



Wisconsin Legislative Council

RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 24-055

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

The proposed rulemaking order combines its discussion of “Statutes Interpreted”, “Statutory Authority”, and “Explanation of Agency Authority” into a single heading. This information should be divided into three separate headings to better assist the Legislature in its oversight role. [s. 1.01 (2), Manual.] When dividing this discussion into separate headings, the agency should consider the extent to which a particular statutory provision is best categorized as a statute interpreted, a source of rulemaking authority, or both.

2. Form, Style and Placement in Administrative Code

a. The “Plain Language Analysis” portion of the proposed order makes numerous errors when describing the effect of each SECTION within the order. For instance, SECTION 1 of the order proposes to define “active nest”, while the analysis suggests that it addresses hunter age and safety requirements and agency discretion to issue chronic wasting disease (CWD) permits on certain properties. Similarly, SECTION 2 of the order proposes to clarify the definition of “contiguous lands”, while the analysis suggests that it clarifies that a permit is not needed to remove a mink causing damage or nuisance. The analysis should be revised to correct its errors and should be reviewed comprehensively to ensure that all proposed changes are described accurately.

b. SECTION 1 of the rulemaking order proposes to define the term “active nest” as “nests with eggs or chicks present”. The definition should be modified to use the singular (i.e., “... means a nest with eggs or chicks present”.) [s. 1.05 (1) (c), Manual.] Additionally, the word “nest” should not be capitalized in the term “active nest”.

c. The treatments proposed in SECTIONS 1 and 2 of the rulemaking order, together with the existing rule language, would result in s. NR 12.001 with subs. (1a), (1k), and (1m). The agency could consider an alternative approach that increases the space available for future insertions, as the current approach leaves only sub. (1L) available between subs. (1k) and (1m). For instance, SECTION 1 of the rulemaking order could create s. NR 12.001 (1d) and SECTION 2 could renumber s. NR 12.001 (1) to NR 12.001 (1i).

d. SECTION 3 of the rulemaking order proposes amendments to ss. NR 12.001, 12.05, 12.06, and 12.10, but does not propose to amend s. NR 12.01. Given that the sections treated in SECTION 3 are not consecutive, the treatments should not be placed within the same SECTION of the rulemaking order. [s. 1.03 (2) (c) 1., Manual]. The preferred approach would be to treat s. NR 12.001 (4), (5), and (9) in SECTION 3, while providing the amendments to s. NR 12.05 (1) and (3), 12.06 (2), and 12.10 (1) (a) 3. and 4., and (b) 1. b. in a separate treatment.

e. Within SECTION 3 of the rulemaking order, the proposed amendment to s. NR 12.001 (4) should include underscoring to indicate the text that will be inserted. [s. 1.04 (4), Manual.] Additionally, within the amendment to s. NR 12.001 (4), the added reference to “ch. 169” should refer to “ch. 169, Stats.”. Cross-references to the statutes should be followed by the source designation “; Stats.”. [s. 1.15 (2) (b) 1., Manual.]

f. Various portions of the proposed rulemaking order require certain actions to be conducted in compliance with federal regulations (see, e.g., the cross-reference to 50 CFR 21.150 in the proposed amendment to s. NR 12.05 (1), and the cross-reference to 50 CFR 21.165 (d) (5), in the proposed repeal and recreation of NR 12.41 (6) (e)). When referencing federal regulations, the agency could consider whether it would be viable to reproduce the language of the cross-referenced federal regulation within the administrative code. This could be accompanied by a note indicating that the new language reflects a federal regulation. [See, generally, s. 1.14 (7), Manual.]

g. Within SECTION 3 of the proposed rulemaking order, in the proposed amendment to s. NR 12.10 (1) (b) 1. b., “NR 12.05” should not be underscored as the text is already present in the existing rule. [s. 1.04 (4), Manual.]

h. Within SECTION 3 of the proposed rulemaking order, in the proposed amendment to s. NR 12.10 (1) (b) 1. b., the rule should more clearly indicate that s. NR 12.10 (1) (b) 1. b. is treated. In this context, the provision should include the text “(b) 1. b.” prior to the provision’s text (the proposed text only includes “b.”). The same consideration should be made with respect with s. NR 12.16 (2) (b) 2. b., within SECTION 9 of the proposed rulemaking order, and s. NR 12.36 (3) (b) 1. c., within SECTION 15 of the proposed rulemaking order.

i. SECTION 5 of the rulemaking order proposes, in part, to strike the word “fee” from the end of s. NR 12.10 (1) (b) 2. and replace it with the word “feet”. This amendment is not necessary, as the current provision ends with the word “feet”.

j. Within SECTION 5 of the proposed rulemaking order, in the proposed amendment to s. NR 12.10 (1) (b) 5., “NR 17.045” should not be underscored as the text is already present in the existing rule. [s. 1.04 (4), Manual.]

k. SECTION 7 of the rulemaking order proposes, in part, to amend s. NR 12.10 (1) (c). As currently promulgated, this provision states, in part, that “[e]xtraordinary conditions include, but are not limited to, ...”. The agency could consider repealing the text “but not limited to,” because the word “includes” does not provide that a list of examples is limiting. [s. 1.07 (3) (b) 2., Manual.]

l. Within SECTION 7 of the rulemaking order, in the proposed amendments to s. NR 12.15 (1) and (2), the text “Public use during open seasons” and “Use refusal” should be written in small capital letters as they reflect the titles of subsections. [s. 1.10 (2) (b) 3., Manual.] The same consideration should be made with respect to various subsection titles reproduced within SECTION 9 of the rulemaking order.

m. SECTION 7 of the rulemaking order proposes, in part, to amend a note that follows s. NR 12.15 (4). However, this amendment is not reflected in the treatment clause for SECTION 7. The treatment clause should be amended to reflect the amendment to s. NR 12.15 (4) (Note). A corresponding change should also be made to the enumeration of treatments within the rulemaking order's introductory clause.

n. Within SECTION 9 of the rulemaking order, in the proposed amendment to s. NR 12.15 (10), the text "(1)" in the cross-reference to sub. (1) should not be underscored as the text is already present in the existing rule. [s. 1.04 (4), Manual.]

o. The treatment clause within SECTION 9, as well as the introductory clause of the rulemaking order, indicate that s. NR 12.15 (11) (d) is amended. However, the proposed order does not actually amend this provision. The agency should review this provision to determine if an amendment is intended.

p. The introductory clause of the rulemaking order should be modified to note the treatment of s. NR 12.36 (1), which is treated in SECTION 13 of the rulemaking order.

q. Within SECTION 15 of the rulemaking order, the proposed amendment to s. NR 12.36 (5) does not correctly indicate the repeal of the word "not" from the existing text and the insertion of the word "only". This should be corrected using the formatting prescribed under s. 1.01 (4), Manual.

r. The introductory clause of the rulemaking order contains a typo in indicating that the order amends "...12.39 (title) (1)l (3) (a)...". This portion should instead read "12.39 (title), (1), (3) (a) and (b) 4.,...".

s. In SECTION 17 of the proposed rulemaking order, the treatment clause should refer to "12.41 (title)" rather than "12.41 title". Additionally, the treatment clause and the introductory clause of the rulemaking order, erroneously omit the treatment of s. NR 12.38 (title).

t. In SECTION 17 of the rulemaking order, the proposed amendment to s. NR 12.37 (4) (a) 6. includes a comma that is both underscored and stricken-through (following the words "... appraisal equipment"). This comma should be omitted in its entirety from the stricken text, as it is not present in the rule as currently promulgated.

u. In SECTION 17 of the rulemaking order, the proposed amendment to s. NR 12.37 (4) (a) 6. enumerates five numbered conditions under which a county or its agent may deem an enrollee uncooperative. The agency should consider redrafting this provision such that a numbered list of items is not contained within the body text of the provision. For instance, the numbered items could instead be established as new subdivision paragraphs within subd. 6. The language relating to the time period for ineligibility following a determination that an enrollee was uncooperative, as well as the language regarding notice to an enrollee regarding their determination, could remain in subd. 6., but would likely need to precede the new subdivision paragraphs in some manner.

v. The agency could consider combining the proposed treatment to s. NR 12.31 (4) (d) (intro.), within SECTION 20 of the order, and the proposed treatment to s. NR 12.41 (4) (d) 1. and 2., within SECTION 21 of the order, into a single treatment that proposes to "consolidate, renumber, and amend" s. NR 12.41 (4) (d) (intro.), 1., and 2. [s. 1.04 (7), Manual.]

3. Conflict With or Duplication of Existing Rules

Within SECTION 4 of the rulemaking order, proposed s. NR 12.10 (1) (b) 1. e. would provide that written authorization is not required to destroy by trapping or shooting mink that are causing damage or nuisance. However, this appears to conflict with the existing s. NR 12.10 (1) (a) 1. a., which in part provides that written authorization is required to destroy a furbearing animal. The agency could consider modifying the existing s. NR 12.10 (1) (a) 1. a. to provide some form of cross-reference to the newly created exemption for mink causing damage or nuisance.

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

a. Within SECTION 3 of the rulemaking order, the proposed amendment to s. NR 12.001 (4) includes a cross-reference to s. NR 10.295, a provision established in EmR1210 that would be established as a permanent rule under CHR 23-047. The agency should review this cross-reference before CHR 24-055 is ultimately promulgated to verify its accuracy in the event that the emergency rule is no longer in effect or s. NR 10.295 is modified within CHR 23-047.

b. SECTION 3 of the rulemaking order proposes, in part, amends s. NR 12.05 (1) to specify additional species that may be shot or trapped in accordance with 50 CFR 21.150. However, various species included in this list are not addressed within 50 CFR 21.150. Specifically, the proposed rule suggests that house sparrows, monk parrots, parakeets, and European starlings are among the species addressed in 50 CFR 21.150, while this federal regulation does not appear to address these species. If the shooting or trapping of these species is addressed under a separate federal regulation, an additional cross-reference could be added. Alternatively, the language of the proposed rule could be modified to more clearly describe the relationship between 50 CFR 21.150 and the species listed in s. NR 12.05 (1).

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

a. SECTION 3 of the rulemaking order proposes, in part, to amend s. NR 12.06 (2) to provide that a landowner with less than five acres may be granted a permit to harvest deer in a CWD-affected area at the discretion of agency staff. The agency could consider providing additional specificity within the rule by describing criteria that will be considered when determining whether to issue a permit to a landowner with less than five acres. Additionally, the proposed language could be modified to clarify that agency discretion applies in situations where a landowner has a *single parcel* of less than five acres. As currently drafted, the rulemaking order may suggest that agency staff would not have discretion in a situation where a person owns several sub-five acre parcels that cumulatively exceed five acres.

b. Within SECTION 3 of the proposed rulemaking order, a comma should be inserted after the word “fisher”.

c. Within SECTION 4 of the proposed rulemaking order, “a” could be omitted from “...causing a damage or nuisance” to better match the wording used throughout the existing rule (which does not refer to animals causing “a” damage).

d. SECTION 5 of the rulemaking order proposes, in part, to move the text “by dogs” within s. NR 12.10 (1) (b) 2. such that the provision would read “...[p]ursuit of animals by dogs released under this subdivision...”. This change suggests that the subdivision refers to the release of dogs, rather than the release of wild animals. The placement of the text “by dogs” in the rule, as currently

promulgated, is acceptable. Alternatively, movement of the phrase to state, “pursuit by dogs of animals released” would also increase the clarity of the text as compared to the current treatment.

e. Within SECTION 5 of the proposed rulemaking order, the proposed amendment to s. NR 12.10 (1) (b) 6. contains a typo. “CRF” should read “CFR”.

f. SECTION 9 of the rulemaking order proposes, in part, to amend s. NR 12.15 (11) (c) to require a participant under an elk damage shooting permit to possess a valid elk license or “a valid license that authorizes hunting with a firearm, bow, or crossbow”. The agency could clarify what types of licenses constitute a “license that authorizes hunting with a firearm, bow, or crossbow”. Is it the agency’s intent to provide that *any* type of hunting license that authorizes one of these methods of take (e.g., a spring turkey license) is sufficient to participate under an elk shooting permit?

g. Within SECTION 9 of the rulemaking order, in the proposed amendment to s. NR 12.15 (12), the “and” in “...if the terms and conditions of the shooting permit are violated” could be replaced with an “or”.

h. Within SECTION 9 of the rulemaking order, in the proposed amendment to s. NR 12.16 (6), the comma after the last use of the word “deer” in the provision (i.e., the comma following “deer” in “...electronic registration has been completed and the deer, has been removed from the field”) should be omitted.

i. Within SECTION 9 of the rulemaking order, in the proposed amendment to s. NR 12.16 (8) (a), the text “and arrow” could be omitted in “... if using a bow and arrow or crossbow...” to improve consistency with terminology used elsewhere in the rule.

j. SECTION 11 of the rulemaking order proposes, in part, to amend s. NR 12.305 to specify that a person must have “a minimum \$1,000 in sales or commodities” to enroll in the Wildlife Damage Abatement and Claims Program (WDACP). The agency could consider modifying the text to clarify this eligibility requirement. For instance, with the reference to a person having “commodities”, does the agency intend to extend eligibility to someone who possesses a certain inventory of a crop, without having any sales? The agency could also better clarify what type of sales or commodities would qualify an individual for WDACP. For instance, must the sales be of the crop that is subject to a participant’s claim?

k. SECTION 11 of the rulemaking order proposes, in part, to amend the definition of “contiguous land” for the purposes of the WDACP program. The agency could consider modifying the definition to address whether lands that touch at the corners may be considered contiguous (similar to the proposed amendment to s. NR 12.001 (1), in SECTION 2 of the rulemaking order).

l. SECTION 13 of the rulemaking order proposes, in part, to amend s. NR 12.34 (3) to specify dates for the quarterly, biannual, or annual submission of reimbursement requests. However, this provision could be amended to more explicitly indicate the submission requirements for biannual reimbursements. As currently drafted, the rulemaking order only addresses one of the two due dates for the biannual submissions (though the second date of March 1 could be reasonably inferred).

m. SECTION 13 of the rulemaking order proposes, in part to amend s. NR 12.34 (4) to provide that a budget amendment may be submitted to allow a county to be reimbursed for administrative or abatement costs in excess of those contained within a county’s approved plan. The agency could consider providing additional language to specify requirements associated with

submission of a budget amendment. For instance, would a county be able to submit a budget amendment in tandem with a reimbursement request, or would the agency prefer to require that any budget amendment be submitted before expenses are incurred?

n. In SECTION 14 of the rulemaking order, in proposed s. NR 12.36 (2g), the hyphen should be omitted between “14” and “days”. Additionally, the agency could consider clarifying whether landowner signatures for leased properties simply need to be *obtained* by a lessee within 14 days of enrollment (or by February 15 of the year of enrollment, per the proposed sub (2r)), or if these signatures must be *submitted* to the county by this deadline.

o. Many of the treatments proposed in SECTION 15 of the rulemaking order are omitted from the enumeration of treatments in the order’s introductory clause. The introductory clause should be modified to reflect these treatments.

p. SECTION 15 of the rulemaking order proposes, in part, to amend s. NR 12.36 (3) (b) 1. c. to provide that land inside a temporary barrier fence may not be considered land suitable for hunting. The agency could consider amending the first sentence of this provision (i.e., “Permanent barrier woven-wire and high profile electric fences.”) to reflect the fact that temporary barrier fences also impact the suitability of land for hunting. The agency could also consider whether the word “may” in this provision could be replaced with “shall” to provide greater clarity.

q. SECTION 15 of the rulemaking order proposes, in part, to amend s. NR 12.36 (3) (b) 3., to require that enrollees make a reasonable attempt to return each phone call from a hunter registering for hunting access. The agency could consider modifying this provision to address other methods by which a hunter may attempt to contact an enrollee (e.g., email). This could generally mirror the proposed amendment to s. NR 12.36 (3) (a), which recognizes that an enrollee may choose the manner by which they may be notified of a hunter’s intent prior to hunting.

r. SECTION 15 of the rulemaking order proposes, in part, to amend s. NR 12.36 (3) (b) 4., relating to hunting access. As currently promulgated, this subdivision provides that hunting access shall be on a “first come, first serve” basis. This should be amended to refer to a “first come, first served” basis (emphasis added).

s. SECTION 15 of the rulemaking order proposes to amend s. NR 12.36 (3) (b) 6. to specify that an enrollee may refuse hunting access if the hunter density limitation specified in subd. 5. are met. However, the reference to “reasonable cause” within s. NR 12.36 (3) (b) 6., as currently promulgated, already incorporates the limit on hunter density through the definition provided in s. NR 12.31 (7). The agency should consider whether the proposed amendment is duplicative, or if the agency intends to establish a new reason for which an enrollee may refuse access. Similarly, the proposed amendment to s. NR 12.36 (3) (b) 6. that an enrollee may refuse hunting access if a hunter fails to complete the hunting log under subd. 4. Would it be possible to omit this proposed amendment and instead incorporate language relating to the hunting log requirement into the definition of “reasonable cause” that is cross-referenced in s. NR 12.36 (3) (b) 6., as currently promulgated.

t. In the proposed amendment to s. NR 12.37 (4) (a) 3., within SECTION 17 of the rulemaking order, the word “calendar” could be omitted as drafting conventions provide that all time periods refer to calendar days unless otherwise provided. [s. 3.10, Manual.] Omitting the word “calendar” may also reduce confusion that could result from the fact that other provisions within the rulemaking order refer generally to “days” rather than “calendar days”.

u. In SECTION 17 of the rulemaking order, the proposed amendment to s. NR 12.38 (2) (a) inserts language that would be duplicative with language that is retained in the provision. That is, the provision would refer to deer or elk damage that "... is likely to occur on the lands of the applicant and is likely to occur in the future". The agency could consider revising this provision to address this duplicative language.

v. In SECTION 17 of the rulemaking order, in the proposed amendment to s. NR 12.39 (title), the word "agent" should not be capitalized.

w. Within SECTION 17 of the rulemaking order, the intent of the proposed amendment to s. NR 12.39 (3) (a), is somewhat unclear. It appears that the inserted text "electronic or paper form" could be omitted, especially given that the proposed amendment to s. NR 12.39 (1) already clarifies that "records" include records in electronic and paper form. The agency should review the proposed amendment to s. NR 12.39 (3) (a) to ensure that it accomplishes the agency's intent.