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CLEARINGHOUSE RULE 00-089

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. Section NR 162.03 (3) (d) and (e) identify projects that are not eligible to receive financial assistance under ch. NR 162. Since the projects in pars. (d) and (e) are not listed in s. 281.58 (8) (a), Stats., the authority for the department to exclude these projects is not apparent.

b. Under s. NR 162.08 (3) (j), a user charge system must be “based on actual or estimated use.” If this requirement is not meant to conflict with the exemption for user charge systems authorized under s. 281.58 (14) (b) 7., Stats., a note describing the statutory exemption could be added to the rule.

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

a. SECTION 1 should repeal chs. NR 161 to 163. SECTION 2 should create ch. NR 162.

b. Since the department has divided ch. NR 162 into subchapters, the entire chapter should be placed in subchapters. Sections NR 162.001 to 162.003 are not in a subchapter.

c. Notes should not include substantive requirements and are not part of the substantive provisions of the rule. [See s. 1.09 (1), Manual.] As such, the department should review all of the notes in the rule to ensure that they do not include substantive requirements. See, for example, the notes following ss. NR 162.003 (9) and (76), 162.04 (3) (c) 3. and 162.11 (2) (b) 3.

d. The definitions in s. NR 162.003 which are identical to statutory or other administrative code definitions should use a consistent format. For example, s. NR 162.003 (16) uses the phrase “has the meaning designated in;” s. NR 162.003 (27) uses the phrase “has the meaning in;” and s. NR 162.003 (29) uses a phrase “has the meaning specified in.” The appropriate phrase is “has the meaning given in.”

e. Since the definition of “median household income” in s. NR 162.003 (36) repeats the statutory definition of this term, the definition in sub. (36) should cross-reference the statutory definition.

f. The preferred drafting style is to avoid the use of “thereof.” For example, in s. NR 162.003 (54) (b) and (c), the preferred style would be to refer to either “the department’s agent” or “its agents.” See also s. NR 162.32 (8).

g. To avoid ambiguity and facilitate any future amendments to the rule, lists of items should be drafted in the standard format that includes the use of “following” in the introductory clause to the list, delineation of whether the list is exclusive or inclusive through the use of terms such as “any of” versus “all of” in the introductory clause and ending each item in the list with a period. This format was not followed in numerous lists in the rule, including lists in ss. NR 162.001 (intro.), 162.003 (3) 1., (41) and (67), 162.01 (intro.), 162.15 (1), 162.18 (1), 162.19 and 162.30 (3) (b) 2.

h. Since the statutes use the phrase “storm water” rather than the single word “stormwater,” the rule should also use “storm water.” See s. NR 162.03 (1) (d) (intro.) and 1.

i. The department should review the entire rule and remove any redundant phrases. See, for example, the inclusion of “newly” before “established” in s. NR 162.003 (42) and “but are not limited to” after “include” in s. NR 162.04 (1) (a) (intro.) and (b) (intro.).

j. If the department uses an acronym in the rule, then the acronym must be defined and used consistently. [See s. 1.01 (8) Manual.] The rule uses the acronyms “IRS” and “BOD” which are not defined in s. NR 162.003. See s. NR 162.06 (4) and the note following s. NR 162.04 (3) (c) 3.

k. In s. NR 162.06 (3), par. (c) has a title and all other paragraphs in sub. (3) do not. Either all of the paragraphs in sub. (3) should have a title or none should. [See s. 1.05 (1), Manual.] Similarly, in s. NR 162.08, subs. (1) and (2) have titles, and subs. (3) to (11) do not.

l. In s. NR 162.08 (3) and (9), the paragraphs should begin with par. (a). [See also s. NR 162.31.]

m. In s. NR 162.09 (1), the phrase “is responsible for the administration and successful completion of” should be replaced by the phrase “shall administer and successfully complete.”

n. The text preceding sub. (1) in s. NR 162.11 should be either redrafted to be an introduction or placed within a subsection. [See s. 1.03 (8), Manual.]

- o. Section NR 162.20 contains two subsections numbered as “sub. (1).”
- p. The references to pars. (a) to (c) in s. NR 162.31 (3) (intro.) do not conform to standard drafting style. [See s. 1.07 (2), Manual.] Also, since the text of sub. (3) is not an introduction to a list, it should not end with a colon. Also, par. (a) does not exist.
- q. The text of the rule should not contain parentheses. [See s. 1.01 (6), Manual.] See the use of parentheses in the definition of “interest-rate” in s. NR 162.47 (2) (a) 2. b.
- r. A rule should use “shall” to denote a mandatory or absolute duty or directive and “may” to denote an optional or permissive privilege, right or grant of discretionary authority. Use of “will” should be avoided. [See s. 1.01 (2), Manual.] This drafting style was not followed, for example, in ss. NR 162.003 (6) and 162.04 (3) (a) and (4).

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

- a. The analysis accompanying the rule cites s. 281.58, Stats., as authorizing rule-making. This reference is unduly broad. The specific provisions within s. 281.58, Stats., that authorize rule-making, including s. 281.58 (2) and (13) (cm), Stats., should be cited.
- b. The analysis accompanying the rule cites s. 281.59, Stats., as being interpreted by the rule. This reference is unduly broad, as parts of s. 281.59 are administered by the Department of Administration and s. 281.59 (3m) and (3s), Stats., do not relate to the clean water fund program. Also, if the department is interpreting s. 1.13, Stats., under s. NR 162.04 (1) (b) 7., then s. 1.13, Stats., should be listed in the analysis as a statute being interpreted by the rule.
- c. The references in the last paragraph in the analysis accompanying the rule are broad. For example, the reference to “s. 281.58, Stats.” should be to “s. 281.58 (7) (b) 5., Stats.”
- d. Section NR 162.07 (1) should include a statutory citation.
- e. The rule incorporates standards by reference. See s. NR 162.12 (1) (m). If this standard was not included in the prior versions of ch. NR 161, 162 or 163 that are repealed by this rule, then consent for incorporation of the standard must be obtained from the Revisor of Statutes and the Attorney General pursuant to s. 227.21 (2) (a), Stats. In this case, the analysis accompanying the rule should, but does not, indicate that this consent has been given either prior to this rule promulgation or concurrently with this rule promulgation.
- f. The internal cross-reference at the end of s. NR 162.08 (1) should be to “this subsection” rather than “sub. (1).”
- g. The cross-reference to s. NR 162.12 (1) (k) in s. NR 162.07 (6) does not appear to relate to the content in sub. (6), as s. NR 162.12 (1) (k) does not relate to the operation or maintenance of a treatment works or structural urban BMP. Is this cross-reference correct?

h. Section NR 162.13 (3) refers to compliance with “any U.S. Treasury requirements for maintaining the tax-exempt status of the bonds sold to the clean water fund program.” Can the department provide a more specific reference to these requirements?

i. The reference in s. NR 162.14 (3) (b) to final project close-out requirements “outlined in the financial assistance agreement” is vague. Can the department provide a specific reference to a financial assistance agreement condition in s. NR 162.12?

j. The references to chs. 19 and 227, Stats., in ss. NR 162.16 (2) and 162.17 (1) are too broad, as these chapters contain substantive provisions not pertinent to the subject matter in the rule in which they are referenced. The department should provide more specific references.

k. The U.S. Code reference should be used for citations to a federal law. [See s. 1.07 (3) (a), Manual.] This style was not followed in the reference to the Federal Single Audit Act in s. NR 162.17 (4).

l. The reference to penalties provided in ch. 281, Stats., in s. NR 162.19 (2) is vague. The department should reference the specific penalty provisions that may apply under ch. 281, Stats.

m. In s. NR 162.30 (2) (c) 3. c., the notation “NR” should precede the cross-reference.

n. The department should identify where the reader of the rule may obtain the list of “303(d) listed waterbodies” referenced in s. NR 162.30 (4).

o. In s. NR 162.40 (1), the references “ch. NR 162” and subch. III” should be replaced by the references “this chapter” and “this subchapter,” respectively.

p. The reference in s. NR 162.42 (3) (b) 3. to “reimbursement regulations of the U.S. Treasury” is vague. The department should be more specific.

q. The reference in s. NR 162.43 (3) to s. NR 162.06 (2) (a) and (c) is in error as s. NR 162.06 (2) does not contain any paragraphs. Also, the reference in s. NR 162.43 (3) to s. 281.58 (9) (d) and (f), Stats., is in error as pars. (d) and (f) relate to the collection of administrative and service fees, and s. 281.58 (9) (d), Stats., exempts applicants for hardship financial assistance from these fees.

r. The reference to s. 281.58 (9) (a) to (d) and (f), Stats., in s. NR 162.43 (3) should include “Stats.” at the end of the reference.

s. The reference in s. NR 162.44 (2) (b) should be to s. NR 162.42 (1) (b) rather than s. NR 162.42 (1) (a).

t. The references to s. NR 162.45 (2) in s. NR 162.48 (1) and (2) are in error as s. NR 162.45 does not contain any subsections.

u. All references to provisions of ch. 66, Stats., should be reviewed in light of the enactment of 1999 Wisconsin Act 150.

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

a. The analysis accompanying the rule needs to be more elaborate. It should contain sufficient details to enable the reader to understand the content of the rule. The format of the rule is to repeal and recreate existing chapters in the administrative code and the text of the rule does not reveal the changes made in existing code. The analysis should summarize the modifications that are made to existing rules to better reflect current policies and procedures and provide further clarity. The analysis should also identify if the rule is inconsistent with any federal requirement applicable to the clean water fund financial assistance program cited in s. 281.58 or 281.59, Stats.

b. In the second paragraph in the analysis accompanying the rule, “to” should be inserted after the second “related.”

c. Since s. NR 162.001 establishes three purposes of ch. NR 162, the introduction to this section should be written in the plural, “The purposes of ch. NR 162 are to:”.

d. The references to paragraphs in s. NR 162.003 (25) and (53) are missing the subsection in s. NR 162.11 that contains the cited paragraphs. Similarly, the reference to “an interest rate specified in s. NR 162.11” in s. NR 162.003 (26) is incomplete. Which of the five interest rate categories identified in s. NR 162.11 (1) does the department intend to reference in sub. (26)?

e. In s. NR 162.003 (37) (a), it appears that the word “resident” should be replaced by the word “residence.”

f. The reference in s. NR 162.04 (4) should be to “sub. (3) (c)” rather than “sub. (3).”

g. In s. NR 162.003 (8), “an” should precede “effluent.”

h. The list of activities identified in s. NR 162.003 (19) as “any activity listed in sub. . . . (46)” is vague, as sub. (46) contains a definition of “performance standards” and does not list any activities. Can the department be more specific?

i. Definitions should be drafted in the singular rather than the plural, and a singular subject and singular predicate should be used in each sentence containing the definition. The department should review all of the definitions in s. NR 162.003 to ensure that the predicates in the definitions appropriately match the subject. See, for example, s. NR 162.003 (20), (28), (31) and (42).

j. Since under s. 281.58 (13) (d), Stats., the department must establish a financial hardship assistance funding list that ranks projects in municipalities that are eligible for state or

federal financial hardship assistance, should “and” in the reference to “s. 281.58 (13) (b) and (be), Stats.” in s. NR 162.003 (23) be replaced by “or”?

k. To improve the clarity of definitions that contain two sentences, the second sentence should repeat the term being defined rather than use a reference such as “the term” or “it.” See, for example, s. NR 162.003 (34) and (44).

l. The department should review the following undefined terms and determine whether a definition is necessary to ensure consistent application of the rule:

- (1) “Useful business function” in s. NR 162.003 (37) (b).
- (2) “Designed figure for total flow” in s. NR 162.003 (59). If this term is the same as the defined term “design flow,” then “design flow” should be used in sub. (59).
- (3) “Annual funding policy” in s. NR 162.02 (1). Does this policy cover hardship financial assistance under subch. III in ch. NR 162? Section NR 162.02 (1) does not reference any provision in subch. III but s. NR 162.44 (1) references this policy.
- (4) “Enforceable wastewater requirement” in s. NR 162.03 (1) (b) and “enforceable requirement” in s. NR 162.30 (1) (b).
- (5) “Indirect project costs” in s. NR 162.04 (1) (a) 30.
- (6) “Toxic pollutants” and “high strength waste” in s. NR 162.08 (3) (h).

m. Since the definition of “municipality” in s. NR 162.003 (40) is based upon identifying types of political entities and not their governing bodies, the last phrase in this definition should refer to “any federally recognized American Indian tribe or band” rather than “any federally recognized tribal governing body.” See also the use of “federally recognized tribal governing body” in s. NR 162.42 (1) (a).

n. The definition of “parallel cost ratio” in s. NR 162.003 (45) is not clear. A ratio implies specification of a numerator divided by a denominator. These terms are not evident in this definition.

o. The department should review the clarity of the definition of “project” in s. NR 162.003 (51). The article preceding “project assign” should be “a” rather than “the.”

p. Rules should be drafted in the active voice. [See s. 1.01 (1), Manual.] The department should review the entire rule and redraft provisions that are in the passive voice. For example, since the determination in s. NR 162.003 (65) is written in the passive voice, it is not clear if a municipality or the department will be making this determination. Furthermore, if these determinations are project specific, then this definition contains a substantive provision

that should be placed in the text of the rule and not in a definition. [See s. 1.01 (7) (b), Manual.] Other examples of provisions in the passive voice are ss. NR 162.43 (5) and 162.49 (3).

q. Section NR 162.02 (2) is not clear. This subsection refers to the Legislature authorizing present value below the percentage specified in s. 281.58 (9m), Stats., but sub. (9m) does not contain any provision relating to the Legislature specifying any percentage. Also, if “present value” in sub. (2) is the same as “present value subsidy,” as defined in s. NR 162.003 (48), then the defined term should be used. Otherwise, “present value” should be clarified.

r. In s. NR 162.04 (2) (f), “or an” should be substituted for the last comma.

s. Under s. NR 162.04 (2) (m), operation expenses of the treatment works on structural urban BMP are ineligible costs. Section NR 162.04 (2) (intro.) states that “costs not directly associated with or not necessary for the construction or operation of an eligible project are not eligible for financial assistance.” Subsection (2) (intro.) implies that operation costs that are directly associated with an eligible project are eligible for financial assistance which conflicts with the prohibition in sub. (2) (m). The department should review these provisions to ensure that they do not conflict.

t. The second sentence in s. NR 162.05 (1) could be read to *not* establish a deadline for the filing of a notice of intent to apply for funding if the application for financial assistance will be submitted at any time other than within the following fiscal year. If the department intends to require this notice by December 31 in the year preceding the fiscal year in which the application will be made, then this sentence should be redrafted. In addition, the sentence would be clearer if it was drafted in the active voice.

u. The reference to “this requirement” in s. NR 162.05 (2) and (3) is vague. Is “this requirement” the requirement to file a notice of intent to apply for funding specified in s. NR 162.05 (1), the requirement to file the notice by the date specified in s. NR 162.05 (1), the requirement to submit the notice on a form provided by the department specified in s. NR 162.05 (1) or a different requirement?

v. In s. NR 162.07 (9) (d), the word “A” should begin subd. 7.

w. In s. NR 162.08 (2) (c), the last sentence should begin with the phrase: “In this paragraph, “user” means.”

x. In s. NR 162.07 (5) (d), a comma should be inserted after the word “bid.”

y. The word “EFFICTIVE” in the title in s. NR 162.15 (4) should be “EFFECTIVE.”

z. Section NR 162.18 (1) (intro.) refers to a breach of contract by the recipient but does not identify the contract that is being breached. Is this contract the financial assistance agreement? A similar ambiguity exists in the unqualified reference to a contract in s. NR 162.53.

aa. In s. NR 162.30 (7), “and” should be substituted for the last comma.

ab. Section NR 162.42 (1) (a) 1. refers to a municipality that is a “census designated place.” Since the definition of “municipality” in s. NR 162.003 (40) does not include a “census designated place,” for s. NR 162.42 (1) (a) 1. to be consistent with this definition, the definition should be modified to include this type of municipality. Also, as necessary to convey the plain meaning of subd. 1., “census designated place” should be defined.

ac. In the first sentence in s. NR 162.45, “the” should be inserted before the first “hardship.”

ad. The formula for computing the total maximum hardship grant under s. NR 162.47 (2) (a) 1. b. is not clear. How is “H (20)” computed?