Wisconsin Legislative Council
RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 22-068

Comments

[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Council Staff and the Legislative Reference Bureau, dated November 2020.]

2. Form, Style and Placement in Administrative Code

a. The introductory clause indicates that the rule affects small business. The rule analysis states that the proposed rule will have no or minimal impact on small businesses, and the department did not complete attachment A of the Fiscal Estimate & Economic Impact Analysis. These contradictions should be resolved.

b. In SECTION 1 of the proposed rule, the matter immediately following the treatment clause should display "Chapter NR 166" and should provide a title for the chapter. Also, the number "1" following "SUBCHAPTER" should be changed to the Roman numeral "I". [s. 1.10 (1) (b) 1. and (2) (b) 1. (Example), Manual.]

c. In ss. NR 166.07 (1) (q) and 166.08 (4) (i) 3., the undefined acronym "PSC" should be spelled out as "public service commission".

d. In s. NR 166.04, the material in sub. (5) does not form a complete sentence with the introductory statement and is not part of the same group of subunit material as subs. (1) to (4). Consider, instead, designating the introductory material as sub. (1) (intro.), revising subs. (1) to (4) to appear as pars. (a) to (d), and revising sub. (5) to appear as sub. (2). In the introductory statement, the designations for those cross-references would also need to be updated. [s. 1.11 (1) and (2), Manual.]

e. In s. NR 166.135, the designation for sub. (1) should be removed, as there are no other subsections. The designations for pars. (a) to (d) should then be revised to appear as subs. (1) to (4). [s. 1.10 (1) (a), Manual.]

f. Consider adding an initial applicability clause to identify whether the revised rule has any applicability to financial assistance applications in being. If the department intends the proposed rule to apply only to new applications, the clause could state: "This rule first applies to financial assistance applications that are submitted on the effective date of this rule.". [s. 1.03 (3), Manual.]

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

a. The following comments relate to definitions in s. NR 166.03:

(1) The definitions of "capital improvement" in sub. (8) and "construction" in sub. (14), each use the other term. This circularity could create confusion. For instance, sub. (8) suggests that only a subset of construction activities results in a capital improvement, but sub. (14) suggests that all construction activities lead to a capital improvement. In addition, consider the following regarding subs. (8) and (14):

(a) In sub. (8), "depreciable property" is used but not defined. Is that term clearly understood?

(b) In sub. (8), it appears that a capital asset qualifies as a "capital improvement". Should this be clarified so that only the **purchase of**, or some type of **upgrade to**, a capital asset could be claimed as a capital improvement? In other words, can a recipient claim a capital improvement merely by possessing a truck, for example, that at one time cost more than $5,000?

(c) In sub. (14), buying capacity in another entity's existing water system is a type of construction, but in s. NR 166.06 (1) (d), purchasing a portion of another public water system's capacity is an eligible project only if it is the most cost-effective solution. Will the lack of a "cost-effective" qualifier in sub. (14) cause any administrative difficulties?

(d) In sub. (14), performing "major repairs" is a type of construction. The department should consider clarifying what is meant by "major", especially given potential overlap with the several types of "repair" that are included in the definition of "maintenance" in sub. (29). For instance, is repair of a burst watermain under sub. (29) both a type of "maintenance" and also a type of "major repair" under sub. (14)?

(2) In sub. (31), "have" should be changed to "has".

(3) In sub. (36), the term "municipality" is defined by reference to a statute. However, the note says that not all entities included in that statutory definition of "municipality" are eligible for assistance under ch. NR 166. The term "municipality" appears over 100 times in this chapter. Would it be preferable to define "municipality" in a manner more suited to the purposes of this chapter?

(4) In sub. (38), the definition of "operations" uses the term "maintenance" in pars. (a) and (b). The term "maintenance" is defined in sub. (29). Is it intended that these two terms overlap in meaning? In addition, in the second sentence of sub. (38) (intro.), should "work activities" be changed to "operations", which is the term defined by this subsection?

(5) In sub. (41), in the second sentence, a comma should be added after "town".

b. In ss. NR 166.04 (5), 166.07 (3) (e), and 166.17 (1) (b) 2., each instance of the phrase "shall not" should be revised to "may not". [s. 1.08 (1) (b), Manual.]

c. In s. NR 166.06:

(1) Subsection (1) (b) (intro.) indicates that projects eligible under this paragraph are those that "replace" infrastructure. However, several of the projects described in subds. 1. to 4. do not involve replacement, such as those involving installation or rehabilitation.

(2) The treatment of reservoirs should be clarified. Rehabilitating or developing a reservoir is ineligible under sub. (1) (b) 1., but installing or upgrading a finished water reservoir is eligible under sub (1) (b) 3. Perhaps separately defining "finished water reservoir" would help avoid any conflict between these two provisions. Also, in sub. (2) (c), developing a reservoir can be eligible if it is part of the treatment process and located on the property where the treatment facility is located. This seems to conflict with sub. (1) (b) 1., which generally renders reservoirs (other than finished water reservoirs) ineligible.

(3) In sub. (2) (k), the use of both "unless" and "except" in the same sentence creates ambiguity regarding the matter that follows the word "except". Is that matter an exception to the overall ineligibility established by par. (k), or an exception to the specific eligibility established by the matter the follows the word "unless"?

d. Several items listed in s. NR 166.07 (1), regarding eligible costs, are addressed in more than one place. The department could review the entire subsection to see if any of those overlapping provisions could be consolidated without jeopardizing meaning. Overlap occurs in the following places:

(1) Paragraphs (f) 2. and (zm) each address the eligibility of costs associated with restoring streets, rights-of-way, pavement, sidewalks, and sewers.

(2) Paragraphs (f) 4. and (r) 2. each address the eligibility of expendable material costs.

(3) Paragraphs (e), (f) 5., and (s) 20. each address the eligibility of costs of complying with federal requirements.

(4) Paragraphs (k) and (q) each address the eligibility of costs associated with removing lead service lines.

e. In s. NR 166.07 (1), par. (i) addresses the eligibility of **general** equipment costs and allows the department to prorate those costs if the equipment is used for multiple purposes. Paragraphs (u), (v), and (z) 5. each address the eligibility of various **specific** equipment costs—such as safety, security, and computer equipment—but do not allow for proration. The department should consider whether the types of equipment addressed in the specific provisions are already covered by the general provision in par. (i), and if so, whether the proposed rule could be condensed to avoid duplication. If the department decides not to consolidate these provisions, it should clarify whether the costs of the specific equipment items may be prorated.

f. In s. NR 166.07 (1) (r) 1., costs associated with on-staff attorneys are not eligible costs. Should the "on-staff" qualifier be applied to legal costs that are eligible costs elsewhere in this section, such as pars. (s) (intro.) and (x)?

g. In s. NR 166.07, sub. (1) (s) 12. provides that "indirect costs" for a scored project are eligible costs. However, under sub. (2) (intro.), costs "not directly associated" with a scored project are generally ineligible. The interaction of these two provisions should be clarified. For instance,

can a recipient claim the cost of leasing land or buildings as an eligible "indirect cost" under sub. (1) (s) 12., despite that cost being otherwise ineligible under sub. (2) (m)?

h. In s. NR 166.07 (1) (s) 21., the meaning of "monitoring the use of American-made products" is vague. Is this intended to mean monitoring compliance with applicable legal requirements to buy American-made products, as opposed to monitoring the actual usage of such products? If so, that should be clarified. However, note that such a requirement already may be covered by par. (e), and that perhaps par. (s) 21. could be omitted.

i. In s. NR 166.07 (1) (t) 3., replacing sewer pipes damaged by construction is an eligible cost, provided that the pipes are replaced with pipes that are the same size or the required minimum size. However, in s. NR 166.07 (1) (zm) and (2) (x), the eligibility of sewer pipe replacement costs is addressed without regard to the size of the replacement pipes. These provisions should be examined for consistency.

j. In s. NR 166.10 (1), some of the paragraphs could be omitted or condensed. That subsection requires the department to determine whether an applicant has submitted various items with an application. Many of these items are also contained in s. NR 166.08, the section detailing the application requirements for an applicant. The introductory language of s. NR 166.10 (1) requires the department to determine whether "all of the applicable requirements of s. NR 166.08 are met". Is there a reason to include in the various paragraphs of s. NR 166.10 (1) any item that is already required by s. NR 166.08, and which the department is already required to check pursuant to s. NR 166.10 (1) (intro.)? For example, s. NR 166.10 (1) (f) requires that the department check whether the applicant has submitted certain documentation of compliance with federal requirements, such as Davis-Bacon wage rate laws. That information appears to be required for an application by s. NR 166.08 (4) (d). Must it also be listed in s. NR 166.10 (1)?

k. In s. NR 166.10, the meaning of sub. (3) is unclear. It requires, as a condition of funding eligibility, that a project be entitled to priority in accordance with ss. NR 166.23 and 166.25. Are all eligible projects given a priority score? If so, what does sub. (3) achieve?

l. In s. NR 166.12 (1), it is not clear what is achieved by the final clause, which reads: "and the applicant does not already have outstanding long-term affordable debt for its project that reached substantial completion more than 3 years prior to the date on which a complete application was submitted to the department". Previously in that subsection, reimbursement is eligible only if a project does not reach substantial completion more than three years prior to the date on which a complete application was submitted to the department.

m. In s. NR 166.135, the department should review how the term "minor civil division" is used. The term "minor civil division" is defined in the proposed rule in s. NR 166.03 (34) to mean "the primary governmental divisions of a county, including towns, as designated by the U.S. bureau of the census to collect and publish data". This raises two questions regarding usage of the term in s. NR 166.135:

(1) In par. (a), the term "minor civil division" is followed by the phrase ", as defined for purposes of data collection by the U.S. bureau of the census". Is that merely duplicative of the reference to the U.S. bureau of the census in the definition, or is it intended to depart from the definition?

(2) In par. (c) 3., the term "minor civil division" is followed by the phrase ", such as a town". That phrase is unnecessary given that towns are already mentioned in the definition.

n. In s. NR 166.23 (3) (c) (intro.), add a carriage return after the colon.

o. In s. NR 166.23 (3) (c) 7.:

(1) The word "the" should be inserted before "project".

(2) Are the 10 points for removing all remaining private LSLs available in addition to whatever points a project receives under subds. 1. to 6.? That appears to be the case, but could be clarified by adding "In addition," at the beginning of subd. 7., or words to that effect.