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## WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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### **CLEARINGHOUSE RULE 05-032**

#### **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.]**

#### **General Comment**

Section 227.14 (1m) (b), Stats., gives the department the authority not to use standard Wisconsin drafting style in drafting certain rules, including this rule. Therefore, this report generally avoids commenting on drafting style concerns that would ordinarily be commented on. However, there are some provisions in which readability or clarity could be improved by following standard Wisconsin drafting style and comments are included regarding those provisions.

#### **1. Statutory Authority**

a. Section NR 661.02 (6) appears to set standards of proof applicable to actions in circuit court. The same applies to ss. NR 661.03 (3) (b) 2. c. 1), 661.04 (6) (a), and 661.38 (3) (h). Even if the Environmental Protection Agency (EPA) has the authority to set such standards, does the department?

b. The department should review the entire rule to ensure that it has not unduly delegated its authority under state law to decisions or actions of the EPA or to future versions of federal regulations and that it has not attempted to improperly regulate the EPA. Examples of these concerns in the rule include the following:

1. The directive to the EPA administrator to make the specified determination within the prescribed time in s. NR 668.13.

2. Citations to federal regulations that are not limited to specific versions of the regulations, such as in ss. NR 668.50 (1) and (6), 670.062 (intro.), and 679.43 (2). While the rule contains numerous notes that state a specified section or subchapter is based on a cited federal regulation as of July 1, 2003, since notes in rules do not have the force of law, these notes do not address this delegation concern.
3. The authority for the EPA administrator to approve the use of an alternative treatment method under s. NR 668.42 (2).
4. The deferral to the EPA region 5 administrator to classify a hazardous waste management facility as a major facility in the definition of “major facility” in s. NR 670.002 (16).

## **2. Form, Style and Placement in Administrative Code**

- a. With the entire text written as new material, the reader has no idea of what text is new, what text is amended, how that text is amended, and what text has been deleted. Furthermore, the rule appears to substantially reorganize existing rules, such that tracking or even finding the changes is very difficult.

The analysis does little to help the reader. The plain language analysis provides neither analysis nor even a description of the rule, focusing almost entirely on a justification for fee increases. There are hints of what the rule does in other sections of the analysis. For example, the comparisons to federal regulations and to rules in adjacent states repeatedly state that the rule continues one or another provision, suggesting (but not stating) that the content of the rules is largely unchanged. Other hints are in the summary of data and methodologies, which indicates the *types* of changes the rule makes but identifies no specific changes. The most useful information is the chapter-by-chapter list regarding anticipated costs; although it still does not say what the rule does, it identifies the subjects of the individual pieces.

The following additions to the analysis are suggested as aids to the reader:

1. A chapter-by-chapter guide, in which each chapter, subchapter, or appendix is listed. The guide should identify the subject matter of the chapters, subchapters or appendices and describe how the rule affects them. If a portion of the rule is unchanged, or changed in only minor or technical points, it should state this; if a portion is changed substantively, the change should be identified. (At what point a change warrants individual listing is, obviously, a judgment, but some items, such as the deletion or modification of Wisconsin-specific provisions, may be of considerable interest to members of the public.) This guide could be written under the plain language analysis heading, but may also include the cost estimates, to avoid repetition of the outline under that heading.
2. A guide to the renumbering of rule provisions. This could be a two-column table, showing the old numbering on the left and the new numbering on the right. (This is a

common practice used by the Legislature when recodifying entire chapters of the statutes.)

b. The rule includes a note after the first section of each subchapter, identifying the source of that subchapter. Often, this note ends up in the middle of the subchapter, where it is hard to find. A more helpful placement would be after the title of the subchapter.

c. The first three subsections of s. NR 660.11 are misnumbered, with two subsections numbered (1) and none numbered (3).

d. The first s. NR 660.11 (1) includes instructions for reading the corresponding table, but none of the other subsections include instructions. If instructions are not needed for most of the tables (which do not all have the same format as the first table), are the instructions needed for the first table?

e. The reference in the first phrase of s. NR 660.20 (1) should be to s. 227.12, Stats., and **ch.** NR 2.

f. The line break at the end of s. NR 660.31 (1) (d) is missing; paragraph (e) should begin on a new line.

g. The definitions in s. NR 661.01 (3) should be in alphabetical order.

h. Section NR 661.02 should indicate the applicability of the definition it creates. This could be done by an introductory sentence, such as: “For purposes of chs. NR \_\_ to \_\_, “solid waste” has the meaning specified in this section”. The same comment applies to the definition of “hazardous waste” in s. NR 661.03 and the exclusions in s. NR 661.04.

i. Section NR 661.02 (3) (a) (intro.) and (b) (intro.) should each end with a phrase such as “any of the following”.

j. In s. NR 661.02 (3) (a) 2. and (b) 2., “However” should be replaced with “Notwithstanding subd. 1.”

k. What list is referred to in s. NR 661.02 (4) (c)? It should be identified by cross-reference.

l. In s. NR 661.02 (5) (a) 3., “subsection” should be replaced with “subdivision”.

m. Defined terms should be used without reference to the definitions. As one example, in s. NR 661.04 (1) (f) and (g), the phrase “as defined in s. NR 661.01 (3)” should be deleted.

n. In s. NR 661.11 (1) (c) 3., “of this section” should be omitted.

o. The material following s. NR 661.11 (1) (c) 11. should be numbered, presumably as par. (d). Also, the first “on” should be “in”.

p. Sections NR 661.33 (intro.) and (1) to (4) should be numbered NR 661.31 (1) (intro.) and (a) to (d); NR 661.33 (5) and (6) should be numbered NR 661.33 (2) and (3).

- q. Section NR 661.38 (3) (a) 1. c. should read, "The notice under this subdivision shall ...".
- r. In Appendix II to ch. NR 661, "TCLP" should be spelled out.
- s. Most of the cross-references in s. NR 662.054 are to the Code of Federal Regulations. Should these instead refer to the Wisconsin Administrative Code?
- t. In s. NR 662.084 (5), readability would be improved if the text following the address were added to the text before the address, i.e., "...to the notifier, to the competent authorities of the exporting and transit countries, and to the:".
- u. Section NR 663.30 (3) (c) refers to "Wisconsin emergency management," while s. NR 664.0056 (4) (b) refers to "the division of emergency government". Only one of the terms should be used.
- v. The table of contents for ch. NR 664 should be presented in its entirety at the beginning of the chapter, not five subchapters worth of it there and the rest with their respective subchapters. Similarly, the table of contents for ch. NR 665 should include subchs. DD and EE and the appendices in that chapter.
- w. In ss. NR 664.0098 (intro.), 664.0099 (intro.), and 664.0100 (intro.), "this subchapter" should be replaced with "s. NR 664.0091 (1)".
- x. Since titles are not a part of the statutes or rules, the applicability of the definitions in s. NR 664.0141 should be stated in the text of the rule, not the title.
- y. The definitions that follow s. NR 664.0141 (6) should be numbered as paragraphs.
- z. The reference in the definition of "current plugging and abandonment cost estimate," following s. NR 664.0141 (6), is an incomplete citation—it cites an entire chapter, not a section. Alternatively, "s." should be replaced with "ch."
- aa. In s. NR 664.0143 (2) (c) (intro.) and 2. a., the cross-references are internal, and so should read, "sub. (1)". The same is true in s. NR 664.0145 (2) (c) (intro.) and 2. a.
- bb. Can a note be added to s. NR 664.0145 (2) (a) that states where the circular may be obtained?
- cc. In s. NR 664.0251 (3), the rule is inconsistent in the use of metric and English units.
- dd. Section NR 664.1081 incorporates definitions that are used elsewhere in the statutes and the rule. This is not done elsewhere in the rule.
- ee. In s. NR 665.0012 (1), the state and federal governmental contacts should be listed in a note rather than the text of the rule to simplify subsequent revisions as changes are necessary.
- ff. Generally, the rule is written in the active voice, making it possible to ascertain who has the specified power or duty. However, in certain provisions, the imperative voice is used. In several parts of ch. NR 665, use of the imperative voice could be replaced by the active voice

and the rule would be clearer. For example, s. NR 665.1033 (2), (3), (4) (a) to (e), and (5) should begin with “The owner or operator shall...”. Similar changes are needed in the last sentence of s. NR 665.1033 (4) (c), (6) (b) 1., 2., and 6. b., and (11) (b) 2. The entire rule, especially the provision of ch. NR 665, should be reviewed for occurrences of this problem.

gg. In s. NR 665.1059 (1), “will” should be changed to “shall” or “may,” depending upon the intent of this subsection. The word “shall” should be used to denote a mandatory duty or directive, and “may” should be used to denote an optional or permissive privilege, right, or grant of discretionary authority. [See s. 1.01 (2), Manual.] The entire rule should be checked for this problem. For example, in s. NR 665.1063 (6), “can” should be changed to “may,” and in s. NR 665.1086 (3) (b) 1., “is” should be changed to “shall be”.

hh. In s. NR 665.1202 Appendix I, the material should be renumbered as follows: “Records of each hazardous waste received, treated, stored, or disposed of at the facility which include all of the following.” should be numbered “(1)”; current sub. “(1)” should be changed to “(a)”; and “(b)” should be added before “Each”.

ii. Section NR 666.080 (1) references a table that does not appear to be included in the rule.

jj. In s. NR 666.100 (2) (a), “chapter” should be changed to “subchapter”. Also, it appears that “they” should be changed to “the conditions”.

kk. In s. NR 666.107 (2) (d) (intro.), “under pars. (a) and (b)” should be added after “Tier I and Tier II screening limits”. The entire rule should be checked to make sure that internal rule citations are included where appropriate. [See s. 1.07 (2), Manual.]

ll. In s. NR 666.111 (5) (b) 2. (intro.), “This assessment” should be changed to “The assessment under sub. (1)”.

mm. In ch. NR 666, Appendix XI, it appears that heading A. should not be italicized.

nn. In s. NR 666.240 (1) (intro.), the rule should identify which rule sections apply if waste must be managed as hazardous waste and which rule sections apply to hazardous waste containers and tank storage requirements.

oo. In the table of contents for subch. H of ch. NR 666, the title of Appendix IX does not reflect the title in the text.

pp. In s. NR 668.02, the definitions should be alphabetized.

qq. Notes in the rule should not contain substantive provisions. See s. 1.09 (1), Manual. For examples, see the notes following ss. NR 670.014 (2) (k) 3. and 670.079 (4).

rr. The references to subds. 1., 2., and 3. in s. NR 668.01 (3) (d) (intro.) should include periods after the numbers.

ss. Subsection (8) in s. NR 670.042 should start on a new line.

tt. The internal reference in s. NR 670.432 (3) should be to “sub. (2)” rather than “s. NR 670.432 (2)”.

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

a. In s. NR 665.1083 (3) (b) 7. a., reference is made to subch. O of ch. NR 664. However, in the following subdivision paragraph, reference is made to subpart O. Are these the same things? If so, the references should be consistent.

b. In the analysis accompanying the rule, the reference to s. 227.14 (1m) being interpreted should be to the more specific s. 227.14 (1m) (b), Stats., since another part of the analysis indicates that the format in the proposed rules is *similar*, rather than *identical*, to the relevant federal regulations.

c. The rule incorporates a number of technical standards by reference. Consent for incorporation of these standards must be obtained from the Revisor of Statutes and Attorney General pursuant to s. 227.21 (2) (a), Stats. The analysis accompanying the rule should, but does not, indicate whether this consent had previously been given for a prior version of the department’s hazardous waste rules. If consent has not been given, then the department should obtain the consent and report it in the analysis.

d. The rule includes a number of vague references to the “requirements previously found in this section”. See, for example, s. NR 668.41, the note to ss. 668.42, 668.43, and 668.46. Which requirements are being referenced?

e. Note 1 following Table 1 in s. NR 668.42 refers to s. NR 668.42, Table 2. Section NR 668.42 contains only one table, Table 1.

f. Footnote A in Table 1 in Appendix VII to ch. NR 668 refers to the “First, Second, and Third rules” but does not provide a citation to these rules.

g. The list in the analysis accompanying the rule of statutes interpreted and of statutes providing authority for the rule should include s. 299.05, Stats., as the rule implements the permit guarantee program in s. 299.05 in s. NR 670.415 (1) and (3).

h. The entire rule should be reviewed for a proper citation format. For example:

1. In s. NR 670.001 (3) (b) 9. c., the correct citation is “ss. NR 664.071, 664.072, and 664.076”. [See also sub. (3) (e).]
2. In s. NR 670.010 (9), the correct citation is “and ss. 670.013 and 670.014”.
3. In s. NR 670.012, the phrase “these rules” should be replaced by a more specific designation of the sections, subsections, or chapters referred to by this phrase.
4. In s. NR 670.014 (3) (g) 3., the notation “s.” should be replaced by the notation “ss.”
5. In s. NR 670.019 (intro.), the notation “subs.” should be replaced by the notation “sub.”

6. In s. NR 670.028, the notation “ss.” should be replaced by the notation “s.”
7. In s. NR 670.031 (3), the notation “NR” should be inserted before the number “664”.
8. In s. NR 670.041, the notation “Stats.,” should be inserted after the reference to “s. 289.30 (8)”.
9. In s. NR 670.072 (2) (e), is it clear to let the phrase “section 3008 (h) refers”?

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

a. The definition of “designated facility” in s. NR 660.10 (21) is unclear. It specifies a combination of characteristics in the format: (1), (2), or (3), and (4). This could be read either as [(1) or (2) or (3)] and (4) or as [(1) or (2)] or [(3) and (4)]. If the first reading is correct, the definition could be drafted as:

(21) “Designated facility” means a...facility to which all of the following apply:

(a) One or more of the following:

1. The facility has received...
2. The facility has received...
3. The facility is regulated...

(b) The facility has been designated....

b. Should the term defined in s. NR 660.10 (54) be “hazardous waste management unit”?

c. Sections NR 660.31 to 660.40 confuse the terms “criterion” and “factor”. A criterion, synonymous with “standard”, is specific, while a factor is general. The lists in these sections are factors, not criteria. Sections NR 660.31 (3) (intro.) and 660.40 (1) (intro.) correctly use “factor”, as does s. NR 661.02 (4) (c).

d. A more descriptive title for s. NR 661.04, and more in line with the section title, would be “Exclusions from the Definition of Solid Waste”. The following introduction would read: “... are excluded from the definition of “solid waste” for...”. The same comment applies to sub. (2) (title) and (intro.).

e. Is s. NR 661.04 (2) (f) 2. (intro.) correct? Should it conclude with “and are **any** of the following:”?

f. Should the reference in s. NR 661.04 (4) (b) (intro.) be “par. (a) 1. **or** 2.”?

g. To clarify the meaning of s. NR 661.21 (1) (a), a comma should be inserted after either “solution” or “volume”. The meaning depends on where the comma is placed, and the provision is unclear without a comma.

h. The first note to s. NR 662.050 should refer to “the U.S. Constitution”. The same applies to ss. NR 662.060 (3) (note) and NR 622.080 (2) (note).

i. Does s. NR 662.054 (7) (intro.) refer to [(a) or (b)] and (c), or to (a) or [(b) and (c)]? This should be clarified.

j. In s. NR 663.10 (2), to what rules does “These rules” refer? This chapter? This subchapter? Some other portion of the rules?

k. Section NR 664.0221 (5) (a), and a number of other provisions in the rule, use the term “monofill”. Is this term defined?

l. In s. NR 664.0573 (9), the word “and” should be inserted before the number “670”.

m. In s. NR 665.0119 (2) (a) (intro.), the reference to “Wisconsin law” should be clarified.

n. In s. NR 665.0145 (6), there is some computer error in the title to that subsection.

o. In s. NR 665.1033 (4) (a), the department should specify what an operator or owner should “design a flare for”.

p. In s. NR 665.1034 (3) (d), “under par. (a) 3.” should be inserted after both instances of the phrase “3 runs”. In sub. (6), “based on knowledge of the waste” should be replaced with the phrase “under sub. (5)”.

q. In s. NR 665.1035 (3) (d) 1., “the” should be inserted before “period”. The entire subsection should be checked for this problem.

r. In s. NR 665.1060 (2) (a) and (c), “can” and “not” should be replaced with “cannot”.

s. In s. NR 665.1064 (9) (b), “percent” should be changed to “percentage”.

t. In s. NR 665.1080 (1), “provided in” should be added after “as” and “provide otherwise” should be deleted.

u. In s. NR 665.1083 (4) (d), it appears that the phrase “the department shall” or “the department may” should be inserted after the comma. This problem also occurs in s. NR 665.1084 (1) (d) 4.

v. In s. NR 665.1084 (1) (c) 2. d., the quotation marks around “site sampling plan” should be removed. This problem also occurs in sub. (2) (c) 2. d. In sub. (1) (d) (intro.), can the department specify what it means if the owner or operator “uses knowledge”? In sub. (2) (intro.), it appears that the phrase “under sub. (1)” should be added after “determination”.

w. In s. NR 665.1085 (3) (b) 4., the phrase “to consider” should be replaced by either “that shall be considered” or “that may be considered”.

x. In s. NR 665.1086 (7) (intro.), it appears that “shall” should be inserted before “comply”. In sub. (7) (a), “if required” is vague; can the department include the rule provisions that require that a written explanation be prepared?

- y. In s. NR 665.1087 (1), a period should follow the subsection title.
- z. The material in s. NR 665.1090 (5) (e) (intro.) and (f) (intro.) is confusing and should be rewritten to more accurately reflect the department's intent. In sub. (9) (c) 2., "currently" should be deleted.
- aa. In s. NR 666.020 (2), "presently regulated" should be changed to "regulated under this subchapter". In subs. (3) and (4) (intro.), "under this subchapter" should be inserted after "regulated".
- bb. In s. NR 666.070 (2) (b), "recyclable materials" or "of recyclable materials" should be inserted after "generators", "transporters", and "store".
- cc. In s. NR 666.100 (2) (b) (intro.), "The following standards all continue to apply:" should be changed to "All of the following standards apply:". In addition, the rule should specify what these standards apply to. In sub. (2) (b) 1., "you elect" should be changed to "an owner or operator elects". In sub. (4) (a) (intro.), the period after "sub. (8)" should be changed to a colon.
- dd. In s. NR 666.102 (2) (a), the term "license authority" is vague and should be clarified. In sub. (4) (d) 4., the phrase "For the remaining duration of the license" should be more specific.
- ee. In s. NR 666.103 (1) (a) 1., "national" should be deleted. The first instance of "existing" should not be in quotations. In sub. (1) (f) 3. and 4., "Such" should be replaced with "Hazardous". In sub. (2) (a), the owner or operator shall provide information specified in par. (b) to the department, and "Such information is termed a "certification of precompliance""." However, in sub. (2) (b), the information "shall be submitted with the certification of precompliance". The department should clarify whether the information is the certification or whether the certification is separate from the information required under sub. (2) (b). After sub. (2) (f) 10., a note containing the mailing address of the Bureau of Waste Management should be added. In sub. (5), the second sentence is confusing; can the department clarify what the intent is? In sub. (10) (d), "These monitoring and inspection data" should be changed to "The monitoring and inspection data under subs. (a) to (c)".
- ff. In s. NR 666.103 (2) (f), requirements are set forth for a notice that must be published by August 21, 1991. Since that date has long since passed, is the paragraph necessary?
- gg. In s. NR 666.104 (1) (b), the rule should specify how an applicant can "demonstrate to the department's satisfaction" that a compound not listed in Appendix VII or not present in the normal waste feed is a suitable indicator of compliance with the DRE requirements".
- hh. In s. NR 666.106 (8), the rule should specify which methods should be used to predict "on-site concentrations".
- ii. In s. NR 666.200 (6), in the second sentence, it appears that "Military" should be inserted before "Ranges".

jj. In s. NR 666.202 (4), can the department provide guidance about how “(a)ny imminent danger threats associated with any remaining material shall be addressed”?

kk. In s. NR 666.901 (3), the rule should indicate where the characteristics of a hazardous waste can be found in the rules.

ll. The first paragraph under the third heading in the analysis accompanying the rule states, “As authorized by s. 227.14 (1m), Stats., the format of the proposed rule is similar to the federal regulations published in the Code of Federal Regulations” by the EPA...”. Section 227.14 (1m) (b), Stats., authorizes the department to use the format of the federal regulations published in the Code of Federal Regulations if the department “determines that all or part of a state environmental regulatory program is to be administered according to standards, requirements, or methods which are similar to standards, requirements, or methods which are similar to standards, requirements, or methods specified for all or part of a federal environmental regulatory program”. Since this determination is a prerequisite for the department to use the federal format in this rule, the analysis should indicate whether the department has made the determination.

mm. In the summary of the rule chapters affected at the end of the analysis accompanying the rule, the summary of subchs. AA, BB, and CC in chs. NR 664 and 665 refers to “this subchapter” rather than “these subchapters”. Similarly, the summary of subchs. F to H, M and N of ch. NR 666 should refer to “these subchapters” rather than “these subchapter”.

nn. The text at the beginning of s. NR 668.01 (5) (d) is grammatically incorrect and appears to be missing text.

oo. The significance of using the number “4” in the tables following s. NR 668.07 (1) (d) and (2) (c) is not apparent and confusing.

pp. Section NR 668.34 (5) is not clear, as it is not apparent if all of the conditions in sub. (5) pars. (a) to (d) must be met or if the conditions in any of these paragraphs must be met for the exception in sub. (5) (intro.) to apply.

qq. Who or what are “zero dischargers” in s. NR 668.39 (2)?

rr. The references in s. NR 668.40 (1) (a) to (c) to the headings in the table in this section are ambiguous, as the table itself does not contain the headings cited in these paragraphs.

ss. Is footnote 6 used in the table in s. NR 668.40? Its use was not observed in the initial pages of this table.

tt. The rule uses many undefined acronyms. The department should review the entire rule and ensure that all acronyms are defined in all of the chapters in which they are used or in s. NR 660.10. Examples of undefined acronyms include: LDR in s. NR 668.49; CWA in Appendix VI to ch. NR 668; LDRS in Appendix VII to ch. NR 668; UIC in Appendix VIII to ch. NR 668; POTWS in s. NR 670.001 (3) (b) 9.; CQA in s. NR 670.004 (1) (c); DRE in s. NR

670.022 (1) (b) (intro.); POHC in s. NR 670.022 (1) (f) 2.; and ACLs in Appendix I to ch. NR 670.

uu. Section NR 670.001 (3) (b) states that “the following persons are among those who are not required to obtain a hazardous waste license...”. Who else is not required to obtain such a license?

vv. There should be a space between “expiring” and “10” in the first sentence in s. NR 670.010 (1).

ww. The reference in s. NR 670.014 (1) to “certain technical data, such as...” is vague. Can the department be more specific?

xx. The definition of “lamp” in s. NR 673.09 (5) is broad and includes incandescent light bulbs. Is that the department’s intent?

yy. The use of the phrase “(as defined in this section)” in s. NR 673.09 (6) and (9) is redundant and unnecessary, as is the use of “(as defined in s. NR 673.09)” in ss. NR 673.10, 673.30, 673.50, and 673.60.

zz. Section NR 679.42 (3) is missing a period at the end of the sentence.