the exception in sub. (4m).

h. Section NR 153.007 (3) (b) 3. refers to an appraisal that may be unacceptable “under department guidelines.” These guidelines, if known, should be placed in rule form. [See also ss. NR 153.17, 153.33 (2) (d) and 153.37. Of course, technical standards may be incorporated by reference using the process described in s. 227.21, Stats.]

i. Section NR 153.010 (2) should be rewritten to read: “The governmental unit shall administer and successfully complete”

j. In s. NR 153.013 (3) (a), the phrase “shall be” should be replaced by the word “are.” In sub. (4), the word “may” should be replaced by the word “does.”

k. In s. NR 153.016, the cross-reference should read “ss. 92.14 (12) and 281.65 (4) (o), Stats.”

l. Section NR 153.017 is improperly drafted. First, the subsection titles are not in the correct format. Second, sub. (3) appears to consist of only a title and no text. Third, it makes

incorrect use of the introduction format, as described above. Fourth, and most important, the subsections are not what the introduction says they are. The introduction makes reference to the requirements identified in the subsections, but those subsections do not create requirements--sub. (3) does not even consist of a complete sentence.

m. In s. NR 153.38 (3) (b) 1. a., the second sentence should be rewritten without a slashed alternative.

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

a. This rule is very confusing. At least three pervasive problems obscure the intent of the rule and the roles of the various players in the programs that the rule creates: first, the rule is poorly organized; second, the terminology used is confusing and the definitions are inadequate; and third, the rule makes excessive use of the passive voice. The rule should be reorganized and much of it should be rewritten to address these problems.

(1) First, this report will address the problems of organization. The text of the rule fails to give a complete picture of the programs that it creates -- even the analysis does not completely describe the programs. It appears that, under the rule, DNR will award grants to local units of government to administer nonpoint source water pollution control programs. It further appears that these programs are to function by installing best management practices on specific properties to control or ameliorate existing nonpoint source pollution problems. It further appears that the local units of government that receive grants may implement best management practices by installing the practices themselves, contracting with third parties to install the practices and by awarding grants to third parties to install the practices. Thus, DNR's role includes administering grants to local units of government and exercising some level of oversight to all activities that occur under those grants; local units of government have three roles, as recipients of grants from the DNR, program administrators and providers of grants to landowners. While many of the pieces of this picture are contained in the rule, nowhere does the rule give the entire picture nor does the organization of the rule facilitate piecing the picture together.

The Administrative Rules Procedures Manual offers the following guidance on the organization of a rule:

(3) TEXT OF RULE. In drafting a chapter or section of administrative rules, proper organization of the text of the rule is important to aid the reader in understanding the pattern of regulation or required conduct set forth in the rules. Single-section chapters should be avoided. Combine similar material into a chapter with several sections, rather than arranging each section as a separate chapter. If it enhances clarity and convenience in locating provisions, a long or complex rule could be divided into

appropriate chapters. The recommended sequence of material in a rule chapter or rule section is as follows:

- (a) Scope or purpose of the chapter or section. (A scope or purpose statement is not necessary, but if it is included, it should be the first item.)
- (b) Definitions of words or terms used in the chapter or section.
- (c) Substantive provisions in their order of importance, time sequence or other logical arrangement.
- (d) Exceptions, exemptions or exclusions, if any, to the chapter or section.
- (e) Benefits, sanctions or results of compliance or noncompliance with the chapter or section.

[s. 1.02 (3), Manual.]

Chapter NR 153, as drafted, is in strong contrast to this guidance. It consists of a number of sections of apparently general applicability followed by two subchapters, each addressing a separate grant program. It appears that the department may be attempting to avoid duplication of lengthy rule provisions by combining provisions applicable to both subchapters in the preliminary provisions. This is a laudable goal, but it should never be pursued at the expense of clarity. The result in this case is that provisions are presented in a completely illogical order. Many of the provisions in the first half of the rule are difficult to understand because they are presented out of the context of the grant programs to which they apply. It might be possible to pursue the strategy of combining provisions applicable to both subchapters by placing them in a third subchapter that *follows* the two subchapters describing the individual grant programs. However, the safer approach would be to integrate the various provisions into each subchapter, as appropriate.

The rule appears to rely heavily on statements of purpose and definitions or descriptions of terms such as “runoff management grant agreement” and “cost-share agreements” to provide the general picture of the programs created by the rule. Clearly, however, this is inadequate, as the picture that this provides is incomplete. Greater detail is needed, for example, in provisions specifying what a local unit of government must do under a grant it receives from the DNR. Additional procedural provisions are needed, as well.

While the DNR has promulgated many rules for the administration of grant programs, any one of which could serve as a workable model for this rule, this rule does face certain special challenges. In particular, it needs to distinguish between the dual roles of local units of government as grant recipients and grant

administrators. In addition, it needs to clearly distinguish between the DNR's functions in administering grants that it makes to local units of government and in overseeing grants made by local units of government. However, these challenges are far from insurmountable. In designing a new organization, the drafter should work through the entire process, from the time the local unit of government first considers applying for a grant until the time that the best management practices are installed and all follow-up work has been completed. If the rule contains all the necessary requirements and describes the entire process in a sequence that is logical and easy to follow, the organization of the rule will be sufficient.

(2) With regard to terminology, the rule is inconsistent in which terms it chooses to define. For example, the term "cost-share agreements" is defined. However, other types of agreements, specifically "runoff management grant agreement" and "local assistance grant agreement," are not defined; instead, they are described in general terms in the text of the rule. Such descriptions are not an adequate substitute for definitions. Furthermore, the general description of the term "cost-share agreements" provided in s. NR 153.005 (1) is different from the definition of that term.

In addition, other terms referring to cost-sharing, such as "cost-share grantor," "cost-share grantee" and "cost-share recipient," as well as the term "cost-share," itself, are not defined. The meaning of some of these terms would be clearer if the organization of the rule were clearer, but that will not avoid the need for clear definitions. For example, what is the difference between a "cost-share grantee" and a "cost-share recipient"? Further confusion is added by the fact that "cost-share" is sometimes used as an adjective and other times used as a verb. In another example, the terms "grant period" and "cost-share agreements period" are both used in the rule; the first of these terms is defined and the second is not.

Section NR 153.013 (2) is peculiarly confusing. It suggests that there is a difference between "termination" and "annulment" of a grant, but does not indicate what the difference is. Paragraph (c) deals with *how* a grant may be terminated and par. (d) deals with *when* a grant may be annulled. This suggests that they are talking about the same thing, in which case a single term should be chosen and used consistently. If this is not the intent, then much more explanation is needed. Also, it appears that some of the provisions of par. (b) should be combined with the provisions of par. (d), which should be placed before par. (c).

Numerous other terms are inadequately defined or inconsistently applied. The following list is illustrative, but not exhaustive:

- The definition of "operation and maintenance period" identifies the beginning point of this time period but not the endpoint.
- Section NR 153.004 (3) uses the undefined term "project area."

- Section NR 153.004 (4) uses the term “maintenance periods,” which is not defined, although the term “operation and maintenance period” is defined.
- Section NR 153.005 (4) (h) refers simply to “a nondiscrimination clause”; this term should be replaced by a full description of what is intended. (Since it is used only once, a definition would be inappropriate.)
- Section NR 153.005 (5) uses the undefined term “runoff management grant agreement grantor,” a term which is never again used in the rule.
- The undefined term “least cost practice” is used in s. NR 153.011 (1) (h) without any context or cross-references to explain its meaning; the two other uses of the term in the rule are with sufficient context that its meaning is clearer.
- Section NR 153.017 (intro.) uses the undefined term “urban recommendations.”

(3) As was noted above, the rule makes excessive use of the passive voice. This grammatical construction obscures, rather than clarifies relations. Instead, to the extent possible, the rule should be written in short, clearer declarative sentences of a form such as: “X shall do Y.” Too often, requirements are stated in the form of “Y shall be done by X” or, in the worst case, “Y shall be done.” Examples:

- See s. NR 153.005 (6) (b), which states that: “[t]he operation and maintenance period for both cost-shared and not cost-shared best management practices shall be for a minimum of 10 years.” Rewriting this sentence in the active voice would not only identify who must do something, but what must be done: “X (the local unit of government? the landowner or operator?) shall do Y (maintain a best management practice installed under a cost-share agreement for a minimum of 10 years beginning upon completion of installation of the best management practice).” Note that this also obviates the need for the inadequately defined term “operation and maintenance period.”
- What does it mean, in s. NR 153.007 (3) (b) 1., that “[a]ppraisals are subject to department review and approval”? Does this mean that the governmental unit *shall* submit an appraisal to the department and the department *shall* review the appraisal and the governmental unit *may not* act upon the appraisal until it has received approval from the department? Or does it mean that the department may, on a case-by-case basis, request that certain appraisals, about which it is concerned, be submitted to it for review and approval?
- Section NR 153.010 (4) (b) is vague. Instead, this provision should state that the department shall approve the use of force account work if the governmental unit demonstrates to the department’s satisfaction that the governmental unit has the necessary competence to accomplish the work and that the work can be accomplished more economically by the use of the force account method. If this is not what the department intends, then this provision needs further clarification.

- Section NR 153.014 (2) (a) to (e) should be written in the active voice. Interestingly, the last paragraph of that subsection *is* written in the active voice.
- b. In s. NR 153.002 (4), it appears that the word “a” should be inserted after the word “means.”
- c. Section NR 153.002 (11) contains references to ch. 66, Stats. If Assembly Bill 710 is enacted, the references to ch. 66, Stats., throughout the rule will require amendment.
- d. In s. NR 153.002 (23), each occurrence of the word “project” should be replaced by the word “project’s.”
- e. In s. NR 153.005 (6) (a), the word “on” should be replaced by the word “in.”
- f. Section NR 153.005 (9) provides that if a change of ownership occurs during a cost-share agreement, a new landowner must fulfill all conditions of the cost-share agreement. How will this be enforced?
- g. In s. NR 153.005 (11) (b), the phrase “on the agreement” should be replaced by the phrase “in the agreement.”
- h. In s. NR 153.007 (3) (g), what is meant by “the interest of the state of Wisconsin”? This provision should more precisely indicate what should be recorded with the deed to protect the state’s interest in the property.
- i. In s. NR 153.011 (1) (e) 3. c., does the governmental unit official conduct the verification or the installation? Presumably, this should be rewritten as follows: “Verification, by the governmental unit official, of proper installation.”
- j. In s. NR 153.013 (1) (a), is the suspension of state liability prospective only? In par. (b) (3), the word “sent” should be replaced by the word “send.”
- k. The discussion of the key, but undefined term “target area” is buried deep within the discussion of the application process, in s. NR 153.13. The only explanation provided of how target areas are identified is found in s. NR 153.13 (2) (b) 12. a. to e. Given the importance of this concept, it would seem appropriate to devote an entire section to this explanation. Section NR 153.13 would then refer simply to certification that the project will implement nonpoint source pollution control in a target area identified under that new section.
- l. In s. NR 153.15 (4) (b), and elsewhere, what does “activities covered by the WPDES permit program” mean? Does this refer to compliance with discharge limits?
- m. Section NR 153.16 (2) (e) and (f) are very unclear. These paragraphs seem to say that the least cost practice must be used unless the department decides otherwise. Of what benefit are these provisions? [See also s. NR 153.36 (2) (e) and (f).] In par. (g), it appears that the word “up” should be deleted. In sub. (3) (intro.), the notation “, Stats.” should conclude the statutory cross-reference.

n. In s. NR 153.16 (4) (b) 1. and 2., are “the landowner or operator” and “the grant recipient” different individuals?

o. Section NR 153.34 (1) (c) provides in part that DNR may establish a minimum of points that must be earned in any given category in order to receive funding. The minimum point totals should be included in the text of the rule.

p. Section NR 153.35 (4) (g) should be rewritten to read: “Areas surrounded by areas or land uses described in pars. (c) to (f).”