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CLEARINGHOUSE RULE 98-198

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.]

2. Form, Style and Placement in Administrative Code

a. The rule lacks an introductory clause in the format set forth in s. 1.02 (1), Manual. The clause should show how the various rule provisions are affected by the proposed rule.

b. In s. NR 233.03 (1e), the material following “Table 10” should be omitted.

c. In s. NR 233.03 (1o), the definition of “equivalent system” is primarily substantive material which should be placed in the text of the rule, rather than in a definition. [See s. 1.01 (7), Manual.]

d. To distinguish between sections of the administrative code and SECTIONS of a rule-making order, when referring to a SECTION of a rule-making order, the word “SECTION” is written in capital letters. [See s. 1.04 (1), Manual.]

e. In s. NR 233.03 (2o) (intro.), the word “pesticide” should be omitted, since the term “active ingredient” is defined. The entire rule should be reviewed for the consistent use of this defined term.

f. Many of the definitions created in this rule contain substance, which should be placed in the text of the rule, rather than in definitions. [See s. 1.01 (7), Manual.] In many cases, the substance appears to be getting at matters of applicability. In these cases, the definitions should be limited simply to stating what the term means and the information regarding applicability

should be placed in appropriate applicability provisions. See, for example, ss. NR 233.03 (6e) and (7u), 233.305 (6) and 233.51.

g. Since there is no s. NR 233.03 (8), the subsections created by SECTIONS 13 to 17 should be numbered s. NR 233.03 (8) to (11).

h. Since s. NR 233.03 (3) creates separate definitions applicable to different subchapters, separate definitions should be created in those individual subchapters.

i. The term “agricultural pesticide,” used in s. NR 233.30 (2) is undefined. What pesticides are agricultural pesticides?

j. In s. NR 233.30 (4) (intro.), “any of the following” should be inserted before the colon. [See s. 1.03 (8), Manual.] The entire rule should be reviewed for instances of this error.

k. The phrase “as defined in s. _____” should never be used when the applicability of the defined term is set forth in a definitions section. See, for example, s. NR 233.30 (4) (d) and 233.31 (2).

l. Although it is drafted as definitions, virtually all of s. NR 233.305 is substantive requirements. These provisions should either be redrafted as free-standing requirements or incorporated into the following sections. This should not cause undue repetition of text, since as subsequent comments suggest, the following sections should be collapsed into a single section themselves.

m. If the department chooses to retain s. NR 233.305 in the form of definitions, the following corrections should be made to the format:

- (1) The title should simply be “**Definitions**” and an introductory phrase “In this subchapter:” should be added.
- (2) Section NR 233.305 (3) (c) should be rewritten to follow grammatically from s. NR 233.305 (3) (intro.). This problem stems from the underlying problem that these are substantive requirements, rather than definitions.
- (3) The word “of” should be replaced by the word “or” in the phrase “quantity of concentrations” in s. NR 233.305 (4) (b).
- (4) The definition of “process wastewater” should be preceded by the phrase “notwithstanding s. NR 205.03 (30).” However, as noted earlier, the substance of this provision should be dealt with in an applicability provision.

n. Sections NR 233.31 to 233.36 need considerable rewriting:

- (1) Since these provisions are virtually identical, much repetition of language could be avoided by collapsing them into a single section.

- (2) The drafting is wordy and confusing. It never comes out and states in so many words that, for example, the effluent limitation representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (the BPT effluent limitation) is zero discharge. Section NR 233.31 (intro.) and (1) (a) could be collapsed into a single sentence stating: “Any existing point source subject to this subchapter may not discharge process wastewater pollutants to navigable waters.” Or “. . . is subject to an effluent limitation of zero discharge of process wastewater pollutants to navigable waters.” If the department feels that it is necessary to repeat the federal language describing the BPT limits, it should at least ensure that the rule makes a clear statement that the BPT limit is zero discharge. These comments apply to the following sections, as well.
- (3) Section NR 233.31 (1) (b), and the parallel provisions in the subsequent sections, should be rewritten as a requirement, rather than as a definition. It could read, for example: “A permitting authority shall not provide additional discharge allowances in pesticide formulating, packaging and repackaging wastewater discharge limits for active ingredients that are also manufactured at the facility.” Also, is the phrase “which are also subject to ss. NR 233.12 or 233.22” a qualification of the applicability of that provision or a comment? If it is a qualification, the word “which” should be replaced by the word “that”; if it is a comment, it should be placed in a note.
- (4) Can the cross-reference to 40 CFR 125.30 to 125.32 be replaced by references to Wisconsin rules? This exception is particularly troubling since it appears to depend upon determinations made by the U.S. Environmental Protection Agency. Are similar determinations made by the department, or could they be made by the department? The effect of this exception is not entirely clear.
- (5) It appears that s. NR 233.31 (2), and the parallel provisions of the following sections, is where the material contained in s. NR 233.305 should be incorporated. In the introduction of this subsection, the cross-reference appears to be incorrect.
- (6) What is a “modification by best professional judgment” referred to in s. NR 233.31 (2) (a) and parallel subsequent provisions? How does one obtain such a modification? This should be spelled out in the rule or identified by a cross-reference to a rule provision that spells it out.
- (7) What is a WPDES permit writer, referred to in s. NR 233.31 (2) (b) and subsequent parallel provisions, and how does it differ from the defined term of “permitting authority”?
- (8) Section NR 233.33 (intro.) is improperly drafted as introductory material. [See s. 1.03 (8), Manual.] It should end in a colon and lead into the

subsections that follow. In the alternative, it could be numbered sub. (1) and the other subsections could be numbered subs. (2) and (3).

(9) In s. NR 233.33 (2) (b), “shall” should replace “will.”

o. Sections NR 233.52 to 233.57 suffer from some of the same defects as those in ss. NR 233.31 to 233.36.

p. There are no treatment clauses for the sections creating Tables 8 to 10. Also, is the table starting on p. 31 of the order a continuation of Table 10? If so, this should be made clearer.

q. The rule does not have an effective date clause. [See s. 1.02 (4), Manual.]

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

a. In s. NR 233.36 (1), “sub. (2)” should replace “sub. 2”.

b. In s. NR 233.36 (2) (c), “(3)” should replace “(2)”.

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

a. In s. NR 233.03 (2e), the definition of “formulation of pesticide products” might be clearer if the phrase “without an intended chemical reaction” were set off by commas.

b. The choice of terms that are defined are sometimes counterintuitive or otherwise inappropriate. For example, the definition of “interior wastewater sources” in s. NR 233.03 (2r) refers to specific types of water, not sources of water; the defined term should be “interior wastewater.” The definition of the term “microorganisms” in sub. (2u) refers only to microorganisms that have been registered as pesticides; the defined term should be “microbial pesticide.” The definition of the term “PFPR/manufacturer” in sub. (6e) refers to specific facilities, not manufacturers; the defined term should be “PFPR manufacturing facility.”

c. The references to eucaryotes and procaryotes in s. NR 233.03 (2u) appear unnecessary and potentially incorrect under modern biological theory. That definition could end with the phrase “. . . protozoa, algae, fungi, bacteria and viruses.”

d. Section NR 233.03 (6o) should be rewritten as follows: ““Pool chemical” means a pesticide that is intended to disinfect or sanitize swimming pools, hot tubs, spas or other similar areas in a household or institutional environment or to reduce or mitigate the growth or development of microbial organisms, such as bacteria, algae, fungi or viruses.” Also, should this list of examples include protozoa, as in the definition of “microorganisms”?

e. Something appears to be wrong with the second sentence in s. NR 233.03 (7s), since it refers to surfaces with labeled directions for use. Also, the last sentence of that subsection includes the phrase “exempted by s. NR 233.03 (6o), although the cross-referenced definition does not exempt or exclude anything. The notation “(7) (s)” should be replaced by the notation

“(7s)” unless the earlier recommendation regarding the numbering of this definition is adopted. Also, why is “otherwise” in this sentence?

f. Section NR 233.30 (3) (f) should be rewritten as follows: “On-site laboratories from cleaning analytical equipment and glassware and from rinsing the retain sample container, except that this subchapter applies to the initial rinse of the retain sample container. These changes correct punctuation, avoid a double negative and spell out the word “subchapter.”

g. The last sentence of s. NR 233.30 (6) is confusing. First, what does “subordinate disinfectant claims” mean? Does this refer to any product which is claimed to have subordinate disinfectant qualities? Second, what does “includes” mean? Does it mean that sterilants and the other category of products are included in the applicability of this subchapter or included in the exclusion from that subchapter created by sub. (6)?

h. There is a stray occurrence of the word “discharge” in s. NR 233.32 (1) (b), which should be deleted.