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RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 95–185

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.]

2. Form, Style and Placement in Administrative Code

The terms "board" and "department" are defined in the rule. Most of the provisions in ch. NR 1 use "board" and "department" without definition. The department should consider whether these definitions are necessary or whether definitions of these terms applicable to all of ch. NR 1 should be created.

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

a. The term "rule" is defined in s. NR 1.52 (1) (c). There does not appear to be a need to define this term. The rule creates procedures and standards applicable to "rules" promulgated by the department. Rules must be promulgated pursuant to the procedures in ch. 227, Stats. There should be no ambiguity as to whether a particular proposal being recommended by the department or considered by the board is a rule. However, if the department insists that a definition must be included in the rule, the department should consider whether the proposed definition is appropriate, or whether a cross-reference to s. 227.01 (13) should be used instead. One key difference between the definition proposed in the rule and the statutory definition is that the rule does not contain all of the exceptions to the term "rule" that are included in the statute.

b. The department proposes procedures for rule promulgation in s. NR 1.52 (2) and (3). The first sentence of s. NR 1.52 (2) merely states the current requirement of ch. 227, Stats., and adds nothing to the rule.

c. The second sentence of s. NR 1.52 (2) and most of s. NR 1.52 (3) merely restate requirements of the current statutes. The purpose of the rule appears to be the creation of addi-

tional standards imposed on rule-making for environmental quality programs that have a federal counterpart and the repetition of current administrative rule procedures is not necessary for this purpose. Further, it is difficult, as the rule is drafted, to determine which elements of s. NR 1.52 (2) and (3) merely duplicate current statutory requirements and which elements of those provisions go beyond the requirements of current ch. 227, Stats.

d. Section NR 1.52 (2) makes the rule applicable to rules promulgating "environmental quality standards." The rule does not define what is an environmental quality standard. The list of statutes interpreted and statutory authority in the analysis suggests that the department contemplates making the rule applicable only to those specific statutes. If so, it may be appropriate to redraft the rule to make it applicable specifically to rules promulgated under that list of statutes. If not, how will it be determined if other statutes, such as s. 144.26, Stats., are subject to s. NR 1.52?

e. Section NR 1.52 (4) refers to "all public hearings on the rule." This should be made specifically applicable to public hearings conducted by the department, to avoid confusion with public hearings that may be conducted by the Legislature on the rule.

f. The second sentence of s. NR 1.52 (4) establishes the restriction on rules adopted by the department and should be included in a separate subsection rather than in the subsection related to information submitted to the board.

g. The second sentence in s. NR 1.52 (4) refers to environmental programs subject to "delegation" of authority by the U.S. Environmental Protection Agency. Is it clear that all of the programs governed by the rule are in fact subject to delegation? For example, the state groundwater protection law is cited both as statutory authority and as a statute interpreted, but the groundwater law is not subject to delegation by the U.S. Environmental Protection Agency. How is the groundwater protection program affected by the requirement imposed in the rule?

h. Section NR 1.52 (4), provides that the department may not adopt environmental quality standards "more restrictive than" provided under corresponding federal law. Will it be clear in all cases what is meant by "more restrictive than?" For example, if a proposed rule in general has a federal counterpart, but part of the rule is not related to federal requirements, is that part of the proposed rule subject to the requirement of s. NR 1.52?

i. The rule permits rules that are more restrictive than federal law if the department demonstrates that the more restrictive standard is necessary to protect public health, safety or the environment. Does this standard preclude alternative regulatory approaches which may be slightly more restrictive than federal law, if the additional restriction is not necessary to protect public health, safety or the environment, but the alternative regulatory approach will result in a substantial savings to state taxpayers or will address other desirable policy objectives?

j. The department's ability to adopt more restrictive standards must be shown as necessary to protect public health, safety or the environment. Many of the programs listed in the statutory authority and statutes interpreted refer also to public welfare. Does the department intend that a more restrictive standard necessary to protect public welfare cannot be the basis of a more restrictive state standard?

k. Section NR 1.52 (5) imposes requirements on the department to review rules if corresponding federal law is subsequently "relaxed." This requirement applies only to environmental quality standards adopted "in conformity with" corresponding federal law. The literal meaning of this is that any environmental quality standard that is not in conformity with corresponding federal law, because the requirements for adopting more restrictive standards as set forth in s. NR 1.52 (4) have been met, need not be reviewed if federal law is subsequently "relaxed."

l. The rule does not expressly state that it is prospective in application, although it is reasonable to conclude that the rule does not require review of all existing rules. Should s. NR 1.52 (5) be redrafted so it expressly applies to preexisting environmental quality standards adopted in conformity with corresponding federal law?

m. Section NR. 1.52 (5) only applies if the U.S. Environmental Protection Agency subsequently "relaxes" corresponding federal standards. Does the department intend that review is not required if federal standards are "relaxed" by Congress or the President?

n. Should s. NR 1.52 (5) refer to promulgating standards in the Federal Register rather than the Code of Federal Regulations?

o. Section NR 1.52 (5) requires the department to propose a schedule for "responding" to the federal action within 60 days after promulgation of the new federal standards. The rule gives no indication as to what kind of "response" is required.