



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

Scott Grosz and Jessica Karls-Ruplinger
Clearinghouse Co-Directors

Terry C. Anderson
Legislative Council Director

Laura D. Rose
Legislative Council Deputy Director

CLEARINGHOUSE RULE 13-016

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Reference Bureau and the Legislative Council Staff, dated November 2011.]

2. Form, Style and Placement in Administrative Code

a. The agency should review the introductory clause to ensure that it correctly reflects the SECTION treatments in the rule. The introductory clause contains several errors that should be corrected. For example, “(5) (b) (Note) and” should be inserted after “50.32” on page 1, line 2; “12.” should be inserted after “50.73 (3) (d)” on page 1, line 5; and “(Note)” should be inserted after “50.90 (3) (b) 2.” on page 1, line 9. [s. 1.02 (1), Manual.]

b. Descriptive or explanatory material should be placed in notes. [s. 1.09 (1), Manual.] Accordingly, in s. ATPC 50.01 (2m) and (15m), the last sentence of the definition of “contaminated runoff” and of “leachate” should be placed in notes.

c. SECTIONS 10 and 12 of the rule direct the Legislative Reference Bureau (LRB) to insert a date, but do not indicate what date is desired. If the intent is to refer to the effective date of the rule, for example, this provision should be written as follows: “the effective date of this section [LRB inserts date]”. [s. 1.01 (9) (b), Manual.] Similarly, s. ATPC 50.04 (3) (hm) 1. could be written as follows: “The first day of the 36th month beginning after the effective date of this section [LRB inserts date]”. The rule contains numerous other occurrences of this error, all which should be found and corrected if the LRB is to know what dates to insert.

d. In s. ATPC 50.04 (3) (dm) 1. (Note), the period is missing from the second sentence. That period should be included and stricken-through. The same is true in the first sentence of ss. ATPC 50.04 (3) (e) (Note) and 50.77 (4) (a) 1. (Note). In addition, in s. ATPC 50.77 (4) (a) 1. (Note), the period at the end of the note should be underscored. Lastly, in s. ATPC 50.04 (3) (f)

4. (Note), the stricken-through period following “~~jsp~~” should not be shown. [s. 1.06 (4), Manual.]

e. In s. ATCP 50.04 (3) (f) 4. (Note), “~~recommendations in the~~” should be deleted to accurately reflect the current text of the rule.

f. Rules, duties, and prohibitions should be written in the active voice. For example, s. ATCP 50.04 (3) (gm) should state who must annually review the plan. For example, if appropriate, it could be written as follows: “A landowner shall annually review the plan...”.

g. In s. ATCP 50.16 (3) (a) 1., “5” should replace “five”. [s. 1.01 (5), Manual.]

h. Notes are not a part of rules and do not have the force of law. Consequently, substantive provisions should never be placed in notes. [s. 1.09 (1), Manual.] Several notes in this rule appear to contain substance. For example, s. ATCP 50.16 (3) (a) 4. (Note) appears to contain important substance that should be in the text of the rule, such as the standards a county may apply in exercising judgment about what constitutes compliance and the length of time to achieve compliance. Similarly, s. ATCP 50.30 (1) (Note) includes an explicit prohibition, which is unenforceable if presented only in a note.

i. In s. ATCP 50.16 (6) (c) (intro.), “the notice” should be replaced with “the notice a notice under par. (a)”.

j. The treatment clause of SECTION 38 should be corrected to state: “ATCP 50.28 (5) (b) (intro.) is amended to read:”. The “(intro.)” notation should be added in the following line and in the introductory clause, as well.

k. Rather than renumbering s. ATCP 50.30 (3) (o), the rule should number the two new paragraphs as s. ATCP 50.30 (3) (ng) and (nr). The introductory clause should also be modified to reflect this change. [s. 1.03 (5), Manual.]

l. In s. ATCP 50.40 (3) (a) (Note), the second set of parenthetical material is left without a closing parenthesis.

m. Section ATCP 50.40 (9) (c) (intro.) should be treated in a separate SECTION, preceding the repeal of s. ATCP 50.40 (9) (c) 1. to 3. The treatment clause should state: “ATCP 50.40 (9) (c) (intro.) is renumbered ATCP 50.40 (9) (c) and amended to read:”. The same applies to the treatment of s. ATCP 50.40 (9) (L) (intro.).

n. In s. ATCP 50.46 (1) (a) 2. and 3., should “under sub. (2)” be inserted when referring to conservation engineering practices?

o. The first sentence of s. ATCP 50.46 (1) (b) is explanatory and should be placed in a note. [s. 1.09 (1), Manual.]

p. What is the “job class ratings of V” referred to in s. ATCP 50.46 (2m) (b)? This should be identified, perhaps by cross-referencing the law, rule, or manual that creates it.

q. Section ATCP 50.46 (3) (c) describes a notice and comment process that the agency will use in revising its certification form. A form that meets the definition of “rule” in s. 227.01 (13), Stats., is required to comply with the rule promulgation process in ch. 227, Stats., except as provided in s. 227.23, Stats. The definition of “rule” contains numerous exceptions, some of which may apply to a particular form. [See, for example, s. 227.01 (13) (q), Stats., which provides that a form the content or substantive requirements of which are prescribed by a rule or a statute is not a “rule” for purposes of ch. 227, Stats.] The agency should review its certification form and ch. 227, Stats., to determine whether modifications to the form need to comply with the rule promulgation process in ch. 227, Stats.

r. In s. ATCP 50.56 (3) (b), “The ordinance” should be replaced with “An ordinance adopted under s. 92.16, Stats.”. Alternatively, so as to not need to repeat that phrase frequently, the rule could define “ordinance” for purposes of s. ATCP 50.56 to mean an ordinance adopted under s. 92.16, Stats. It appears that a similar approach could be taken in other sections of the subchapter.

s. Rules should not use jargon, and the placement of quotes around “as built” in s. ATCP 50.56 (3) (b) 2. identifies that term as jargon. Descriptive language that informs the reader of the meaning, even if requiring more text, should be used instead.

t. In the treatment of SECTION 112, “of ch. ATCP 50” should be inserted after “(Note)”. The introductory clause should also be modified to reflect this change. [s. 1.07 (2), Manual.]

u. Current ch. ATCP 50 makes extensive and apparently interchangeable use of the terms “cost-share” and “cost-shared”. The two terms appear to be used exclusively as an adjective. However, s. ATCP 50.61 (3) (intro.) uses “cost-share” as a verb. Instead, the rule should say something like “use cost-share funding for a practice...”.

v. The third sentence of the definition of “feed storage area” in s. ATCP 50.705 (1) (a) appears to be substantive, establishing the applicability of the section. That information should be in a substantive provision of the rule, not a definition. [s. 1.01 (7) (b), Manual.] For example, sub. (3) could list costs for facilities for the storage of these feeds as ineligible.

w. In s. ATCP 50.71 (3) (b) 1., “(September, 2010)” should be underscored. [s. 1.06 (1), Manual.]

x. The second note following s. ATCP 50.86 (4) (b) 8. should be deleted because the subsequent SECTION repeals that note.

y. The treatment in SECTION 190 should be placed before SECTION 188. [s. 1.04 (1), Manual.]

z. In s. ATCP 50.885 (4) (a) 4., a period should be inserted at the end of the subdivision.

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

a. With the change from “and” to “or” in s. ATCP 50.01 (33), “chs.” should also be changed to “ch.” [s. 1.07 (2), Manual.]

b. In s. ATCP 50.04 (3) (e) (Note), “par. (dm) 1. (Note)” should replace “sub. (3) (dm) 1. (Note)”. [s. 1.07 (2), Manual.]

c. References to statutory obligations in provisions that implement those obligations are superfluous and should be omitted or placed in notes. The phrase “as required in s. 91.80, Stats.” in s. ATCP 50.16 (1) is an example.

d. In s. ATCP 50.16 (1) (d), “s. NR 151.02, and ss. NR 151.03,” should be replaced with “ss. NR 151.02, 151.03,”.

e. In s. ATCP 50.28 (5) (a) 2., it appears that “subd. 5” should replace “subd. 2”.

f. In s. ATCP 50.40 (9) (j) (Note), “s.” should be inserted before all references to “ATCP”. [s. 1.07 (2), Manual.]

g. Presumably, the last sentence of s. ATCP 50.46 (12) should refer to “sub. (7) or (9)”, not “subs. (7) and (9)”. [s. 1.07 (2), Manual.]

h. In the second note following s. ATCP 50.56 (3) (b) 2., “s.” should replace “ss.” [s. 1.07 (2), Manual.]

i. In s. ATCP 50.62 (1) (b) 6., “(1)” should be inserted after “50.93”.

j. In s. ATCP 50.705 (2) (intro.), should “s. ATCP 50.40” replace “this section” to be consistent with sub. (3) (intro.)?

k. In s. ATCP 50.705 (5) (b) (Note), “s. NR 151.055” should replace “s. NR 155.055”.

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

a. Section ATCP 50.01 (2m) uses the word “fluid” where, it appears, “liquid” may be more appropriate.

b. The terms “precipitated manure sludges” and “supernatants,” used in the definition of “manure” in s. ATCP 50.01 (20), are rather technical. Are they generally understood by the anticipated readers of this rule, or should they be defined?

c. As affected by this rule, s. ATCP 50.04 (2) refers to croplands and pastures, and s. ATCP 50.04 (3) (a) refers to fields and pastures. Should this terminology be made consistent?

d. Area is measured in square feet, but s. ATCP 50.04 (4) (b) refers to a “setback area greater than 5 feet”. Should this instead refer to a “setback distance” or simply a “setback”?

e. Section ATCP 50.04 (4) is obscure as to who must do what, and appears to fall short of what the analysis states the rule does, that is, to establish a method of determining the required tillage setback. Paragraph (a) makes clear that the landowner is responsible for complying with the standard in s. NR 151.03. However, who does what under par. (b) is not stated; in fact, it is not clear even what is required to happen. From s. NR 151.03, it appears that this paragraph should clearly state that the agricultural practice required to comply with the standard in s. NR 151.03 is to establish a five-foot tillage setback, but that a greater setback, up to 20 feet, may be

required. Further, par. (b) should clarify how, and by whom, it is determined if a setback greater than five feet is required and, if so, what that greater setback should be. There is a confusing reference to “county and other conservation professionals” in that paragraph, while the paragraph appears to be talking only about the obligations of the landowner. What is the role of these professionals?

f. Section ATCP 50.16 (1) should identify the Department of Natural Resources standards it applies to by reference (in the text, not a note) to the section of the NR Code where they are found. However, the citation to the statute that creates this requirement is superfluous and should be omitted or placed in a note.

g. What are the “benchmarks” referred to in s. ATCP 50.18 (1) (b)? They should be identified in some manner.

h. In s. ATCP 50.34 (3) (a) (Note), what is meant by the word “specifically”? It does not appear to add any additional requirement to the current text. The agency should clarify this or remove “specifically” from the note.

i. Section ATCP 50.62 (5) (em) 1. is confusing, in referring to “any additional storage necessary to maintain the same storage capacity”. How does adding capacity result in no change to capacity? Or does “storage capacity” mean storage capacity per animal unit? This should be clarified.

j. In s. ATCP 50.65 (1), both occurrences of “which” should be changed to “that”.

k. In s. ATCP 50.65 (3) (b), and elsewhere, can the rule be more specific than “the environmental problem”? Even if the specific problem is not identified, it would be better to refer to something like “the environmental problem for which the practice is installed”.

l. In s. ATCP 50.885 (2) (c), is the second clause (“to the extent...”) intended to modify both the first and last clauses of that sentence? If so, it may be clearer to write that sentence as: “The costs of installing a culvert and the additional costs necessary to prevent soil erosion to the waterway as a result of the culvert installation, to the extent the costs exceed the cost of normal culvert installation.”. Even if the agency does not choose to follow this suggestion, it is suggested that the agency rephrase the paragraph.