



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 19-098

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Reference Bureau and the Legislative Council Staff, dated December 2014.]

2. Form, Style and Placement in Administrative Code

- a. In the rule caption’s listing of affected provisions:
 - (1) The reference to s. ATCP 50.02 (b) (Note) should be revised to s. ATCP 50.02 (1) (b) (Note), in order to include the subsection designation.
 - (2) The reference to s. ATCP 51.06 (b) should be revised to s. ATCP 51.06 (2) (b), in order to include the subsection designation.
 - (3) It is not necessary to repeat the source designation “ATCP” after the first listing in each type of treatment. For example, the repealed provisions could be listed as “ATCP 51.01 (2) and (Note), (11) (Note), (13) (Note), (16), and (26) (Note), 51.12 (6) (Note), 51.30 (3) (Note), and 51.34 (3) (a) (Note);”. [s. 1.02 (1) (Example), Manual.]
- b. Throughout the proposed rule, the affected rule text that follows a treatment clause should begin with a re-identification of the affected provision. See, for example, the format shown in s. 1.067 (Example 2) of the Manual, or the format used in CHR 18-085.
- c. The department should review the proposed rule for consistency in definitional terms. Consider, for example, the following:
 - (1) The definition of “waste storage structure” excludes all types of “waste transfer systems” but the definition of “waste transfer system” provides that a certain type

of waste transfer system is classified as a “waste storage structure”. This conflict should be resolved.

- (2) “Operator” is a defined term in ch. ATCP 51, but “livestock operator” is not. Throughout the rule, both terms are used. The department could consider either defining the term “livestock operator” or changing it in every instance to “operator”.
- (3) Section ATCP 51.12 (2) (d) uses the terms “manure storage or housing structure” and “manure storage and housing structure” and s. ATCP 51.12 (2m) (Note) uses the term “manure storage facility”, but those terms are not defined.
- (4) Sections ATCP 51.14 (3) (a), 51.18 (2) (b) 1. a., and 51.20 (5) (c) use the term “livestock operation”, but that term is not defined.

d. In ch. ATCP 51 (intro.) (Note), the period at the end of the first paragraph should not be underscored.

e. In s. ATCP 51.01 (5) (Note), the second period should be shown with a strike-through, and the period after the website address that is shown with a strike-through should be moved to the end of the inserted website without underscoring or a strike-through.

f. In s. ATCP 51.01 (19m), the phrase “calf hutches” should be rewritten in the singular form as “a calf hutch”. [s. 1.01 (9) (e), Manual.]

g. In s. ATCP 51.01 (19m) and (Note), in the new definition of “livestock housing”, the department should review whether the description of livestock housing Category 1 and Category 2 is consistent with the listing of housing types referenced in the note. The note refers to Appendix A of ch. ATCP 51, Worksheet 2, Chart 2, as published in the Administrative Register, April 2006, No. 604. But it seems that the new definition actually aligns with Appendix A of ch. ATCP 51, Worksheet 2, Chart 1, as included in the proposed rule. See page A-8 of Appendix A. If so, the note should be modified accordingly. Also, in the new definition, parentheses should not be used around the word “layers” after the word “poultry” and the word “liquid” should appear in parentheses after the word “ducks”, to achieve consistency with the new chart.

h. The creation of s. ATCP 51.01 (33m) should be revised to be designated as sub. (32m), in order for the defined term to appear in alphabetical order.

i. In the treatment clause for SECTION 12 of the proposed rule, the designation “and (Note)” should be inserted after “(23m)”. The rule caption’s listing of affected provisions should also be updated accordingly.

j. In s. ATCP 51.01 (42), the comma before “leachate” should be underscored because it does not appear in current rule text.

k. In SECTION 25, an amendment to the note states that certain noncommercial livestock operations generating less than \$6,000 in gross annual income are excluded from coverage under ch. ATCP 51. If this is intended to create an exception to a regulatory requirement, the department should consider moving the contents of the note into rule text. A note may not include substantive provisions and is not part of the substantive law created by a rule. [s. 1.09 (1), Manual.] The

department should also consider whether it has statutory authority to create an exception based on income.

1. In SECTION 32 of the proposed rule:

- (1) The treatment clause indicates that a note is being repealed and recreated but a note is not shown in the recreated text. If the department intends to recreate the note, that material should be inserted. Alternatively, if the department intends to repeal the note, the repeal should be treated in a separate SECTION of the proposed rule.
- (2) The text shown in par. (a) appears to be a full reprinting of sub. (2) from the current rule, without modification. If no modifications are intended, the SECTION should be divided into separate SECTIONS to first renumber sub. (2) to sub. (2) (a), and then to create par. (b). [s. 1.067, Manual.]

m. In s. ATCP 51.10 (3) (d) (Note), the inserted reference to “s. 92.15” should be underscored because it does not appear in the text of the current rule.

n. In s. ATCP 51.12 (1) (e) (intro.), a phrase should be inserted to specify the interaction of the subunits, such as “does any of the following:”. Also, subd. 1. should be revised to end with a period, rather than a comma and the word “or”. [s. 1.03 (3) and (4), Manual.]

o. In s. ATCP 51.14 (1) (b), the designation “sub.” should appear before “(2) (b)”.

p. In s. ATCP 51.14 (2), par. (b) states that a plan “should incorporate” certain practices. Is this a requirement? If so, the department should change “should” to “shall”. If not, it seems that the exception “unless the operator provides a financial or other justification for discontinuation of the practice” should be removed.

q. In s. ATCP 51.14 (3) (b) 1., the abbreviation “ss.” should be revised to “s.”.

r. In s. ATCP 51.16 (1) (b) (Note 2), “ch NR.214” should be revised to “ch. NR 214”.

s. In s. ATCP 51.16 (2) (c), the department should revise the phrasing to clearly specify the relationship between ss. ATCP 51.16 and NR 151.04. For example, is it intended to mean that, for purposes of s. ATCP 51.16, a political subdivision shall presume that an operator is in compliance with s. NR 151.04, if the operator is in compliance with s. ATCP 50.04 (3)? As written, it appears to grant an operator an alternative means of complying with a regulation of a separate agency.

t. In s. ATCP 51.16 (3) (a) (intro.), the introductory material should specify whether an applicant must submit “all” or “any” of the items identified in the subunits that follow. Also, subd. 2. (intro.) should end in an introductory phrase, such as “subject to all of the following”, and end with a colon rather than a period.

u. In s. ATCP 51.16 (4), a title should be inserted for the subsection. Also, would par. (a) be better suited as a note, as it appears that the department is opining on a regulation of a different department? In par. (b), the dash in “(c)-(d)” should be revised to the word “to”. [ss. 1.01 (9) (d), 1.05 (1), and 1.09 (1), Manual.]

v. In s. ATCP 51.16 (6) (intro.), the introductory material should specify whether a political subdivision may do “all” or “any” of the actions specified in the subunits that follow. Also, the department should change “The political subdivision” to “A political subdivision”.

w. In s. ATCP 51.18 (1), the designation “(a)” should appear after the subsection title rather than before it.

x. In s. ATCP 51.18 (2) (a) (intro.), (a) 1. (intro.), (b) (intro.), and (b) 1. (intro.), the introductory material in each provision should specify whether “any” or “all” of the items that follow each colon apply.

y. In s. ATCP 51.18 (2) (b) 1. a., b., and c., the verb tense should be revised by changing “Certify”, “Submit”, and “Submit” to “Certifies”, “Submits”, and “Submits”, respectively.

z. Section ATCP 51.18 (2) (a) should be revised so that it is not further divided into only one subdivision. [s. 1.03 (1), Manual.]

aa. In s. ATCP 51.18 (5) (b) (Note), the material allows a political subdivision to accept a certification other than one specified in the immediately preceding rule provisions. A note may not include substantive provisions and is not part of the substantive law created by a rule. [s. 1.09 (1), Manual.] As such, the department should consider moving the contents of the note into rule text.

bb. In s. ATCP 51.20 (2) (a), each subdivision and subdivision paragraph should be revised to end with a period.

cc. In s. ATCP 51.20 (2) (c), the prohibition could be interpreted as applying only to existing animal lots due to its placement in sub. (2). Is that the intent? If the department instead intends to apply the prohibition also to a new or substantially modified animal lot, par. (c) could be either elevated to its own subsection or repeated in sub. (1).

dd. In s. ATCP 51.20 (4) (title), a period should be inserted after the title.

ee. Section ATCP 51.20 (4) (b) (intro.), (c) (intro.), and (e) 2. (intro.) should each be modified to specify whether “any” or “all” of the items that follow each colon apply.

ff. The treatment of s. ATCP 51.30 (4) and (Note) should be separated into two SECTIONS of the proposed rule: first, to repeal and recreate sub. (4) with the embedded note after sub. (4) 2.; and second, to repeal sub. (4) (b) (Note).

gg. In s. ATCP 51.34 (4) (intro.), the designation “(intro.)” that appears within the text should be removed (page 52, line 6).

hh. In s. ATCP 51.34 (4m) (title), a period should be inserted after the title.

ii. The treatment of s. ATCP 51.34 (5) (b) and (c) should be separated into two SECTIONS of the proposed rule: first, to repeal par. (b); and second, to amend par. (c) to strike-through the reference to par. (b).

jj. In SECTION 60 of the proposed rule, the department should revise the initial applicability clause in sub. (2) to specifically apply the revised rule to an identifiable event or events occurring on or after the identified date. For instance, the clause could state that the rule

first applies to a small business “that submits a permit application” (or other applicable procedural step) on the first day of the third month. [s. 1.02 (3m), Manual.]

kk. In Appendix A, Worksheet 2, Chart 1, the last row indicates that any item with an asterisk “may use clusters to determine AU capacity”. No items in the chart are marked with an asterisk. Should the last row be removed? Alternatively, if intended, should items be marked?

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

a. In s. ATCP 51.06 (2) (b), should the reference to sub. (5) of s. ATCP 51.34 instead be to sub. (4m) of that provision?

b. Section ATCP 51.12 (1) and (2) address setback requirements. Section ATCP 51.14 (4) authorizes certain deviations from setback requirements. Should these three subsections cross-reference each other to ensure proper interaction?

c. Section ATCP 51.14 (1) (b) (Note 1) contains a cross-reference to par. (c). There is not a par. (c) in sub. (1). Should the cross-reference be to sub. (2) (c), instead?

d. Section ATCP 51.14 (3) (b) 2. contains an internal cross-reference to “See sub. (3)”. This cross-reference does not make sense given that it is located within sub. (3).

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

a. In the treatment clause for SECTION 2 of the proposed rule, the word “is” should be revised to “are”. The same comment also applies to the treatment clause for SECTION 18 of the proposed rule.

b. In s. ATCP 51.01 (44m), the word “as” should be inserted after “such”.

c. In ss. ATCP 51.10 (1) and 51.14 (1) (b), the proposed rule uses the phrases “local approvals and permit modifications” and “local approval including a permit modification”, respectively. The department should consider whether it is redundant to mention permit modification in each instance given that s. 51.01 (21) (intro.) amends the definition of “local approval” to include a “permit modification”.

d. The following comments apply in s. ATCP 51.12 (1) and (2):

(1) In sub. (1) (b), the phrase “or more” should be deleted.

(2) In sub. (1) (d), an article should precede “operator”, such as “the” or “an”.

(3) In sub. (2), the rule should be revised to use consistent language in describing ranges of animal units. Specifically, each instance of the phrase “between X to Y” should be revised to “between X and Y”, using the conjunctive “and”.

(4) In sub. (2) (c) 4. (note), an article should precede “livestock structure”.

(5) In sub. (2) (d) 2., the phrase “prior the effective date” should be revised to “prior to the effective date”.

e. In s. ATCP 51.12 (2m) (a), the phrase “each location” could be revised to “each cluster”, for clarity. Also, the phrase “at for” appears to be a typographical error, and should be corrected.

f. In s. ATCP 51.12 (2m) (b), the phrase “This treatment” is ambiguous. Consider revising it to “Paragraph (a)” or “The treatment afforded by par. (a)”, or other phrasing that meets the department’s intent.

g. In four places in the proposed rule, the department has included a new provision stating that a livestock facility, or an operator, “is presumed to comply with this section if the application for local approval complies with s. ATCP 51.30”. The meaning of these provisions is unclear. Each could be interpreted as allowing an applicant to achieve compliance with a substantive standard merely by satisfying a procedural application requirement. Is that the intent? This provision appears in ss. ATCP 51.14 (5), 51.16 (5), 51.18 (3), and 51.20 (11).

h. In s. ATCP 51.14 (1) (a), the reference to a “passing” odor score should specify how an operator would determine a “passing” score. The provision repeals the current odor standard in s. ATCP 51.14 (1) that uses the concept of an “odor score”.

i. In s. ATCP 51.14 (2) (b) (Note), it is not clear why the note mentions dust, when the provision addresses a plan for odor.

j. In s. ATCP 51.14, the department should review how subs. (1), (2), and (3) interact. In the rule summary’s plain language analysis, sub. (2) is described as applicable to a facility that has been granted an approval, or a permit modification, under sub. (1) (b), but that is not apparent in the rule text itself. It is also not clear whether subs. (2) and (3) apply to different types of facilities and applications.

k. In s. ATCP 51.14 (2) (c), what does it mean that an odor-related complaint is “verified”? Also, what is the recourse if a political subdivision requests that a livestock operator update an odor management plan and the livestock operator refuses?

l. In s. ATCP 51.14 (4) (c), what is the meaning of “innovative”? That modifier is not used elsewhere in sub. (4).

m. In s. ATCP 51.18 (2) (b) 2. and (4) (a) 1., the references to “then-existing NRCS standards” should be revised to “NRCS standards that existed at the time of construction”. Compare, for example, the phrasing that is used in sub. (4) (a) 2.

n. In s. ATCP 51.18 (4) (a) 3., it appears that the word “meeting” should be revised to “meet”, “meets”, or “met”.

o. In s. ATCP 51.18 (4) (a) 3. (Note 1), the provision is unclear. It states: “A full investigation includes emptying facilities of their contents, especially earthen-lined structures, to allow for complete inspection and evaluation.”. Why does this apply especially to earthen-lined structures? Does this mean that it is possible to conduct a full inspection of a non-earthen-lined facility without emptying its contents? Also, in the second sentence, it appears that the word “storage” should be revised to “facility”, or, better, the defined term “waste storage facility”.

p. In s. ATCP 51.18 (5) (intro.), the phrase “the following” should be inserted after “complies with”. Also, the phrase that is enclosed in parentheses should either be moved to a note or enclosed in commas. [s. 1.01 (6), Manual.]

q. The department should review how s. ATCP 51.18 (4), (5), and (6) apply to existing facilities that are also substantially altered. For instance, if an existing facility underwent a substantial alteration prior to the effective date of this rule, would it have to comply with both sub. (4) and sub. (5)? If just sub. (5), then would it be subject to closure under sub. (6) on the basis of failure to achieve certification under sub. (4)?

r. In s. ATCP 51.18 (7) (c), does the department intend the provision to apply only to a dairy farm? Or should it be revised to apply to a “livestock facility”, as with the rest of the chapter?

s. In s. ATCP 51.20 (2) (b), the provision could be modified to clarify that the intent of the department is that a minor alteration to an existing animal lot will not by itself convert the animal lot to a new or substantially modified animal lot.

t. In s. ATCP 51.20 (4) (e), the department should review the provision for clarity in the treatment of expanded feed storage structures. For instance, par. (e) (intro.) addresses both new structures and new portions of existing structures, but it is not clear whether the reference in subd. 1. to “proposed structure” applies only to a new structure or also to a new portion of an existing structure.

u. In s. ATCP 51.20 (4) (e) 2. c., the department should examine whether the use of the term “significant discharge” is accurate. Under the new definition in the proposed rule, the term “significant discharge” applies only to a discharge of process wastewater. This provision, on the other hand, appears to address a different kind of discharge.

v. In s. ATCP 51.20 (5) (a), the reference to “treatment system” is unclear. Should this term be defined or explained?

w. In s. ATCP 51.20 (5) (c), the reference to “an extended period” is ambiguous. Are there any specified time periods in a technical standard that could be referenced instead?

x. In s. ATCP 51.20 (6), the reference to “clean water” is unclear. The existing rule, as well as the ATCP rule cross-referenced in the note, refer to “runoff”. Why the change to “clean water”?

y. In s. ATCP 51.34 (4m) (a) (intro.), it appears that the phrase “procedures to” should be revised to “procedures in”.

z. In s. ATCP 51.34 (4m) (a) 2. c., more specificity should be used in identifying Worksheets 1 and 3. Also, the phrase “a revised” should be changed to “revised”.