



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 11-047

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 September 2008.]

2. Form, Style and Placement in Administrative Code

a. In the relating clause to the rule, the final phrase should read: “and affecting small business” (rather than “businesses”).

b. The rule includes the repeal and recreation of the Appendix to ch. Comm 41, which is 121 pages in single-spaced, two-column format. The analysis makes no mention of the Appendix, much less of what changes are made to it. The first page of the Appendix, though, explains that the Appendix is simply a reproduction of selected portions of the standards incorporated by reference in the rule, provided for the convenience of the reader. This explanation should be added to the analysis, as well.

c. The rule repeals a number of provisions. A brief explanation of what is repealed should be included in the analysis.

d. The rule makes a number of typographic changes to ch. Comm 41 by specifying, for example, that all occurrences of certain spellings or punctuations be replaced by another, such as in SECTION 22. It is suggested that all such provisions be collected together in a single SECTION at the end of the rule, rather than spread throughout the rule (presumably at the location of the first occurrence of each change to be made). Also, the analysis should make brief mention of the inclusion in the rule of these typographic changes.

e. The rule makes numerous changes to ch. Comm 41 that are rather complicated and, in a number of cases, drafted incorrectly. A common error in the rule is the combination of disparate treatments in a single rule SECTION. Usually this occurs in a SECTION that amends one rule unit but also either creates or repeals an entire subunit. [See SECTIONS 10 and 32 for examples.] These actions should be separated into individual SECTIONS for each type of treatment and where, for example, an amendment is followed by a creation which is followed by another amendment, they should be further separated into enough SECTIONS to keep all the types of treatment separate and all the rule parts in sequential order. Some individual errors are pointed out as examples, with detailed instructions on how to correct them. The entire rule should be reviewed carefully to find and correct all such errors. SECTIONS 100 and 101 are a good example of correct drafting format. [See s. 1.04, Manual for guidance on the correct arrangement of material in SECTIONS.]

f. The order of s. Comm 41.03 (1) (a) and (b) should be reversed, placing the more general statement of applicability first.

g. In s. Comm 41.03 (2) (a), the two occurrences of “department-written rule in this chapter” should be replaced with “provision of this chapter.”

h. With regard to s. Comm 41.03 (2) (b) and (c), the correct manner to address the kinds of conflicts described here is to use “notwithstanding” and “except as provided” clauses in the specific provisions. The rule should not leave it to the reader to figure out which provision applies in a given instance.

i. Similarly, s. Comm 41.03 (3) uses an inappropriate drafting device. Section Comm 41.10 speaks for itself and there is no need for a statement in the section dealing with applicability [s. Comm 41.03 (3)] to say that it means what it says. If there are apparent conflicts, they should be addressed through the use of “notwithstanding” and “except as provided” clauses in the specific provisions.

j. Section Comm 41.04 (1) should be treated in one of the following ways: (1) repeal and recreate the subsection in a single SECTION and show the text of pars. (a) and (b) without strike-throughs or underscoring; or (2) treat the subsection in two SECTIONS, the first of which renumbers and amends Comm 41.04 (1) as Comm 41.04 (1) (a) and the second of which creates Comm 41.04 (1) (b) and (Note). The latter approach would show the reader how sub. (1) (a) is being modified. Also, the comma following “Alteration” should be outside the end quotation mark, as it is not part of the defined word.

k. Rather than renumbering numerous provisions within s. Comm 41.04, it would be preferable to use the decimal system described in s. 1.03 (2) (g), Manual, to insert new rule provisions in their proper numerical or alphabetical order. Renumbering impairs the ability to trace a provision’s history and may result in ambiguity or error. It is best to avoid renumbering any unit to eliminate a gap in numbering, as is done in SECTIONS 15 and 16 and elsewhere, or to otherwise reuse a previously existing number that is eliminated by repeal.

l. The treatment clause to SECTION 25 should read: “Comm 41.04 (30) and (Note) are repealed.”

m. The treatment of s. Comm 41.08 should be done in three rule SECTIONS: the first should renumber Comm 41.08 (1) as Comm 41.08 and amend the renumbered provision; the second should repeal s. Comm 41.08 (2); and the third should create Comm 41.08 (Note).

n. Section Comm 41.09 (3) relates to inspections, not enforcement, and so would be more appropriately placed in subch. II, perhaps numbered as s. Comm 41.15 (4).

o. Together, SECTIONS 35 and 36 of the rule make a number of changes to current s. Comm 41.10, Adoption of Standards by Reference. The treatment clauses to the two SECTIONS are drafted incorrectly and, among other things, there are errors in the renumbering of provisions and the treatment of notes. To avoid confusion and improve readability, it is suggested that s. Comm 41.10 be repealed and recreated. That would be done in SECTION 35, with the following treatment clause: “SECTION 35. Comm 41.10 is repealed and recreated to read:”. The rule text would be drafted as the department wishes it to read once the rule is promulgated, without any strike-throughs or underscores. Notes no longer needed would simply be deleted and newly created notes would be inserted as needed. Current notes the department wishes to amend should be drafted as they will appear in the rule as promulgated, again without strike-throughs or underscores.

Where some material leads into other material, for example, in s. Comm 41.10 (2) (intro.), which leads into pars. (a) and (b), draft the (intro.) with language that ends grammatically in a colon and leads logically to the language in pars. (a) and (b). For example, sub. (2) (intro.) could say: “The following standards of the American Society of Mechanical Engineers (ASME):”. Then, all provisions relating to ASME could be listed in paragraphs under the (intro.). This would appear to include the language in proposed sub. (2) (a) to (e), some of which is in current SECTION 36. Place any notes immediately after the provision or provisions to which they apply.

p. The rule should include a note to the LRB indicating in which subchapter, subch. I or subch. II, the new s. Comm 41.11 is to be placed. If it pertains to inspections, it should be in subch. II.

q. Section Comm 41.15 (4) (a) should be rewritten in the active voice to clearly indicate who must provide the inspection reports. Is it the inspector? The department? There are numerous other examples in the rule of duties such as these that should be stated in the active voice. [See s. 1.01 (1), Manual.]

r. SECTION 46 of the rule combines a variety of treatments, including renumbering, amending, and creating. SECTIONS 47 and 48 provide separate treatments, repealing and creating, respectively, but not in the sequence of the provisions as they appear in the code. These various treatments should be separated into a number of SECTIONS, each providing a separate treatment of the rule provisions, in sequence.

s. In the treatment of s. Comm 41.33 and numerous other provisions, hyphens are inserted in an incorrect manner. In the example of inserting a hyphen between “pressure” and “reducing,” the correct format is as follows: ~~pressure-reducing~~ pressure-reducing.

t. It is unclear why the rule changes s. Comm 41.33 (intro.) into a subsection, as it does appear to introduce the material in the following subsections. The final sentence is substantive, though, and could be moved to one of the existing subsections or made a subsection of its own.

u. Section Comm 41.33 (1) (title) should be created in a separate SECTION, following SECTION 69 of the rule. See SECTIONS 93 and 94 of the rule for an example of correct format for this type of treatment.

v. The treatment of s. Comm 41.36 should be accomplished in two SECTIONS, the first of which repeals Comm 41.36 (2) (title) and the second of which renumbers Comm 41.36 (2) as Comm 41.36.

w. In references to sections of the statutes or administrative rules, the word “section” is spelled out only if it is the first word in a sentence; otherwise, it is abbreviated “s.” (for singular) or “ss.” (for plural). SECTIONS 71 and 74 change correct formats to incorrect formats.

x. The treatment of s. Comm 41.38 (1) is complicated. The correct sequence of actions is the following:

SECTION X. Comm 41.38 (1) (intro.), (a), and (b) are consolidated, renumbered Comm 41.38 (1) (a), and amended to read:

Comm 41.38 (1) ACCIDENTS. (a) ~~Whenever~~ If a component of a boiler, or pressure vessel, or power piping fails and causes an injury to any person that needs more than first aid treatment, the owner or user shall ~~do all of the following:~~ (a) Notify ~~report the facts involved to the department on form SBD-10787-E during normal business hours or notify the state division of emergency management during non-business hours~~ within 24 hours of the accident. (b) ~~Shall~~ The owner or user may not remove or disturb the boiler, or pressure vessel, or power piping or any of...etc.

SECTION Y. Comm 41.38 (1) (a) (Note) and (b) are created to read: [Note that the underscoring should be removed from both of these provisions, as they contain newly created language. [See s. 1.06 (1), Manual.]

...

SECTION Z. Comm 41.38 (1) (b) (Notes) and (4) (Note) are amended to read:

...

y. Also, with regard to the note following s. Comm 41.38 (1) (a), the third note following sub. (1) (b), and the note following sub. (4):

(1) Is *www.commerce.wi.gov* (emphasis added) still the correct website address, in light of the dissolution of the Department of Commerce?

(2) The three notes contain identical language. It appears that one note should suffice if it is drafted to make clear that it applies to the entire section.

z. In s. Comm 41.41 (1) (a), the amendment of the form number should be written as follows: ~~SBD-6314~~ SBD-6314-E. Similarly, in s. Comm 41.41 (4) (b), the insertion of the hyphen should be written as follows: ~~solid-fuel-fired~~ solid-fuel-fired. In a number of locations in the rule, the revision of the reference to ANSI/ASME standards should be written as follows: ~~ANSI/ASME~~ ASME. The rule should be reviewed for other errors of this nature.

aa. The note following s. Comm 41.41 (2) (c) appears to contain substantive material relating to a provision [s. 41.16 (2) (c)] that appears much earlier in the chapter. The substantive language should be in rule text, not in a note, and its current placement should be reviewed.

bb. It is appropriate to number the notes following s. Comm 41.42 (1), but the rule does not entirely accomplish this. Two steps are required. The first step is to give numbers to the existing notes; the second step is to create and number the two new notes. Note that SECTION 79 of the rule states that it creates Note [3], but the “[3]” designation is missing from the text. Also, in Note [3], should “with” be inserted before “Canadian”?

cc. The department may wish to number multiple notes occurring in other provisions of ch. Comm 41, using the technique described in the previous comment.

dd. SECTION 80 should be separated into three SECTIONS: the first would amend Comm 41.42 (2) (a); the second would renumber Comm 41.42 (3) as Comm 41.42 (3) (a) and amend it; and the third would create Comm 41.42 (3) (b).

ee. Section Comm 41.62 (2) (a) 2. b. should be numbered s. Comm 41.62 (2) (a) 3.

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

In the note following s. Comm 41.03 (1) (c), the correct reference is “chs. Comm 61 to 66”, without reference to the Wisconsin Commercial Building Code. [See s. 1.07, Manual, with particular attention to the format of internal references. Note that, since the Building Code is part of the Wisconsin Administrative Code, as is ch. Comm 41, this is actually an internal reference.]

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

a. In s. 41.04 (4), the definition of “authorized agent” is confusing. Paragraph (a) says that it is “[a] certified inspector who is addressed in a written contract with the department as enforcing this chapter.” What does it mean to be “addressed” in a written contract? Between whom is the contract? This definition appears to assume that the reader already knows a great deal that is not specified in the definition. Paragraph (b) states that the City of Milwaukee is an authorized agent. Is that literally what is intended? Since s. Comm 41.04 (4) (intro.) states that

an “authorized agent” is either (a) or (b) *or their authorized representatives*, does par. (b) mean that anyone authorized by the City of Milwaukee is an authorized agent?

b. The word choices in s. Comm 41.03 (1) (a) and (c), “that are existing” and “that exist,” are unclear. What is meant by “does not apply retroactively to boilers...that are existing prior to the effective date”? Does “existing” mean “installed”? Or does it refer to any of the described equipment regardless of whether it is already installed or being installed in a public building or in a one- or two-family residence? A more precise and descriptive term would help clarify the intent.

c. Perhaps even more confusing is s. Comm 41.27. Since it refers to boilers “existing or installed,” existing and installed must have different meanings (or else two separate words would not be needed). What that difference is, though, is unclear. That provision specifies that certain rules apply to boilers and pressure vessels existing or installed on or after the effective date of the rule. If “existing” refers to equipment that was previously installed, then “existing or installed on or after” would appear to include *all* boilers and pressure vessels, since “existing on” would be equivalent to “installed before.” See also s. Comm 41.53 (1).

d. In the definition of “relief valve” in s. Comm 41.04 (29), no comma should be inserted. (“Which” is preceded by a comma; “that” is not.)