



Wisconsin Legislative Council

RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 23-050

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

Proposed s. NR 851.76 establishes requirements and considerations relating to open records requests for certain records associated with applications under proposed ch. NR 851. It appears that this provision generally seeks to implement s. 281.346 (9) (e), Stats. This statute provides that certain records received by the department are “public record[s] as provided in subch. II of ch. 19” while also providing that “any record may be treated as confidential upon a showing to the secretary that the record or information is entitled to protection as a trade secret...or upon a determination by the department that domestic security concerns warrant confidential treatment”.

As indicated above, s. 281.346 (9) (e), Stats., generally authorizes the department to restrict access to certain records in a manner that would not otherwise be permitted under the Public Records Law. It appears that the department has recognized this, as various provisions within proposed s. NR 851.76 deviate from the provisions of subch. II of ch. 19, Stats. The department should consider providing further information within its explanation of agency authority to indicate why these deviations may be necessary for determining whether confidential treatment of a record is warranted. The following deviations should be evaluated to determine their necessity or to provide further information regarding their justification:

- (1) Proposed s. NR 851.76 (2) (a) provides that the department may request that a records request be put into writing. However, s. 19.35 (1) (h), Stats., provides “a request may be made orally, but a request must be in writing before an action to enforce the request is commenced...”. Is a written request necessary for the department to evaluate security risk? Alternatively, the department could accept oral records requests to better align the provision with s. 19.35 (1) (h), Stats.
- (2) Proposed s. NR 851.76 (2) (b) provides that the department may request various pieces of identifying information from a requestor. Similarly, par. (d) provides that the department may request “the reason the information is requested and how it will be used”. While the former appears to reasonably align with s. 19.35 (1) (i),

Stats., the latter does not. Notably, the statute provides “no request... may be refused because the person making the request is unwilling to be identified or to state the purpose of the request... A requester may be required to show acceptable identification... whenever security reasons or federal law or regulations so require”. Is information regarding why a record is requested and how information from a request will be used necessary to evaluate whether a particular record merits confidential treatment? Further information could be provided to justify the deviation from s. 19.35 (1) (i), Stats.

- (3) Proposed s. NR 851.76 (3) provides, in part, that the department may place conditions on the use of information shared pursuant to a records request when these conditions are necessary to protect the public’s interest in domestic security. Neither the Public Records Law, nor s. 281.346, Stats., generally contemplates the creation of conditions on the use of information obtained through a records request. While s. 281.346 (9) (e), Stats., indicates that the department secretary may find that certain records merit confidential treatment (preventing disclosure entirely), the provision does not suggest that the department may create conditions on the use of information after it is disclosed. The department could provide further explanation regarding its authority with respect to this provision and why this provision is necessary.
- (4) Proposed s. NR 851.76 (3) also provides, in part, that the department “may provide the requested information in a different format when necessary to protect the public’s interest in domestic security”. This is not generally contemplated within s. 281.346 (9) (e), Stats. Courts have provided relatively limited guidance regarding the extent to which public records must be provided in the format specified by a requestor. However, in *Lueders v. Krug*, the Court of Appeals held that a requester was entitled to certain emails in electronic form when the requester specifically requested email records in electronic form. [2019 WI App 36.] The department could provide further information to describe its statutory authority with respect to this provision and why this provision is necessary.

2. Form, Style and Placement in Administrative Code

a. In various instances, the proposed rulemaking order creates definitions that cross-reference definitions created within the statutes or elsewhere in the administrative code. These each include the language “has the meaning specified under...”. The department could consider revising this phrase to “has the meaning given in...”, for consistency with the example provided in s. 1.07 (4) (a), Manual.

b. It appears that the proposed rulemaking order should include s. 281.98, Stats, as a statute interpreted. Notably, proposed s. NR 851.15 (3) includes “costs of investigation and prosecution” as a potential penalty, which is not included in the cross-referenced s. 281.346 (14), Stats. However, s. 281.98 (2), Stats., allows a court to award the Department of Justice the reasonable and necessary expenses of the investigation and prosecution of a violation of ch. 281, Stats., including attorney fees.

c. Given that the proposed rule includes provisions relating to open records requests, it appears that the order should include relevant portions of the state's Public Records Law, ss. 19.31 to 19.39, Stats., as statutes interpreted.

d. In proposed s. NR 851.11 (21), the designation for par. (a) should be removed, as there is no other subunit under sub. (21).

e. Proposed s. NR 851.15 (3) includes numbered subunits (e.g., 1., 2., 3., etc.). These subunits should be lettered, rather than numbered. [s. 1.10, Manual.]

f. Proposed s. NR 851.23 (3) includes the title "Department Review". This text should be reformatted, as subsection titles should be written in small capital letters. [s. 1.10 (2) (b) 3., Manual.]

g. In proposed s. NR 851.50 (intro.), the reference to "Wis. Stats." should be revised to "Stats."

h. Proposed s. NR 851.52 includes two titles. It appears that the second title, "Department review", may be the intended title for the section. If so, the text should be reformatted, as section titles should be written in bold font, and the text of the first title should be removed.

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

Proposed s. NR 851.75 (2) refers to a "public notice posted on the department website under s. NR 851.73 (2) (b) 3.". It appears that this should instead reference s. NR 851.72 (2) (b) 3.

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

a. The description of s. 281.346 (4) (d) 1., Stats., within the "Statutory Authority" section of the proposed rulemaking order, contains a typo. It should refer to "intrabasin" transfers, rather than "intrabasis" transfers.

b. In one instance, proposed s. NR 851.10 refers to "Great Lakes' water". The apostrophe could be omitted for consistency with other uses of the term.

c. Within proposed s. NR 851.11 (5), it appears that the "s" in "subbasin" could be lower-case.

d. Within proposed s. NR 851.11 (5) (Note), the period after the word "Portal" should be omitted.

e. Proposed s. NR 851.11 (12) defines "public water supply system" to mean "water treated for human consumption distributed to the public...". It appears that this definition should refer to the system used to treat, store, and distribute water, rather than to the water itself.

f. Proposed s. NR 851.11 (18) (b) should be revised as the provision is currently an incomplete sentence.

g. Within proposed s. NR 851.21 (2) (b), it appears that the comma following "withdraw" could be omitted for clarity.

h. It appears that proposed s. NR 851.21 (2) (p) details information that must be submitted to the department for the department to evaluate compliance with s. 281.343 (4n) (a) 1., Stats. However, the language proposed in the rule does not appear to contemplate a circumstance under which all of the water withdrawn from the basin is returned (less an allowance for consumptive

use) without using surface water or groundwater from outside of the basin. Though this situation is perhaps unlikely, the department could consider modifying the proposed rule to reflect this possibility.

(1) The same consideration could be made with respect to the requirements established in proposed ss. NR 851.22 (1) (i) and 851.51 (3) (b).

i. Throughout the proposed rulemaking order, the term “waterbody” is presented as both a single word and as two separate words. The department could consider using a consistent approach throughout the proposed rule. Chapter 281, Stats., presents the term as two separate words.

j. Proposed ss. NR 851.21 (4) (c) and 851.31 (2) (r) 3. indicate that certain applicants must submit “a description of any land acquisitions, equipment, energy consumption, or the relocation or re-siting of any existing community, facility, right-of-way, or structure that will be required”. This text could be modified to provide further clarity regarding the information required under these provisions. For example, the rule could specify what type of energy consumption information should be included. Similarly, it is unclear what the rule means when it refers to the “relocation or re-siting of a community”.

k. The term “diversion area” is used throughout the proposed rulemaking order. However, the meaning of this term is somewhat unclear. The department could consider including a definition of this term within proposed s. NR 851.11.

l. Similarly, could the use of the term “diversion approval area” in proposed s. NR 851.23 (2) (a) 1. be replaced with the term “diversion area?”

m. Proposed s. NR 851.22 (1) (k) provides that if an applicant is relying on another entity to withdraw or return the water, the entity withdrawing or returning the water must have the “capacity to withdraw the volume needed” and must have demonstrated support for the proposal in the form of a letter or resolution. However, this provision does not address whether the entity must have the capacity to return the volume needed, if the applicant is relying on the entity to return the water. The department could modify this provision to address this.

n. Within proposed s. NR 851.23 (3) (b), the word “amount” could be omitted for consistency with the language used in sub. (2) (a) 2.

o. Proposed s. NR 851.30 refers to the “intrabasin transfer of water from one basin of the Great Lakes to the basin of another one of the Great Lakes”. However, the proposed rulemaking order also defines “intrabasin transfer” to mean the “transfer of water from the watershed of one of the Great Lakes into the watershed of another of the Great Lakes”. The department could consider modifying proposed s. NR 851.30 to reduce the use of redundant language, as the defined term already provides that the water in question is from a Great Lakes basin.

(1) The same consideration could be made with respect to proposed ss. NR 851.10, 851.20, and 851.40.

p. It appears that proposed ss. NR 851.21 (2) (a), 851.31 (2) (a), and 851.41 (2) (a) each require an applicant to submit their contact information, as well as the contact information of a primary point of contact, if it differs from the applicant. However, these provisions could be read as requiring an applicant to submit their own contact information and to simply specify the name of the primary point of contact (if it differs from the applicant), without providing the primary

point of contact's contact information. The text of these provisions could be amended to clarify that the department requires the contact information of both the applicant and a primary point of contact.

q. Proposed s. NR 851.31 (2) (g) refers to the "expected daily average of the intrabasin transfer". This provision could be amended to specify that the department is seeking information regarding the expected daily average *volume* of the intrabasin transfer.

r. It appears that the last sentence of proposed s. NR 851.40 may be missing a word after the word "community". As currently drafted, the sentence reads, "No person may begin a new or increased community within a straddling county diversion until the person applies for and obtains approval from the department". It appears that the same consideration may be made with respect to proposed s. NR 851.41 (1).

s. Within proposed ss. NR 851.21 (2) (e) and 851.41 (4) (e), the second sentence should be modified to improve formality. Drafting conventions provide that directives should be denoted through use of the word "shall" (e.g., "the person shall specify if the source is surface water..."). [s. 1.08 (1) (b), Manual.]

t. In the proposed title to subch. IV of ch. NR 851, it appears that the plural word "diversions" should be revised to the singular "diversion".

u. Proposed s. NR 851.52 (intro.) should be revised to the active voice, to identify that it is the department taking the action. This could be rephrased similarly to the application review provisions, such as "The department may approve an exception if it finds all of the following:".

v. Within proposed s. NR 851.52 (5) (b), a comma should follow the first use of the abbreviation "Stats.".

w. The term "water dependent natural resources" is presented both with and without a hyphen throughout the rulemaking order. A consistent approach should be used throughout the rule. Chapter 281, Stats., presents the term without a hyphen.

x. Proposed s. NR 851.60 (2) could be amended to better identify the entities to which it applies. As currently drafted, the provision does not specify what type of "new owner" it is referring to, nor does it specify what type of "property" may be changing ownership.

y. Proposed s. NR 851.72 (1) describes content that must be included in a public notice relating to a completed application. Within this subsection, par. (e) specifies that the notice must contain "the location where copies of the application materials are available for review". This suggests that the notice could indicate that copies of the application materials are available for review in a particular physical location. However, the statute specifying what the department must include in the public notice (s. 281.346 (9) (b) 2., Stats.) indicates that the notice must include "information indicating where the complete application may be viewed on the department's Internet website". Proposed s. NR 851.72 (1) (e) should be amended to specify that the notice must contain information regarding where on the department's website the application materials may be viewed.

z. Within proposed s. NR 851.75 (3) (b), the word "virtual" could be replaced with the word "online" to better reflect the terminology used earlier within the sentence.