



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 20-043

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Reference Bureau and the Legislative Council Staff, dated December 2014.]

1. Statutory Authority

a. The statutes require the department to adopt minimum standards for nonferrous metallic mineral exploration, prospecting, and mining by rule. Those promulgated minimum standards must include certain components. [s. 293.13 (2), Stats.] Rather than promulgating such minimum standards by rule, the proposed rule appears to merely cross-reference the statutory requirement described above and authorize the department to impose site-specific conditions to implement that statutory requirement. (See, e.g., proposed s. NR 130.108 (1) (a), which provides that the department shall deny an application for an exploration license if the proposed exploration “will not comply or has not been conducted in compliance with the minimum standards in s. 293.13 (2) (b) and (c), Stats.”, and proposed s. NR 130.109 (1) (d), which authorizes the department to impose site-specific conditions “to ensure compliance with the minimum standards under s. 292.13 (2) (b) and (c), Stats.”, and s. NR 130.204 (2) (a) 3., which requires a bulk sampling plan to demonstrate that it will “comply with the minimum standards specified in s. 293.13 (2) (b) and (c), Stats.”) As mentioned, s. 293.13 (2) (b) and (c), Stats., direct the department to adopt standards by rule. Site-specific standards are not adopted by rule. Thus, the department should adopt specific standards by rule.

b. Section 293.21, Stats., requires a person intending to conduct nonferrous metallic mineral exploration to obtain a license from the department, pay annual license fees and additional fees reflecting the department’s actual costs, and to provide a bond of \$5,000 or greater. The proposed rule requires an applicant for an exploration license to also provide a certificate of insurance and certain securities filings or other financial information. Please explain the

department's authority to require the certificate of insurance and securities filings or other financial information in addition to fees and a bond.

c. The statutes require a person seeking to commence drilling for nonferrous metallic mineral exploration to provide notice to the department "at least 10 days in advance of the commencement of drilling" and require the department to transmit a copy of the notice to the state geologist. The proposed rule requires such notices to be provided "at least 30 days in advance of the anticipated commencement of drilling" and specify that such notices must be publicly posted and transmitted to certain local and tribal officials. (See proposed s. NR 130.109 (1) (a).) What is the department's authority for requiring a longer timeframe and various new disclosures for such notices?

d. The statutes require persons engaging in nonferrous metallic mineral exploration to obtain a license, to comply with certain reclamation standards promulgated by the department by rule, and to notify the department before drilling. The statutes do not appear to otherwise authorize the department to approve or deny such exploration. The proposed rule provides that the department "shall approve, conditionally approve, or deny" an exploration licensee's notice of an intent to drill. (See proposed s. NR 130.109 (1) (d).) Please explain the department's statutory authority for doing so.

e. Section 293.26 (2), Stats., specifies items a person must include in a bulk sampling plan. What is the department's authority for requiring additional items in a bulk sampling plan under proposed s. NR 130.204 (2) (a)?

f. Proposed ss. NR 130.114 and NR 130.208 provide for revocation or suspension of exploration and bulk sampling licenses, respectively. The statutes provide for such license revocations where the department determines, following a hearing, that a licensee "has failed to comply" with relevant statutes and rules. [ss. 293.21 (5) and 293.26 (17), Stats.] In contrast, the proposed rules provide for license revocation where "the department has reason to believe" that a licensee has violated a relevant statute or rule. In addition, the proposed rule provisions provide for a hearing only if requested by a licensee. To conform with the statutes, the proposed rules should be revised to provide for revocations only after the department has held a hearing and determined that a licensee has not complied with a relevant statute or rule.

g. The statutes arguably do not authorize the department to require a person submitting a preapplication notification for a prospecting permit to submit environmental data and related background information obtained before the submission, as is required under proposed s. NR 131.105 (1) (d). Section 293.31, Stats., authorizes a person to submit a proposed methodology to the department, but that statute does not require a person to do so. Instead, the statute requires the department to inform a person who submits a preapplication notification of the type and quantity of information that the department believes to be needed to support an application. [s. 293.31 (4), Stats.]

h. The language of the prospecting permit requirement under proposed s. NR 131.107 (1) mirrors the statutory language for mining permits but differs from the statutory language governing prospecting permits, which appears to require a particular operator to have obtained a permit, rather than only requiring a permit for a particular site. [See s. 293.35 (1), Stats.] Section NR 131.107 (1) should be revised to clarify that a permit must be obtained by any particular operator before

engaging in nonferrous metallic mineral prospecting. Operator-specific requirements also appear to be required under s. 293.13 (1) (b), Stats.

i. What is the statutory authority for the burden of proof requirements under proposed ss. NR 131.107 (5) and NR 132.107 (6)? Are those requirements intended to apply to all potential legal proceedings involving a permit applied for under ss. NR 131.107 and NR 132.107? Typically, petitioners carry an initial burden of proof when challenging a final agency decision under ss. 227.43 or 227.52, Stats., but burdens may shift depending on the stage of proceedings and arguments made. It is not clear what provision in chs. 227 or 293 authorizes the department to impose a burden of proof requirement by rule for such reviews.

j. Please explain the department's authority for the visual standards in proposed ss. NR 131.111 (1), NR 132.111 (1) (e) and NR 132.111 (1). Although the areas to be addressed in minimum standards promulgated by the department are not necessarily restricted to those matters enumerated in s. 293.13 (2), Stats., they must be promulgated to ensure that nonferrous metallic mineral prospecting and mining will be conducted "in a manner consistent with the purposes and intent of" ch. 293, Stats. Because ch. 293, Stats., does not appear to address visual or aesthetic features of prospecting or mining sites, it would be helpful to explain how the requirements are necessary to ensure that operations are conducted "in a manner consistent with the purposes and intent of" ch. 293, Stats. (In contrast, that explanation is arguably not needed with respect to aesthetic considerations under proposed s. NR 182.108 (2) (h), for which the statutory authority to promulgate rules regulating the design of mining waste sites under s. 289.05 (2), Stats., is relatively broad.)

k. Is the "reasonably certain to result in" standard in ss. NR 131.114 (1) (a) and NR 131.114 (1) (a) intended to interpret the "complies with" standard in s. 293.45 (1), Stats.? The "or" in that statutory provision introduces some ambiguity regarding the standards applicable to permit issuance. However, a "reasonably certain to result in" standard, which presumably entails a review of practical likelihood, arguably differs somewhat from a "complies with" standard. What is the rationale for the "reasonably certain" language?

l. Please describe the statutory authority for issuing an extended care prospecting permit under s. NR 131.121 (7) (b).

m. Section 293.37, Stats., requires an applicant for a nonferrous metallic mining permit to submit certain information to the department in the permit application, including information identifying certain local units of government, and other pertinent information the department requires. That statute does not require a mining permit applicant to distribute copies of the application to local officials. Instead, s. 293.43 (2m), Stats., requires the department to send a public hearing notice to certain local officials. Proposed s. NR 132.107 (3) (b) requires a nonferrous metallic mining permit applicant to distribute copies of a mining permit application to certain local officials. The statutory authority for requiring that distribution is unclear.

n. Section 293.53 (2), Stats., requires an operator of a nonferrous metallic mining site to submit an annual report to the department. In addition to that annual reporting requirement, s. NR 132.119 requires an operator to submit two separate annual reports relating to planned and completed reclamation activities. The statutory authority for those separate annual reporting requirements is unclear.

2. Form, Style and Placement in Administrative Code

- a. In s. NR 130.106, was the text beginning with “A renewal” and ending with “under s. NR 130.07” in s. NR 130.106 (1) (f) intended to be provided in a separate subsection, i.e., in s. NR 130.106 (2)?
- b. A line break appears to be missing between s. NR 131.103 (7) and (8).
- c. Is the paragraph following s. NR 132.115 (1) (g) intended to be numbered as subsection (2)?
- d. Throughout s. NR 182.108, consider converting the paragraphs to new subsections, to result in fewer divisions of subdivisions. [See s. 1.03 (2) (f), Manual.] Alternatively, consider dividing that section into multiple separate sections.
- e. Because ch. NR 182 is being recreated, the numbering in s. NR 182.1095 could be adjusted to avoid using double-letter numbering, to allow for double-letter numbered provisions in future rules revisions.
- f. Is s. NR 182.110 (4) missing a par. (b)?

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

- a. The phrase “3 percent or greater by volume for the purposes of management and disposal of drilling mud and cuttings under this subsection” in s. NR 130.101 (11m) could be clarified.
- b. In s. NR 130.105 (2) (intro.), “wishing” could be replaced with “intending” to mirror the statutory language.
- c. In s. NR s. 130.105 (2) (a), “for the exploration license” could be removed.
- d. In s. NR 130.107 (4), it may be helpful to add “under s. NR 130.109” or other appropriate cross-reference after the phrase “subsequent plan approvals”.
- e. In s. NR 130.109, the numbering could be adjusted to result in fewer divisions of subdivisions. [See s. 1.03 (2) (f), Manual.] For example, sub. (1) (a) could be numbered sub. (1), and subs. 1. to 10. in sub. (1) (a) could be numbered sub. (1) (a) to (j), and so on.
- f. In s. NR 130.109 (1) (a) 6., the word “procedures” could be removed in the second sentence.
- g. In s. NR 130.109 (1) (a) 10. a., is there a word missing between “will be” and “or otherwise”?
- h. How is the notice requirement under s. NR 130.109 (2) distinct from the notice requirement under s. NR 130.09 (1)? Could an anticipated date required under sub. (1) make the notice under sub. (2) unnecessary?
- i. Section NR 130.111 (title) could be revised to reflect that the section provides the schedule of per-hole fees required under s. 293.21 (2), Stats., for example by replacing “abandonment and reporting” with “abandonment, fees, and reporting”.

j. In s. NR 130.207 (2), would it be possible to specify which safety procedures are “applicable”?

k. In s. NR 131.103 (11), the definition could be revised to avoid two separate lists of included solid waste materials.

l. The definition of “prospecting” in s. NR 131.103 (17) appears to mirror the statutory definition in s. 293.01 (18), Stats. If so, consider incorporating the statutory definition by cross-reference, and then specifying in s. NR 131.103 (17) any “other means” by which an operator may obtain nonferrous metallic mineral samples within the definition of prospecting. As proposed, it is odd that the definition in the rule refers to other means which the department may identify by rule.

m. In s. NR 131.104 (2), the phrase “The person who submits a preapplication under s. 293.31, Stats., shall provide” could cause confusion, because it appears to refer to the sub. (1) submissions as mandatory rather than optional, and because it appears to require such submissions to be provided by a person who has submitted or is submitting a preapplication notification, rather than by a person who intends to submit a preapplication notification in the future. That confusion might be alleviated by removing “The person ... version of the” at the beginning of the provision and instead beginning the provision with “Information submitted under”, with “shall be submitted” added after “sub. (1)”. For reference, s. NR 132.104 (1) treats the submission requirements in a manner that avoids that confusion.

n. In ss. NR 131.108 (4) and NR 132.108 (4), the paragraph provisions could be revised to more directly require the provided activities. For example, in par. (d), the phrase “the backfilling of excavations” could be replaced with “excavations shall be backfilled”.

o. There appear to be minor typos in ss. NR 131.09 (1) (d) (intro.), NR 131.112 (2) (d), and NR 132.110 (1) (b).

p. In s. NR 131.112 (3), “section” should be added following “under this”.

q. In s. NR 131.112 (4), the first part of the provision should be revised to refer to a singular process exemption or variance request.

r. Sections NR 131.122 (4) and NR 132.123 (4) authorize complaints brought by six or more citizens as authorized under s. 299.91, Stats. Those provisions could have the potential of causing confusion with s. 293.89, Stats., which authorizes any citizen to commence a civil action.

s. Throughout s. NR 132.103, definitions that are identical to statutory definitions could be replaced with cross-references to the applicable statutory definitions, where applicable.