



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

Ronald Sklansky
Clearinghouse Director

Richard Sweet
Clearinghouse Assistant Director

Terry C. Anderson
Legislative Council Director

Laura D. Rose
Legislative Council Deputy Director

CLEARINGHOUSE RULE 02-097

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. In s. NR 400.02 (95), the sentence added to the definition of “maximum theoretical emissions” is a substantive provision that should be placed in a substantive provision of the rule. [See s. 1.01 (7) (b), Manual.] In fact, the same is true for all but the first sentence of this definition.

b. In a number of provisions, text does not follow from introductory language that precedes it. [See s. 1.03 (8), Manual.] In some case, the material does not agree grammatically. For example, to agree with the preceding introduction, s. NR 406.04 (2) (f) 2. d. should read: “The owner or operator of the source keeps records” In other cases, the material does not follow conceptually from the introduction. For example, s. NR 439.045 (1) (b) (intro.) sets up a list of items that must be presented in documentation for an application. The list that follows consists of all nouns, except that subd. 4. is a full sentence creating a separate requirement, not related to the introduction. That requirement should either be recast in the format of the rest of the paragraph or renumbered as a separate paragraph. There are additional, similar errors elsewhere in the rule.

c. In s. NR 407.14 (1) (intro.), the phrase “except as provided in par. (e)” should be placed at the beginning of the sentence. Also, the word “for” should be omitted. These errors are made in a number of other provisions in the rule.

d. There are two errors in the treatment clause of SECTION 28: first, the wrong section number is given (it should be s. NR 422.083); second, the word “and” should appear between

“(b)” and “Note.” In the treatment clause of SECTION 44, the word “and” should appear after “NR 447.02 (4).”

e. Section NR 439.045 (intro.) is not actually an introduction, but a separate provision of that section. It should be numbered sub. (1) and be given a title, such as PURPOSE AND APPLICABILITY. The material in sub. (3) should be combined with this subsection. In addition, somewhere in this section (perhaps in the proposed new sub. (1)) a statement should be made that the self-certification and third-party certification options are alternatives, between which the applicant may choose.

f. Rules should not cross reference definitions that already apply to the rule in question. For example, the sentence, “The term EMS has the meaning provided in s. NR 400.02 (61g)” should be omitted from s. NR 439.045 (intro.).

g. Section NR 439.045 (1) (f) (intro.) should indicate whether either of the following conditions is sufficient for a finding of noncompliance or whether both conditions must be met for such a finding.

h. To maintain numerical sequence, the creation of s. NR 445.02 (9), (10), (13), and (14) should follow the amendment of s. NR 445.02 (8) (intro.), in a separate SECTION.

i. The statement in s. NR 445.04 (intro.) that the section applies to sources last modified between the specified dates is duplicated in every provision that follows. The rule could be modified by either omitting this statement from the introduction or deleting it from all of the following provisions. The same is true of s. NR 445.05.

j. In SECTION 62, the numbering of the new section is incorrect—it should be s. NR 445.05 (intro.), as in the treatment clause.

k. Titles should be provided for s. NR 445.04 (7) and (8).

l. Section NR 445.14 (1) (intro.) lists four criteria for determining compliance, all in one sentence separated by an “and” and two occurrences of the word “or.” It is unclear from this construction what combination of conditions are required to produce a determination of compliance. Rewriting this in an outline format would clarify it. Also, the partial list of applicable requirements should be placed in a note.

m. In s. NR 445.07 (5) (intro.), the word “under” should be replaced by “from the requirements of.”

n. Why are there blank rows in Table A for amorphous and crystalline silica and wood dusts, especially if such emissions are exempt under s. NR 445.07 (5) (g) and (h)? It seems that both the blank table entries and the exemptions are superfluous—leaving both out of the rule would have the same effect.

o. In Tables A, B, and C, the four subheadings under Thresholds for Emission Points need further labeling. From the text, it appears that these are categories of facilities by stack height—if this is correct, they should be labeled as such.

p. The footnote and note for Tables A, B, and C appear only once, at the end of Table C, about 20 pages after the notations for footnotes first appear. It would seem more appropriate and

useful to include the footnotes in each table, and most useful to put them at the bottom of the first page of Table A.

q. Both the footnote and the note at the end of Table C appear to be substantive, and so should be incorporated into the text of the rule (though they may be retained as notes in the tables, as well). The first two bullet points of the footnote are included in s. NR 445.07 (1) (c); is the third incorporated elsewhere?

r. Section NR 445.08 (intro.) should be numbered s. NR 445.08 (1) and given a title such as GENERAL.

s. There are two paragraphs numbered s. NR 445.08 (1) (c).

t. The first s. NR 445.08 (1) (c) and subsequent provisions refer to unit risk factors established by either the Environmental Protection Agency (EPA) or the California Air Resources Board. The term should be defined and the specific risk factors should be incorporated by reference.

u. In the second s. NR 445.08 (1) (c), should “column (g) of” be inserted before “Table A or B”?

v. Section NR 445.08 (2) (b) (intro.) should end with either “all of the following” or “any of the following,” as appropriate.

w. Section NR 445.08 (4) (c) does not follow from the introductory language. However, it appears that the introduction is not needed, since all the paragraphs of that subsection are full sentences that stand on their own.

x. Section NR 445.08 (5) (c) 4. and (6) (a) and (b) do not follow from the introductory language. In the latter two cases, simply rewriting the provisions in the active voice may solve the problem.

y. Section NR 445.08 (5) (b) and (c) refer to the admission of a hazardous air contaminate either less than the applicable threshold or greater than the applicable threshold. To cover all contingencies, the rule also should treat the emission of a hazardous air contaminant that equal the applicable threshold. Also, in sub. (5) (c) 1., an owner or operator must submit information adequate to describe how certain control requirements will be met no later than 18 months “after the effective date of this section.” Given the vagaries of what constitutes a month, for example, 28 days, 30 days, or 31 days, it is clearer to use a structure such as the following: “submit information adequate to describe how applicable control requirements . . . will be met no later than the first day of the 18 month after the effective date of this section.” The entire rule should be reviewed for the phrasing of future effective dates.

z. In s. NR 445.09 (3) (a) 1., the phrase “the limit in subd. 1. a. or b., as applicable,” should be replaced by the phrase “either of the following.” The introduction then should conclude with a colon.

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

Cross-references to Tables A, B, and C of s. NR 445.07 are usually complete but sometimes lack the “of s. NR 445.07” portion of the citation. Although it appears that all such

references are found in rule provisions where the full citation has already been used, the full citation still should be used consistently.

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

- a. The rule should be paginated.
- b. The rule quite consistently uses the word “which” when “that” should be used.
- c. In s. NR 400.02 (45e), the definition of “compression ignition internal combustion engine” would be simpler and clearer if written in a single sentence: “. . . means an internal combustion engine that is designed with operating characteristics substantially similar to the theoretical diesel combustion cycle and that lacks a throttle to regulate the intake of air flow for power control during normal operation.”
- d. In s. NR 400.02 (61g), it appears that a comma should be inserted after the second occurrence of the number 14001.
- e. Section NR 406.04 (2) (f) 1. and 2. describe mutually exclusive circumstances; however, s. NR 406.04 (2) (intro.) requires that all of the conditions that follow it must be met. Does the department mean that one of the conditions of par. (f) must be met? If so, it could be clarified by creating s. NR 406.04 (2) (f) (intro.) to read: “One of the following applies:”
- f. Section NR 407.14 (1) (intro.) states that par. (e) is an exception to the requirements of pars. (a) to (d), which are a list of conditions under which the department is required to modify a permit. However, par. (e) is written simply as another condition under which a permit modification would be required. Identical language is also created as s. NR 407.14 (1m) (e), except that the subject of this subsection is the discretionary revision of permits and this paragraph is not cast as an exception. It is unclear what is intended here. If the intent is to allow, but not require, permit revisions based on this language, then the rule should simply create s. NR 407.14 (1m) (e) and not modify s. NR 407.14 (1) (intro.) and (e) and (1m) (intro.). If the intent is something else, that intent needs to be clarified.
- g. In s. NR 438.03 (1) (am) 1., what is a “facility of incidental emissions”? Should this read “facility that emits incidental (or fugitive?) emissions”? Also, the phrase “his or her” should be replaced by the word “the.”
- h. Section NR 439.045 (1) (b) presents a list of documentation that must be included in a permit application. Subdivision 3. appears to require submittal of annual compliance reports. How can these be presented at the time of permit application? Also, the list of additional information that the department may request, in par. (c), is terse to the point of vagueness. For example, environmental aspects *of what?* Finally, par. (d) 3. states that the department may consider the due diligence of the applicant to deliver environmental improvements in deciding whether to approve an application; how can due diligence under an Environmental Management System (EMS) have been determined before the EMS is approved?
- i. In the first sentence of s. NR 439.45 (2) (a), what is “the third party audit”? If it is an existing requirement, then it should be identified by cross-reference; otherwise, the requirement for such an audit should be clearly articulated. In the last sentence of that paragraph, the word “they” should be replaced by “the source” and the word “their” should be replaced by the word

“its.” Similarly, the first sentence of par. (b) should read: “A source . . . its EMS, and who submits . . . the time it is in compliance with its EMS . . . permit, state statutes or rules”

j. The purpose of the definition of “disposal” in s. NR 445.02 (2) is unclear. The term is standard enough that it usually does not require a definition. This definition, however, deviates from standard usage by limiting it to the release of hazardous air contaminants. In this sense, then, how does the defined term differ from “emission,” defined in s. NR 400.02 (57) as the release of an air contaminant, and why is a separate term needed? Furthermore, every use of the term in the rule uses it in the form “disposal of X,” where “X” is either raw materials or waste; a pesticide, rodenticide, insecticide, herbicide, or fungicide; or a pharmaceutical—in no case is it specifically used to refer to disposal of a hazardous air contaminant. It appears that this definition is superfluous.

k. Periods are lacking in s. NR 445.02 (4) (a) 1. and 2.

l. A number of notes, such as the Note following s. NR 445.07, show department telephone numbers as 608-xxx-xxxx. Obviously, these need to be corrected.

m. Section NR 445.08 (intro.) requires that compliance demonstrations be made when operating at the maximum operating conditions allowed by a permit, or in the absence of a permit, at maximum theoretical emissions. Would it be more comparable if, in the absence of a permit, compliance were demonstrated at maximum practical operation or some such concept?

n. Section NR 445.08 (1) (b) requires limiting emissions to a quantity, concentration or duration that is less than a specified concentration. What does it mean to limit an emission to a quantity that is less than a specified concentration, or to a duration that is less than that concentration? The concepts are not directly comparable. Does this mean to limit the emissions to a quantity, concentration or duration *that results in* concentrations less than the specified concentration? If so, then where is the concentration measured, in emissions or ambient air? If it is the former, then the provision should be written to require limiting emissions to the specified concentration; if it is the latter, then the provision should be written to require limiting emissions to a quantity, concentration or duration that will not result in a violation of the ambient air quality standards in column (g) of the table (compare the language used in the following paragraph of the rule); if all of these interpretations are incorrect, then the provision should be clarified in some other appropriate manner.

o. The first s. NR 445.08 (1) (c) and subsequent provisions use the Greek letter phi (Φ) to indicate a factor of 10^{-6} in representing the term “microgram” (Φ g). Is the letter mu (μ) conventionally used in this application (μ g)?

p. Section NR 445.08 (1) (d) requires application of controls in an iterative manner to units that emit “decreasingly smaller amounts” of a contaminant. This could be read in the sense of a double negative: each successive unit emits a less small, i.e. larger amount. To avoid this absurd result, the rule should refer to “progressively smaller amounts.”

q. The first sentence of s. NR 445.08 (4) (a) is confusing. Can it be made more clear by breaking it into more than one sentence?

r. In s. NR 445.09 (3) (a) 1. a. and b., the notation “grams per brake horsepower-hour” may be symbolically correct; however, it would be more readily understandable if written out as “grams per brake horsepower per hour.”

s. In s. NR 445.11 (1) (a) 1., it would be more precise to refer to “the LAER control requirement for which a variance has been requested” rather than cross-referencing all the requirements for which a variance could be requested.

t. In s. NR 445.12 (1) (a), the word “the” before the word “listing” should be omitted. In sub. (2) (a) 1., the word “be” should be inserted before “carcinogenic.”