



Wisconsin Legislative Council

RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 21-039

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Council Staff and the Legislative Reference Bureau, dated November 2020.]

1. Statutory Authority

a. The proposed rule contains 15 sections. The first 14 sections propose the repeal of provisions addressing drainage district corridors. The 15th section proposes the repeal of a provision addressing grants to county drainage boards.

Although SECTION 15 of the proposed rule meets the standard that is required to submit a petition under s. 227.26 (4), Stats., for expedited repeal of an unauthorized rule, SECTIONS 1 through 14 of the proposed rule raise questions about the appropriate utilization of the expedited repeal process.

An “unauthorized rule” is a rule for which an agency lacks the authority to promulgate due to the repeal or amendment of the law that previously authorized its promulgation.

SECTION 15 repeals subch. IX of ch. ATPC 48. That subchapter, consisting of s. ATPC 48.60, addresses grants to county drainage boards. Such grants were last authorized by s. 88.15, 2005-06 Stats. The department’s rulemaking authority over grants to county drainage boards was removed by the repeal of s. 88.15, Stats., by SECTION 2558 of 2007 Wisconsin Act 20. (See comment 2. a., below, for a suggested related repeal.) The treatment described in SECTION 15 relates to content previously submitted in Clearinghouse Rule 19-055, a petition for repeal that was withdrawn by the agency in June 2020.

SECTIONS 1 through 14 repeal s. ATPC 48.24 and contain amendments conforming other code provisions to that repeal, such as striking cross-references to s. ATPC 48.24. The provisions treated in SECTIONS 1 through 14 relate to content previously submitted in Clearinghouse Rule 18-052, a petition for repeal that was withdrawn by the agency in June 2020. In the current administrative code, s. ATPC 48.24 establishes certain requirements for the use of land abutting a drainage district ditch; such land is called a “district corridor”. Subsequent to the promulgation of s. ATPC 48.24, the Legislature established district corridor provisions by creating s. 88.74, Stats., in 2017 Wisconsin Act 115. As the department notes in its brief summary of the proposed rule, the enactment of s. 88.74, Stats., created inconsistencies between that statute and s. ATPC 48.24 regarding the treatment of district corridors. Although the need for the department to amend or repeal s. ATPC 48.24 is therefore apparent, the standard to submit a petition for expedited repeal

requires a repeal or amendment of the law that previously authorized its promulgation. The department has not explained how the enactment of s. 88.74, Stats., has repealed or amended its authority over rulemaking regarding district corridors. Absent such a showing, the department should pursue SECTIONS 1 through 14 through the regular rule promulgation process. Similarly, the nature of several Clearinghouse comments, below, suggests the proposed rule may benefit from the more extensive review afforded by the regular rulemaking process.

Also, note that when significant changes are required to address the Clearinghouse comments on a petition for expedited repeal, it may be preferable for an agency to submit a new petition, as significant amendment to an expedited rule is not anticipated between review by the Clearinghouse and submission of the petition to JCRAR, and if changes are later requested by JCRAR, s. 227.26 (4) (b) 3. c., Stats., directs an agency to resubmit the petition and proposed rule.

b. In the rule summary's listing of statutory authority, it may be helpful to insert ", 2005-06, Stats." after "88.15" to indicate an obsolete reference.

2. Form, Style and Placement in Administrative Code

a. A SECTION should be inserted to repeal s. ATPC 48.49 (6) (e) because it relates to s. ATPC 48.60, which is repealed by SECTION 15 of the proposed rule (as part of the repeal of subch. IX of ch. ATPC 48). The introductory clause should be modified accordingly.

b. SECTION 1 of the proposed rule repeals the definition of "district corridor", apparently as an amendment conforming to the repeal of district corridor provisions in s. ATPC 48.24 by SECTION 13 of the proposed rule. Despite the repeal of district corridor provisions in s. ATPC 48.24, the term "district corridor" will still appear in several locations throughout ch. ATPC 48. For that reason, the department may want to consider retaining some definition of "district corridor" to ensure that the term is given the proper meaning within the chapter.

c. In the introductory clause, make the following changes:

- (1) Change "Subchapter IX" to "and subch. IX".
- (2) Add "48.21 (2) (b) (Note)" to the recitation of provisions amended.
- (3) Insert "and" before "(4) (a) 1." and strike the comma after "(4) (a) 1.".
- (4) Strike "and (Note)" after "48.22 (5)".
- (5) Change "48.28 (Note)" to "48.28 (2) (Note)".

d. The department should examine whether SECTION 12 of the proposed rule creates a conflict with existing law regarding whether notice is required before entering certain private land, as follows:

- In s. ATPC 48.22 (5) of the current administrative code, a county drainage board or its agent must give notice to a landowner before performing certain operations on private land, other than in a district corridor.
- SECTION 12 of the proposed rule strikes the exception for a district corridor; as a result, notice would be required before entering private land within a district corridor to perform the covered operations.

- Under s. 88.74 (4) (a), Stats., with a few exceptions, a board may enter a district corridor without prior notice to the landowner in order to perform operations similar to those described in s. ATPC 48.22 (5).

If a conflict is found to exist, the department could remedy it by not striking the words “other than in a district corridor under s. ATPC 48.24” and instead amending them to read something like “except as provided in s. 84.74, Stats.” or “except as authorized by s. 84.74, Stats.”.

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

a. In the rule summary’s listing of statutes interpreted, it may helpful to make the following modifications:

- (1) Insert “, 2005-06, Stats.,” after “88.15” to indicate an obsolete reference.
- (2) Add a reference to SECTION 2558 of 2007 Wisconsin Act 20.

b. In the rule summary’s listing of related statutes and rules:

- (1) It may be helpful to insert “, 2005-06, Stats.” after “20.115 (7) (d)” to indicate an obsolete reference.
- (2) References to ss. 32 and 227 should be clarified. Does the department intend to refer to chs. 32 and 227 in their entirety?