



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 12-023

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 November 2011.]

As a preliminary comment, this rule is in need of significant revision. It contains numerous drafting errors that could have been avoided by adherence to the rule drafting instructions set forth in the Administrative Rules Procedures Manual. In particular, the department should review the rule for adherence to instructions relating to accurate use of treatment clauses, avoidance of excessive renumbering, and general organization of the proposed rule text and the rule-making order.

1. Statutory Authority

a. The rule relies, in numerous instances, on the discretion of the department to provide exceptions and accept alternatives to the requirements prescribed by the rule. The department should review the use of this discretion in light of the general purpose of rule-making to provide a comprehensive source of information on the administration of state laws, as well as the department’s obligation under s. 227.10 (1), Stats., to promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement of administration of that statute.

b. The department should list s. 299.45 (7), Stats., in the statutory authority section of the rule analysis, and add an explanation of the agency’s authority under s. 292.68 (11), Stats., with respect to the changes proposed in this rule-making order.

2. Form, Style and Placement in Administrative Code

a. In the introductory clause of the rule, the enumeration of provisions treated should include a more specific list of sections affected and should be updated to reflect the changes recommended below.

b. The rule should be reviewed in its entirety for appropriate use of strike-throughs and underscores to indicate amendment of rule provisions and compliance with other instructions relating to the amendment of rule provisions. [See s. 1.06, Manual.]

c. In SECTION 10, why does the phrase “General Requirements” appear in the rule text? The phrase already exists as the title for ch. NR 700.

d. In s. NR 700.01 (2), the citations for statutory authority should appear in numerical order, with ch. 160, Stats., appearing before ch. 292, Stats.

e. Section NR 700.03 (1a) should be created as s. NR 700.03 (1g) and s. NR 700.03 (1m) should be s. NR 700.03 (1r).

f. In SECTION 16, the department refers to “federal authorities.” Would it be more appropriate to refer to federal laws? Are the acronyms used by the department defined prior to their use?

g. Under SECTION 20, the referenced rule text should be limited to s. NR 700.03 (2) (a) or s. NR 700.03 (2) should be fully included in the treatment clause and rule text. Generally, the rule should be reviewed in its entirety to ensure that the referenced rule text matches the treatment clause in each SECTION. In some instances it may be appropriate to reduce the referenced rule text to match the treatment clause; in other instances, it may be appropriate to maintain the current referenced text and modify the treatment clause to match the referenced text.

h. Section NR 700.03 (7m) should be s. NR 700.03 (6m).

i. In s. NR 700.03 (11m) Note, the department should provide a more specific reference to the Internet location of the BRRTS than “on the web”.

j. Section NR 700.03 (45g) should be s. NR 700.03 (45e).

k. In s. NR 700.03 (49r) Note, the reference to “chapter NR 720” should be written “ch. NR 720”.

l. The rule should be reviewed in its entirety for use of internal and external cross-references as prescribed under ss. 1.03 and 1.07, Manual.

m. Section NR 700.03 (51) should be rewritten in the style described in s. 1.03 (3) and (4), Manual. The rule should be reviewed in its entirety and should conform to the style described in these sections.

n. Section NR 700.03 (52m) should be revised. The department should consider the distinction between “means” and “includes” as described in s. 1.01 (7) (c), Manual.

Additionally, the phrase “for the purposes of this chapter” is either superfluous (if the term is used only in ch. NR 700) or misleading (if the phrase is intended to apply differently in different chapters, it should be defined separately in each chapter).

o. Section NR 700.03 (64m) should be s. NR 700.03 (64g) and s. NR 700.03 (65m) should be s. NR 700.03 (64r). The definition of “TSCA” should include a more specific reference to the U.S. Code than “15 USC”.

p. In s. NR 700.03 (66) Note, the cross-reference to Department of Commerce rules should be updated to reflect the dissolution of that department. The rule should be reviewed in its entirety for the need to update other, similar cross references.

q. The terms defined in s. NR 700.03 (66t) and (66w) should be switched so that they are in alphabetical order.

r. What standards will the department use to determine whether other requirements than those listed under s. NR 700.11 (1) (a), including report submission frequency, will be required of responsible parties? The rule should be reviewed in its entirety for other instances in which the department is given flexibility to impose different requirements than those listed in the rule without specification as to how or when such flexibility will be exercised. Throughout the rule, the department should avoid the use of vague exceptions, alternatives, and opportunities for department discretion and should instead include more specific details regarding those exceptions, alternatives, and exercises of discretion within the administrative code.

s. In SECTION 64, if sub. (2) is repealed, par. (2) (a), and all of the other provisions under sub. (2), will be repealed. It is not appropriate to separately list par. (2) (a).

t. In SECTION 66, does the department intend to refer to “par. (a) 2. to 4.” instead of “subds. 2. to 4.”?

u. The changes provided in SECTION 68 and SECTION 70 should be included in a single SECTION. (Note that the proposal as drafted does not repeal all of s. NR 700.11 (3) in SECTION 68 yet it creates a new s. NR 700.11 (3) in SECTION 70.)

v. SECTIONS 69 and 70 are out of numerical order.

w. SECTIONS 71 through 73 are out of order and should be redrafted. All actions affecting a particular subsection or other division of the code should be contained in one SECTION where possible. The rule should be reviewed in its entirety for other instances in which a single division of the code is affected in multiple SECTIONS.

x. In the explanatory text following SECTION 73, do not refer to the recreation of the applicable provisions in SECTION 195 as “renumbering”. The rule should be reviewed in its entirety for use of appropriate treatment clauses. [s. 1.04 (1) (b), Manual.]

y. The repeal of titles of subchapters should be done in a consistent manner (compare for example, SECTIONS 74, 75, 88, and 103).

z. In multiple instances in the rule, provisions of existing code are renumbered and the previous number is re-used for a new provision. It is best to avoid this practice and to instead insert new provisions between existing provisions. Section 1.03 of the Manual should be reviewed for direction as to how to correctly accomplish these changes, focusing in particular on sub. (5) (a) and (b). See, for example, SECTIONS 78 through 95 and 182 through 198 of the proposal. The entire rule should be reviewed with respect to this comment.

aa. When renumbering is appropriate, the substantive provision below the SECTION description should not show the strike-through and underline change of the number (see, for example, SECTIONS 92 and 95). [See the examples following s. 1.04 (2), Manual.] Also, lower divisions below a renumbered division should not show separate renumbering treatment. For example, SECTIONS 210 through 214 should be combined into a single section under which s. NR 716.15 (2) (g) is renumbered and revised to include all of the subsequent listed changes. The entire rule should be reviewed for other similar examples and revised accordingly.

bb. Each separate treatment should be indicated by a numbered SECTION (see the material following SECTION 92 for the absence of a numbered SECTION). Conversely, no material follows SECTION 498. The rule should be reviewed in its entirety with respect to this comment.

cc. SECTION 97 appears to create introductory material rather than amending introductory material that already exists, rendering the treatment clause inaccurate. Additionally, the style of the introductory material does not conform to s. 1.03 (3), Manual.

dd. It is not appropriate to end a list that begins with “including” with a provision such as “and other sources not specifically identified herein.” (See, for example, SECTION 108.) It is also not appropriate to use the phrase “including, but not limited to.” (See, for example, SECTION 131.) [s. 1.01 (7) (c), Manual.] The entire rule should be reviewed with respect to this comment and revised accordingly.

ee. The rule should be clarified as to whether the Note following s. NR 708.11 (1), as amended, should follow s. NR 708.11 (1) (a) or (b).

ff. If the requirements included in s. NR 708.17 (4) (a) Note are intended to be enforceable requirements, they must be included in a substantive rule provision. The rule should be reviewed in its entirety to ensure that any material intended to have the force of law is not placed in a Note.

gg. When a provision is created, do not underline the text. “Recreating” a provision is not appropriate. (See for example, SECTIONS 290 and 294.) When a provision is truly being completely eliminated and replaced by a new provision, it should be “repealed and recreated”. The rule should be reviewed in its entirety for similar changes.

hh. If a title is used for one provision in a set of provisions, a title must be used for all in the set. (See, for example, s. NR 720.05.) The rule should be reviewed in its entirety for other instances where additional titles are necessary.

ii. Section NR 720.07 (2) (d) 2. must include an introductory phrase such as “all of the following” or “any of the following”. The rule should be reviewed in its entirety for other instances of inappropriate introductory provisions. (See, for example, multiple instances under s. NR 720.11 (3).) [s. 1.03 (3), Manual.]

jj. The meaning of the phrase “rule series” in s. NR 722.02 (2) should be clarified.

kk. SECTION 375 is either numbered wrong or misplaced in the proposal.

ll. Titles of paragraphs may not contain substantive requirements. (See s. NR 727.07 (1) (a) through (g).)

mm. In s. NR 746.03 (5), it is unnecessary to list the Act that created a particular statute.

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

a. In s. NR 169.05 (29g) Note 1., the department should revise the format of its exponential representation of vapor concentration to use an appropriate superscript.

b. Under s. NR 169.13 (2) (f) 3., consider requiring the use of existing building components to the extent “practicable” instead of to the extent “possible” if it is your intent to allow the department to decide whether it makes economic sense to reclaim structures or materials.

c. When terms defined in a code chapter are used elsewhere in the chapter, do not cross-reference the definition. See, for example, s. NR 169.15 (1), which should read: “The department project manager shall designate each site as a high priority site, a medium priority site, or a low priority site.” Similar modification should be made to s. NR 169.15 (2).

d. The rule should be reviewed in its entirety for grammatical errors. For example, a comma should precede “Stats.” in s. NR 700.02 (2) Note and an errant letter “r” should be removed from the treatment clause of SECTION 20. A period should end the definition of “property boundary” in s. NR 700.03 (45m).

e. In SECTION 24, the Note should be revised for clarity.

f. In s. NR 700.03 (39m), the department should clarify its intent regarding the reference to “residential setting” as it relates to the definition of “facility”.

g. The definition of “property” under s. NR 700.03 (45g) should be clarified. Note the inconsistencies between this definition and the definition of “property boundary”.

h. The definition of “sub-slab” under s. NR 700.03 (60m) should be clarified. A building’s “lowermost foundation” and a building’s “lowermost floor” are generally at different depths, and it is not clear whether a “foundation floor” is a recognized building component.

i. If it is the department's intent to authorize the use of more than one of the means of identifying potentially responsible parties under s. NR 700.10, remove the word "one" from the (intro.) to that section.

j. The changes to s. NR 706.03 (5), as renumbered, should be re-worded.

k. The definition of "economic development corporation" in SECTION 117 should be revised for clarity.

l. In s. NR 708.17 (3) (b) 1. and 2., it is not clear what difference is meant by "sites meeting par. (a)" and "sites that have been included on the department database". If no difference is intended, these provisions should be consistent.

m. In s. NR 708.17 (4) (b) 4., what is meant by "or as otherwise required by the department"?

n. In SECTION 148, add "Chapter" before "NR 714".

o. It is unclear how a responsible party is expected to use the factors under s. NR 714.07 (1) (a) to (d) to inform its decisions on conducting public participation and notification activities.

p. The introductory material in s. NR 714.07 (4) (a) does not grammatically correspond with the list that follows.

q. Is it the department's intent to repeal and recreate s. NR 716.11 (2) under SECTION 176 of the rule? If so, this provision should be modified to reflect that intent.

r. The new text under s. NR 716.15 (3) and (4) does not follow grammatically with the title of the section (missing subjects). (For grammatically correct examples, see s. NR 716.15 (5) and (6), as renumbered and amended.)

s. Section NR 718.12 (2) (b) 9. does not follow grammatically with the introductory clause, and should be inserted as a separate paragraph.

t. Section NR 720.02 (8) does not flow grammatically with the title of the section.

u. Under s. NR 722.09 (2m), what is meant by requiring a responsible party to "address the following criteria" and what is meant by "as appropriate"?

v. Section NR 738.03 (4) (e) does not flow grammatically with the introductory clause, and pars. (a) through (d) should not be included in the same list as par. (e) as they are alternatives.

w. The use of "DNR" should be replaced by "department" where used in the rule.