



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 06-109

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated January 2005.]

2. Form, Style and Placement in Administrative Code

- a. The text of s. NR 440.07 (5) (a) 3. is misplaced and should begin on a new line.
- b. The department should remove the extra spaces between “section” and “will” in s. NR 440.205 (1) (h).
- c. In s. NR 440.20 (8) (b) 2. b., the word “sample” should follow “~~individual.~~”
- d. In s. NR 440.215 (2) (i) and 440.218 (2) (sm), the second “section” in the reference to provisions in the Clean Air Act is redundant and should be deleted. Also, the preferred format for specifying citations to multiple provisions is to list the lowest numbered provision first.
- e. The treatment clause of SECTION 251 should be corrected to refer to s. NR 440.62 (7) (f) (intro.), rather than s. NR 440.62 (7) (f) (title).
- f. If the entries in Table A were numbered, it would be possible to amend a single entry without having to reproduce the entire table. The same applies to the table in s. NR 440.686 (8) and other tables in ch. NR 440.
- g. In Table A, the column headings are repeated following the entry for p-tert-Butyl benzoic acid in the rule and after the entry for benzyl in the existing code. It appears that wherever it is placed, repetition of the headings is unnecessary and should be eliminated.
- h. Sections NR 440.64 (6) (e) 1. and 2. should be written in the active voice, to indicate whose responsibility it is, for example, that each record is instantly available at the terminal. The

same comment applies throughout the rule. Notwithstanding s. 227.14 (lm), Stats., such stylistic conventions are worth observing.

i. SECTION 277 of the rule (and perhaps others) replaces a final semi-colon with a period in one subdivision paragraph. While this complies with the Legislative Reference Bureau (LRB) drafting style, it does not work to do it for only one subdivision paragraph, as the punctuation of the subdivision as a whole then makes no sense. (That minor error noted, it should be acknowledged that the rule brings ch. NR 440 as a whole into closer compliance with the LRB drafting style.)

j. Sections NR 440.644 (2) (a) (intro.) and (b) (intro.) should include, at the end, "In this section:".

k. The formatting of the formula in s. NR 440.644 (4) (f) 2. d. 8. should be checked; it is printed over the page number. Other formulae have the same defect.

l. It appears that the treatment clause of SECTION 293 should read: "NR 440.647 (6) (h) 1. is repealed and recreated to read:".

m. In ss. NR 440.647 (1) (j), 440.675 (1) (d), 440.686 (1) (d), 440.705 (1) (d), (and possibly other provisions), owners and operators are given the option of complying with certain regulations as in effect on December 14, 2000. Each reference to the regulations following the first reference omits the phrase "as in effect on December 14, 2000." That phrase should be included in each reference; alternatively, the same result could be accomplished by defining a term to refer to that version of the regulations (e.g., "the 2000 subpart D" or "the 2000 _____ regulation").

n. In s. NR 440.688 (1) (am), "the following operations: All" should be omitted.

o. In s. NR 440.75 (2) (intro.), would it be useful to apply the definitions in s. NR 500.03 to this section or to define certain terms by cross-reference to definitions in that section?

p. A number of definitions in ss. NR 440.75 (2), 440.76 (2), and 440.77 (2) include substance, which should be removed and placed in the text of the rule. Examples in s. NR 440.75 (2) include the definitions of "design capacity," "lateral expansion," "MSW landfill," and "NMOC." Also, regarding definitions, examples should be placed in notes, e.g., the parenthetical material in the definition of "gas mover equipment." When listing items that are included in a definition, it should be formatted as, e.g., "'Industrial solid waste" includes waste resulting from..." Note that "but is not limited to" is not used, as it is implied by the word "includes." Finally, explanatory material, not establishing substantive requirements, should also be placed in notes. See, for example, the last sentence of the definitions of "class I units" and "class II units" in s. NR 440.76 (2) (cm) and (d) and the last sentence of s. NR 440.77 (2) (p) 1., in the definition of "modification." The same applies to explanatory material in the text of rules, such as the last sentences of s. NR 440.76 (9) (d) 3. and 4. and (10) (b). See s. NR 440.76 (9) (j) 5. (note).

q. The definition of “you,” “your,” “I,” and “my” in ss. NR 440.78 and 440.77 is correct only for the terms “you” and “I.” Based on definitions in any standard dictionary, “your” and “my” should be defined as “of or relating to the owner or operator of...”

r. Section NR 440.75 (3) (b) 2. e. does not follow grammatically from the introduction. It could, instead, be numbered s. NR 440.75 (3) (b) 3.

s. “Title V,” used in s. NR 440.77 (12), is not defined in s. NR 400.02, 440.02 or 440.77 (2); a definition should be provided. The citation used in s. NR 440.77 (12) (intro.) does not constitute a definition. Further, this subsection says nothing about what is required: What is the significance of a Title V permit? To whom does one apply for a Title V permit, the Department of Natural Resources or Environmental Protection Agency (EPA)? What are the application requirements? At the least, the rule should provide a cross-reference to other rules or EPA regulations that relate to Title V permits.

t. In SECTION 358 of this rule, the five paragraphs of text should be numbered as separate subsections.

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

a. In the analysis accompanying the rule, the list of statutes providing statutory authority for the rule should include either s. 227.14 (1m) (a) or (b). Elsewhere in the analysis, item 6 indicates that the format of the proposed rule is that used in the cited federal regulation as allowed under s. 227.14 (1m), Stats.

b. The rule incorporates by reference a number of procedures and test methods incorporated by reference into the corresponding federal rules. See item 6 in the analysis accompanying the rule. The analysis to the rule should, but does not, indicate that the Attorney General and the Revisor of Statutes have consented to this incorporation. [See s. 2.08 (1), Manual.]

c. Section NR 440.17 (2) (L) indicates that the identified material from the American Hospital Association Service may be inspected at the EPA’s Air and Radiation Docket and Information Center at the specified street address in Washington, D.C. Is there a site in Wisconsin where these materials may be inspected?

d. The reference in s. NR 440.215 (1) (i) to the federal solid waste disposal act should include a reference to the corresponding section in the U.S. Code.

e. The references to sections in the Clean Air Act in ss. NR 440.215 (2) (i) and 440.218 (2) (sm) should include corresponding references in the U.S. Code. Since “act” is defined to mean the Clean Air Act in s. NR 400.02 (5), the reference in s. NR 440.215 (2) (i) should be to the “act” rather than the Clean Air Act. The department should also review the entire rule to ensure that other references to provisions in this act include references to the corresponding provisions in the U.S. Code.

f. The department should review the entire rule to ensure that references to standards incorporated by rule are complete and that the references use a consistent format. For example, the references to Method 3, Method 3A or 3B of 40 C.F.R., Part 60, Appendix A, in s. NR 440.216 (12) (b) 6. a., and Method 9 in s. NR 440.44 (6) (e) 4., and section 5.4 of Method 19 in s. NR 440.216 (12) (e) 2., do not include a reference to the provision in s. NR 440.17 that incorporates these methods by reference.

g. Since the department is using the EPA guidance document cited in s. NR 440.445 (4) (e) 4. (intro.) as a standard, the reference to this document should also indicate that it has been incorporated by reference with the appropriate citation in s. NR 440.17.

h. The department should review the adequacy of the reference to the definition of “by-product material” in the Atomic Energy Act of 1954 provided in s. NR 440.218 (2) (km). The U.S. Code citation in this paragraph is to only part of the definition of by-product material. Also, the Atomic Energy Act spells “by-product” without a hyphen.

i. Section NR 440.76 (2) (gm) refers to permit requirements established under three specified sections of the Code of Federal Regulations. Are these CFR provisions incorporated into the Wisconsin Administrative Code, such that they could be identified by cross-references within the Code, as well?

j. In s. NR 440.76 (3) (c) 2., can the department provide a more precise cross-reference than chs. NR 405 and 408?

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

a. Item 9 in the analysis accompanying the rule indicates that the analysis of the effect of the proposed rules on small business was not performed since identical requirements are already in effect through 40 C.F.R. Part 60. The analysis would be clearer and more useful to a reader if it included a citation to the corresponding federal analysis and information on where the federal analysis may be obtained.

b. The use of “etc.” in s. NR 440.08 (4) is vague. Can the department be more specific?

c. The two formulas following the conversion constant K, in s. NR 440.18 (6) (c) are potentially confusing. Is the formula intended to depict the units of the conversion constant? Also, it is not clear why two versions of the same formula are included in the text.

d. The department should review the entire rule to ensure that references to the “administrator” of the environmental protection agency are appropriate. Examples of references to the administrator are in ss. NR 440.11 (2), 440.647 (1) (j), 440.218 (7) (i), and 440.285 (2) (f) 4.

e. A semi-colon should be inserted after “quarter basis” in s. NR 440.215 (1) (k).

f. In the definition of “reconstruction” in s. NR 440.216 (2) (sm), should the first use of “construction” be instead to “reconstruction”?

g. The references in s. NR 440.216 (8) (a) and (b) to “a state certification program” are vague. Can the department better identify this program?

h. In s. NR 440.218 (2) (nm) (intro.), the verb at the end of the first sentence should be “are listed” rather than “is listed” to correspond with the plural noun “biologicals.”

i. The reference in s. NR 440.218 (2) (nm) 3. d. to items that are “now caked” with dried human blood is potentially ambiguous. Can the department clarify when this caking is to have occurred?

j. Since the rule retains existing s. NR 440.285 (1) (d) and adds a subdivision to that paragraph, it is not clear why the rule removes the reference to the exemption in par. (d) in its treatment of s. NR 440.285 (1) (a).

k. In s. NR 440.41 (4) (c), the square symbol in the last sentence preceding “5%” should be replaced with appropriate text that conveys the intended meaning of the provision.

l. The rule refers to a “certified visible emission observer” in ss. NR 440.44 (4) (c) and (d) and 440.445 (4) (c) and (d) but does not indicate in any of these provisions how such observers become certified or the qualifications for this certification.

m. Should “run” be included after “EPA Method 7E” in s. NR 440.50 (6) (c) 4.?

n. In several provisions, the rule refers to “megagrams,” presumably meaning 1 million grams or 1,000 kilograms, which is a metric ton. “Megagram” is not a recognized term in standard dictionaries and should be replaced with “metric ton.”

o. In s. NR 440.64 (3) (e) 3. a. 1) and 2), should the word “last” be replaced with “preceding”? See s. NR 440.64 (2) (L).

p. The formula in s. NR 440.642 (7) (i) 4. b. includes the term HV_v, but the definitions of terms in the formula refer to H_v. Which is correct?

q. In s. NR 440.642 (9) (e) 1., why is the notice provision permissive? What happens if the administrator does not give notice? Also, in s. NR 440.642 (9) (e) 2. (intro.), “shall” should be “may.”

r. Section NR 440.65 (2) (a) 6. uses the phrase “as determined by Method 24,” while s. NR 440.65 (2) (b) 15., 16., and 17. use the phrase “as determined from Method 24.” Presumably, these should be consistent.

s. “That” in the last sentence before Table 1 in SECTION 325 is correct, and should not be changed to “which.” Also, in s. NR 440.688 (2) (z), both occurrences of “which” should be replaced by “that.” In rule writing, “that” is the correct choice in most instances.

t. In s. NR 440.688 (7) (g), “the no visible emission limit” should be written “the no-visible-emission limit.” There are a number of similar terms that should be punctuated in the same manner.

u. Sections NR 440.75 to 440.77 require compliance with various requirements by a specified time after a facility is placed in operation (or some similar trigger event) or a date certain, which in all cases is already past. This would appear to put all existing facilities in noncompliance on the effective date of the rule, unless they have already complied for other reasons. To avoid this problem, the rule could specify delayed effective dates for such provisions to give operators at least the same time to comply allowed for a facility newly placed in operation.

v. The definition of “enclosed combustor” in s. NR 400.75 (2) (j) refers to “an enclosed flare,” which is an oxymoron given that “flare” is defined as a combustor “without enclosure or shroud.” Unless the definition of “flare” is elaborated in some manner, the reference to “enclosed flare” should be omitted.

w. In the definition of “interior well,” what does “perimeter” mean? A definition of this term, which is key to the definition of “interior well,” would be helpful.

x. Section NR 440.75 appears to use “lateral expansion” and “horizontal expansion” interchangeably. One term should be selected and used exclusively.

y. Numerous provisions of s. NR 440.75 allow a choice of measuring capacity in megagrams or cubic meters. However, some provisions say megagrams or cubic meters while others say megagram and cubic meters. These differences are significant; are they intentional?

z. Should s. NR 440.75 (8) (f) 4. begin with the words “Description and duration of” as the preceding two subdivisions do?

aa. The definition of “potential hydrogen chloride emissions” is s. NR 440.76 (2) (4) should read: ...means the level of hydrogen chloride emissions....” The same applies to the definitions of “potential mercury emissions” and “potential sulphur dioxide emissions.”

bb. In s. NR 440.76 (3) (c) 2., it appears that “plan” should be inserted following “separation.”

cc. Section NR 440.76 (6) (c) 3. (intro.) should permit the specified action without prior department approval only, not without notice; the first subdivision paragraph immediately following requires notification to the department.

dd. In s. NR 440.77 (2) (j) 3., it appears that “regardless or” should be “regardless of.”