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RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 00-039

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 Department of Natural Resources (DNR) adopts performance standards and prohibitions under s. 281.16 (3) (a), Stats., and the department promulgates conservation practices and technical standards to implement the performance standards and prohibitions. However, some of the provisions in s. ATCP 50.04 appear to be performance standards or prohibitions. What is the department’s statutory authority to adopt these provisions? How do these provisions compare with DNR standards in ch. NR 151?

b. Section 281.16 (3) (e), Stats., provides that an owner or operator of an agricultural facility or practice that is in existence before October 14, 1997, may not be required by the state or a municipality to comply with various performance standards, prohibitions, conservation practices or technical standards unless cost-sharing is available to the owner or operator. What authority exists for s. ATCP 50.06 (2) (a) which provides that a farmer need not have a nutrient management plan or discontinue or modify that part of an agricultural facility or practice that was constructed or begun prior to the effective date of the rule provision unless the farmer can discontinue or modify the practice without incurring significant out-of-pocket or opportunity costs? In other words, what statutory authority exists that requires the owner or operator of an agricultural facility or practice in existence before October 14, 1997 to alter the facility or practice simply because the alteration will require only insignificant costs?

c. Is there specific statutory authority that authorizes contracts described in s. ATCP 50.40 (13) to be recorded? See s. 59.43 (1) (a), Stats.

d. Section 92.05 (3) (L) authorizes the department to provide technical assistance to local units of government, which may include review to determine if draft ordinances “comply with applicable statutes and rules.” On its face, this authority of the department is advisory. Section ATCP 50.54 requires ordinances to be “reasonably consistent with” ch. ATCP 50. What is the authority for the department to impose this requirement? [See also ss. 92.15 (2) and 92.16, Stats.]

e. Under s. 92.16, Stats., standards for manure storage systems may apply to manure storage facilities constructed after July 2, 1983. Should this date be included in s. ATCP 50.56?

f. Section 92.16, Stats., requires the department to adopt rules for ordinances that set standards and criteria for construction of manure storage facilities. Is s. ATCP 50.56 (3) (c) an adequate response to this mandate? The Natural Resources Conservation Service (NRCS) technical guides only apply, under the rule, if “incorporated by reference in the ordinance.” A standard that only applies if incorporated by reference in the ordinance cannot be described as a standard of the department.

2. Form, Style and Placement in Administrative Code

a. The second sentence in s. ATCP 50.01 (2) creates an exception to the definition of “conservation practice.” It would be better drafting practice to omit that sentence, and define and use the term “best measurement practice” in s. ATCP 50.38.

b. The subsections in s. ATCP 50.54 should be numbered, not lettered.

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

a. References to “other applicable law,” as used in s. ATCP 50.01 (14) (b), (c) and (d) should be avoided. Specific cross-references should be used, if possible. Also, the specific provisions of ch. 88, Stats., that are the source of regulatory authority should be identified in s. ATCP 50.01 (14) (d).

b. Can a more specific cross-reference to ch. 283 be provided in s. ATCP 50.01 (28)? [See also s. ATCP 50.40 (3) (c).]

c. A cross-reference to DNR rules is included in s. ATCP 50.12 (2) (h). However, this rule is not yet in effect. A note should be included to explain the current status of that rule. Also, the subchapter reference should be corrected.

d. In s. ATCP 50.12 (4) (b), the notation “subs.” should be replaced by the notation “sub.”.

e. Section ATCP 50.18 (1) provides for a report to be filed on a form provided by the department. The department should comply with the requirements of s. 227.14 (3), Stats. [See also s. ATCP 50.26 (1) and other provisions of the rule.]

f. In s. ATCP 50.22 (4), the notation “s. NR” should be inserted before the cross-reference.

g. In s. ATCP 50.56 (3) (b), the notation “s.” should be inserted before the cross-reference.

h. Can the reference to “guidelines adopted by the department” in s. ATCP 50.58 (4) (d) be specified?

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

a. The note after s. ATCP 50.01 (1) suggests the comparison of the rule definition with two statutory definitions. It appears that the definition in the rule is the same as the statutes.

b. The definition of “cost-share grant” in s. ATCP 50.01 (4) refers to an “eligible” conservation practice identified in the grant. Is this word necessary? Will ineligible conservation practices be identified in the grant?

c. Can “controls,” as used in s. ATCP 50.01 (12) be made more specific? Does this refer to a lessee, a holder under a land contract, an occupant of land or an employe of a person who owns the land?

d. The term “municipal” is used in s. ATCP 50.01 (14) (c), but this term is not defined in the rule. The cross-referenced statutes in that provision also include authority for counties and certain special purpose districts to promulgate ordinances. The term “municipal” should be defined.

e. A cross-reference in s. ATCP 50.01 (24) (b) would be useful, by rewriting that provision as follows: “A farm nutrient plan prepared or approved for a farmer by a person who is a qualified nutrient management planner under s. ATCP 50.48.”

f. Section ATCP 50.04 (intro.) requires “every farm in this state” to implement conservation practices. The definition of “farm,” together with the definition of “agricultural practices,” does not appear to place any lower limit on the size of an agricultural operation that may be considered a farm, subject to the requirement to implement conservation practices. Is this the intent of the rule? Also, why is the requirement to implement conservation practices placed on a farm rather than on a farmer?

g. Section ATCP 50.04 (3) (a) and (b) could be combined, and “facility” should be added after “manure storage” in s. ATCP 50.04 (3) (a).

h. Are the terms “permeable soils” and “fractured bedrock” defined in the NRCS technical guide referenced in s. ATCP 50.04 (3) (c)?

i. Section ATCP 50.06 (1) (b) should be rewritten as: “December 31, 2010 for farms not described in par. (a).”

- j. Can the “other program elements” referenced in s. ATCP 50.10 (1) (h) be specified?
- k. The text of s. ATCP 50.26 (1) provides that a land conservation committee “shall apply” for funding but the note states that the department will “solicit” grant applications from land conservation committees. Is it intended that land conservation committees are required to apply for funding each year or is this optional?
- l. Should counties be added to the list of entities that may receive grants from the land conservation committee in s. ATCP 50.34 (1) (b)? Also, can the rule specify the entities that are eligible as a “local governmental unit”? [See also s. ATCP 50.54 (2).]
- m. Section ATCP 50.40 (3) (intro.) refers to other conservation practices that the department approves in writing. These practices, when known, should be promulgated as administrative rules under subch. VIII of ch. ATCP 50. [See also ss. ATCP 50.62 (7) (a) 7. and 50.67 (5) (b).]
- n. Should s. ATCP 50.40 (3) (m) use current terminology from ch. 83, Stats., rather than “septic system”?
- o. The colon at the end of s. ATCP 50.40 (7) should be changed to a period.
- p. What is an “agreement” under s. ATCP 50.40 (8) (L)? If this is intended to “run with the land,” must the agreement be in the form of an easement?
- q. “Formal” in s. ATCP 50.46 (8) (c) and (d) is unnecessary. There is no informal contested case.
- r. Would “include” be a better word than “disclose” in s. ATCP 50.50 (4) (intro.)?
- s. Section ATCP 50.58 (4) (a) requires certain information to be submitted “except as provided in par. (c).” However, par. (c) does not relate to the submission of information.
- t. The first two sentences of s. ATCP 50.62 (1) (c) should be combined: “‘Manure storage facility’ means one or more manure structures and includes equipment used”
- u. Can “intercepts” in s. ATCP 50.63 (2) (b) be clarified?
- v. Can the meaning of “adjacent to” in s. ATCP 50.75 (3) (c) be clarified?
- w. In s. ATCP 50.77 (2) (intro.), the use of the word “currently” is vague. The phrase “that are currently contributing” should be replaced by the phrase “that contribute.”
- x. Many of the rule sections in subch. VIII of ch. ATCP 50 contain requirements that a farmer must agree to maintain a particular practice for 10 years unless farming operations on the affected land are discontinued. Other rule sections relating to practices do not contain such a provision. The department should ensure that the provision was not inadvertently excluded in those sections.