



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 02-081

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 September 1998.]

2. Form, Style and Placement in Administrative Code

a. The statutory cross-reference in s. Trans 401.03 (1) (c) should include “Stats.,” after the citation.

b. In s. Trans 401.04 (31), the defined term should be “Selected site.” Also, the meaning of the added sentence to this subsection is unclear. Is the intent of the sentence to state: “‘Selected site’ does not include a site from which incidental sales of excavated material are made directly to consumers.”?

c. In s. Trans 401.04 (35m), the quotation marks around the word “minor” should be deleted.

d. In s. Trans 401.07 (1j) (f), the reference “s. Trans 401.07 (1) (d) 2.” should be replaced by a reference to “sub. (1) (d) 2.”

e. In SECTION 401, the text should begin with the notation “Trans 401.07 (2) (g).”

f. In s. Trans 401.107 (1), the subunits should be shown as “(a)” and “(b).”

g. The initial applicability provision should be reviewed carefully. It does not appear that the intent of the department is that the rule should apply only to the three types of actions specified. As drafted, the rule seems to suggest that. Typical initial applicability provisions state that a statute or rule first applies to actions that have been commenced at the time the rule takes effect, except for actions that have reached a certain point in the regulatory approval process. If this is the department’s intent, the three items in the initial applicability would be restated in the

negative, to constitute an exception to the general rule of applicability. For example, the rule would not apply to an action for which a final environmental impact statement has been approved on the effective date of the chapter.

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

Sections Trans 401.105 (1) and 401.10 (4) appear to refer to newly created department forms. If so, the requirements of s. 227.14 (3), Stats., should be met.

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

a. In s. Trans 401.04 (7m) (a) and (b), does the phrase “unless the bid specifies that this chapter does not apply” mean that the parties simply can contract out of ch. Trans 401 and any regulation at all or does it mean that, in accordance with the note following par. (3), if the activity is not regulated by ch. Trans 401, it will be regulated by the Department of Natural Resources? This should be clarified.

b. In s. Trans 401.08 (1) (a), it appears the word “and” should be inserted before the phrase “to the department of transportation.”

c. Section Trans 401.08 (1) (ar) presumably means that the department may hold a pre-construction conference if the events described in either subd. 1. or 2. occur. However, the phrasing of the paragraph could be read to mean that if either of the events in subd. 1. or 2. occur then a pre-construction conference could be held prior to 14 days after the prime contractor delivered or mailed the ECIP to the Department of Natural Resources.

d. In s. Trans 401.105, reference is made to both a prime contractor and a utility person in subs. (1) and (3). However, a utility person is not referred to in subs. (2), (4), and (5). Perhaps the utility person is not referred to in subs. (2) and (4) because of the creation of s. Trans 401.105 (1m) and the differences in these provisions regarding when corrective action should be taken. See also s. Trans 401.11 referring to the failure of a utility person to implement within the prescribed time period a corrective action ordered under s. Trans 401.105. The use of the term “utility person” in these provisions should be reviewed for consistent use.

e. Section Trans 401.106 (1g) is, at best, unclear. First, the subsection appears to be an applicability provision; thus, its title “delayed effective date” is inappropriate. Next, the provision seems to be saying, colloquially:

A number of activities are not regulated by this chapter but will be regulated in the future by the Department of Natural Resources (DNR), but until DNR actually regulates these activities, we will regulate the activities, but only if we want to.

The reader should be made aware, possibly through an appropriate cross-reference, of those transportation facility construction activities that are not otherwise subject to regulation under ch. Trans 401. Also, a note to this provision should be included that provides some explanation of why these activities are not now subject to rules administered by DNR and when

such regulation is anticipated. Finally, the rule should propose some standards under which ch. Trans 401 will be applied to activities that are otherwise not subject to ch. Trans 401.

f. In s. Trans 401.106 (3) (a), the use of the word “new” may be unclear. It is preferred drafting style to specifically describe the regulated activity by using a phrase such as: “For transportation facilities constructed or modified on or after the effective date of this section [revisor inserts date].” [See also, sub. (9) (c).]

g. Section Trans 401.106 (5) (d) 9. could be clarified. Presumably, an area which meets two of the characteristics described in subpars. a. to c., but does not meet the third characteristic, will be prohibited from meeting the requirements of sub. (5). However, the introduction to sub. (5) (d) 9. could be read to mean that the area must fail to meet all of the characteristics specified in subpars. a. to c. before the area is prohibited from meeting the requirements of sub. (5). The provision should be reviewed. Also, in subpar. c. presents a situation in which the soil medium within the infiltration system does not provide an equivalent level of protection. To what is the level of protection equivalent?