



Wisconsin Legislative Council

RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 23-002

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.]

1. Statutory Authority

a. In the rule summary’s listing of statutory authority, the department should remove the citation to s. 227.24, Stats. That statute relates to emergency rules and does not confer rulemaking authority. The instant order proposes permanent rules.

b. In the rule summary’s listing of statutory authority, the citations could be revised to more precisely identify the applicable subunits that grant rulemaking authority as follows: ss. 289.05 (1), 289.06 (1), 289.43 (8) (d) 1. h., and 292.31 (2), Stats.

c. The department should examine s. NR 500.08 (3m) (c) of the proposed rule for consistency with s. 289.43 (8) (d) 1. e., Stats. Under both the statute and the proposed rule, an exempt dredged material disposal facility must be located at least 100 feet from any wetland or critical habitat area and be located outside a floodplain. In the case of disposal for beach nourishment, both the statute and the proposed rule contain an exception to those location restrictions. Under the statute, the exception is limited. It applies only in the case of beach nourishment “above the ordinary high water mark on a public beach that has already been noticeably disturbed by human activities such as the construction of a parking lot, public swimming area, or other improvement and that has no unique ecological value.” The proposed rule does not contain corresponding limitations on the beach nourishment exception. The department should modify the exception for beach nourishment in s. NR 500.08 (3m) (c) so that it is not overly broad in relation to the statute.

d. Under s. 289.43 (8) (d) 1. d. and 2., Stats., the regulatory exemption for a disposal facility expires if there is a material adverse change in the contamination of the dredged material that would be disposed of at the facility or if there is a material change in the intended use of the dredged material. This expiration feature, which is explained in the rule summary’s plain language analysis, should be incorporated in the proposed rule itself.

3. Conflict With or Duplication of Existing Rules

a. In the current administrative code, s. NR 500.08 (3) (a) provides a solid waste licensing and plan review exemption for the disposal of nonhazardous dredged material consisting of less than 3,000 cubic yards from, among other sources, Lakes Michigan and Superior. The proposed rule implements a similar statutory exemption, but for up to 35,000 cubic yards of dredged material from Lakes Michigan and Superior (and their bays and harbors). To the extent each of these exemptions could apply to the same dredged material in a quantity of less than 3,000 cubic yards, the two rules overlap. The department should consider whether there are any unintended consequences of this duplication.

b. In the current administrative code, s. NR 347.07 (4) establishes requirements for allowable Great Lakes beach nourishment disposal. Should those requirements be rendered inapplicable to a disposal utilizing the regulatory exemption under s. 289.43 (8) (d), Stats., as implemented in the proposed rule?

c. As added by 2021 Wisconsin Act 93, ss. 289.63 (6) (e) and 289.67 (1) (fp), Stats., exempt soils and dredged sediments from groundwater and well compensation fees and environmental repair fees, respectively. Either in this proposed rule or another, s. NR 520.14 (1) (a) and (2) of the current administrative rule should be amended to reflect these exemptions.

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

Section NR 500.08 (3m) (L) (intro.) of the proposed rule states that an application must be submitted on a form provided by the department. Section 227.14 (3), Stats., specifies that if a proposed rule requires a new or revised form, a note must be included to describe how the form may be obtained. Accordingly, the proposed rule should be revised to include a note to indicate where the form under par. (L) may be found or how it may be obtained. [s. 227.14 (3), Stats.; and s. 1.12 (3), Manual.]

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

In s. NR 500.08 (3m) (j) 1. of the proposed rule: (a) is it clear what is meant by “native” soil?; and (b) for consistency of grammatical structure, either insert the word “be” before “compatible” or remove the word “be” before “capable”.