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## WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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### CLEARINGHOUSE RULE 04-023

#### 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 October 2002.]**

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

General Comment: If the department is making use of the format authority given in s. 227.14 (1m), Stats., the analysis to the rule should so state. Even if the department is making use of this authority, the statutory provision is not a mandate and the rule could be made clearer by following the format suggestions made in this part of the report.

a. The rule contains a number of references to subch. I or II in ch. NR 463 in which the form of the reference does not conform with preferred drafting style. [See s. 1.07 (2), Manual.] These references are in, for example, the title to Appendix N in ch. NR 460, the general provisions reference to s. NR 460.07 (3) (a) 1. in Appendix N to ch. 460, and the treatment clauses for SECTIONS 12 and 21.

b. The rule makes extensive use of slashed alternatives, contrary to the style identified in s. 1.01 (9) (a), Manual. The department should review the entire rule and modify it to conform with this preferred drafting style. Examples of the use of the slashed alternatives are in the table in Appendix RRR in ch. NR 460 and in ss. NR 463.11 (2) (c) and (3) (b), 463.12 (7), (10), (15), (22), (26), (31), (34) and (42), 463.15 (15) (b), 463.16 (title), 463.163 (5) (intro.) and 463.18 (2) (b) 5.

c. The secondary aluminum production facility identified in s. NR 407.02 (6) (b) 8. is in the singular, whereas other facilities identified in other subdivisions in par. (b) are in the plural. The list of facilities in par. (b) should be of parallel construction. Also, the notation “s.” should be inserted before “NR 463.11 (3).”

d. In s. NR 407.04 (7), the phrase “effective date of this rule” should be replaced by the phrase “effective date of this subsection.”

e. The treatment clause in SECTION 21 creating subch. II of ch. NR 463 should identify the location of the subchapter, for example, “subch. II of ch. NR 463 [precedes NR 463.11] is created to read:”.

f. Parentheses should be avoided in the text of a rule. [See s. 1.01 (6), Manual.] This style was not followed, for example, in s. NR 463.12 (16) and (27) and the entry in Table 2 following s. NR 463.20 on in-line fluxer with lime-injected fabric filter.

g. The use of notations such as “i.e.,” “e.g.” and “etc.” should be avoided. The first two notations can be replaced by the phrase “such as” and by the word “including,” respectively. For example, see ss. NR 463.12 (3), (5), (9), (29), (31) and (37) and 463.14 (2) (b).

h. In s. NR 463.11 (1), the phrase “as defined in s. NR 463.12 (37)” is unnecessary and should be deleted.

i. In s. NR 463.12 (41) and (42), the phrase “for purposes of this subchapter” is unnecessary and should be deleted.

j. The use of introductory material in the rule does not follow the format prescribed in the manual. For example, in s. NR 463.13 (6), the unnumbered, complete sentence introduction should be renumbered as par. (a) and the remaining paragraphs and internal cross-references should be renumbered accordingly. In s. NR 463.14 (5) (a), the introduction should conclude with the phrase “do all of the following.” Even if in some cases the context makes the direction clear, an introduction always should inform the reader whether all of the following subunits are required to be completed or if only one of the following subunits needs to be met.

k. A mandatory requirement or directive should be denoted through the use of “shall”; an optional or permissive privilege, right or discretionary authority should be denoted through the use of “may.” [See s. 1.01 (2), Manual.] In addition, “will” should not be used to denote a mandatory directive. The department should review the entire rule to ensure conformity with this style. Examples where it was not are in s. NR 463.15 (2) (intro.), (9) (c) and (23) (a) and (d) (intro.).

l. The preferred drafting style is to draft in the active voice. This style was not followed, for example, in s. NR 463.15 (5) (a) and (10) (a) 2.

m. The department should review Table 2 following s. NR 463.20 to ensure that the table is in the desired format. In particular, for affected sources or emission units with multiple monitor type, operation or process entries, the second and subsequent entries for monitor type, operation or process in the second column are not aligned with an operating requirement in the third column.

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

a. The rule incorporates two EPA documents by reference in s. NR 484.05 (10) and (12). Consent for incorporation of these documents 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 that this consent has been given either prior to this rule promulgation or concurrently with this rule promulgation.

b. The cross-reference in s. NR 406.04 (1) (zh) is incorrect. In addition, the facilities referred to in this paragraph, “secondary aluminum processing facilities,” are not defined in s. NR 463.12. If the facilities in par. (zh) should be “secondary aluminum production facilities,” then the cross-reference in s. NR 406.04 (1) (zh) should be to s. NR 463.12 (37). If the references in par. (zh) should be “secondary aluminum processing units,” then the cross-reference should be to s. NR 463.12 (36).

c. The reference in s. NR 407.02 (6) (b) 8. is incorrect; it should reference the definition of “secondary aluminum production facility” in s. NR 463.12 (37). Similarly, the cross-reference in s. NR 407.04 (7) to the definition of “secondary aluminum processing unit” should be to s. NR 463.12 (36).

d. The text of the rule refers to the three tables in ch. NR 463; Table 1 in s. NR 463.13 (1), Table 2 in s. NR 463.14 (1) (d) and Table 3 in s. NR 463.15 (1). To assist a reader in locating these tables, the provisions that identify the tables should indicate the location of the table, such as through a note following the provision.

e. The references in s. NR 463.15 (15) (e) and (f) to “all applicable requirements of the general provisions of ch. NR 460” and “all applicable requirements of this subchapter,” respectively, are vague. Can the department be more specific?

f. Since the rule divides the specification of emission standards for affected sources and emission units and the equations for determining compliance with these standards between ss. NR 463.13 and 463.166, the rule should contain references to the appropriate provisions in s. NR 463.166 in the standards in s. NR 463.13 and references to the emission standards in s. NR 463.13 in the equations in s. NR 463.166.

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

a. SECTIONS 4, 5 and 7 contain provisions that do not relate to either emissions standards for hazardous air pollutants for facilities engaged in the secondary production of aluminum or to revising other provisions in the department’s rules affected by the creation of these standards. As such, the department should either expand the analysis accompanying the rule and the rule’s relating clause to reflect the provisions in these SECTIONS or delete the SECTIONS from the rule.

b. In s. NR 463.11 (6), a comma should be inserted after the second occurrence of the word “emit.”

- c. Section NR 463.13 (1) refers to Table 1. The rule does not contain a Table 1.
- d. The comma after “system” in s. NR 463.14 (5) (intro.) is confusing. The department should review whether it is necessary to convey the meaning of this provision.
- e. The department should review the technical words and phrases used in the rule and, as appropriate, provide definitions of them to ensure the clarity and consistent application of the rule. Examples of words and phrases not defined include the following:
  - 1. “The period from tap-to-tap” in s. NR 463.12 (27).
  - 2. “Good air pollution control practices” in s. NR 463.14 (16).
  - 3. “Capture/collection system” in s. NR 463.15 (4) (a).
  - 4. “Closed vent system” in s. NR 463.15 (4) (b).
  - 5. “Continuous opacity monitoring system” in s. NR 463.15 (6) (b) (intro.).
- f. The department should review the entire rule and remove redundant text. Examples of redundant text include the following:
  - 1. Inclusion of the phrase “of this section” in the text “the requirements of this section or this subchapter” in s. NR 463.15 (2) (intro.) and (15) (a) (intro.).
  - 2. Use of “but is not limited to” after “includes” in s. NR 463.12 (5) and (28).
  - 3. Duplicative text in the fourth and seventh sentences in s. NR 463.17 (2) (intro.).
- g. The rule uses the terms “OM&M Plan” and “performance test” throughout the text of subch. II of ch. NR 463. The requirements for the OM&M Plan are set forth in s. NR 463.15 (2). The requirements for performance tests are set forth in ss. NR 463.16 and 463.163. To improve the clarity and consistent application of the rule, the department should add definitions of these terms to s. NR 463.12. These definitions could reference the provisions in the rule that specify the contents of the plan or test.
- h. In s. NR 463.15 (20) (c), a comma should be inserted after the second occurrence of the phrase “24-hour period.”
- i. Subsections (1), (2), (3) and (5) in s. NR 463.166 all begin with a directive with no noun specifying who is subject to the directive. The subject of these directives should be added to each of these provisions or in an introduction to the provisions.
- j. A comma should be placed after “s. NR 460.08 (2) (a)” in s. NR 463.17 (1) (a).
- k. In s. NR 463.17 (1) (b), it appears that a comma should be inserted after the reference to “ch. NR 406.”
- l. The department should review the use of dates in the rule to establish the applicability of provisions in the rule. This will ensure that these provisions are unambiguous and workable. For example, s. NR 463.115 (1) requires the owner or operator of an existing

affected source to comply with the requirements of subch. II of ch. NR 463 by March 24, 2003. Use of this date means that any of these owners or operators will automatically be out of compliance with the rule when the rule becomes effective. Similarly, the reference to the specified application being submitted no later than 90 days after September 24, 2002 in s. NR 463.17 (1) (d) 2. does not appear to be workable.

m. Since the sentence in s. NR 463.18 (3) (a) contains a singular noun, "period," the verb in this sentence should be "was reported" rather than "were reported."

n. Tables 2 and 3 at the end of subch. II of ch. NR 463 contain the undefined abbreviations "COM" and "VE."

o. The department should review Tables 2 and 3 at the end of subch. II of ch. NR 463 to ensure that these tables are clear and do not have unintended legal consequences. The department may wish to consider adding cross-references to the requirements identified in these tables to assist the reader in identifying the underlying requirements in the text of the rule. In addition, as drafted, the tables are included in the text of the rule and have the force of law. The Legislative Council Rules Clearinghouse did not review the summary of operating and monitoring requirements in these tables to ensure that they conform with the corresponding requirements set forth in the text of the rule.