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CLEARINGHOUSE RULE 95-041

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 October 1994.]

1. Statutory Authority

a. Sections NR 135.07 (2) (c) and 135.08 (3) make compliance with all federal, state and local regulations governing the public health, safety and welfare a condition of a nonmetallic mining permit. This is not a requirement of the statute and the department should consider whether there is statutory authority to impose this requirement. Also, the department should consider whether this provision of the rule gives adequate notice as to the regulations that must be complied with pursuant to a nonmetallic mining permit.

b. Section NR 135.25 (1) and (3) (k) appear to make future land uses in the surrounding area and the proposed post-mining land use of the nonmetallic mining site conditions that determine the degree of mining reclamation necessary. These conditions are not required by the statute and the department should determine whether there is statutory authority to design reclamation or requirements according to these conditions. In particular, the department should consider whether members of the public should be able to influence the degree of reclamation necessary, as implied by s. NR 135.25 (3) (k). See also s. NR 135.27 (4).

c. Section NR 135.40 (3) (b) 2. provides that a municipality must continue to administer and enforce its nonmetallic mining reclamation program if the department finds that the county's program is not in compliance. Nothing in the statutes requires a municipality to continue administering a nonmetallic mining reclamation program and a municipality may cease doing so at any time, which lapses jurisdiction back to the county or the department. There appears to be no statutory support for requiring a municipality to continue administering and enforcing an ordinance in this instance.

d. Why is proof of financial responsibility required for sites of less than one acre in s. NR 135.45 (6)? Sites of less than one acre are exempted from regulation by s. 144.9407 (5) (e) 5., Stats.

e. Section 144.9407 (9), Stats., permits landowners to register land with nonmetallic mineral deposits. Section NR 135.66 requires the landowner to provide notice of intent to seek registration. What is the statutory authority for requiring this notice? If there is authority to require this notice, how much advance notice is required before the landowner may register the nonmetallic mineral deposit?

2. Form, Style and Placement in Administrative Code

a. Throughout the rule, all references to subchapters should use Roman numerals.

b. In s. NR 135.01 (2), the phrase “the above” should be deleted. This method of cross-referencing provisions is incorrect and, in this instance, is not necessary.

c. In s. NR 135.02 (3) (j) 2., the phrase “This exemption” should be replaced by the phrase “The exemption under subd. 1.” Also, subd. 3. should be rewritten to read: “The exemption under subd. 1. applies regardless of whether a nonmetallic mining site...department of transportation project.” In the alternative, the three subdivisions in par. (j) could be combined as one paragraph without the creation of subdivisions.

d. “Land owner” is two words in s. NR 135.03 (7), but one word as used in the rule. [See also s. NR 135.65.]

e. In s. NR 135.03 (9), the second sentence should read: “‘Nonmetallic mineral’ includes, but is not limited to...” See also the second and third sentences of sub. (12) and the second sentence of sub. (14). Finally, in sub. (12), the phrase “the above objectives” should be replaced by the phrase “the objectives described in this subsection.”

f. In s. NR 135.03 (19), par. (a) should conclude with a semicolon and par. (b) should conclude with the notation “; or.”

g. In s. NR 135.15 (4), the phrase “shall be” should be replaced by the word “is.”

h. In s. NR 135.17 (2), should par. (b) conclude with the word “or” or “and”? Also, in sub. (2) (c), the word “inspection(s)” should be replaced by the word “inspections.” [See ss. 227.27 (1) and 990.001 (1), Stats.]

i. In s. NR 135.21 (1), the notation “subs” should be replaced by the notation “subs.” and, in the Note, the second occurrence of the word “of” should be replaced by the word “after” and the notation “NR” should be inserted before “135.48.”

j. In s. NR 135.22 (1) (intro.), the first occurrence of the word “this” should be deleted.

k. “Department” and “ch.” in s. NR 135.22 (1) (a) should not be capitalized.

l. In s. NR 135.27 (4), the word “must” should be replaced by the word “shall.” Also, in sub. (5) (f), the notation “and/or” should be replaced by the word “and.”

m. The introductory material in s. NR 135.31 should be numbered as sub. (1) since it does not lead into the following divisions of the section. If this material is renumbered as sub. (1), the remaining subsections must be renumbered accordingly.

n. In s. NR 135.35 (2) (a), the phrase “shall submit” is unnecessarily repeated.

o. In s. NR 135.41 (4), the phrase “, at its discretion,” is unnecessary and should be deleted.

p. Section NR 135.50 includes a cross-reference to a nonexistent subsection.

q. In s. NR 135.60, the final two sentences would more appropriately be placed in a note.

r. The rule does not contain an effective date provision.

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

Sections NR 135.25 (2) and 135.26 (2) and a number of other provisions in the rule refer to forms. The rule does not include the proper note indicating where copies of the forms may be obtained and copies of the forms are not attached to the rule. [See s. 227.14 (3), Stats.]

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

a. In the second paragraph of the analysis, it appears that the word “to” should precede the phrase “audit, county and other government units.”

b. In the fourth paragraph of the analysis, the second occurrence of the word “ordinance” in the sixth sentence should be replaced by the word “ordinances.”

c. The word “applicable” is used to modify “valid ordinance” in s. NR 135.01 (1) (c). This word appears to serve no purpose and should be deleted. “Valid ordinance” is defined to mean an ordinance that applies to a nonmetallic mining site. “Applicable” should be deleted at all other places in the rule that it is used.

d. “Continuously operating” in s. NR 135.02 (1) is unclear. This is apparently intended to mean nonmetallic mines that ceased operation before the effective date of a valid ordinance and continue operation after that time. “Continuously” is confusing in part because an ordinance may apply to intermittent nonmetallic mining.

e. The use of “municipality” in s. NR 135.02 (2) is incorrect. Section 144.9407 (5) (d), Stats., applies the nonmetallic mining ordinance to a municipality, as defined in s. 144.01 (6), Stats. That statute includes counties and several public entities, in addition to those in the definition of “municipality” in s. NR 135.03 (8).

f. The use of “effective date” in s. NR 135.03 (3) to apply both to the effective date of a local ordinance and the effective date of department regulatory authority has the potential to cause serious problems in the rule. For example, see s. NR 135.07 (2), which establishes standards for lands mined before the effective date of a valid ordinance. If the department’s regulatory authority takes effect six months after the effective date of the rule, the county belatedly adopts an ordinance, and a municipality adopts an ordinance after the county’s ordinance is effective, there will be three different “valid ordinances,” each with a different “effective date.” Which of the effective dates is used to determine the applicability of standards in s. NR 135.07 (2)? The entire rule should be examined for similar problems whenever the phrase “effective date” is used.

Also, in s. NR 135.03 (3), “that” should be deleted, “defined in sub. (20)” should be deleted and “becomes enforceable” should be clarified.

g. It is not clear why a definition of “exemption” is necessary in s. NR 135.03 (4). The Note after s. NR 135.35 acknowledges that statutory exemptions are self-executing and do not require approval of the regulatory authority.

h. In s. NR 135.03 (5), the word “is” should be inserted before the word “sufficient.”

i. “Is” is missing in s. NR 135.03 (5).

j. In s. NR 135.03 (6), how can excavation occur “less than once in a calendar year”?

k. “Created under the authority of state law” should be deleted in s. NR 135.03 (8).

l. A nonmetallic mineral deposit is defined in s. NR 135.03 (10) as a “quantifiable” body of nonmetallic minerals. Could any nonmetallic mineral deposit be unquantifiable?

m. In s. NR 135.03 (14) (f), it appears that the paragraph will be clearer if commas are inserted after the second occurrence of the word “reclamation” and after the word “diversion.”

n. “So” in s. NR 135.03 (16) should be “to.”

o. In s. NR 135.03 (20), it is not clear how topsoil can prevent erosion.

p. “Regulatory authority” is defined to include the department and “valid ordinance” is defined to include the rule if there is no valid local ordinance. Therefore, the use of “this chapter” in s. NR 135.03 (21) is unnecessary. “This chapter” is used inappropriately at a number of other places in the rule in connection with “valid ordinance.”

q. In the Note after s. NR 135.04, “and 500-522, 812” should be replaced by “500 to 522 and 812.” Also, “project” should be replaced by “site.” See, also, the Note after s. NR 135.06 (2) (b).

r. The second unnumbered paragraph in s. NR 135.05 refers only to land use planning, but the third unnumbered paragraph refers also to land uses. Should these paragraphs be made consistent? The paragraphs should be numbered subsections.

s. In the second unnumbered paragraph of s. NR 135.05, “disposal” should be “dispose.”

t. It is not clear what “permanently abandoned” means in s. NR 135.06 (1). It may be better to say “nonmetallic mining that has ceased before the effective date of a valid ordinance and is not continued after the effective date of a valid ordinance.”

u. “But only” should be deleted in s. NR 135.06 (2).

v. The first two sentences of s. NR 135.07 (1) do not clearly define the applicability of ordinances to portions of the nonmetallic mining site that are not mined after the effective date of an ordinance. The first sentences used the term “abandoned” which, as discussed above, is not a defined term in the rule and does not necessarily mean that mining may not occur again on such areas. The second sentence refers to land that is “part of” the operation. It would appear that previously mined land could continue to be part of a nonmetallic mining operation if used for roads or storage of materials. Also, in sub. (1), does the word “previously” refer to mining occurring before the effective date of a valid ordinance? If so, this should be clarified. Finally, the last sentence of sub. (1) refers to a mining site mined after the effective date of a valid ordinance. However, s. NR 135.02 states that overall applicability of ch. NR 135 occurs after the effective date of a valid ordinance or after six months following the effective date of ch. NR 135, whichever comes first. The two statements of effectiveness should be made consistent.

w. “Affects” in ss. NR 135.07 (2) (b) and 135.08 (2) should be “affect.”

x. A comma should be inserted after “federal” in ss. NR 135.07 (2) (c) and 135.08 (3).

y. Section NR 135.07 (2) (f) refers to a reclamation plan approved pursuant to a valid ordinance. Paragraph (h) refers to an improved reclamation plan and par. (i) refers to a reclamation plan approved pursuant to a valid ordinance and approved by the regulatory authority in an issued permit. These varying expressions are confusing and either should be made consistent or should be consolidated in a definition of the term “reclamation plan.”

z. Section NR 135.07 (2) (g) begins with an incomplete sentence.

aa. “Criteria” is used in the first sentence of s. NR 135.07 (2) (j). The same word should be used in the second sentence.

ab. “To” should be inserted before “comply” in s. NR 135.08 (2) (k).

ac. The general standards in s. NR 135.08 should have an applicability provision comparable to the one in s. NR 135.07 (1).

ad. The phrase “shall not” is used in s. NR 135.09 and at numerous other places in the rule. The preferred form is “may not.”

ae. The brief statement in s. NR 135.11 (2) does not adequately describe the various requirements of ch. 160, Stats., and ch. NR 140.

af. The exception in s. NR 135.13 (1) is unclear. This provision establishes a requirement for stable slopes, but provides an exception where the plan designates the slope as a stable slope.

ag. Is the reference to groundwater level in s. NR 135.13 (2) correct? Should this be surface water?

ah. Section NR 135.14 uses the phrase “except where uniform redistribution is undesirable or impractical.” Who makes this determination?

ai. In s. NR 135.15 (2) (a), to what does the word “productivity” refer?

aj. In s. NR 135.15 (4), the phrase “shall be” should be replaced by the word “is.”

ak. “Will” should be replaced by “may” in s. NR 135.16.

al. In s. NR 135.19, it appears that the word “to” should be inserted before the word “comply.”

am. The comma in the second sentence of s. NR 135.24 (1) should be deleted.

an. In s. NR 135.24 (3) (b) 1., the word “a” should follow the word “submit.”

ao. The requirement for submission of a fee in s. NR 135.24 (3) (d) conflicts with s. NR 135.44. Section NR 135.44 (4) (d) provides that no fee under s. NR 135.44 is required for an interim permit. Is the reference in s. NR 135.44 (4) (d) to “section” incorrect? Why should a local governmental unit be precluded from requiring an application fee for an interim permit, when s. 144.9407 (2) (b) 5., Stats., requires local fees?

ap. The first sentence of s. NR 135.25 (1) appears to state that an operator may engage in nonmetallic mining after the effective date of a valid ordinance, but prior to submission of a permit application. Is this really a reference to an operator who is mining prior to the effective date of the ordinance? This should be clarified.

aq. In s. NR 135.25 (2), the phrase “, if the operator so chooses” is unnecessary and should be deleted.

ar. In s. NR 135.28 (1) (a), is it likely that a regulatory authority will receive an “application or request” to suspend or revoke a permit?

as. Section NR 135.28 (1) (b) is drafted as if each county and municipality has an official newspaper. Counties and towns are not required to have an official newspaper and the department should determine if each county and town has an official newspaper.

at. Section NR 135.28 (2) provides an opportunity to request a public hearing within 15 days after the actual date of public notice. The notice required under s. NR 135.28 (1) (b) is a Class 2 notice, which requires two insertions. If appropriate, the rule should be clarified so that the 15-day deadline commences to run after the second notice is published.

au. In the title of s. NR 135.29 (1), “to be” should be replaced by “permit.”

av. In s. NR 135.29 (2), should the word “may” be replaced by the word “shall”?

aw. “Pursuant” in s. NR 135.29 (5) should be deleted.

ax. What does the last phrase of s. NR 135.30 (2) mean? This appears to create an exception from reclamation standards for nonmetallic mining sites in existence before the effective date of the ordinance. However, the statute clearly requires reclamation for nonmetallic mining sites, in existence before the ordinance, that continue to be mined after the ordinance is adopted.

ay. The meaning of “predecessor” in s. NR 135.30 (4) (b) 1. could be clarified. Does this mean a corporate entity that was the predecessor of the current corporate entity or does this refer to the predecessor in title of the nonmetallic mining site?

az. In s. NR 135.31 (1), it appears that the word “or” should be inserted before the phrase “other measures.”

ba. The first “pays” in s. NR 135.315 (1) should be deleted. Also, “such” should be replaced by “an.”

bb. Section NR 135.315 (2) could be clarified to indicate whether the expedited review process may not waive requirements to provide public notice and hold a hearing or whether the expedited review process may not shorten the time limits related to public notice and hearing.

bc. Section NR 135.33 (2) pertains to amending and cancelling a permit. Is an application necessary to cancel a permit? If so, the second clause in the first sentence should be modified to add “or cancel.” Is public notice and the opportunity for a public hearing required to cancel a permit? The last sentence should indicate the specific standards and procedures that are applicable to the decision to amend or cancel a permit.

bd. The tenses in s. NR 135.34 (1) should be made consistent, preferably the present tense. “If it finds that the operator has done” can be replaced by “If the operator does.” “Has made” can be replaced by “makes” and “has been” can be replaced by “is.”

be. Section NR 135.34 (2) refers to orders to protect human health and the environment under s. NR 135.47. However, s. NR 135.47 makes no references to orders to protect human health and the environment. Also, if protection of human health and the environment is appropriate in s. NR 135.34 (2), should this also be included as an appropriate purpose for the use of forfeited financial assistance under s. NR 135.34 (3)? Also, in subs. (2) and (3), the notation “NR” should precede the numeric cross-references to ch. NR 135. [See also s. NR 135.35 (1) (b).]

bf. The Note after s. NR 135.35 (1) (b) indicates that certain activities are exempt whether or not the regulatory authority grants a request for an exemption. This is correct and it is difficult to understand the need for s. NR 135.35 (1) (b). Also, the notation “NR” should be inserted before “135.02 (3).”

bg. Section NR 135.35 (2) (a) describes some of the procedures for a variance or exemption. The rest of the paragraphs in that subsection should refer to exemptions, as well as variances. [See also s. NR 135.35 (3).]

bh. In s. NR 135.35 (2) (e), the word “a” should be inserted before the phrase “public informational hearing.”

bi. The logic of s. NR 135.375 should be corrected. This provision states that a permit remains in effect until renewed or modified, thus implying that a permit is no longer in effect after it is renewed or modified. This problem could be avoided by redrafting s. NR 135.375 to provide that, after a change in regulatory authority, the new regulatory authority must continue to enforce any existing nonmetallic mining permits.

bj. To the extent that the last sentence in s. NR 135.38 (1) could be construed to refer to the State Legislature, it is obviously incorrect. To the extent that this refers to legislative review by the local governing body, the phrase is unnecessary, because s. 68.14, Stats., simply provides that a person who seeks judicial review of a municipal administrative decision is not precluded from seeking legislative relief. The existence of s. 68.14, Stats., could be referred to in a note, if necessary.

bk. In s. NR 135.38 (2), “program” should be replaced by “permit.”

bl. The title to s. NR 135.40 (1) should be modified by deleting “ordinarily.” All counties are required to adopt an ordinance.

bm. There appears to be no reason to provide, in s. NR 135.40 (3) (b) 1., that a county must administer the nonmetallic mining reclamation program “if it enacts a valid ordinance.” All counties are required to administer and enforce the ordinance. This phrase should be replaced by “in that municipality.”

bn. Section NR 135.41 (4) allows the regulatory authority to obtain information by documentation of its inspections of a nonmetallic mining site. If it does so, the regulatory authority must require the operator to submit a certification that the information is correct. Will this information be provided for the operator’s review and will the operator be given an opportunity to correct any information collected by the county or municipality? Also, in the third sentence, it appears that the word “to” should be deleted.

bo. Does the list of elements required in the annual report on s. NR 135.42 cover all of the possible conditions? What about the acreage of area on which mining has been completed but is not yet reclaimed?

bp. Section NR 135.43 requires notice of completed reclamation. How will the operator determine that reclamation of a portion of the nonmetallic mining site has been completed for purposes of the report under s. NR 135.43? How often will the operator be required to submit these reports? Could this provision be simplified by making the report on reclamation completed a part of the annual report under s. NR 135.41 (4)?

bq. In the formula in s. NR 135.44 (2), what does it mean to be “affected” by nonmetallic mining?

br. In s. NR 135.45 (2), “who” should be replaced by “that.” Also, the phrase “following approval of the nonmetallic mining permit, and as a condition of the permit, the operator shall

file proof of financial assurance” is confusing. The phrase “a condition of the permit” implies that something must be done before a permit is issued. However, this subsection provides that after the permit is issued, proof of financial assurance may be filed.

bs. “Deposits” in s. NR 135.45 (4) should be replaced by “deposit.” Also, in the first sentence, the first occurrence of the word “shall” should be deleted.

bt. Section NR 135.45 (7) uses the term “mine site.” The defined term “nonmetallic mining site” should be used instead. The entire rule should be reviewed to determine that the defined term is used consistently.

bu. In the last sentence of s. NR 135.45 (7), the certification does not actually cause the proof of financial assurance to be released. This sentence should be rewritten to provide that, upon receiving the certification, the operator is no longer required to maintain financial assurance.

bv. Section NR 135.45 (8) (a) and (b) require forfeiture of financial assurance if a permit is revoked or not reissued or if the operator fails to apply for permit renewal and the permit expires. This requires forfeiture of financial assurance even though the operator, if these conditions occur, successfully reclaims the site. Is this the intended result? Also, in sub. (8) (intro.), the word “if” should be inserted before the word “any.”

bw. Section NR 135.45 (9) commences with a reference to financial assurance, but the remainder of that subsection refers to bonds. The reference to bonds should be replaced by references to financial assurance.

bx. In s. NR 135.45 (11), the word “a” should precede the word “voluntary.”

by. Section NR 135.45 (12) should commence with “The amount of the” and the same phrase should be inserted after “adjust” in the last sentence of that subsection. May this decision be appealed?

bz. The use of cross-references to the net worth test for solid and hazardous waste disposal facilities in s. NR 135.45 (13) does not work. This provision might work if it provided that the net worth test for nonmetallic mining sites is calculated in the same manner as the net worth test for solid and hazardous waste disposal facilities. However, at a minimum, the rule must indicate the costs related to a nonmetallic mine that are substituted for the costs of closure and long-term care requirements for solid or hazardous waste disposal facilities. Requiring a nonmetallic mining operator to “meet the definition in s. 144.44 (1) (b), Stats.,” simply makes no sense. That definition applies only to solid or hazardous waste disposal facilities. Similarly, the literal cross-reference to minimum financial standards in s. 144.443 (6), Stats., does not make sense.

ca. Can some indication be given in s. NR 135.455 of what are “appropriate credentials” for the inspector of a nonmetallic mining site? Also, “their” should be replaced by “his or her.”

cb. The title of s. NR 135.46 is “VIOLATIONS.” However, the substance of that section describes requirements imposed on the operator if a violation occurs. Also, in sub. (1), the phrase “shall be” should be replaced by the word “is.”

cc. Section NR 135.46 (2) requires an operator to cease “the activity” if nonmetallic mining is conducted in violation of a permit. Does this require the operator to cease the activity that results in the violation? Or does it require the operator to cease nonmetallic mining?

cd. “Governing body” should be replaced by a “regulatory authority” in s. NR 135.47 (1) (intro.).

ce. Why is the authority given to the department to issue orders under s. NR 135.47 (2) different from the authority given to the local regulatory authority in s. NR 135.47 (1)?

cf. “Special” should be deleted in s. NR 135.47 (1) (d) and (2). What is the meaning of “an activity regulated under this section” in s. NR 135.47 (2)?

cg. In s. NR 135.47 (3), what is the meaning of the phrase “nor the cost of enforcement by the regulatory authority up to \$1,000”?

ch. In s. NR 135.48, the word “month” should be replaced by the word “months.”

ci. The following comments apply to the model ordinance in Appendix A:

- (1) The citations to ch. NR 135 would be more helpful if specific sections and subunits were cited.
- (2) The use of the notation “Wis. Adm. Code” and the phrase “Wisconsin Administrative Code” should be made consistent throughout the ordinance.
- (3) In SECTION 2.00, the word “complies” should be replaced by the phrase “to comply” or the phrase “that complies.”
- (4) In SECTION 15.00, the word “submit” should be inserted before the phrase “an annual fee.”

cj. In s. NR 135.51 (2), in the last sentence, should the word “enacted” be replaced by the word “amended”?

ck. Section NR 135.52 (4) states the obvious: if the department does not advise the county or municipality how to modify its proposed ordinance, the county or municipality is not required to consider that advice. However, this subsection seems to imply that if the department fails to provide advice on how to modify the ordinance, the county or municipality is free to adopt the ordinance as proposed. This is not correct. The statute requires the ordinance to be in strict conformity with the model ordinance, whether or not the department provides advice on how to modify the ordinance.

cl. “Existing” should be “pre-existing” in s. NR 135.53. Also, the meaning of the last sentence of that section is impossible to understand.

cm. In s. NR 135.54 (3) (b), the first semicolon should be replaced by a comma.

cn. In s. NR 135.54 (4), when does the three-year period begin and end?

co. The first “shall” in s. NR 135.55 should be changed to “may.”

cp. Will operators be given notice of the change in regulatory authority under s. NR 135.57 (1)? Such notice appears to be necessary so that the operator can properly direct the various reports and fee payments required by the rule.

cq. Section NR 135.57 (2) prohibits a municipality from enacting “for the first time” an ordinance while the department is administering the program in that county. What happens under this provision if a municipality has previously adopted and then ceased administering an ordinance and is now proposing to enact an ordinance for the second time?

cr. “May be provided” should be deleted at the end of s. NR 135.60.

cs. In s. NR 135.63 (1), the phrase “under s. NR 135.62” should be inserted in the first sentence after the phrase “the registration.” Also, in the second sentence, the phrase “consider it describe” should be clarified.

ct. Should termination under s. NR 135.65 also be allowed if there is no longer sufficient buffer area on the parcel to meet the requirements of s. 144.9407, Stats.?

cu. “That” should be changed to “who” in s. NR 135.66.

cv. The term “regulatory authority” is used in s. NR 135.66. However, the registration authorized by the statute does not pertain to nonmetallic mining reclamation and, therefore, using this defined term, which limits this provision only to counties and municipalities that have a valid ordinance, may not be appropriate. If the intention is to provide this notice to any county or municipality with zoning authority, the use of “regulatory authority” will not accomplish that purpose. Finally, this section appears to require a landowner to notify a regulatory authority of the intention to seek registration after the landowner already has registered. The order of these actions should be reversed.