



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 04-140

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 January 2005.]

1. Statutory Authority

Section ATCP 40.60 states that the department may initiate court actions to enforce ch. ATCP 40, including: (1) requesting a court to seize and dispose of fertilizer; (2) seeking temporary and permanent injunctions; (3) seeking to recover civil forfeitures. It also states that the department may ask a district attorney to initiate a criminal prosecution. The statutory authority for each of these appears clear, with the exception of initiating civil forfeiture actions. Authority of the department to initiate civil forfeiture actions is made particularly uncertain by s. 94.64 (12) (b), Stats., which specifically assigns the duty to commence all court actions, civil and criminal, for violations related to fertilizers to the district attorney. The department should review these provisions carefully.

2. Form, Style and Placement in Administrative Code

a. Some of the definitions in s. ATCP 40.02 establish a good deal of substantive policy through extensive and detailed exceptions. For example, see the definitions of “distribute,” “manipulated manure” and, especially, “soil or plant additive.” Most, if not all, of this material should be placed in the main body of the rule, not the definitions. [See, s. 1.01 (7) (b), Manual.]

b. In s. ATCP 40.02 (24), “including use” should replace “such as.”

c. There should be no need for three terms that fit a single definition, as in s. ATCP 40.02 (40). One term should be selected and used consistently throughout the rule. However, in

this instance, one of the terms is “biosolids” and the definition includes liquids. This apparent conflict may indicate that the terms are *not* identical, and so need separate definitions.

d. Based on common use, dictionary definitions, and other definitions in this rule, the terms “substantiate” and “unmanipulated animal or vegetable manure” are readily understandable and do not need definition.

e. The note following s. ATCP 40.04 (1) is substantive, and should be placed in the text of the rule. The same applies to the note following s. ATCP 40.20 (1) and the second note following s. ATCP 40.08 (6) (b).

f. In s. ATCP 40.04, relating to fertilizer licenses, there is no provision creating a license renewal process, only a reference to a penalty that applies if a licensee fails to renew before a license expires. Such a provision should be added. The same applies to s. ATCP 40.20.

g. In the note after s. ATCP 40.08 (2) (d), “ch.” should be inserted before “COMM” and “ATCP.”

h. Section ATCP 40.08 (7) (title) should use the word “substantiate” (or “substantiation”), since that is the defined term and the term used in that section.

i. The note following s. ATCP 40.08 (7) (b) is substantive information that should be in the text of the rule. Perhaps the best placement for it would be in the definition of “scientific evidence.”

j. The rule misuses the term “enhancing element” in at least three provisions. Sections ATCP 40.02 (9) and 40.10 (1) (a) refer to “the enhancing elements cobalt and sodium.” By definition, those elements are enhancing elements, so “the enhancing elements” should be deleted. Similarly, s. ATCP 40.08 (3) (a) refers to a fertilizer that “contains cobalt or sodium as an enhancing element.” By the definition, cobalt and sodium are *always* enhancing elements. If cobalt or sodium are ever *not* enhancing elements, the definition is incorrect.

k. The manner in which the rule establishes minimum standards for inclusion of a nutrient in a guaranteed analysis--by means of an illustration of the format for presenting the guaranteed analysis--is incorrect. The standards should be established in the text of the rule or a table. One option to accomplish this is to rewrite s. ATCP 40.10 (3) as follows:

ATCP 40.10 (3) MINIMUM GUARANTEES. (a) No person may represent that a fertilizer contains a specific plant nutrient unless the nutrient guarantee equals or exceeds the following minimum percentage amounts or a minimum percentage amount in a permit issued under s. ATCP 40.12:

1. Total nitrogen (N), 1.0%.
2. Available phosphate (P₂O₅), 1.0 %
3. etc.

- l. The illustration could then be moved to an appendix.
- m. Section ATCP 40.10 (3) (b) should be moved to s. ATCP 40.12, since it relates to fertilizer permits, not labeling. Similarly, a more appropriate placement should be found for the second sentence of s. ATCP 40.24 (1) (a).
- n. Section ATCP 40.10 (3) (c) should be modified to read: “Paragraph (a) does not apply to any of the following:”.
- o. The phrase “Except as provided in sub. (8) (a),” should be inserted at the beginning of the first sentence of s. ATCP 40.10 (5) (a), and the last sentence of the following par. (b) should be omitted.
- p. For proper placement and sequencing of provisions, s. ATCP 40.10 (9) should be renumbered s. ATCP 40.10 (2) (bm).
- q. In s. ATCP 40.14 (3), the symbols “N,” “P₂O₅,” and “K₂O” should be replaced, or supplemented, with the chemical names.
- r. The note following s. ATCP 40.58 appears substantive, and so should be placed in the text of the rule.

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

Various notes tell readers to see statutory or rule provisions, but do not explain why. For example, the note after s. ATCP 40.04 (3) (b) should state: “Section 93.135 (cm), Stats., requires provision of an applicant’s social security number.”

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

- a. In s. ATCP 40.02 (1) (intro.), the words “of a fertilizer or soil or plant additive” should be inserted following “performance.”
- b. What is the authority or regulation intended in the phrase “or required to be declared” in s. ATCP 40.02 (1) (c)?
- c. Of the five terms listed in s. ATCP 40.02 (3), two are defined and three are not. The terms are fairly obvious and it would appear that none *need* defining. The same is true of the two terms listed in s. ATCP 40.02 (29); one is defined, the other is not, and neither appears to need a definition.
- d. The first sentence of the definition of “fertilizer,” could be rewritten as: “... any substance that contains ..., is used for ..., and is designed for”
- e. The definition of “fertilizer” excludes animal or vegetable manure. “Vegetable manure” appears to be an obscure use of the word “manure” and could be confusing. If vegetable manure is meant to mean animal bedding that is mixed with animal manure, it may be clearer to omit the words “animal or vegetable.” If it is intended to include crop residue or other purely vegetable materials, it would be clearer to make this explicit.

f. In s. ATCP 40.02 (20) (intro.), the closing quotation mark in both sentences should be placed after the word “manure.”

g. In s. ATCP 40.02 (41) (intro.), “which” should be replaced by “that.”

h. Should the definition of “product” include combinations or, as drafted, refer to only a fertilizer or a soil or plant additive, not in combination with other fertilizer, additive, or pesticide?

i. In s. ATCP 40.02 (35), to what does “prior” refer--prior to sale or prior to use? If it is the latter, it might be stated more clearly as “... without mixing or dilution by the user.”

j. In s. ATCP 40.04 (3) (f), it appears that the phrase “that the applicant proposes to manufacture or distribute,” or words to that effect, should be inserted following “fertilizer products.”

k. Section ATCP 40.08 (2) (a) 8. should specify *what* “(o)ther information required under this chapter” must be included in bulk fertilizer labels, rather than relying on that vague statement.

l. The term “component products” is not defined and, in juxtaposition with “combination product” in s. ATCP 40.08 (3) (g), is not clear. Does the department mean “components of the combination product”?

m. In s. ATCP 40.10 (8) (a), the second occurrence of “phosphorous acid” is misspelled.

n. Presumably, the department intends, in s. ATCP 40.12 (2) (c) 2., that the label use the defined term, not the definition.

o. In Table 1, following s. ATCP 40.14 (2), allowable deficiencies should be stated as, for example, “0.2 percentage points and 5% of the labeled guarantee.” As shown in the rule, it looks like the sum of two percentages.

p. In s. ATCP 40.24 (3) (a), the word “label” should be inserted following the first “additive.”

q. It is unclear whether s. ATCP 40.24 (4) (b) 2. refers to a fertilizer-additive combination in which the only plant nutrients are one or more of the four humic substances listed, or if it refers to a fertilizer-additive combination that may contain other plant nutrients but does not include any humic substances other than the four listed.

r. Section ATCP 40.26 (2) (b) specifies the requirement in the absence of microorganism ingredients, but says nothing of the requirement when there are microorganisms.

s. In s. ATCP 40.26 (3) (a) and other provisions where “by weight” follows “percentage,” the former should be omitted, as that is stated in the definition of “percent” or “percentage.” Alternatively, “percentage by weight” could be used consistently in the rule and the definition could be omitted.

t. In s. ATCP 40.26 (3) (b) 1., “genus” should replace the second occurrence of “microorganism.”

u. Section ATCP 40.28 (1) (title) contains the stray word “No.”

v. In s. ATCP 40.50, what effect, if any, does a modification of an application have on deadlines for department action?

w. The title of Table B-1, in Appendix B, should be replaced with something more complete and accurate, such as: “Metal Contamination Limits for Soil or Plant Additives Derived from Sources Less Than 80% Organic.”

x. The first sentence of Appendix C refers to a “test of 0.5 N NaOH extraction,” while the reagent listed is 1 N NaOH, and the procedures refer to 1 N NaOH. Is this correct?

y. Should the 14th step of the analysis in Appendix C refer to lines 12 and 13, or just line 12?