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CLEARINGHOUSE RULE 95-047

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 October 1994.]

2. Form, Style and Placement in Administrative Code

a. The introductory clause should note that ss. NR 1.60 and 1.61 are created in the rule. [See s. 1.02 (1), Manual.]

b. In s. NR 1.60, the definition of “integrated resource management” should begin with the phrase “In this section,”.

c. In s. NR 44.01 (4), the phrase “natural resources” should be deleted. The term “board” is a defined term in s. NR 44.03 (8).

d. There are altogether too many definitions in this rule. Most of the definitions are unnecessary. Many of the definitions are of commonly understood terms and do not add any nuances or special meanings beyond the commonly understood meanings or the meanings readily available through dictionaries. Examples of these terms include “clear cutting,” “master plan amendment,” “master plan revision,” “master plan variance,” “natural,” “primitive,” “rustic,” “silviculture” and “temporary road.” Many other definitions appear to be of terms used only once, if at all, in the rule. This applies in particular to the many forestry terms defined. In most cases, if the meaning of a term is not clear in context, its meaning can be made clear in the text without requiring a definition. However, most of these terms do not appear to need definitions.

e. Several definitions include descriptive or explanatory material that should be placed in notes. For example, the last two sentences of the definition of “even-age management” should be placed in a note, as should the last sentence of the definition of “old-growth forest,” and the definition of “permanent all-season road.”

f. Several definitions include substantive provisions, which should be removed from the definitions and placed in the main body of the rule. This includes the material beginning with the phrase “and typically having” in the definition of “intensive recreational use.” Also, the classification scheme for road types in the definition of “road” should be placed in the text of the rule, as should the classification scheme for trail types. Finally, the definitions of recreational use settings, types 1 to 4, merely repeat some of the concepts contained in the body of the rule and probably should be omitted altogether. If defined, these terms should be defined simply by cross-referencing the text of the rule, such as the following: “Type 1 recreational use setting means a recreational use setting described in s. NR 44.07 (1).”

g. In s. NR 44.03 (25), each occurrence of the notation “ss.” should be replaced by the notation “s.” The entire rule should be reviewed for this problem in references to other provisions. [See s. 1.07 (2), Manual.]

h. In s. NR 44.03 (29), the defined terms should be “master plan” or “plan,” rather than “master plan or plan.”

i. Section NR 44.03 (43) should read: “Person has the meaning given in s. 990.01, Stats.”

j. In s. NR 44.03 (48), the notation “Stats.” should follow the reference to “s. 23.14.” Also, the phrase “natural resources” should be deleted.

k. The organization of the substantive requirements of the rule should be reconsidered. Overall, the rule does not give a complete picture of the requirement to develop master plans, how master plans will be developed and what master plans will look like once finished. These provisions should begin with general information regarding the requirement that a master plan be developed, what a master plan is, what its purpose and scope are and a discussion of its regulatory significance. It is not even clear how closely bound the department is to follow a master plan. The rule might next give a detailed description of the information that must be contained in a master plan. Next, the rule should describe the planning process, step-by-step. It should clearly indicate how a planning process is initiated and by whom. Under what circumstances are master plans required? Is this a discretionary decision of the department? Presumably, the last step of the process will be submission of the department’s proposed master plan to the board and adoption by the board. The discussion of citizen involvement could be integrated into the description of the planning process or, if the provisions relating to citizen involvement are all gathered together in one series, as in the current rule, it could be discussed in a separate section. At the end of the discussion of process, most likely in a separate section, the rule should give a complete discussion of requirements for revision of plans, amendments to plans and variances from plans.

l. The phrase “for a department property” should be omitted from s. NR 44.04 (1) since that concept is contained in the definition of “master plan.”

m. The phrase “unless otherwise directed by the board” in s. NR 44.04 (1) appears to authorize the board to sweep aside any and all provisions of ch. NR 44 at any time it chooses. Such a broad variance authority would seem to warrant a more explicit statement and fuller description.

n. The Note following s. NR 44.04 (5) (c) appears substantive in nature and should be placed in the text of the rule. In any event, it appears to be more closely related to the material contained in s. NR 44.04 (4) (a) and should be placed along with that material.

o. The rule consistently makes incorrect use of introductory material and uses an incorrect format for listing provisions following an introduction. [See s. 1.03 (8), Manual.]

p. There are frequent examples of the inconsistent use of titles; that is, the use of a title for one but not all subunits of a rule unit. [See s. 1.05, Manual.] Examples of this error are found in ss. NR 44.04 (13) and (14) and 44.06 (1) (a). In the second example, note that the colon should not be part of a title.

q. The rule should be written in the active voice, clearly indicating the subject of each sentence. [See s. 1.01 (1), Manual.] The rule contains a number of sentences which have an object but no subject! For example:

Section NR 44.04 (2): “A variance to the master plan may be proposed...”—by whom?

Section NR 44.04 (6): “Concerns or inquiries about the process may be submitted...”—by whom?

Section NR 44.04 (14): “A request for an amendment or revision shall be filed...”—by whom and with whom?

r. The rule should be written in terms of specific requirements, using the word “shall” to denote mandatory actions and the word “may” to denote optional or permissive privileges. [See s. 1.01 (2), Manual.] Terms such as “should” or “will be” or “generally are” should not be used except in explanatory notes. To indicate options or examples, the phrase “may include” is permitted and is often useful.

The use of this drafting style for rules such as this can be a challenge, but it is by no means impossible. Procedural requirements should be stated in terms such as the following: “The department shall...” or “An interested citizen may....” Descriptions of plans can be written in terms such as the following: “A master plan shall include all of the following information:”. A classification scheme can be described in terms such as the following: “The department shall designate an area as a wild resource management area if the area meets all of the following criteria:”.

s. In s. NR 44.04 (8), the words “under this subsection” should be inserted following “any proposal.”

t. In s. NR 44.04 (14), the phrase “of a master plan” should be inserted after the phrase “amendment or revision.”

u. Section NR 44.05 (7) is vague and rhetorical and, although the language used would suggest otherwise, has no legal effect. This provision should either be omitted or placed in a note. Also, the phrase “this rule” should be replaced by the phrase “this section.”

v. The format of the subsections of s. NR 44.06 need work. First, the material that is numbered as an introduction to each subsection should be renumbered as separate paragraphs and could be given a title such as “Primary management objective.” An appropriate introduction might be the following: “A master plan shall follow the following guidelines for an area designated under s. _____ as a habitat management area:”.

w. Section NR 44.06 (1) (b), and parallel provisions in subsequent subsections, should read: “The master plan for an area in this classification shall identify all of the following:”. That paragraph could be given the title “Master plan components.” Paragraph (c) could be given the title “Appearance categories.”

x. The rule should address how the designations described in this section are made. This issue could be addressed in the portion of the rule dealing with the planning process, in a separate section or a subsection of s. NR 44.06 dealing with land management classification designations or as a paragraph in each of the subsections of s. NR 44.06. [Note that if this last option is used, it may be necessary to modify the suggested introduction for a subsection.] Such a provision could state, for example: “The department shall designate as a habitat management area any of the following:”. The “following” could include information such as that contained in the Note following s. NR 44.06 (4) (intro.). It could also include boilerplate language such as “any other area with the primary management objective of an area of this type.”

y. Many of the Notes in s. NR 44.06 appear to be substantive. The department should consider placing these Notes in the text of the rule.

z. Section NR 44.06 (2) (a) is unclear. An alternative follows: “A master plan may call for any management activity or technique, including those used to achieve secondary objectives, that are consistent with the primary management objective of the area and are compatible with the site’s ecological capability.” This comment applies to numerous similar provisions.

aa. The phrase “with the classification in this subsection” should be inserted following the word “compatible” in s. NR 44.06 (3) (c) and in other parallel provisions.

ab. Section NR 44.06 (8) is a conceptually different subject than the remainder of that section, and should be placed in a separate section. [Note that the two paragraphs used for the introduction to this subsection is an inappropriate format. The first paragraph, being purely rhetorical, should be omitted.]

ac. The format of each subsection of this new section could be parallel to that for the subsections of s. NR 44.06. Introductory clauses should clearly introduce the concepts to follow. Each subsection should describe the category adequately and clearly indicate what management activities are allowed and what management activities are not allowed or are limited. As with management classifications, some provisions should be made for a specification of criteria for designation of lands under each of these categories and for the process by which that designation will be made. Note also that titles to rule provisions are not considered to be text of a rule.

Consequently, the name of the categories should be included in the text of the rule rather than included as references to titles by the use of the phrase “this category.”

ad. In the Note following s. NR 44.06 (8) (b) 9. b., the notation “9.a.” should be replaced with the notation “subd. 9. a.”

ae. The titles to s. NR 44.06 (8) (e) and (f) should be underscored.

af. The words “this area” in the first sentence of s. NR 44.07 (1) (a) should be replaced by the phrase “an area designated under this subsection.” However, that sentence should be rewritten as a planning requirement, such as the following: “An area designated under this subsection shall be managed to maintain a perception of remoteness.”

ag. In s. NR 44.07 (1) (c), the reference to “this section” and to “para. 2.” should be replaced by references to “this subdivision” and “subd. 2.,” respectively.

ah. In s. NR 44.07 (3) (g) (intro.), the reference to “sub. (3)” should be replaced by a reference to “pars. (a) to (f).” Also, the language in that sentence following the word “apply” should read as follows: “in a nonmotorized recreational use area under this paragraph, except as follows:”.

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

a. Section NR 44.03 (4) defines “basal area” as the cross-sectional areas of tree per acre. Section NR 44.06 (8) (b) 9., on the other hand, refers to basal area per acre. These provisions need to be reconciled.

b. The phrase “that the term [includes] [does not include]” should be inserted following the word “except” in s. NR 44.03 (38) to clarify whether the meanings that follow are included in or excluded from the definition of “nonmotorized recreational use.”

c. In s. NR 44.03 (56), the term “rotation” should be defined in terms of a period of time required to establish and grow trees. The number of years is the length of the rotation, not the rotation itself. However, is this definition really needed?

d. In s. NR 44.03 (71) (a), it appears that the comma following the word “few” should be deleted.

e. Section NR 44.04 (4) (intro.) requires that a citizen involvement plan be developed prior to the formulation of a plan’s goals and objectives. This provision would suggest that the department intends to give citizens an opportunity to participate in the formulation of those goals and objectives. In the next step of the process, however, as outlined in sub. (5), the citizenry is to be informed of the planning effort, including the scope and objectives of the planning effort. This raises two questions. At what point in the process are the goals, scope and objectives of the planning project determined and what role, if any, is the citizenry given in this important early step.

f. In s. NR 44.04 (7), to what does “property designation” refer? Does this refer to the various classifications outlined in ss. NR 44.06 and 44.07 or to the designation of the property as a state park, state forest, wildlife refuge or other such designation? This needs clarification.

g. In s. NR 44.04 (11), what happens if the board takes no action? In that case, will a master plan automatically be extended or will it automatically expire?

h. What are the management plans referred to in s. NR 44.04 (13)? Everything else in this chapter refers only to master plans.

i. Each subsection of s. NR 44.06 makes one or more reference to secondary objectives. Should each subsection identify secondary objectives that are compatible with that particular management classification?

j. In s. NR 44.06 (1) (c), the word “class” should be replaced by the word “classification.”

k. It is unclear how the Note following s. NR 44.06 (2) (b) 3. relates to that section.

l. In s. NR 44.06 (4) (intro.) Note, it appears that the word “one” in the first sentence should be replaced by the numeral “1.”

m. The term “hazard trees,” as used in s. NR 44.06 (4) (b) 1. is jargon. It should be replaced by a descriptive phrase, such as that used to convey the same idea in s. NR 44.06 (5) (a) 3.

n. In s. NR 44.06 (4) (d) 1., the phrase “an area that generally is not be less than” should be replaced by the phrase “an area that generally extends not less than.” Similarly, s. NR 44.06 (4) (e) 1. should refer to “an area that generally extends not less than 400 feet from the shoreline or includes the zone of effective visibility from the water, whichever area is larger.”

o. In the second paragraph of s. NR 44.06 (8) (intro.), the word “lessor” should be replaced by the word “lesser.”

p. The first sentence of s. NR 44.06 (8) (b) 9. should read as follows: “Up to 85% of the forested area may be managed using uneven-aged or passive management timber harvesting techniques.” Subsequent provisions on this subject should be similarly modified. The following paragraph refers to “one-half.” The rule should specify one-half of what, the harvested area?

q. The first sentence of s. NR 44.06 (8) (b) 11. should read as follows: “Slash from timber harvesting shall be....”

r. In the Note to s. NR 44.06 (8) (c) 6., the notation “subd.” should be inserted after the second occurrence of the word “in.”

s. The Note following s. NR 44.07 (1) (d) 2. discusses management of trails, while s. NR 44.07 (1) (c) 1. states that there shall be no trails in lands under this recreational use setting. These provisions should be reconciled.

t. Section NR 44.07 (2) (f) could be read to require that on-site visitor controls be used as often as possible and that they should harmonize with the environment. A more appropriate statement would be as follows: “The department shall minimize the use of on-site visitor con-

trols. On-site visitor controls shall harmonize with the environment whenever possible.” Note that the term “low-key” is jargon and should be omitted.

u. In s. NR 44.07 (3) (d) 1., it appears that the word “compliment” should be replaced by the word “complement.” Also, in par. (g) 2., it appears that the word “and” should be inserted after the last semicolon.