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CLEARINGHOUSE RULE 00-076

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. The rule limits the lakes that may be the subject of a planning grant to public inland lakes. See ss. NR 190.002 and 190.003 (6). Section 281.68, Stats., which provides authority for the rule and is interpreted by the rule, does not appear to be limited to public inland lakes. The statutory basis for applying the grants only to public inland lakes in the rule is not apparent.

b. Section NR 190.003 (8) includes in the definition of “public inland lake” any lake which has been listed by the department as a public inland lake in the department’s publication, Wisconsin Lakes, Pub. FM-800. To conform with the definition of a “rule” in s. 227.01 (13), Stats., the department should either promulgate this publication as a rule or reference a particular version of the publication within the definition of “public inland lake” in s. NR 190.003 (8). Otherwise, if the department revises this publication, the revision would have the effect of changing what constitutes an eligible public inland lake without going through the rule-making process.

c. Under s. NR 190.03, specified school districts may apply for a small-scale project. Section 281.68 (3) (a), Stats., identifies the entities that are eligible recipients for a lake management planning grant. The eligible recipients include “other local governmental units, as defined in s. 66.299 (1) (a), that are established for the purpose of lake management.” A school district is an “other local governmental unit, as defined in s. 66.299 (1) (a)” but is not established for the purpose of lake management. The cosponsorship requirement for a school district to

become an eligible applicant under s. NR 190.03 does not convert a school district into an eligible recipient.

2. Form, Style and Placement in Administrative Code

a. The titles in the table of contents to ch. NR 190 should be consistent with the titles in the text of the rule. For example, see the titles for ss. NR 190.004, 190.06 and 190.16.

b. The section titles in the rule should only have an initial capital letter. [See s. 1.05 (2) (b), Manual.]

c. If a rule defines a term, the rule should use the defined term consistently throughout the text of the rule. For example, “activities” in ss. NR 190.04 (intro.) and 190.14 (intro.) should be replaced with the defined term “planning projects.”

d. The department should review the entire rule and, as appropriate, remove redundant or unnecessary terms or phrases. Examples of redundant or unnecessary terms or phrases include the following:

- (1) The phrase “and whose bylaws, charters or incorporation papers reflect as a purpose of the organization the acquisition of property for conservation purposes” in s. NR 190.003 (5). This phrase is already included in the statutory definition of “nonprofit conservation organization” in s. 23.0955 (1), Stats.
- (2) The phrase “but are not limited to” in s. NR 190.005 (1) (intro.) and (2) (intro.).
- (3) The repeated phrase “when developing a project priority list” in ss. NR 190.07 (4) (intro.) and 190.17 (4) (intro.).
- (4) The phrase “as defined in NR 190.003 (4)” in s. NR 190.13.
- (5) The phrase “, as defined in this chapter” in s. NR 190.03.

e. Rules should be drafted in the active voice. [See 1.01 (1), Manual.] Examples of provisions that are not in the active voice include all three sentences in s. NR 190.004 (1) and ss. NR 190.15 (4) and 190.17 (1).

f. Section NR 190.14 should be restructured since sub. (9) does not follow from the (intro.). It is suggested that “(1)” be inserted before the (intro.), subs. (1) to (8) become pars. (a) to (h), and sub. (9) becomes sub. (2).

g. Mandatory duties should be denoted in a rule through the use of “shall”; an optional provision or discretionary authority should be denoted through the use of “may.” Prohibition should be stated as “no person may . . .” or “a person may not . . .” In addition, “should,” “will,” “must” or “it is the responsibility of” should not be used to express mandatory or

permissive action. [See s. 1.01 (2), Manual.] This drafting style was not followed in ss. NR 190.16 (2) and 190.17 (1).

h. The rule should contain a treatment clause that indicates that the rule repeals and recreates ch. NR 190. This treatment clause should precede the chapter title.

i. Since s. NR 190.08 (6) relates to preferences given for grant renewals relating to lake trend monitoring, it appears that it would be more appropriately considered as a factor in setting priorities under s. NR 190.07 (4) rather than the awarding of grants under s. NR 190.08.

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

a. The analysis accompanying the rule cites s. 281.68, Stats., as authorizing rule-making. This citation is unduly broad as it contains all the lake management planning grant statutes. The specific statute that establishes the duty of the department to adopt rules, s. 281.68 (3), Stats., should be cited.

b. Section NR 190.004 (9) refers to “a grant awarded under this section.” This reference is in error as no grants are awarded under s. NR 190.004. Similarly, ss. NR 190.04 (intro.) and 190.14 (intro.) refer to “activities eligible for funding under this section,” but neither of these sections relate to the awarding of these funds. An alternative would be to reference funding under “this subchapter” in these provisions.

c. The rule references department forms for payment of claims and for applications for a grant. See ss. NR 190.004 (2), 190.05 (1) and 190.15 (1). The rule should include a reference to each of these forms in a note to the rule. The note should indicate where the form may be obtained. A copy of the form should be attached to the rule or a statement should be included stating where the form may be obtained at no charge. [See s. 1.09 (2), Manual.]

d. Under ss. NR 190.06 (1) and 190.16 (1), the department may deny the request for funding based on consideration of the factors identified in s. 281.68 (1) or (3), Stats. If the department also intends to deny the request for funding under s. 281.68 (1r) or (2), Stats., then the department should list these other statutory subsections in these provisions.

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

a. The reference to a “township” in ss. NR 190.002 and 190.003 (4) is inappropriate. A “township” is a unit of area used in land surveying. A “town” is one type of general purpose local government in Wisconsin.

b. What makes a nonprofit conservation organization “qualified” in s. NR 190.003 (4)?

c. The use of the term “tribe” in s. NR 190.003 (4) is vague. Since the awarding of a lake management planning grant to an Indian tribe is authorized under s. 20.002 (13), Stats., the reference should be to a “federally recognized Indian tribe.”

d. In s. NR 190.003 (8), the use of the phrase “or portion thereof” is not as direct and clear as defining a “public inland lake” to mean “part or all of a lake”

e. The department should review the entire rule to ensure that it is using the terms “applicant” for and “recipient” of a grant consistently and clearly. Other terms for an applicant or recipient, such as “sponsor” in s. NR 190.006, or “grantee” in s. NR 190.004 (1), should be avoided.

f. Since the use of the word “include” results in an open-ended list, the department should review its use of “include” throughout the rule to ensure that each provision is unambiguous. For example, the department should specify the complete list of eligible applicants in s. NR 190.03 rather than using a list with “includes.”

g. In s. NR 190.03, the reference to a “qualified applicant as defined by s. 281.68 (3) (a)” implies that that statute contains a definition of “qualified applicant.” Since the cited statute specifies a list of eligible recipients, a preferable word choice would be to substitute “identified in” for “as defined by.” Also, “Stats.” should follow the statutory cite.

h. In s. NR 190.17 (4) (i), “first time” should be hyphenated.