WISCONSIN LEGISLATIVE COUNCIL
RULES CLEARINGHOUSE

Scott Grosz
Clearinghouse Director

Margit Kelley
Clearinghouse Assistant Director

Terry C. Anderson
Legislative Council Director

Jessica Karls-Ruplinger
Legislative Council Deputy Director

CLEARINGHOUSE RULE 16-069

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 plain language analysis in the rule summary does not contain sufficient detail to enable the reader to understand the content of the rule and the changes made in existing rules. [s. 1.02 (2) (b), Manual.] Because the plain language analysis does not sufficiently explain which changes were made for what reasons, it is generally difficult to evaluate the statutory authority for the various changes. The plain language analysis explains that "the proposed updates would incorporate recent federal streamlining provisions to re-establish consistency between federal and state rules for environmental documents related to transportation", but does not provide any detail about the ways in which ch. Trans 400 may be inconsistent with federal rules. Likewise, the plain language analysis explains that "this rule-making addresses non-substantive errors and provisions that may be perceived as internally inconsistent in the current rule", but also does not provide any detail about which provisions within the proposed rule fall within this category of changes. Accordingly, it is difficult for a reader to know whether any change is meant to be: (1) substantive, but based on substantive changes to federal law; (2) substantive, but meant to address perceived internal inconsistencies; or (3) a non-substantive correction of an error. The department should consider providing additional detail characterizing the changes proposed by the rule in its plain language analysis and explanation of statutory authority.

b. In SECTION 12 of the proposed rule, the department proposes replacing "Measures necessary to avoid, minimize and to mitigate adverse environmental impacts of proposed actions shall be part of the development and evaluation of alternatives" [emphasis added] with "Measures necessary for the mitigation of adverse environmental impacts of proposed actions shall be part of

the development and evaluation of alternatives.". Is the removal of the inclusion of measures necessary to avoid and minimize adverse environmental impacts as part of the development and evaluation of alternatives consistent with s. 1.11, Stats., and related federal law? Likewise, the proposed rule makes a number of changes to the notice and hearing provisions in ch. Trans 400. Are these changes consistent with related state and federal law?

2. Form, Style and Placement in Administrative Code

a. An introductory clause must enumerate each of the rule provisions treated by the proposed order and the nature of the treatment. The introductory clause to the proposed rule instead specifies very generally that the proposed rule "amend[s] … ch. Trans 400". Rather, the introductory clause should include the following treatments, as organized per s. 1.02 (1), Manual:

> To repeal Trans 400.04 (15), 400.05 (note), 400.08 (1) (a) (note), 400.11 (1) (b) 1. to 4., (3) (b) 1. to 4., and (5) (b) 1. to 5., and 400.13 (1) (a); renumber Trans 400.08 (1) (c) 4. and (d) 4.; to renumber and amend Trans 400.08 (1) (c) (intro.), 3., and 5., and (d) (intro.) and 3., 400.10 (4) (a) 1., 400.11 (1) (b) (intro.), (3) (b) (intro.), (5) (b) (intro.) and (7), and 400.12 (4); to amend Trans 400.04 (3), (4), (5), (10), and (24), 400.05, 400.06 (5) and (6), 400.07 (2) (intro.), (b) 1., and (c), 400.08 (1) (a) (intro.), 1. c., 2. a. and b., and 3. (note) and (b) (intro.), 3., and 5., and (2) (a) and (f), 400.09 (4) (e), 400.10 (3) (c), (4) (a) 5., and (5) (intro.), 400.11 (2), (4), and (5) (a) and (c), 400.12 (3) (a) and (4) (title), 400.13 (1) (b) (intro.) and (2) (a), and 400.14 (1) (a) and (2) (a); to repeal and recreate Trans 400.08 (1) (b) 1. and 2., (c) 1. and 2., and (d) 1. and 2.; and to create Trans 400.03 (note), 400.04 (3) (note) and (22m), 400.10 (4) (a) 1g, 400.11 (7) (b) and (8), 400.12 (4) (b), 400.13 (1) (am) and (3), and 400.14 (3).

b. In SECTION 1 of the proposed rule, the rule should use the form "s. 1.11, Stats.", for the statutory citation contained in that provision. [s. 1.07 (2), Manual.]

c. SECTION 8 of the proposed rule defines "participating agency" as "any Native American tribe or any local, state, or federal agency, other than the lead agency, with an interest in the project". The phrase "with an interest in the project" is vague. The primary difference between the proposed definition of "participating agency" and the current definition of "cooperating agency",—other than the inclusion of Native American tribes in the former—is that a cooperating agency "has jurisdiction by law over the proposed action or which has special expertise with respect to any relevant environmental effect generated by the proposed action". [s. Trans 400.04 (4).] The proposed definition of "participating agency" specifies that it includes "cooperating agencies", so it is not clear what other agencies might have "an interest in the project".

d. In SECTION 9 of the proposed rule, why has the department proposed changing "a DEIS and FEIS", to "an approved draft or final environmental document"? Would the proposed change affect documents other than a DEIS or FEIS? If not, does any benefit of changing this wording outweigh the possibility for confusion about the documents this provision applies to?

e. In a variety of places, the proposed rule should ensure that the rule text utilizes appropriate title format as described in s. 1.05 (2), Manual. [See, for example, the use of single quotation marks in SECTIONS 26, 27, 31, 33, and 37 and the use of solid capital letters in SECTION 52.]

f. In SECTION 42 of the proposed rule, the department has inserted the word "substantive" before "environmental issue", but the rule does not appear to provide guidance on what constitutes a substantive versus non-substantive environmental issue.

g. In SECTION 58 of the proposed rule, should the introductory material end with the phrase, "all of the following"?

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

a. Is the change in SECTION 18 of the proposed rule necessary? It appears these changes were made to include, within the section that currently lists various types of fixed rail transit facilities as examples of department major actions that require the preparation of an EIS, "bus rapid transit that will not be located within an existing transportation right-of-way". Would bus rapid transit facilities not be included in s. Trans 400.08 (1) (a) 1. d.? That provision lists as another example of major departmental actions requiring the preparation of an EIS, "New construction or extension of a separate roadway for buses or high occupancy vehicles not located within an existing highway facility".

b. In a number of SECTIONS of the proposed rule, the department has modified rule provisions that explain when certain documents are required or provisions apply by inserting the word "normally" before the words "require", "required", or "apply", [See, for example, SECTIONS 17, 22, 26, 27, 31, and 33.] Inserting the word "normally" suggests that there are exceptions to these provisions, but the rule does not describe when these exceptions might apply.

c. In SECTION 30, there should be a space between "department" and "may".

d. The "9" between "renumbered and Trans" in the treatment clause of SECTION 32 should be removed.

e. The "2" between "renumbered" and "Trans" in the treatment clause of SECTION 38 should be changed to "to".

f. In SECTION 43, why was "secondary" changed to "indirect"?

g. Throughout the current rule, there are a variety of instances in which a paragraph contains a clause that specifies "Examples…are as follows" and then lists the examples in subdivisions of that paragraph. Throughout the proposed rule, the department has eliminated the "examples… are as follows" clauses from these paragraphs and instead included similar language within each subdivision. The department should review for grammatical correctness all of the instances in the rule in which it has made this change and ensure that introductory provisions properly relate to subunits following the introductory material as described in s. 1.03 (3), Manual. [See, for example, SECTIONS 23 to 38.]

h. In SECTION 56, the word "determines" is awkward. The department might consider replacing "if the department determines to afford" with "If the department affords…." This

comment applies to various other SECTIONS of the rule where similar language appears. [See, for example, SECTIONS 62, 63, and 68.]

i. In SECTION 59, the "6" in s. Trans 400.11 (8) (c) 3. should be removed.

j. There should be a space between "a" and "request" in SECTION 62.

k. The first sentence of SECTION 63 of the proposed rule is overly verbose. It could be written as follows: "The department may hold a public hearing or afford the opportunity for a public hearing for ER actions.". Because "may" is permissive, it is unnecessary to also say the department has discretion.

l. The department should review the proposed rule throughout for overly verbose language. [See, for example, SECTION 10 ("the following specific versions"; and SECTION 65 ("To the maximum extent practicable" and "expeditiously develop").]