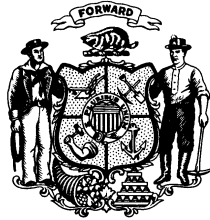


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CLEARINGHOUSE RULE 98-155

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 September 1998.]

1. Statutory Authority

a. Under s. HFS 163.30 (2), the department may delegate all or part of its enforcement authority to any other state or federal agency through a memorandum of understanding. Section 254.152, Stats., permits the department to delegate such authority to a local health department under specified conditions. However, there appears to be no statutory authority to delegate enforcement authority to any state or federal agency.

b. Section HFS 163.30 (3) (a) permits the department to inspect the premises where any violation of ch. HFS 163 is alleged to be occurring or to have occurred. Section 254.30 (1) (a), Stats., permits the department to “enter, at a reasonable time, a dwelling or premises undergoing any lead hazard reduction to determine if all persons engaged in lead hazard reduction have been appropriately certified if required under s. 254.176.” Therefore, under s. 254.30 (1) (a), Stats., the authority of the department to enter premises is not as broad as the rule provides. For example, the department is not permitted to enter the premises of a training provider under that statute in order to investigate a violation. In view of the specificity of s. 254.30 (1) (a), Stats., what statutory authority exists for the broad power asserted in s. HFS 163.30 (3) (a)?

2. Form, Style and Placement in Administrative Code

a. Section titles are written with an initial capital letter and in bold print. [s. 1.05 (2) (b), Manual.] Paragraph titles should not be underlined and should be italicized. [s. 1.05 (2) (d), Manual.]

b. In s. HFS 163.10 (8), the Note following par. (a) should be incorporated into the body of the rule.

c. In s. HFS 163.11 (5) (b) 2., “Material Safety Data Sheets” should not be capitalized.

d. In s. HFS 163.12, subs. (6), (7) and (8) should be combined into one subsection or one separate section of the rule.

e. In s. HFS 163.14 (5) (f), it appears that subd. 1. d. should be renumbered as subd. 1. c. In par. (h), the phrase “High Efficiency Particulate Air” should be shown all in lower case.

f. In s. HFS 163.14 (5) (h) 2., “High Efficiency Particulate Air” should not be capitalized. Also, if the drafter wishes to use “HEPA,” it should be defined in s. HFS 163.03.

g. In s. HFS 163.20 (8) (a) 4., subd. par. 1. should be written as subd. par. L. This comment also applies to s. HFS 163.31 (4) (L) and sub. (4) (L) of Appendix A.

h. Section HFS 163.24 (3) (e) 2. should be written as an introduction to the subsequent subdivision paragraphs or should be numbered subd. par. a. This comment also applies to sub. (4) (e) 2. (intro.).

i. Section HFS 163.32 (5) (c) and (9) describe possible forfeiture actions and criminal penalties. Since the department does not have authority to authorize the Attorney General to take action or have authority to impose a criminal penalty, these rule provisions that reflect independent statutory authority should be placed in a descriptive note. It is also questionable whether the department can limit a court’s review to “whether or not the forfeiture has been paid” in s. HFS 163.32 (5) (c).

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

a. In s. HFS 163.01, is the cite to s. 250.04 (7), Stats., supposed to be to s. 250.04? The entire section is cited as authority for the rule in the analysis.

b. In the Note to s. HFS 163.10 (3), “sub.” should be replaced with “subs.”

c. In s. HFS 163.10 (4) (f), a period should be inserted after “b.”

d. In s. HFS 163.11 (2) (a) 4., a period should be inserted after “3.”

e. In s. HFS 163.11 (2) (a) 5., a period should be inserted after “4.”

f. In s. HFS 163.11 (3) (a) 2. and 3. a., a period should be inserted after “1.”

g. In s. HFS 163.14 (5) (b), periods should be inserted after “3” and “4.”

h. In s. HFS 163.14 (5) (d) 1., a period should be inserted after “2.”

i. In s. HFS 163.14 (6) (i) 3., should the reference to par. (g) refer to par. (h)?

j. In s. HFS 163.23 (2), (3) (a) and (5) (a), should “chapter” be replaced with “subchapter”?

k. In s. HFS 163.31 (2) (g), “subchapter” should be written as “subch.”

l. In s. HFS 163.31 (5) (intro.), “sub.” should be replaced with “subs.”

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

a. In s. HFS 163.02 (2), in the last sentence, “will” should be replaced with “shall.”

b. In s. HFS 163.03 (1) (b), “Specifically,” should be deleted.

c. In s. HFS 163.03 (1) (b) 4., the comma should be replaced by the word “and.”

d. In s. HFS 163.03 (1) (b) 5., is the request for an abatement made by the owner of the property? Also, the phrase “or which claims to be an abatement” appears to be superfluous and could be deleted.

e. In the second sentence of s. HFS 163.03 (1) (c), the word “abatement” should be placed within quotation marks.

f. In s. HFS 163.03 (13), it seems that occupants should be included in the list of those containment is meant to protect.

g. In s. HFS 163.03 (16), a comma should be inserted after “written.”

h. In s. HFS 163.03 (17), “blue print” should be written as one word. This change should also be made in s. HFS 163.21 (6) (f).

i. In s. HFS 163.03 (22), “paint” should be inserted before “application history.”

j. In s. HFS 163.03 (23), it appears that a phrase such as “for abatement and lead hazard control” should be inserted at the end of the sentence.

k. The definition of “person” in s. HFS 163.03 (63) should be reviewed. What is a “judicial person”? Also, it appears that “corporation” and “body . . . corporate” mean the same thing. See, also, s. 990.01 (26), Stats.

l. In s. HFS 163.03 (55), the phrase “has the authority to” should be replaced by the word “may.”

m. In s. HFS 163.10 (1) (a) 1., a hyphen should be inserted between “child” and “occupied.”

n. In s. HFS 163.10 (2) (f), a phrase such as “to perform work” should be inserted after “required to be certified.”

o. In s. HFS 163.10 (3) (b) 4. b., it appears that the word “or” should precede the phrase “environmental remediation work.”

p. In s. HFS 163.10 (3) (c) 4., “at another time” should be replaced with “for another time.” Also, “the transfer” should be replaced with “to reschedule.”

q. In s. HFS 163.10 (4) (a), “include” should be inserted after “The applicant shall.”

r. In s. HFS 163.10 (4) (f) 3., “A” should be inserted at the beginning of the sentence.

s. In s. HFS 163.10 (4) (g), it is not clear who may qualify for the government certification fee exemption, although it becomes clear later in the chapter. It would be helpful to include a cross-reference to a section that explains the exemption.

t. In s. HFS 163.10 (5) (d), reference is made to a check that is not honored by a bank. Since many more types of financial institutions other than banks use checking systems, this provision is drafted too narrowly. The use of the term “financial institution,” along with a definition of that term, may be preferable. The entire rule should be reviewed for the inappropriate use of the word “bank.” In addition, a phrase such as “holding the account” should be inserted before the phrase “on which it is written.”

u. In s. HFS 163.10 (8) (d) 3., the second comma should be replaced by the word “and.”

v. In s. HFS 163.10 (8) (e), “for” should be inserted after “expiration date.”

w. In s. HFS 163.11 (1) (b), it is unclear what is meant by “as protective as the accreditation requirements under subch. III.” Would it be appropriate to substitute “comparable to the accreditation requirements under subch. III”?

x. In s. HFS 163.11 (1) (c) and (d), “when” should be replaced with “if.”

y. In s. HFS 163.11 (2) (a), the internal cross-references to various subdivisions are not clear or, at least, require the reader to unnecessarily be led through consecutive, multiple cross-references.

z. In s. HFS 163.11 (2) (b), “a course test in the discipline” should be replaced by “the course test.”

aa. In s. HFS 163.12 (3) (a) 1. a., “company’s” should be inserted before “physical address.”

ab. In s. HFS 163.12 (3) (a) 1. e., should the first occurrence of the word “certified” be replaced by the word “authorized”?

ac. The Note to s. HFS 163.13 (6) (d) explains how to request a summary form, although the form is not mentioned in par. (d). Is the summary required to be submitted on the form? If so, this should be clarified.

ad. In s. HFS 163.14 (2) (c) 4., “of units inspected” should be inserted after “numbers.”

ae. In s. HFS 163.14 (2) (c) 8., “x-ray fluorescence (XRF) device” should be replaced with “XRF” since XRF is a defined term.

af. In s. HFS 163.14 (3) (i) 2., “screened” should be inserted at the end of the sentence.

ag. In s. HFS 163.14 (3) (i) 4., “of units screened” should be inserted after “number.”

ah. In s. HFS 163.14 (3) (i) 13., “device” should be deleted.

ai. In s. HFS 163.14 (4) (j) 2., “assessed” should be inserted at the end of the sentence.

aj. In s. HFS 163.14 (4) (j) 4., “of units assessed” should be inserted after “number.”

ak. The title for s. HFS 163.14 (5) is “ABATEMENT.” However, in par. (d), notification of a lead hazard reduction activity for which certification is required is mandated. Because a lead hazard reduction activity may be a measure to temporarily control a lead hazard, this is confusing. The department should clarify exactly which provisions apply to an activity for which certification is required and which apply only to abatements. Although it may be rare that an activity short of abatement will require certification, it is possible if the work is court- or agency-ordered to be performed by a certified individual. See also par. (e) 1. a. which mentions interim controls.

al. In s. HFS 163.14 (5) (d) 2. and 3., may emergency and revised notice be either written or verbal? If verbal notice is given, is subsequent written notice required?

am. In s. HFS 163.14 (5) (e) 1. a., the phrase “stop dates” is used. Is this the same as the “end date” as used in par. (d) 3. b.? If so, consistent language should be used. Also see pars. (f) 1. a. and (k) 1.

an. In s. HFS 163.14 (5) (e) 3., “date on the” should be inserted before “department’s date.”

ao. In s. HFS 163.14 (5) (f) 3., “date of the” should be inserted before the second occurrence of “verbal notification.”

ap. In s. HFS 163.14 (5) (k) 3., “that” should be inserted before “information.”

aq. In s. HFS 163.14 (6), it may be clearer if pars. (b) and (d) were combined.

ar. In s. HFS 163.14 (6) (e) 1., are there any guidelines as to how far outside the containment area a dust sample should be collected?

as. In s. HFS 163.14 (6) (e) 3., in the second sentence, “is present” should be replaced with “are present.”

at. In s. HFS 163.14 (6) (h), the subdivisions’ text should end with periods. Also the abbreviation ug/ft² should either be defined in s. HFS 163.03 or spelled out.

au. In s. HFS 163.14 (6) (i) 2., it is not clear how one achieves a 95% level of confidence that at least 95% of all dwelling units would pass clearance if all were sampled without sampling 95% of the units. Could more guidance be given for this requirement?

av. In s. HFS 163.14 (8) (b), does the requirement that every component that is being tested be included in the sample mean that every window, for example, must be included in one sample? Will there ever be an instance in which it would be more accurate or helpful to limit the number of components included in the sample?

aw. In s. HFS 163.20 (8) (a) 3. f., would it be accurate to replace “other sources of lead exposure” with “sources of lead exposure other than lead-based paint”?

ax. In s. HFS 163.22 (4) (a), the length of accreditation partially depends on the amount of the fee paid. However, the fees specified are for 0 to 24 months. In addition, it is not clear exactly how the department determines how long accreditation may remain in effect. This comment also applies to s. HFS 163.23 (5) (a).

ay. In s. HFS 163.22 (5), would it be accurate to delete “or use the certificate” at the end of the last sentence and insert “or use” after “shall not allow another person to copy” instead?

az. Under s. HFS 163.22 (6) (a), the department may conduct an on-site audit of an accreditation training course. It appears that current s. HFS 163.23 (2) (a) requires that such an audit be conducted. If this is accurate, the change in policy should be addressed in the analysis. In addition, in the last sentence, it appears that the word “in” should precede the phrase “class activities and in the course test.”

ba. Section HFS 163.22 (6) (c) requires that the department notify a training manager of preliminary audit results. Is the manager notified of final audit results?

bb. In s. HFS 163.23 (1), “more than one year” should be replaced with “one year or more” so that it is clear what is required if the accreditation has been expired for exactly one year.

bc. In s. HFS 163.24 (3) (a) 2. a., “lead” after “(Pb)” should be deleted.

bd. In the second paragraph of the Note following s. HFS 163.24 (3) (a) 3. a., the word “and” should precede the phrase “lead management activities relating to other hazardous materials.”

be. In s. HFS 163.24 (3) (b) 5., is the “train-the-trainer” course the same as the “teaching methods” course mentioned in par. (a) 1. a.? If so, consistent terminology should be used.

bf. In s. HFS 163.24 (3) (d), it appears it would be clearer to replace the text with “Subject to compliance with this chapter, the department may grant principal instructor approval which shall be valid until the expiration of the instructor’s qualifying lead certification or 12 months, whichever is earlier.” A similar change is suggested for par. (e) 3.

bg. In s. HFS 163.25 (3) (c) 2., if a training manager notifies the department of a scheduled training course by telephone, is a follow-up written notification required? This comment also applies to sub. (5) (g).

bh. In s. HFS 163.25 (7) (a), “closest office location to Wisconsin” should be replaced with “office location closest to Wisconsin.”

bi. In s. HFS 163.25 (7) (b) 2., what is meant by “form used in the course”?

bj. In s. HFS 163.31 (2) (a) to (k), the violations should be expressed as nouns. For example, par. (a) should read: “Submission of a check to the state” This comment also applies to sub. (4).

bk. Section HFS 163.31 (4) (b) would be clearer if written as: “Issuance of a training certificate by a training manager to a person who has not attended the appropriate course or an entire course or who has not passed an approved course test.”

bl. Section HFS 163.31 (4) (m) and (n) should specify who must be permitted entry or specify the citation of the provision relating to entry and inspection of work sites.

bm. In s. HFS 163.32 (5) (intro.), it appears that the phrase “fails to respond to a notice of inquiry under sub. (1) by the time specified in the order” should be replaced with “fails to respond to a letter of inquiry under sub. (1) by the time specified in the letter” to be consistent with the language in sub. (1). In addition, the language in sub. (5) (b) is extremely broad without any standards for determining whether a person is “fit and qualified.”