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RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 05-075

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.]

General Comment

The comments in this report highlight errors and give examples. The department will need to review the entire rule to find and correct all occurrences of errors.

2. Form, Style and Placement in Administrative Code

a. The rule repeals and recreates an entire chapter. The Wisconsin Bill Drafting Manual, 2005-2006, prepared by the Legislative Reference Bureau, says this:

> Repealing and recreating generally ***obscures the nature and extent of changes in the law***. However, there are three instances in which repealing and recreating may be appropriate: when there are so many changes that the text is ***almost unreadable because of extensive striking and underscoring***…. [s. 4.105 (2), Bill Drafting Manual; emphasis added.]

The two other instances are not pertinent to this rule. While it appears that the rule makes fairly substantial changes to the existing rule, it does not appear that the changes are so extensive as to make the rule unreadable if drafted with striking and underscoring. In fact, many of the changes are the creation of entirely new text. Preferably, the rule should be drafted to show the precise changes it makes to current law, through the creation, amendment, renumbering, and repeal of text.

Since the department has chosen to use the repeal and recreate format, it is incumbent upon the department to inform the reader of how the rule changes current law. The analysis

provided with this rule is a good summary of the entire chapter but it does not indicate how the law is changed by the rule. If the repeal and recreate format is retained, the department should modify the analysis to explain how the rule affects current law.

b. The rule defines many more terms than is necessary or appropriate. The term "combined animal unit" is used only once outside the definition, as are "conduit to a navigable water," "contaminated runoff," "long-term no-till," "pasture or grazing area," and "livestock facility"; the terms "grassed waterways," "proper incorporation," "proper injection," "reviewable facility or system," "sufficient vegetative cover," and others are used only two or three times. In most, if not all of these examples, the definitions could be omitted and the defined term could be replaced in the text of the rule with more descriptive language.

c. The definition of CAFO should read as follows:

"…means an animal feeding operation to which any of the following apply:

(a) The operation has 1,000….

(b) The operation has 300 to 999 animal units and is designated by the department under s. NR 243.24 as having a category I unacceptable practice….

(c) The operation is designated by the department under s. NR 243.26 (2) as…."

d. The definition of "cropland" seems too narrow. Should it also include crops grown for fiber? Or crops grown for biomass, e.g., as fuel or as feedstock for the manufacture of ethanol? However, if the department does not intend to limit the meaning, it would appear that there is no need for a definition.

e. The definition of "karst feature" does not differ from a standard dictionary definition of the term, and so should be omitted. Note also that the rule refers sometimes to "karst features" and other times to "karst topography" or "karst formations," suggesting that, if a definition is retained, the term defined should be only the word "karst."

f. The rule makes three common mistakes in the use of introductory language:

First, an introductory clause must indicate whether ***all*** of the listed items apply, or ***any*** of them. For example, the last sentence of s. NR 243.12 (2) (a) 6. (intro.) should read: "The plan shall include ***all of*** the following information:".

Second, each item that follows an introductory clause must flow, conceptually and grammatically, from the introduction. For example, ss. NR 243.14 (4) is a list of options for the land application of manure or process wastewater; pars. (g) and (h), however, relate to nutrient management plans and application rates. Those paragraphs should be placed in another subsection or in subsections of their own. Similarly, ss. NR 243.03 (46) (a) and (d) do not follow grammatically from the introductory clause, and should be modified to do so or placed in another subsection.

In another form of this mistake, s. NR 243.24 (4) (intro.) does not introduce the following paragraphs; rather, it is a requirement separate from those paragraphs and so should be numbered par. (a). Similarly, ss. NR 243.15 (1) (b) 1. and 2. should be numbered pars. (c) and (d).

Third, some introductory clauses are unnecessary. See, for example, s. NR 243.24 (1) (intro.). Sometimes, but not always, the problem of a subunit not following conceptually from the introduction can be resolved by eliminating the introduction.

g. A number of definitions are substantive, or include substantive material, which should be placed in the text of the rule. See, in particular, the definitions of "pasture or grazing area," "proper incorporation," "proper injection," "sufficient vegetative cover," and "wastewater treatment strip." Also, what constitutes "proper" incorporation or injection?

h. The definitions in ss. NR 243.115 and 243.22 should be moved to s. NR 243.03. None of these terms have meanings that are different in the respective subchapters than in the rest of the chapter, and some of them are used in more than one subchapter.

i. "Existing source CAFO" is defined as "an operation" while "new source CAFO" is defined as "a large CAFO." These terms should be defined with parallel terminology.

j. The rule incorporates a large number of documents by reference. It might be helpful to include a provision similar in format to s. NR 600.10.

k. Rules should be drafted in the singular, to the extent practical. For example, s. NR 243.12 (1) (intro.) should begin: "A large CAFO shall be…"; par. (a) should begin: "A person who proposes…." Section NR 243.18 is an example of good drafting, referring to "a permittee" in the first sentence and "the permitee" in subsequent sentences.

l. Rules should be written in the active voice, to the extent practical, to make sure that the rule is clear as to who is responsible for compliance with the various requirements of the rule. For example, the second sentence of s. NR 243.12 (4) (b) should read: "In no case may the department determine that a large CAFO has no potential…." In a more critical example, s. NR 243.142 (5) (a) should read: "The [permittee?] [recipient?] shall identify…." The second sentence of s. NR 243.24 (4) (a) 2. should read: "The department may amend the NOD…."

m. In s. NR 243.115 (1) Note, the phrase "of this rule" should be replaced by the phrase "of this chapter."

n. Section NR 243.12 (1) (c) (intro.) should read: "…its current WPDES permit, unless all of the following apply:".

o. It appears that, in s. NR 243.12 (2) (a) 6. (intro.), all the material following "of s. NR 243.14" repeats material in s. NR 243.14. If this is correct, the material should be omitted.

p. The rule appears at times to use the terms "CAFO," "operation," "facility," and "animal feeding operation" interchangeably. The defined term should be used consistently. Similarly, the rule refers to both "owner," "owner or operator," "applicant," "applicant or

permittee," and "permittee or designee." The department should ensure that these terms are used consistently and appropriately.

q. In general, the word "also" should not be used. See, for example, s. NR 243.12 (4) (b).

r. Section NR 243.12 (4) (b) should begin with the phrase, "In making a determination under par. (a), …."

s. Section NR 243.121 (3) provides that the department must specify criteria for determining eligibility for general permit coverage in the WPDES general permit. If these specific criteria are of general applicability, they would meet the definition of the term "rule" in s. 227.01 (13), Stats., and should be included in the text of ch. NR 243.

t. "Green tier," used in s. NR 243.127, is jargon; the statutory title of this program is the "environmental results program."

u. References to exceptions should be in the form: "except as provided in...." For example, the second sentence of s. NR 243.13 (2) (intro.) should begin: "Except as provided in par. (b) or (c), …."

v. The second sentence of s. NR 243.13 (2) (intro.) should end: "…unless all of the following apply:".

w. The inspection, maintenance, and record keeping requirements of s. NR 243.19 are not optional, so why are they referenced as a condition in s. NR 243.13 (2) (a)? See also s. NR 243.13 (3) (b). Similarly, a requirement established in one rule provision should not be repeated in another. See, for example, s. NR 243.14 (2) (e).

x. Section NR 243.13 (3) (c) 1. a. and b. should be combined in a single subdivision paragraph.

y. The rule frequently states the reason for a requirement, as well as the requirement. Such explanatory material should be either omitted or placed in notes. See, for example, s. NR 243.14 (2) (d) (intro.) and (e).

z. In s. NR 243.13 (8) (a) 2., the word "vegetated" should be inserted before the word "area."

aa. Section NR 243.14 (4) (intro.) should conclude with a colon.

bb. In the second note following s. NR 243.14 (5) (a) 1., does the department intend the cited document to be the standard that must be followed, or only an example? If it is the former, it should be moved to the text of the rule and incorporated by reference; otherwise, it should be made clear that the cited document is one source acceptable to the department. The same applies to the first note following s. NR 243.14 (5) (b) 7.

cc. Table 4 should have a fourth column, like the fourth column of Table 5, to more clearly state what is now a parenthetical comment in the title of the third column.

dd. Section NR 243.14 (7) (d) 1. should begin: "Except as provided in subd. 3., …." Subdivision 3. should read something like: "The department may authorize, in writing and on a case-by-case basis, an owner or operator to make emergency applications on locations or under restrictions other than those specified in subd. 1.".

ee. The title of s. NR 243.15 is "Submittal and approval of proposed facilities or systems," but only the first subsection addresses that topic; the remaining subsections relate to design requirements. Subsections (2) to (10) should be placed in a separate section.

ff. The designation of pre-approved additives under s. NR 243.17 (2) (b) meets the statutory definition of a rule. Consequently, the department must identify such materials in the rule.

gg. The notation "1." following s. NR 243.19 (1) (c) (title) should be deleted.

hh. Since s. NR 243.20 applies to the subject matter of both subchs. II and III (see s. NR 243.26 (7)), it should be placed in a new Subchapter IV that applies to the entire chapter. If there are other requirements, such as testing, record keeping, or reporting, that apply to both subchapters, these could also be moved to a new Subch. IV.

ii. Section NR 243.23 only repeats the requirements of other rules and so should all be placed in notes. The notes might appropriately follow s. NR 243.21.

jj. Section NR 243.24 (2) (intro.) should begin: "Except as provided in sub. (_)," and s. NR 243.24 (2) (d) should be renumbered as the subsection referenced in that introductory clause.

kk. Section NR 243.26 (1) (title) and (1) use "medium size CAFO," "animal feeding operation with 300 to 999 animal units," "facility that has 300 to 999 animal units," and "animal feeding operation," apparently all referring to the same entities. They are not "medium CAFOs" as that term is defined, since they have not necessarily been designated such under sub. (2). However, some consistent terminology should be devised. If necessary, the title could be simplified to "General."

ll. Section NR 243.26 (2) (c) repeats the definition of type I unacceptable practice. It should read: "…unless the operation has a type I unacceptable practice."

mm. Section NR 243.26 (4) should be written using infinitives, such as "do," "comply," and "address."

nn. In s. NR 243.26 (5), "choose to" should be deleted.

oo. In s. NR 243.26 (6), "has a duty to" should be replaced by "shall."

pp. SECTION 2 (1) of the rule-making order should begin: "Except as provided in subs. (2) to (4),".

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

a. Several provisions of the rule appear to confuse subsections ("subs.") with subdivision paragraphs ("subd. pars."). For example, the cross-reference in s. NR 243.13 (2) (b) 1. e. should be to subd. pars. b. to d., not subpars. b. to d.

b. In s. NR 243.15 (1) (a) 1., the reference to s. NR 243.12 should be omitted, as it is redundant with the referenced section. Instead, a note could be used to provide a linkage to that section. The reference to s. NR 108.04 (2) appears appropriate, as it is less clear that that section applies here, although this, too, could be communicated through a note. See the note following s. 243.15 (1) (b) for a model.

c. In s. NR 243.15 (1) (a) 2., more precise references should be provided, rather than referring to all of chs. NR 811 and 812.

d. The note following s. NR 243.17 (7) (b) should refer to the NRCS standard, rather than "this document."

e. A reference should be added at the end of s. NR 243.24 (1) (b) identifying the livestock performance standard or prohibition intended. Other provisions should be similarly modified. If this becomes too cumbersome, it may be appropriate to use a defined term.

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

a. In the preface to the rule, in the third sentence of the third paragraph of item 9., the word "of" should be inserted after the word "portions" and the phrase "to be provided" should be inserted before the phrase "to the Department."

b. In the preface of the rule, in the third paragraph of item 12., the first citation should read "s. NR 281.98 or ss. 283.87, 283.89, and 283.91, Stats."

c. Almost every occurrence in this rule of the word "which" should be changed to "that"; the exceptions are constructions such as "for which," "on which," "under which," or "at which." When used as in "which is incorporated by reference," "which is" may be omitted.

d. In the definition of "maximum operating level," "a minimum of the combined distance" should be replaced with "the sum of." If the department intends anything other than the sum, this needs to be clarified.

e. "Haylage," used in the definition of "raw materials," appears not to be a legitimate word; it does not appear in the unabridged versions of either the Webster's New International Dictionary or the Oxford English Dictionary. Why not just use "hay"?

f. Can the definition of "reviewable facility or system" be replaced with a definition such as "…a facility or system subject to review and approval by the department under s. ___"?

g. The definition of "unacceptable practice" should simply be "…a practice identified in s. NR 243.24 (1)." Similarly, the definition of "WPDES" should include a reference to ch. 283, Stats.

h. The note following the definition of "new source CAFO" describes them in relation to the effective date of the rule, while the definition refers to April 14, 2003. Should these not be the same date?

i. In s. NR 243.115 (2) (d), the word "in" should be replaced by the word "is."

j. "No potential to discharge determination" and "determination of no potential to discharge" are jargon and should be replaced with more straight forward language. For example, s. NR 243.12 (4) (c) (intro.) should read "…determination that there is no potential of the facility to discharge animal waste to the waters of the state and…." However, a simpler option is to write "…determination under par. (a)…." The same applies to the two following paragraphs.

k. The note to s. NR 243.12 (3) refers to various forms. If these forms are available on the department's website, the note should indicate this.

l. In s. NR 243.13 (3) (a), it is not clear what provisions of sub. (2) apply to facilities housing swine, poultry, and veal calves. Can this be made more explicit? Also, it appears that this section should make clear that sub. (3) applies to poultry ***other than ducks***, since ducks are addressed in sub. (2).

m. It appears that s. NR 243.13 (4) (b) should apply to all large CAFOs, not just those housing horses and sheep. If this is the case, it should be moved to s. NR 243.13 (5).

n. The word "land" should be omitted from the second sentence of s. NR 243.14 (1) (b).

o. In s. NR 243.14 (2) (b) 3., "and" should be inserted before "minimize".

p. In s. NR 243.14 (2) (b) 4., the word "separation" should be replaced by "depth." This is easier to understand, and is the wording used in s. NR 243.15 (1) (b) 2. a.

q. Section NR 243.14 (4) uses the term "SWQMA" whereas the defined term is "WQMA." Later provisions use the term "WQMA." The defined term should always be used.

r. In s. NR 243.14 (4) (b) 2., "crop" should be inserted before "residue."

s. It appears that the second sentence of s. NR 243.14 (4) (c) should read: "For the purpose of this paragraph, …." Otherwise, that definition should be moved to the beginning of the section.

t. In the note following s. NR 243.14 (7) (d) 2., the word "of" should be inserted after "onset."

u. Sections NR 243.14 (7) (e) and (9) appear to be in conflict with regard to certain existing CAFOs.

v. In s. NR 243.141 (3) (c), the comma should be deleted.

w. In s. NR 243.142 (2) (a), and elsewhere, "diminimus" should be "de minimus."

x. The note following s. NR 243.142 (3) conflicts with s. NR 243.142 (3) (intro.). The note, cross-referencing s. NR 243.142 (2) (a), states that department approval is not required for

the transfer of responsibility for de minimus amounts of manure. Section NR 243.142 (3) (intro.), however, states that department approval is required for ***any*** transfer of responsibility, and s. NR 243.142 (2) (a) does not provide an exception.

y. In the third sentence of s. NR 243.15 (3) (i), how is it determined whether "at the time of permit issuance" or "prior to November 30 after permit issuance" applies?

z. The rule uses the word "proper" a number of times without providing a standard of what constitutes "properness." Section NR 243.15 (3) (i), for example, provides a definition, but it would be clearer to write: "…shall have liquid manure storage or containment facilities that meet the standards in s. NR 243.__ (_) or a system of facilities that meet the design requirements of par. (f)…." Other instances of "proper" should be treated in a similar manner.

aa. Contrary to the impression given by s. NR 243.15 (8), one cannot compost mortality, although one can compost animal carcasses.

bb. Section NR 243.19 (2) (b) 2. g. should be written in the same form as sub. (3) (c) 5. g.

cc. The phrase "in the previous 12 months" (or whatever the appropriate time period is) should be inserted at the end of s. NR 243.19 (3) (c) 4.

dd. Section NR 243.24 (1) (c) should be written: "…that caused a discharge of pollutants to waters of the state and that is not described in par. (a) or (b)."

ee. It appears that "medium or" should be inserted before "small" in s. NR 243.24 (3) (b) 3.

ff. In the last sentence of the note to s. NR 243.24 (3), the phrase "these rules" should be replaced by the phrase "this chapter."

gg. Section NR 243.24 (4) (a) should be written as follows:

(a) The department shall include all of the following in an NOD:

1. A summary of the results of….

2. One or more suggested corrective….

3. A list of known governmental or private services that may be available to provide technical or financial assistance.

4. (as written in the rule, except no title)

5. (as written in the rule, except no title)

6. An explanation of….

hh. In s. NR 243.25 (2), what enforcement is allowed in a case in which cost sharing is required but not available? This should be stated, for clarity and completeness.

ii. In s. NR 243.26 (4) (c) note, the term "CAFOs" should be replaced by the term "CAFO." Also, is a point source discharge by a small CAFO prohibited unless the discharge is covered by, and in compliance with, a WPDES permit?