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CLEARINGHOUSE RULE 00-036

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

Section 281.65 (4) (e), Stats., provides that the rules must specify which best management practices are cost-effective best management practices. Section NR 154.02 (3) defines “cost effective.” However, the defined term appears to be used in only three parts of ch. NR 154: (a) s. NR 154.03 (1) (e) requires practices below the ordinary high-water mark to be the “most” cost-effective means of preventing or reducing pollutants; (b) s. NR 154.03 (14) (b) 3. b. provides for cost-sharing of agricultural sediment basins of a certain height only if the Department of Natural Resources (DNR) makes a finding that the construction is cost effective; and (c) s. NR 154.03 (21) (b) 4. b. and 7. describes how to determine if the relocation or abandonment of an animal lot is cost effective.

Thus, the statutory requirement that the rules specify which best management practices are cost effective seems to have been complied with only with respect to animal lots. It appears that ch. NR 154 should establish a link between the requirement regarding cost effectiveness and the various provisions in ch. NR 154.

2. Form, Style and Placement in Administrative Code

a. As discussed in item 4. a., below, the statutory authority and statutes interpreted section of the analysis should refer to s. 281.65, Stats. Section 281.65 (4) (e), Stats., requires that the rules promulgated under s. 281.65 (4) be done in consultation with the Department of

Agriculture, Trade and Consumer Protection (DATCP) and also requires that, before the rules are promulgated, DNR must submit the rules to the Land and Water Conservation Board for review under s. 281.65 (3) (at), Stats.

Neither the analysis nor the agency procedures for promulgation description in the Report to the Legislative Council Rules Clearinghouse indicate that these steps have been or will be taken. These steps are required and should be described in the materials submitted to the Legislature.

b. There are two provisions labeled s. NR 154.02 (12). The second one should be renumbered as s. NR 154.02 (13).

c. Section NR 154.02 (1) and (12) define “agricultural performance standards” and “non-agricultural performance standards,” respectively. However, neither term is used in ch. NR 154, other than in a reference in a note in s. NR 154.01. A term should not be defined unless it is used in the text of a chapter.

d. Definitions should be in alphabetical order. [See s. 1.01 (7) (a), Manual.] Thus, “cost sharing” should follow “cost-share agreement.”

e. In s. NR 154.02 (14), “source” should not be capitalized. In s. NR 154.03 (12) (c) 8., “crevice” should not be capitalized. In s. NR 154.03 (18) (a), “technical” should not be capitalized. In s. NR 154.03 (22) (c) 1., “well” should not be capitalized. In s. NR 154.03 (23) (c) 1. c. and (24) (c) 1. c., “manure” should not be capitalized. In s. NR 154.03 (24) (a) “technical” should not be capitalized. [See s. 1.01 (4), Manual.]

f. There are two provisions labeled s. NR 154.02 (18). The second one should be renumbered s. NR 154.02 (19).

g. Section NR 154.03 (1) (b) 3. refers to technical standards in a particular DNR publication. It would be useful if a note were inserted following this provision to specify how this document may be obtained or viewed. [See s. 1.09 (1), Manual.] This comment also applies to s. NR 154.03 (9) (c) 2., (14) (c) (intro.) and (19) (c).

h. In s. NR 154.03 (2) (c), the entire title should be italicized. [See s. 1.05 (2) (d), Manual.] This comment also applies to s. NR 154.03 (5) (c), (6) (c), (11) (c) and (12) (c).

i. In s. NR 154.03 (3) (b) and (19) (c), the subdivision number “1.” should be deleted because there are no other subdivisions. [See s. 1.03 (intro.), Manual.]

A similar comment applies to s. NR 154.03 (6) (b) in which the subdivision number “1.” should be deleted and the subdivision paragraphs a. and b. should be changed to subdivision numbers 1. and 2.

j. Section NR 154.03 (8) (b) (intro.) provides that “cost-sharing may be provided for:”. It should be changed to use an introductory phrase such as “cost-sharing may be provided for

[all] [any] of the following:”. [See s. 1.03 (8), Manual.] Similarly, s. NR 154.03 (9) (b) 1. (intro.) should use an introductory phrase which refers to the following items.

In general, ch. NR 154 uses a very inconsistent approach with respect to language which introduces a list and also with respect to end punctuation of items in the lists. Introductory language should be used to explicitly refer to the list that follows. For example, in s. NR 154.03 (10) (b) 1., the phrase “Cost-sharing may be provided for the planting of cover in green manure crops:” should be changed to a phrase such as “Cost-sharing may be provided for the planting of cover and green manure crops for all of the following purposes:”.

The correct punctuation at the end of items in a list is a period following each item, with the relationship of the items explained in the introductory clause. This makes it easier to delete or insert material in the future. For example, in s. NR 154.03 (10) (b) 1., the semicolons and the conjunction before the last item in the list should all be changed to periods. In s. NR 154.03 (23) (b) 5. a., b. and c., “; or” should be changed to a period in each provision.

In general, the entire rule should be reviewed to establish a consistent approach with respect to introductory language to lists and end punctuations for the items in a list.

k. In several places in the rule, the phrase “, but are not limited to” should be deleted after “include.” For example, see s. NR 154.03 (9) (b) 1. a.

l. Section NR 154.03 (9) (c) should be changed so that the first part includes introductory language such as: “The following technical standards apply under this subsection:”. The “NRCS field office technical standard 595” should be listed as s. NR 154.03 (9) (c) 1., and s. NR 154.03 (9) (c) 2. should begin on a separate line.

m. There are two provisions labeled s. NR 154.03 (11) (c) 1. h. The first one should begin on a new line, and the second one should be renumbered s. NR 154.03 (11) (c) 1. i., with an appropriate change made to the following item.

n. There are two provisions labeled s. NR 154.03 (16) (c) 4. The second one should be renumbered s. NR 154.03 (16) (c) 7.

o. In the last sentence of s. NR 154.03 (19) (b) 6. a. and 8. d. and f., “must” should be changed to “shall.” [See s. 1.01 (2), Manual.] The entire rule should be reviewed for instances of the word “must.” Also, it appears that in s. NR 154.03 (19) (b) 6. d., “should” should be changed to “shall.”

p. In s. NR 154.03 (19) (b) 6. d., the two references to “three layers” should be changed to “3 layers.” [See s. 1.01 (5), Manual.]

q. A title should be provided for s. NR 154.03 (23) (c) because titles are provided for the other paragraphs in s. NR 154.03 (23). [See s. 1.05 (1), Manual.]

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

a. The title of ch. NR 154 indicates that it relates to best management practices, technical standards and cost-share conditions. Section 281.65 (4) (e), Stats., requires DNR to promulgate rules concerning best management practices which are required for eligibility for cost-sharing grants. Section 281.65 (4) (e), Stats., also requires that the standards and specifications concerning best management practices be consistent with the performance standards, prohibitions, conservation practices and technical standards under s. 281.16, Stats. Similarly, s. 281.16 (3) (e), Stats., indicates that DNR must promulgate rules to specify criteria for determining whether cost-sharing is available under s. 281.65, Stats. Therefore, the statutes interpreted reference in the analysis should include s. 281.65, Stats., and the statutory authority reference should include s. 281.65 (4) (e), Stats.

It is not clear that references to s. 281.16 (2) and (3), Stats., are appropriate. However, in a sense, those provisions also are being interpreted inasmuch as the standards and specifications under s. 281.65, Stats., must be consistent with the performance standards, prohibitions, conservation practices and technical standards under s. 281.16, Stats.

The interrelationship between ch. NR 154, other proposed rules and ss. 281.16 and 281.65, Stats., is unclear. Some of the confusion may be contributed to by the fact that s. 281.65 (4), Stats., requires rules establishing “standards and specifications” but does not require rules establishing “technical standards.” In contrast, s. 281.16 (2) and (3), Stats., requires rules establishing “technical standards” to implement “performance standards.” While the s. 281.65 “standards and specifications” must be consistent with the the performance standards, prohibitions, conservation practices and technical standards under s. 281.16, Stats., they are not necessarily identical. Thus, labeling certain provisions in ch. 154 as “technical standards” suggests that they are the “technical standards” referred to in s. 281.16, Stats., rather than the “standards” referred to in s. 281.65, Stats. The confusion is exacerbated by the fact that s. 281.16 (3) (c), Stats., requires that *DATCP, not DNR*, promulgate rules establishing “technical standards” which relate to nonpoint sources that are agricultural.

Would it be more accurate to change the references in ch. NR 154 to “standards,” rather than “technical standards”? Also, it would be helpful if the analysis and s. NR 154.01 were expanded to more completely explain the relationship of ch. NR 154 to other provisions in the Wisconsin Administrative Code.

b. The fiscal estimate indicates that the conditions in ch. NR 154 apply to chs. NR 120, 151 and 243. In contrast, the analysis indicates that the conditions apply to grant recipients under chs. NR 120 and 153 and may also be applicable in certain circumstances in chs. 151 and 243. This inconsistency should be clarified.

c. In the analysis, the statutory authority provision should include a reference to s. 227.11 (2) (a), Stats., and the statutes interpreted provision should delete the reference to s. 227.11 (2), Stats.

d. The note following s. NR 154.01 indicates that ch. NR 154 “may also apply to other programs as set forth in their administrative rules.” The note then refers to various chapters. It

would be more useful to specify to which other programs ch. NR 154 applies in an unequivocal statement, rather than using equivocal language (that is, “may also apply”) and indicating that chapters are included, with the implication that this is not an exhaustive listing.

e. Section NR 154.02 (2) refers to “the performance standards . . . in this chapter.” However, there do not appear to be performance standards in ch. NR 154. This provision should be changed to cross-reference the provisions which include the pertinent performance standards.

f. In s. NR 154.03 (7) (b) 5., the reference to “nutrient management and pesticide management under subs. (9) and (10)” should be changed to “nutrient management and pesticide management under subs. (8) and (9).”

g. It appears that s. NR 154.03 (7) (c) 1., 2. and 3. should be renumbered as s. NR 154.03 (7) (b) 6., 7. and 8., respectively. It also appears that what is now s. NR 154.03 (7) (c) 4. should be renumbered as s. NR 154.03 (7) (c). Also, the last provision should be structured to match provisions in other subsections which provide technical standards and should include a reference to items that follow.

h. Section NR 154.03 (17) (b) 6. indicates that: “An appropriate permit, if required, and approval shall be obtained.” It is not clear what kind of approval is needed. It would be useful to include a cross-reference to the approval process. Also, the subdivision should be reworded in the active voice.

i. Section NR 154.03 (17) (c) refers to design and implementation being “in accordance with standards approved by the department.” It is not clear how approval for these standards is sought or if there is another provision under which standards are approved. This provision should be clarified. If there is another provision under which standards are approved, a cross-reference to that provision would be useful.

j. The second sentence of s. NR 154.03 (20) (b) 2. b. refers to “This paragraph.” It appears that the reference should be to “This subdivision paragraph.”

k. Section NR 154.03 (20) (b) 2. b. refers to “s. NR 154.20.” There is no such provision. The correct cross-reference should be inserted.

l. Section NR 154.03 (20) (c) 2. refers to “other standards as approved by the department.” It is not clear how approval for such standards is sought or if there is another provision under which standards are approved. This provision should be clarified. If there is another provision under which standards are approved, a cross-reference to that provision would be useful.

m. In s. NR 154.03 (21) (b) 1. d., it appears that the reference to “subs. (17), (19) and (20)” should be changed to “sub. (20).”

n. Section NR 154.03 (23) (c) 2. and (24) (c) 2. refer to: “Other standards as specified by the department.” It would be useful to include a cross-reference to the provision in which these standards are specified. Similarly, s. NR 154.03 (25) (b) 1. d. refers to other measures

approved by DNR, and s. NR 154.03 (25) (c) 2. requires that milking center waste control systems must be designed in accordance with standards approved by DNR. Again, appropriate cross-references would be useful.

o. In s. NR 154.03 (25) (c) 1., the second set of items numbered “a., b. and c.” should be renumbered “d., e. and f.”, respectively.

p. Section NR 154.03 (27) (a) refers to the technical standards in s. NR 154.03 (27) (c). However, there is no s. NR 154.03 (27) (c).

q. Section NR 154.03 (28) (c) 1. indicates that DNR must identify acceptable technical standards for each best management practice in an approved priority watershed plan, approved priority lake plan or project grant. Section NR 154.03 (28) (c) 1. does not specify that it is directly related to the subject of s. NR 154.03 (28), that is, structural urban best management practices enumerated in s. NR 154.03 (28) (a). This link should be established.

Also, s. NR 154.03 (28) refers to standards developed under the process in “ch. NR 151.15.” There is no s. NR 151.15 in the rules submitted to the Rules Clearinghouse. The correct cross-reference should be inserted. Also, note that “s.” should precede the cite to a section, not “ch.”

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

a. In s. NR 154.02 (4), the defined term “cost sharing” is not hyphenated. However, throughout most of ch. NR 154, the term “cost-sharing” is hyphenated. See, for example, s. NR 154.03 (1) (d) and (2) (b). This inconsistency should be remedied. The comma following “practice” should be deleted. Also, the quotation mark preceding “conservation” should be deleted.

b. In s. NR 154.02 (6), the gray mark covering the last period should be deleted. Also, ““Dam”” should replace “A dam.”

c. A period should be inserted at the end of s. NR 154.02 (11). This comment also applies to s. NR 154.02 (17).

d. Section NR 154.02 (18) (the first sub. (18)) and the note following it should use the defined acronym “NRCS” rather than referring to the natural resources conservation service of the U.S. Department of Agriculture.

e. A period should be inserted after the end of the title to s. NR 154.03.

f. Section NR 154.03 (1) (a) indicates that the chapter applies to all cost-share agreements “signed after (effective date of legislation).” The correct date should be inserted if this is in fact tied to the effective date of legislation.

Also, since s. 281.65 (4) (e), Stats., provides that DNR may waive the standards and specifications in exceptional cases, it would be more accurate if this sentence indicated that unless a waiver is granted under the cross-referenced provisions which provide for a waiver, the chapter applies to all cost-share agreements signed after the inserted date.

g. Section NR 154.03 (1) (b) (intro.) should end with a colon, rather than a period.

h. Section NR 154.03 (1) (b) 1. and 2. and other provisions refer to *installing* the best management practice. Section NR 154.03 (1) (b) (intro.) refers to *implementing* a best management practice. Section NR 154.03 (1) (b) 3. refers to the *construction* of the best management practice. Unless installing, implementing and construction are intended to have different meanings, it would be preferable to select one term and use it consistently.

i. Section NR 154.03 (1) (b) 4. provides that in meeting the best management practices under ch. NR 154, “permanent and temporary vegetative cover including seed, mulch, fertilizer, trees, shrubs and other necessary materials, except for conventional agricultural crop cover, shall be established.” This literally requires that all of the specified items be included. Unless all situations would always require that all of the specified items be included, it would appear to be more appropriate to rephrase this so that the specific items are examples, rather than requirements in each case.

j. In s. NR 154.03 (1) (e), it is not clear how it is determined whether a practice is “the *most* cost-effective means” (emphasis added), rather than simply a “cost-effective means.”

k. In s. NR 154.03 (2) (c) (intro.), the phrase “are as:” should be changed to “are as follows:”. (Also see item 2. j., above, relating to appropriate introductory language.)

l. In s. NR 154.03 (2) (c) 1. to 4., three of the items are followed by a period. In contrast, the next-to-last item ends with the word “and.” Section NR 154.03 (2) (c) 3. should be changed to end in a period.

m. In s. NR 154.03 (2) (c) 2., a semicolon should be inserted after the word “removal.”

n. In s. NR 154.03 (4) (c) 10., the phrase “TO BE ADDED” should be changed to a date. This comment also applies to s. NR 154.03 (13) (c) 13. and 14., (23) (c) 1. e., (24) (c) 1. e. and (25) (c) 1. c. (the first c.).

o. Section NR 154.03 (7) (b) 3. provides that cost sharing may be provided for a maximum of three years, with a possible one-year extension with DNR approval under ch. NR 154. Chapter NR 154 does not make clear how to apply for an extension or what standards DNR uses to evaluate an application for an extension.

A similar comment applies to s. NR 154.03 (10) (b) 3., which provides that cost-sharing may not be provided for certain practices for the same acreage in the same crop year without prior DNR approval. Again, it is not clear how to request an exception or what standards DNR uses to evaluate whether an exception should be made.

p. Section NR 154.03 (6) (c) 6. should begin on a new line, and the word “management” should be followed by a semicolon.

q. Section NR 154.03 (8) (a) refers to “one or more of the technical standards in par. (c).” However, there is only one standard in par. (c). Section NR 154.03 (8) (a) should be changed to reflect this. A similar comment applies to s. NR 154.03 (10) (a) and (18) (a), with respect to s. NR 154.03 (10) (c) and (18) (c), respectively.

r. Section NR 154.03 (8) (c) should be changed--either by making it a complete sentence or by changing the first semicolon to a colon.

s. The last sentence of s. NR 154.03 (11) (b) 1. leads into a list of items for which cost sharing may be provided. However, the listed items are also numbered as subdivisions of s. NR 154.03 (11) (b), rather than items which are subparts of subd. 1. This inconsistent approach should be remedied. Specifically, it appears that the last sentence of s. NR 154.03 (11) (b) 1. should be changed to s. NR 154.03 (11) (b) 2. (intro.) and that s. NR 154.03 (11) (b) 2. to 8. should be changed to s. NR 154.03 (11) (b) 2. a. to f. (If this approach is used, the reference in current s. NR 154.03 (11) (b) 7. to “this subparagraph” should be reviewed for accuracy after any changes are completed.)

t. In s. NR 154.03 (11) (c) 1. i., the period following “walkways” should be changed to a semicolon.

u. Section NR 154.03 (15) (b) 2. a. refers to “planting trees if approved by department fish manager.” Does this position have a more specific title?

v. Section NR 154.03 (15) (c) 2. a. should end with a period.

w. The second period following the title of s. NR 154.03 (16) (a) should be deleted.

x. Section NR 154.03 (16) (b) 1. and 2. should end with a period.

y. The third sentence of s. NR 154.03 (19) (a) 2. refers to “grasses that have been maintained for several.” It is not clear what several is being referred to; for example, is it several years or months?

z. Section NR 154.03 (19) (b) 3. should end with a period.

aa. Section NR 154.03 (19) (b) 6. a. and b. and 8. a. refer to the “no-touch zone.” If this term is not commonly understood, it should be defined.

ab. The rule sometimes refers to “riprap” and other times refers to “rip rap.” One term should be chosen and used consistently.

ac. Section NR 154.03 (19) (b) 5. a. requires that no “known” violations of shoreland zoning requirements be present on the entire property. It is not clear why the word “known” is included, that is, it is not clear who is responsible for knowing.

ad. The first sentence of s. NR 154.03 (19) (b) 5. b. should end with a period. Also, the comma after “gullies” should immediately follow the word.

ae. Section NR 154.03 (19) (b) 6. (intro.) should end with a colon.

af. The overstriking before the last sentence of s. NR 154.03 (20) (a) should be deleted.

ag. Section NR 154.03 (20) (b) 1. b. provides that no cost sharing is available if the discharge could be prevented through improved management practices at “nominal costs.” It is not clear what “nominal costs” means or who determines if costs are nominal.

ah. A conjunction should be inserted before the last item in the series in s. NR 154.03 (20) (b) 1. c.

ai. In s. NR 154.03 (20) (c) 1. k., the overstricken “~~and~~” should be deleted.

aj. In s. NR 154.03 (20) (c) 1. l., the single apostrophe following 1999 should be deleted.

ak. In s. NR 154.03 (21) (b) 4. (intro.), should the reference to approval by the “governmental unit” be changed to approval by the “project sponsor”? If not, it is not clear which governmental unit is intended. This comment also applies to s. NR 154.03 (21) (b) 6. and (28) (c) 3. and 4.

al. In s. NR 154.03 (23) (b) 3. c., “s.” should be changed to “ss.”

am. In s. NR 154.03 (23) (c) 1. c. and (24) (c) 1. c., the comma at the end should be deleted.

an. Section NR 154.03 (25) (a) indicates that milking center waste control systems practice must be implemented using *one* or more of the technical standards in s. NR 154.03 (25) (c), thus suggesting a choice. However, s. NR 154.03 (25) (c) 2. indicates that it always applies. This inconsistency should be remedied.

ao. In s. NR 154.03 (25) (c) 1. b. (the first b.), a semicolon should be inserted before the date to be consistent with the format that is being used in the rule for listing technical standards.

ap. In s. NR 154.03 (25) (c) 1. a. (the second a.), the period following “tank” should be deleted.

aq. Section NR 154.03 (26) (a) indicates that the practice must be implemented using *one* or more of the technical standards in s. NR 154.03 (26) (c). However, s. NR 154.03 (26) (c) appears to indicate that all of the standards must be met. This inconsistency should be remedied.

ar. In s. NR 154.03 (26) (b) 2. a., “~~an~~” should be changed to “a.” Also, the overstriking of “a” at the end of the first line should be removed. Also, it appears that the phrase “the sum of the walls” should be changed to “the sum of the length of the walls.”

as. In s. NR 154.03 (26) (b) 2. b., it appears that the phrase “application requesting the enclosure” should be changed to “application requesting cost sharing for the enclosure.”

at. In s. NR 154.03 (28) (c) 4., “criterion” should replace “criteria.”