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RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 99-094

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. Section 101.144 (3m) (a) 3., Stats., requires the Department of Commerce and the Department of Natural Resources (DNR) to set “schedules” for determining whether a petroleum product discharge site should be classified as high, medium or low priority. Nothing in the rule appears to set a schedule.

b. The risk criterion in s. NR 746.06 (2) (b) excludes public roads or street rights-of-way. Is the effect of this exception to allow contaminants in excess of an enforcement standard off site if the contamination is beneath a public road or street right-of-way? If so, how does this provision relate to the requirement under ss. 160.21 (2) (a) 2. and 160.25 (1), Stats., that the enforcement standard must be met at the property boundary, among other places?

c. Section NR 746.07 (3) relates to the errors of measurement, repeatability of test results and statistical significance. This provision also requires the two departments to develop a process for taking these considerations into account. However, s. 160.19 (6), Stats., requires the DNR to “‘promulgate’ by rule a scientifically valid procedure for determining if a preventive action limit or enforcement standard is, in fact, attained or exceeded.” The DNR has done so in s. NR 140.14. The statute further requires that the procedure developed by DNR be used for “all regulatory and enforcement purposes under [ch. 160, Stats.]” How is it intended that the new procedure in the rule will relate to the existing statutory and rule requirements, and what is the authority for the Department of Commerce’s involvement in this process?

2. Form, Style and Placement in Administrative Code

a. The last sentence of s. NR 746.01 notes that ch. NR 746 codifies portions of the memorandum of understanding between DNR and the Department of Commerce. The DNR should consider whether anyone may wish to obtain a copy of the memorandum of understanding. If so, a note after s. NR 746.01 could indicate how to obtain the document. Also, in both sentences of s. NR 746.01, “chapter” should replace “rule.”

b. The definitions of high-, medium- and low-priority sites in s. NR 746.03 refer to a “site that is contaminated with a petroleum product.” However, the definition of “site” in s. NR 746.03 (20) is “any area where a petroleum product has discharged.” One reasonable distinction is that a “site” is any area where a petroleum product has been discharged, even if remedial action is completed, whereas the high-, medium- and low-priority sites are sites that are **currently** contaminated. It might be appropriate to include a note explaining the relationship between these definitions. It may also be possible to change the definitions of high-, medium- and low-priority sites to make these distinctions more apparent.

c. The introductory paragraphs of s. NR 746.03 (8) and (9) require the site to meet both of the criteria in the definition. Each of the two criteria in the definitions should be a separate sentence. The “and” between the two criteria is superfluous. Throughout the rule, subunits should end with a period (except introductory material, which ends with a colon). [See s. 1.03 (intro.), Manual.]

d. The rule refers to “the responsible person or a consultant retained by the responsible person.” The latter part of this phrase could be omitted and the duties in the rule could be assigned to the responsible person. An additional substantive provision could be added to the rule providing that any duty of the responsible person may be undertaken by a consultant retained by the responsible person.

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

a. The “remedial action performance standards” of ch. NR 720 are included in the definition of “site closure” in s. NR 746.03 (21). If possible, this definition should be clarified by including specific references to the relevant portions of ch. NR 720.

b. The cross-reference to “par. (a)” in s. NR 746.05 (4) is incorrect.

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

a. The phrase “laterally extensive permeable material” in s. NR 716.11 (5) (a) is vague. This phrase occurs at several other places in the rule.

b. Section NR 720.02 (1m) refers to “petroleum-contaminated” sites. Chapter NR 746 refers to a “site contaminated by a petroleum product.” It appears that these terms should be consistent. “Petroleum-contaminated” occurs at several other places in the rule.

c. The apparent intent of s. NR 720.02 (1m), according to the description in the note, is that the exemption applies if soil contamination is within four feet of the ground surface at a site contaminated by a petroleum product *and* the site satisfies the risk criteria in s. NR 746.06 (2). The rule can be redrafted more clearly to indicate this intent.

d. The definition of “low permeability material” in s. NR 746.03 (7) excludes bedrock, but the definition of “permeable material” in s. NR 746.03 (12) does not. Is the latter definition correct?

e. The definition of “remedial action” in s. NR 746.03 (17) defines a remedial action as a type of “response action.” “Response action” is not a defined term. It appears that this definition would be clarified by deleting “response.” Also, the definition defines “remedial action” as a type of action to control *the discharge of petroleum products*. Is this correct, or is the purpose of a remedial action to control, minimize or eliminate *petroleum products*?

f. In the definition of “remediation target” in s. NR 746.03 (18), the phrase “before a site can be granted” and “before a site . . . is eligible for” closure appear to be mean essentially the same thing.

g. It is not clear in s. NR 746.04 (3) why the setting of remediation targets for sites that are competitively bid or “bundled” with another site must be a joint decision of the agencies. Is it assumed that the sites will include both high-priority sites and either medium- or low-priority sites? Does the DNR intend that a single remediation target will be set for all sites that are competitively bid or bundled with another site? If so, this should be clarified.

h. Section NR 746.04 (3) requires the two departments to “implement a system of joint decision-making” for certain purposes. Several other provisions of the rule require the two departments to undertake further policy development and implementation. Should the rule indicate how this joint effort will be undertaken and what will be the final result? Is the intention to develop a new memorandum of understanding, modify the existing memorandum of understanding, amend or create administrative rules or implement these requirements by other means? Can the intent of the rule be more clearly specified, or an explanatory note included?

i. A closure request is required under s. NR 746.04 (4) (a) to be accompanied by the “appropriate fee.” How is this fee established?

j. If a closure request is not submitted and the site has met its remediation target, s. NR 746.04 (4) (b) provides that the department may “solicit a closure request” from the responsible person. The rule does not indicate that the responsible person must respond. Is it optional for the responsible person to submit a closure request?

k. Section NR 746.04 (5) provides a process for resolving disputes under s. NR 746.04 (3) and (4). However, the decisions under s. NR 746.04 (4) appear to be individual decisions of either agency, and it is not clear how these decisions can result in a dispute.

l. “Agreed upon” should be hyphenated in s. NR 746.05 (2).

m. Section NR 746.05 (3) (d) refers twice to the “objectives of this section.” It is not clear what are the “objectives” that must be met. Further, it is not clear why these phrases are necessary, if use of an alternative method requires department approval. If the intent of this phrase is to establish the criteria for approval, it would appear more appropriate to require that the alternative method must be expected to result in an adequate determination of hydraulic conductivity.

n. Section NR 746.05 (4) is difficult to understand and would benefit from editing. Also, the last sentence of s. NR 746.05 (4) appears to duplicate in substantial part the requirement of s. NR 746.05 (3) (c) (intro.).

o. The risk criteria, according to s. NR 746.06 (1), are “used to measure” certain risks. However, the risk criteria are not expressed in numerical terms. Other provisions of the rule, such as s. NR 720.07 (1) (a), refer to a site that “satisfies” the risk criteria. In fact, the “risk criteria” in s. NR 746.06 (2) relate primarily to the *absence* of conditions that would create risk for public health or the environment. The department should consider whether this portion of the rule could be clarified by using a different phrase than “risk criteria,” or modifying how the risk criteria are described or used in the rule.

The overall purpose of s. NR 746.06 is to establish criteria for screening sites. However, s. NR 746.06 (1) also includes a provision describing how the risk criteria are used. These provisions appear to restate substantive requirements that are established elsewhere in the rule.

p. It is not clear why s. NR 746.06 (2) (intro.) refers only to s. NR 746.07. The risk criteria are also an element of s. 746.05 (1).

q. Some of the criteria in s. NR 746.06 (2) relate to occurrences “at the site” while some do not use this phrase. It appears that this phrase should be included in all of the criteria.

r. In s. NR 746.07 (1) (a), “post closure” should be hyphenated.

s. The requirements imposed by s. NR 746.07 (1) (b) and (c) could be clarified by reducing the length of the sentences and rewriting for clarity. Also, the first two commas in par. (b) are unnecessary.

t. Section NR 746.07 (1) (b) and (2) mention “institutional controls” as required under ch. NR 726. However, the phrase “institutional controls” is not used in ch. NR 726.

u. Should s. NR 746.04 (2) (regarding remediation targets) also be cross-referenced in s. NR 746.07 (2)?

v. Section NR 746.07 (3) requires DNR and the Department of Commerce to take specified actions by June 30, 1999. Since this date has already passed, DNR should consider deleting either the date or the whole sentence.