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CLEARINGHOUSE RULE 00-034

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

Section NR 243.23 (2) (a) indicates that corrective action needs to be taken if cost-sharing is available. However, it also provides that if cost-sharing was available previously, corrective actions must still be taken regardless of the current availability of cost-sharing. Section 281.16 (4), Stats., seems to indicate that cost-sharing being available is a necessary precondition for existing operations to have to come into compliance without regard to whether it was formerly available. Does s. 281.16 (4) authorize the department to consider previously available cost-sharing? Also, although the title to s. 243.23 (2) (a) indicates it applies to “existing operations,” nothing in the substantive text limits it to those operations. It appears that it should.

2. Form, Style and Placement in Administrative Code

a. The rule incorporates a number of standards by reference. The analysis of the rule should indicate that consent to incorporation has been given by the Attorney General and the Revisor of Statutes. [s. 2.08 (1), Manual.]

b. In s. NR 243.04 (1), line 24, “to” should replace the hyphen.

c. Some of the definitions in s. NR 243.04 are out of alphabetical order. For example, the term defined in sub. (7) should follow sub. (9). Subsections (34) and (35) should be reversed.

d. In s. NR 243.12 (2) (d), on line 19, “specifications” should replace “specification.”

e. The introductory paragraphs of s. NR 243.14 (2) and (3) are not truly introductory material; that is, they do not really introduce and lead into the material that follows. Therefore, they should be given appropriate paragraph lettering and the remaining paragraphs should be re-lettered. Also, see s. NR 243.23 (2) (intro.).

f. Section NR 243.21 contains only one provision. Therefore, the provision should not be numbered sub. (1).

g. In s. NR 243.23 (2) (c) (intro.), the phrase “any of the following occur” should be inserted before the colon. Also, subd. 1. should end in a period and the “or” should be deleted.

h. In s. NR 243.23 (2) (d), the second note appears to contain substantive material that should be placed in a substantive provision of the rule.

i. Because all of the other subsections of s. NR 243.23 have titles, sub. (5) should have a title as well.

j. Section NR 243.27 (2) should be drafted as a definition of “runoff management grant agreement.” Additionally, s. NR 243.27 (3) should be drafted as a definition of “cost-share agreement.”

3. Conflict With or Duplication of Existing Rules

Section NR 243.16 provides that owners or operators of large animal feeding operations must comply with applicable standards and prohibitions in ch. NR 151, as provided in their permits. Section NR 243.11 (1) implies that not all owners or operators of large animal feeding operations may need a permit. Is s. NR 243.16 intended to apply to those who do not need a permit?

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

a. In s. NR 243.04 (30), and other places in the rule, a federal enactment is referred to by its common name, e.g., “the safe drinking water act.” If the federal act’s common name is to be used, the term should be defined with a citation to the U.S. Code.

b. Section NR 243.13 (5) (a) appears to be the first of several provisions that relate to “conditions” contained in a permit. However, the rule does not appear to specifically discuss the department’s ability or authority to impose conditions. Under what provisions are conditions imposed? It appears that if the rule were amended to include language relating to the department

actually granting permits pursuant to the comment under item 7., below, that would be an ideal location to discuss conditions on those permits.

c. Section NR 243.14 (2) (b) refers to the “provisions of sub. (2).” It appears that the reference should be to the provisions of “this subsection.” However, if a different sub. (2) was intended, a more complete cross-reference should be provided. Also, given the existence of par. (c), it appears that par. (a) should begin with the phrase “Except as provided in par. (c).”

d. The term “ch.” before “NR 214” in s. NR 243.15 (1) should be deleted.

e. Section NR 243.21 provides that certain animal feeding operations “may be subject” to the subchapter if certain conditions exist. A specific cross-reference to that portion of the rule which causes them to be subject to the subchapter should be provided.

f. Several places in s. NR 243.23 (2) (a) to (c) refer to “eligible costs.” It appears that this term is defined in par. (d). Either par. (d) should be made into a true definition applicable to the section, or each reference to “eligible costs” should contain a reference to par. (d). However, s. NR 243.27 (1) provides that “eligible costs” are defined in chs. NR 153 and 154. The relationship of these terms and their appropriate definitions should be reviewed.

g. The term “NR” should be inserted before the citation to 153.004 (1) (f) in s. NR 243.27 (2) (c).

h. It appears that in s. NR 243.27 (4), par. (e) should be par. (b).

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

a. In s. NR 243.01 (2), does the phrase “its declared interest” relate to the interest of the state’s agricultural industry or the interest of the department? The rule should be clarified. Also, the phrase “our natural resources” should be changed to “the state’s natural resources.”

b. Section NR 243.02 indicates that the provisions of the rule apply to only certain large animal feeding operations. However, s. NR 243.11 seems to imply that owners or operators of all large animal feeding operations must file an application for a permit. Thus, it seems as though the applicability provision of the rule is too narrow.

c. In s. NR 243.04 (1), what is an “environmentally accepted manner” of handling, storing and using manure? Is the phrase necessary? Are the “practices, techniques and measures” in ch. NR 154, s. NR 243.26 and ss. ATCP 50.61 to 50.95 all environmentally accepted, or are just some of them? In other words, can the definition be shortened to get precisely at the core of the definition? Also, with respect to the other practices and procedures “as determined by the department,” will these be published somewhere or will they be determined on a case-by-case basis? The rule should be clarified.

d. In s. NR 243.04 (4), the phrase “for the purposes of this chapter” is not needed as the section only relates to definitions used in ch. NR 243.

e. In s. NR 243.04 (8) and (9), it is sufficient to either define a term or to define it with a cross-reference to another provision of the Wisconsin Administrative Code. A definition and a cross-reference are not necessary.

f. In s. NR 243.04 (20), the phrase “but not limited to” is implied in the term “including” and, therefore, is not necessary. This comment applies to other provisions of the rule, such as s. NR 243.12 (2) (b). The entire rule should be reviewed for the use of the phrase “but not limited to.” Also, the term “Governmental unit” in the last sentence should be enclosed in quotation marks.

g. Does the first use of the term “effective” in s. NR 243.04 (32) refer to the technical guide that is in effect on the effective date of the rule, or the technical guide that goes into effect on the effective date of the rule? The rule should be clarified.

h. What is the triggering point for the phrase “within 12 months” in s. NR 243.11 (1)? Does it mean within 12 months of the effective date of the rule? Alternatively, is the phrase intended to convey an anticipated ownership any time within a 12-month period? The rule should be clarified.

i. Section NR 243.12 (1) provides that owners and operators of large animal feeding operations that are required to obtain a Wisconsin pollution discharge elimination system (WPDES) permit, must file an application. Section NR 243.11 (1) appears to require all owners or operators of large animal feeding operations to file an application for a WPDES permit. Are two separate applications envisioned under these two provisions, e.g., an initial application and then another when it is determined a permit is needed? The relationship of the application requirements in these two provisions should be clarified.

j. In s. NR 243.12 (2) (intro.), what is a “new applicant”? Is this term used to distinguish between persons who already hold a permit and an owner of a “new operation” who has not yet been issued a permit? The rule should be clarified by either defining the term “new applicant” or by clarifying in the text to whom it applies. This comment also applies to s. NR 243.14 (1). Also, the phrase “all of the following” should be inserted before the colon.

k. In several places in the rule, a report or other information is required to be submitted to the department. The rule provides that the report, or other information, must contain “at a minimum” certain specific information. For example, see s. NR 243.12 (2) (c) and (d). Is it necessary to use the phrase “at a minimum”? Does the department expect that additional information will or should be provided? If the department does expect other information to be provided, that information should be specified in the rule. If not, simply state the minimum requirement and eliminate the phrase “at a minimum.”

l. In s. NR 243.13 (2), it appears that the term “providing” should be changed to “provided” or “if.”

m. Section NR 243.13 (5) (b) refers to the impairment of a “303 (d) listed waterbody.” The rule defines “303 (d) listed waters.” Is there a difference? If so, the difference should be

clarified through a definition of a listed “waterbody.” If there is no difference, the same terminology should be used throughout the rule.

n. In s. NR 243.13 (5) (d) 2., the condition applies if the “owner or operator” does not land-apply the manure. Which “owner or operator” is referred to, the one who sells the manure or the one whose operation purchases the manure? Also, who is required to report the amount “managed in such a manner” to the department? The rule should be clarified.

o. Section NR 243.13 (6) (a) appears to apply to an operation “composting manure under anaerobic conditions.” However, the rule defines “composting” to be an aerobic process. Is sub. (6) designed to address aerobic composting that has somehow turned anaerobic? In any event, the apparent inconsistency between sub. (6) and the definition in s. NR 243.04 (9) should be resolved. Also, given the proffered definition of composting, are the phrases “composting manure under aerobic conditions” in sub. (6) (b) and (c) redundant and unnecessary.

p. In s. NR 243.13 (7), what qualifies as “short-term” stacking? Also, the last sentence refers just to “stacking.” Should it apply to “short-term” stacking? The rule should be clarified.

q. In the third sentence of s. NR 243.14 (1), the material beginning with “including the requirement” is not necessary since, presumably all of the requirements are listed in s. NR 108.04. However, if it is important to emphasize the requirements of s. NR 108.04, they could be listed or summarized in a note to the rule.

r. Section NR 243.14 (3) (intro.) refers to “owners or operators” in the first sentence and “the permittee” in the second. Are these intended to refer to the same individual? If so, is there a reason different terms are used? If the terms refer to different persons, the rule should be clarified accordingly.

s. The second period at the end of the second sentence in s. NR 243.14 (3) (b) should be deleted.

t. In s. NR 243.14 (3) (c) (intro.), how will the department require additional design and operation requirements? Will this be done after construction is complete? The rule should be clarified.

u. With regard to s. NR 243.14 (3) (d) 1., “prior to construction” of what? Earthen-lined storage structures? The substantive text of the rule should be clarified. Also, who is to take the soil samples? The department? The owner or operator? The contractor? The rule should be clarified on this point as well.

v. In the first sentence of s. NR 243.14 (3) (d) 2., the term “also” is not needed. Also, when and why would the department require post-construction sampling to be done? Also, who does the sampling? The rule should be clarified. Also, the last sentence refers to “the performance standard for liner thickness.” What is this? Is this a department standard? A condition of a permit? A provision in one of the national standards incorporated by reference? The rule should be clarified.

w. What is an “existing manure storage facility” referred to in s. NR 243.14 (3) (e) (intro.)? Although the rule defines “existing operation,” it does not define an “existing manure storage facility.” Are they the same? If so, why are two different terms used? If not, the meaning of the undefined term should be made clear. In other words, at what point is a manure storage facility existing? The day the rule is effective?

Also, par. (e) (intro.) refers to an owner or operator requesting an exemption from certain design standards, yet it does not specify that the department may grant the exemption or how and why an exemption may be granted. It seems that the rule should. Finally, par. (e) (intro.) should end with the phrase “with all of the following performance criteria:”. Each subdivision should end with a period and the word “and” at the end of subd. 2. should be deleted.

x. How does one go about getting “approval” under s. NR 243.14 (4)?

y. Section NR 243.14 (6) refers to abandoning “other practices and structures.” Is this referring just to practices or structures for which a permit or approval from the department under ch. NR 243 is required or to other practices and structures? The rule should be clarified.

z. Section NR 243.22 (2) provides that a certain contact be made “as early as possible.” As early as possible in relation to what? The rule should be clarified. Also, the term “will” should be “shall.”

aa. Section NR 243.23 (1) (intro.) begins using the term “NOD.” This term is not defined in the rule. It should be defined either in the definition section for the chapter, or in a separate definition applicable to subch. III. In addition, the phrase “all of the following” should be inserted before the colon.

ab. In s. NR 243.23 (1) (a) (intro.), the phrase “all of the following” or “any of the following” should be inserted before the colon, depending on the department’s intent. Also, the phrase “but not limited to” should be deleted.

ac. Paragraphs (b) to (d) of s. NR 243.23 (1) should end in periods and the word “and” in par. (d) should be deleted. In par. (f), should the term “of” after “60 days” be “after”?

ad. How does a county agency or the Department of Agriculture, Trade and Consumer Protection (DATCP) “express an interest” in reviewing proposed corrective measures in s. NR 243.23 (3)? Also, it seems upon close reading of sub. (3), that if the county agency or DATCP do not want to review the proposed corrective measures and if the department does not ask for them to be submitted, no agency has to review the corrective measures. Is this the intent?

ae. Who is supposed to submit the report to the department in s. NR 243.23 (4)?

af. Section NR 243.24 (1) is drafted rather awkwardly and, as a result, is less than clear in its meaning. It is suggested that the first sentence be rewritten substantially as follows: “If an owner or operator fails to implement the necessary corrective measures within the time period provided in the NOD under s. NR 243.23, the department shall either pursue enforcement under . . . or commence the process of issuing a WPDES permit.” Also, what does it mean to

commence the process for issuing a WPDES permit? Does this mean that the department would require an owner or operator to apply for a permit? The rule should be clarified. Also, the last sentence should be rewritten as follows: “The owner or operator may request an administrative review of the department’s decision . . . pursuant to ch. NR 203.”

ag. What is the purpose of s. NR 243.24 (2)? Is it to delineate when the department may seek enforcement action as opposed to issuing a WPDES permit, as provided in sub. (1)? If so, sub. (1) should contain a reference to sub. (2). Also, is the department to choose between an enforcement action and issuing an NOD, as sub. (2) provides, or issuing a WPDES permit, as sub. (1) provides? The purpose of sub. (2) and its relationship with sub. (1) needs to be clarified.

ah. It does not appear that the term “also” in s. NR 243.26 (1) is necessary.

ai. In s. NR 243.26 (2), the phrase “approval will” should be changed to “approval shall.” Also, where are the “standard engineering principles” located and who will decide if the design is according to them?

aj. The provisions of s. NR 243.27 (5) to (7) and (9) appear to apply to governmental units. Nothing in the applicability provisions of the rule appear to indicate that the provisions of the rule will apply to governmental units.

ak. Who may apply for a variance under s. NR 243.27 (9)?

7. Compliance With Permit Action Deadline Requirements

Section NR 243.11 (1) requires certain persons who own or operate large animal feeding operations to apply for a permit. Each rule which includes a requirement for a business to obtain a permit must include the number of business days, calculated beginning on the day a permit application is received, within which the agency will review and make a determination on the permit application. [s. 1.10, Manual.] It is not readily apparent that the rule addresses the issue of the time period in which permits will be issued. In fact, it does not appear that the rule specifically sets forth a procedure or requirements for the department to grant permits. That procedure seems to be presumed given the tenor of various provisions of the rule. Perhaps there should be a provision that says something to the effect of: “The department shall grant a permit if” Also, how long do the permits last? Section NR 243.12 (1) requires an application 180 days prior to their expiration. The expiration information should be contained in the rule.