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# Wisconsin Legislative Council

## RULES CLEARINGHOUSE

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## CLEARINGHOUSE RULE 24-035

### Comments

**[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Council Staff and the Legislative Reference Bureau, dated November 2020.]**

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

a. The proposed rulemaking order refers to ss. 289.21, 289.24, 289.30, 289.31, 289.33, 289.41, 289.43, 289.61, and 289.63, Stats., among other provisions, as sources of statutory authority. However, the order does not address these provisions in its explanation of agency authority and other statutes cited as sources of agency authority appear sufficient for the proposed rule. These statutes could be reviewed to evaluate the extent to which each statute relates to the substance of the proposed rule, and whether they may be better characterized as statutes interpreted by the proposed rule. For instance, s. 289.41, Stats., addresses financial responsibility requirements and does not appear to be closely related to the changes proposed in the rulemaking order.

Similarly, s. 291.001, Stats., is also referenced as a source of statutory authority, while the explanation of agency authority describes it as a legislative declaration of policy regarding the management of hazardous wastes. Considering s. 227.11 (2) (a) 1., Stats., which provides that “[a] statutory or nonstatutory provision containing a statement or declaration of legislative intent, purpose, findings, or policy does not confer rule-making authority on the agency or augment the agency’s rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature,” should s. 291.001, Stats., be referenced as a source of statutory authority for the proposed rule? As mentioned above, other sources of statutory authority cited in the proposed rulemaking order appear sufficient for the proposed changes.

If changes are adopted, the agency should review Clearinghouse Rules 24-036 and 24-037 for consistency, as the analysis of each proposed rule follows a similar format.

b. SECTION 1 of the rulemaking order proposes to amend s. NR 660.11 (1), Wis. Adm. Code. However, the text of the rulemaking order does not accurately reproduce the text of the existing code. The rulemaking order refers to materials incorporated by reference “under” other references while the existing rule refers to materials incorporated by reference “in” other references. The proposed text should be modified to mirror the existing text, or a proposed change

should be indicated with underscored and stricken-through text. Additionally, in the proposed change to s. NR 660.11 (1) (Note), the word “offices” should be completely stricken through.

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

a. Both the proposed rulemaking order and the rule, as currently promulgated, include ASTM E926-88 in the list of standards incorporated by reference. However, it does not appear that this standard is referenced in any requirement within the rulemaking order or in the DNR’s rules, as currently promulgated. Notably, it appears that this is the only standard under s. NR 660.11 that does not include text indicating where the standard is incorporated by reference. Should this standard be omitted from the proposed rulemaking order? Alternatively, additional text could be added to describe how the administrative rules incorporate ASTM E926-88.

b. In SECTION 2 of the proposed rulemaking order, proposed s. NR 660.11 (2) (t), (u), and (v) indicate that the respective standards are incorporated by reference for ch. NR 664, and specified subchapters of ch. NR 665. Given that chs. NR 664 and NR 665 are largely parallel in their organization, should proposed s. NR 660.11 (2) (t), (u), and (v) each refer to the relevant subchapter of ch. NR 664, rather than referring to the entirety of the chapter?

c. In SECTION 2 of the proposed rulemaking order, it appears that proposed s. NR 660.11 (3) (a) could be amended to indicate that APTI Course 415 is also incorporated by reference in s. NR 661.1035. Proposed s. NR 660.11 (3) (a) also indicates that APTI Course 415 is incorporated in s. NR 670.025. Section NR 670.025 includes an error with respect to this publication, referring to “ATPI” Course 415. This error should be corrected.

d. In SECTION 2 of the proposed rulemaking order, s. NR 660.11 (3) (c) 10. lists code provisions that incorporate “Method 1311” by reference. The department could consider adding s. NR 664.0552 to this list, given that s. NR 664.0552 (5) (d) 4. f., as currently promulgated, references this method. Alternatively, the existing list could be maintained to more closely mirror the analogous federal regulation.

e. In SECTION 2 of the proposed rulemaking order, s. NR 660.11 (3) (c) 10., 11., and 16. refer to ch. NR 661 Appendix IX. As currently promulgated, this appendix includes a note indicating that a current copy of the appendix may be found on the Government Publishing Office’s e-CFR website. However, the hyperlink that is provided in the appendix appears to be a dead link. The department should consider updating this link or providing alternative guidance as to how a current copy of Appendix IX may be viewed.

f. In SECTION 4 of the proposed rulemaking order, the description of a compressed gas refers to “ASTM Test D-323” (consistent with language used in a federal regulation). The agency could consider adding this particular testing standard in the list of standards incorporated by reference under s. NR 660.11.

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

a. In SECTION 2 of the proposed rulemaking order, s. NR 660.11 (7) (a) refers to “Standards for Dual Wall Underground Storage Tanks”. This could be revised to read “Standard for Dual Wall Underground Storage Tanks” (i.e., using “standard” rather than “standards”) to directly reflect the name of this particular standard.

b. In SECTION 4 of the proposed rulemaking order, proposed s. NR 661.0021 (1) (c) 2. a. refers to “the pipeline and hazardous materials safety administration with the U.S. department of transportation”. This could be amended to refer to “the pipeline and hazardous materials safety administration in the U.S. department of transportation” (emphasis added) to mirror the language in the proposed s. NR 661.0021 (1) (d) 1. d. (which itself mirrors 49 C.F.R. s. 261.21 (a) (4) (i) (D)).