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CLEARINGHOUSE RULE 19-105

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.]

1. Statutory Authority

a. The department should more directly explain the relationship between the proposed rule and s. 227.139, Stats., which places a general limit on an agency's authority to promulgate certain high-cost rules. In its fiscal estimate and economic impact analysis to the proposed rule, the department indicates the rule has no direct economic impact because "the rule itself will not impose any additional economic or fiscal impact besides what the federal government requirements imposed". The department estimates the cost of the federal rules, which it asserts would be imposed in the absence of department rulemaking, to be approximately $13 million per year.

b. Section 227.139, Stats., as enacted under 2017 Wisconsin Act 57, prohibits an agency from proceeding with a rulemaking for which the economic impact analysis describes an impact of $10 million over a two-year period. Instead, under s. 227.139, Stats., an agency must stop work on the rule until legislation is enacted to specifically authorize the agency to resume the rulemaking.

c. This statutory limitation does not apply to the proposed rule, because the rule is based on a scope statement approved by the Governor in 2015, while 2017 Wisconsin Act 57 first applies to rules promulgated based on scope statements approved after the effective date of the Act. Nonetheless, through its fiscal estimate and economic impact analysis, the department appears to imply that s. 227.139, Stats., would not apply because a similar impact would be imposed under federal rules in the absence of state rulemaking. With respect to a proposed rule relating to water

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pollution, such as this particular rule, the basis for the department's conclusion regarding its statutory authority is unclear.

d. Several provisions of s. 227.139, Stats., and the legislative history of 2017 Wisconsin Act 57 suggest the limitation on rulemaking authority would apply, but for the initial applicability of the Act. In particular, s. 227.139 (4) (a) 1. to 3., Stats., specifically provides an exemption for certain rules promulgated by the department, if those rules are no more stringent than required under the federal Clean Air Act. However, s. 227.139, Stats., provides no similar exemption for rules promulgated by the department that are intended to conform to other federal regulations, such as the federal Clean Water Act. Additionally, during the Legislature's consideration of 2017 Senate Bill 15, which was enacted as Act 57, the Assembly rejected an amendment to the bill that would have provided a broad exemption from the limitation of s. 227.139, Stats., for "a proposed rule that is required in order to comply with a federal law or an order from the federal government". [Assembly Amendment 4 to 2017 Senate Bill 15, laid on the table, Ayes, 62; Noes, 33 (June 14, 2017).]

e. The rule analysis lists "281.003 (2)" as a statute interpreted. That statute does not exist. Should "s. 283.001 (2), Stats." be listed instead?

2. Form, Style and Placement in Administrative Code

a. Throughout the proposed rule, the department should review the use of the terms "applicant", "permittee", and "owner or operator" for consistency. For example, the first sentence of s. NR 111.41 (13) uses both "owner or operator" and "applicant". Are these different parties or the same party? In addition, in s. NR 111.25, although sub. (2) (intro.) refers to "materials submitted by the applicant", sub. (2) (a) refers to the "permit application from the permittee". Are the "applicant" and the "permittee" different parties or the same party?

b. Throughout the rule, the department should ensure that each portion of the rule accomplishes the intent expressed in the title of that portion. Titles to any unit of a rule are not part of the substance of the rule itself. [s. 1.05 (1), Manual.] For instance, the title of s. NR 111.41 (19) is "TRACK II COMPREHENSIVE DEMONSTRATION STUDY". That title suggests that the subsection will only address those facilities that are subject to the track II requirements. The first sentence of that subsection, however, ostensibly applies to all facilities. It states, "The applicant shall perform and submit the results of a comprehensive demonstration study".

c. Section NR 111.02 (3) (b) 1. b. uses the term "greenfield", which is not defined. It could be changed to "greenfield facility", which is defined.

d. Section NR 111.03 (9) should be reorganized so that par. (a) does not have just one subdivision. When any part of a section is divided into smaller subunits, at least two subunits must be created. [s. 1.03 (1), Manual.]

e. In s. NR 111.03 (9) (b), the acronym DIF should be enclosed by quotation marks.

f. In s. NR 111.03 (43), the department should consider adding "threatened or endangered species" as an alternate term when defining "threatened and endangered species". Throughout the rule, as in the applicable federal regulations, both formulations are used extensively and thus both formulations should be defined.

g. In s. NR 111.15 (1) (c) (intro.), the abbreviation "s." should be inserted before "NR".

h. In s. NR 111.40 (1) (intro.), "New facilities with cooling water intake structures" should be rewritten in the singular form as "A new facility with a cooling water intake structure". [s. 1.01 (9) (e), Manual.]

i. In s. NR 111.40 (3) (b), the title refers to certain new units not previously subject to "subchapter IV", but the text refers to certain new units not previously subject to "this chapter". Should those references be harmonized?

j. In s. NR 111.41 (19) (c) 1. a., the department should consider changing "fish and shellfish and all life stages" to "all life stages of fish and shellfish" because the latter is a defined term but the former is not. The department should consider a similar change to "impinged life stages of fish and shellfish" in subd. 2. b.

k. Section NR 111.42 (1) (b) should be revised to refrain from using the word "current" because that word is meaningless once ch. NR 111 is printed. [s. 1.01 (9) (b), Manual.] Would replacing "after issuance of the current permit" with "during the pendency of a permit" achieve the department's intent?

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

a. In s. NR 111.02 (2) (a), the department may want to clarify the meaning of "point source" by adding a reference to s. 283.01 (12), Stats. See, for example, the approach taken in s. NR 111.03 (16) for the definition of "facility".

b. Insert a period at the end of s. NR 111.02 (3) (b) 1. a.

c. In s. NR 111.02 (6), a cross-reference to sub. (2) (c) would aid clarity. Absent that contextual signal, the explanations of "the 25 percent threshold" and "the 25 percent cooling water threshold" are confusing.

d. In s. NR 111.03 (18), how will the department's decision to deem a species as a "fragile species" be manifested?

e. In s. NR 111.03 (34):

(1) How will the department's decision to add to the list of nuisance species be manifested?

(2) Will there be any unintended consequences for the operation of the chapter by listing two species (alewife and rainbow smelt) as "nuisance species" in sub. (34) when they are also listed as "fragile species" in sub. (18)?

(3) Should "water of the state" be changed to "waters of the state"?

f. In s. NR 111.03 (35) (b), the reference to "large aquatic organisms" might be ambiguous. The applicable federal regulation provides some frame of reference for the word "large" by listing "marine mammals, sea turtles, and other large aquatic organisms". [40 C.F.R. s. 125.92 (v).] Are there any analogous examples that could be provided in par. (b) to give connotation to the word "large"?

g. Insert a period at the end of s. NR 111.03 (38).

h. In s. NR 111.15, the department should review the syntax used in subunits following colons. For instance, both subs. (1) and (2) follow a colon at the end of s. NR 111.15 (intro.) but sub. (1) begins with an infinitive verb while sub. (2) is a complete sentence. Also, pars. (a) to (c) of sub. (1) are sentence fragments but pars. (d) and (e) of sub. (1) are complete sentences. In general, each subunit following an introduction should form a complete sentence when read with the introduction. [s. 1.03 (3), Manual.]

i. In s. NR 111.20 (1) (intro.):

(1) Either the comma after "shall" should be removed or a comma after "minimum" should be added.

(2) What is the significance of the phrase "at a minimum"?

j. In s. NR 111.21 (2) (a), subd. 4. c. uses the phrase "species of concern" while subd. 5. c. uses the phrase "species of concern to the department". Should the terminology in the two subdivision paragraphs be harmonized?

k. In s. NR 111.21 (4) (a), should "under subs. (2) and (3)" be changed to "under sub. (2) or (3)"? As written, this could be interpreted as requiring a person to demonstrate that a requirement under sub. (2) and a requirement under sub. (3) are applicable to the person in order to qualify for less stringent requirements. Is that the intent?

l. In s. NR 111.22 (intro.), what is the significance of the phrase "at a minimum"?

m. The intent of s. NR 111.22 (5) is not clear.

(1) If it is imposing verification monitoring requirements on track II facilities that are *in addition* to the monitoring requirements in s. NR 111.22 (1) to (4), that could be made clear by, for example, changing "shall comply" to "shall comply also".

(2) If it is instead imposing verification monitoring requirements on track II facilities that are *in lieu* of the monitoring requirements in s. NR 111.22 (1) to (4), that could be made clear by, for example, concluding the subsection with "in lieu of the requirements specified in subs. (1) to (4)".

n. In s. NR 111.23 (intro.), what is the significance of the phrase "at a minimum"?

o. In s. NR 111.31 (3) (c), the reference to "these regulations" is ambiguous and should be clarified.

p. In s. NR 111.40 (2), it appears that pars. (b) and (c) are mutually exclusive such that a facility could be subject to one or the other but not to both. On the one hand, par. (b) applies to an existing facility that, among other criteria, withdraws *less than* or *equal to* 125 MGD AIF. On the other hand, par. (c) applies to an existing facility that, among one other criterion, withdraws *greater than* 125 MGD AIF. Given that dichotomy, it is not clear why par. (c) states that its requirements are "in addition to requirements specified in par. (b)". So stating suggests that there could be a circumstance in which a facility subject to par. (c) might also be subject to par. (b). The conflict should be resolved in a manner that achieves the department's intent.

q. In s. NR 111.41 (3) (intro.):

(1) The meaning of the first sentence is not clear. It states that certain information "is required" in order to perform certain characterizations. But it is not clear whether this sentence actually imposes a requirement on any party.

(2) In the third sentence, it is not clear to what "This supporting information" refers.

(3) The meaning of the fourth sentence is not clear. It states that the owner or operator "may supplement the data". Does this mean that the owner or operator may supplement source water baseline biological characterization data that had previously been submitted? Or does this mean that the owner or operator may supplement a permit renewal application? In either case, is there a deadline for submission of the supplemental data?

r. In s. NR 111.41 (3) (a) 2., how will it be decided which species are "most important" to commercial and recreational fisheries?

s. In s. NR 111.41 (7) (a) 4. and (c) 4., will an owner or operator understand what is meant by "major upgrades"? Paragraph (a) 4. includes examples of major upgrades, but par. (c) 4. does not. Does this suggest a different interpretation between the two subdivisions?

t. In s. NR 111.41 (9) (c) (intro.), the department should review the eighth sentence. It states: "Social costs shall also be discounted using social discount rates of 3 percent and 7 percent.". Will an applicant know what this means?

u. In s. NR 111.42 (1) (a) 2. b., should "request for the request" instead be "request for the reduction"?

6. Potential Conflicts With, and Comparability to, Related Federal Regulations

a. In several locations, ch. NR 111 uses the term "graywater". [e.g., s. NR 111.12. (1) (c).] The applicable federal regulation uses the term "gray water". [e.g., 40 C.F.R. s. 125.94 (c) (10).] Should ch. NR 111 be conformed to the federal regulation?

b. Although s. NR 111.11 (1) (b) closely tracks the syntax of the applicable federal regulation, the department could consider whether it has the latitude to revise this paragraph in response to a changed circumstance. For instance, could it be revised to account for the fact that although July 14, 2018 was a prospective date when the applicable federal regulation was promulgated, that date is now in the past? In the year 2019, there are not any "currently effective" permits that expire "prior to or on July 14, 2018" and thus par. (b) as written is a nullity.

c. Although the third sentence of s. NR 111.16 (4) (a) closely tracks the applicable federal regulation, the department should consider replacing "this regulation" with a less ambiguous cross-reference, such as "this chapter" or some subunit thereof, as appropriate.

d. In ss. NR 111.21 (4) (b) and 111.31 (3) (a), the rule establishes departmental discretion in the event that certain compliance would result in "costs wholly out of proportion to the costs U.S. environmental protection agency considered in establishing the requirement at issue". Although this same formulation appears in the applicable federal regulation, does the department have a method of determining what costs the federal agency considered?