

Report From Agency

ORDER OF THE DEPARTMENT OF COMMERCE

CREATING RULES

The Wisconsin Department of Commerce proposes an order to repeal Comm 5.003 (19), 5.82 (5) (b), 5.83 (5) (b), 5.86 (6) (b), and 5.87 (6) (b);

to renumber Comm 5.003 (17m) and (18), Comm 5.10 (1) (a) 12. h. to k., 5.82 (5) (a) 1. and 2., 5.86 (5) (f) and (g) to (j) and (6) (a) 1. and 2., and 5.87 (6) (a) 1. and 2.;

to renumber and amend Comm 5.83 (5) (a) 1. and 2., and 5.88 (1);

to amend Comm Table 5.02 Line 49; Table 5.06 Lines 42 and 49 to 53; 5.08 (1) (e) 2. a.; 5.68 (1), (3), and (7) (b) 1.; 5.82 (4); 5.83 (title), (1), (2) (intro.), (3), and (4); 5.84 (1) (intro.) and (5) (e) and (f); 5.85 (1) (intro.) and (5) (e) and (i); and 5.86 (title), (1) (intro.), and (5) (intro.); and 5.88 (3) and (4) (a);

to repeal and recreate Comm 5.003 (9), 5.81 (4) (c), 5.82 (1), and 5.87 (1) and Note; and

to create Comm 5.003 (10m); Table 5.02 Lines 54g and 54r; Table 5.06 Lines 54g and 54r; 5.07 (2) (b) 3.; 5.08 (1) (e) 2. c., (g), and (h); Comm 5.10 (1) (a) 12. i. and j. and 13. (intro), d., and e.; 5.68 (6) Note; 5.80 (2) (e) and (5) (c) 3.; 5.81 (2) (d); 5.82 (2) (c) and (5) (c); 5.84 (5) (g) and (7); 5.85 (5) (e) Note; 5.86 (5) (a) Note and (f), (h), and (m); 5.87 (2) (c), (6) (c), and (7); 5.88 (1) (b); and 5.89; relating to credentials for storage of flammable, combustible, and hazardous liquids; and for cleanup of properties contaminated by petroleum-product discharges; and affecting small business.

Rule Summary

1. Statutes Interpreted.

Sections 101.02 (1), (20), and (21), 101.09 (3), 101.143 (2) (g), and 227.51.

2. Statutory Authority.

Sections 101.02 (1) and (15), 101.09 (3), 101.19 (1), 101.143 (2) (g), and 227.11 (2) (a).

3. Explanation of Agency Authority.

Section 101.02 (1) of the Statutes requires the Department to adopt reasonable rules relative to the exercise of the Department's powers and authorities. Section 101.02 (15) (j) requires the Department to protect public safety by promulgating reasonable rules for construction, repair and maintenance of places of employment and public buildings. Section 101.09 (3) (a) requires the Department to promulgate rules for protecting the waters of the State from improper storage, handling and use of flammable or combustible liquids, or federally regulated hazardous substances; and requires those rules to include construction and maintenance requirements related to the prevention of leaks. Section 101.09 (3) (c) authorizes the Department to promulgate rules that require certification of persons who install or inspect tanks which are used for storing these liquids or substances. Section 101.143 (2) (g) authorizes the Department to promulgate requirements for the registration of persons who provide consulting services relating to cleanup of properties contaminated by petroleum-product discharges. Section 101.19 (1) requires the Department to fix and collect fees for offsetting the cost of determining and certifying the competency of inspectors. Section 227.11 (2) (a) authorizes the Department to promulgate rules interpreting the provisions of the statutes that the Department enforces or administers.

4. Related Statute or Rule.

Chapter Comm 10 of the *Wisconsin Administrative Code* provides fire and life safety, and environmental protection, by regulating the storage, display, installation, operation, use, maintenance and transportation of flammable, combustible and hazardous liquids; and by regulating the equipment, facilities and buildings that are used to store, transfer and dispense those liquids. Chapter Comm 47 contains requirements for reimbursing eligible costs that are incurred because of a petroleum-product discharge from a storage system.

5. Plain Language Analysis.

Chapter Comm 5 contains the Department's rules for issuing numerous credentials that businesses and individuals are either mandated or permitted to obtain. These credentials include certifications and registrations that relate to safe storage of flammable, combustible, and hazardous liquids, and to cleanup of properties contaminated by petroleum-product discharges.

The proposed rules would primarily modify chapter Comm 5 by creating (1) a certification category for individuals who conduct cathodic protection testing of any tank system that will hold flammable, combustible, or hazardous liquids which are regulated by chapter Comm 10; and (2) a certification category for individuals who design or install cathodic protection systems for those tank systems. The proposed rules would also limit this testing, design, and installation to individuals who are certified under these rules.

Other substantive changes relating to chapter Comm 10 in the proposed rules would (1) modify several specialty credential responsibilities by deleting outdated activities, and adding activities that have proven to better reflect the nature of the work; (2) remove references to past dates that have no relationship to current-day credential qualifications or administration; (3) eliminate continuing-education requirements from three specialties because the corresponding technical aspects do not change appreciably, and continuing-education opportunities within the industry are limited; (4) shorten the approval duration for continuing-education courses, from five years to three, unless otherwise specified in an approval letter; (5) require departmental notification

if an approved, continuing education course is discontinued or modified; (6) no longer allow renewal of credentials after they expire, except by complying with all of the requirements for new applicants; (7) expand the reasons for denial, suspension or revocation of a credential to include failure to maintain required records, denial of Departmental access to requested records, failure to submit a required notice or report to the Department within a required time period, and submittal of false or routinely inadequate reports to the Department; (8) directly link all credentials for storage of flammable, combustible, and hazardous liquids to the corresponding requirements in chapter Comm 10; (9) modify the site assessor specialty credential terminology to better reflect the scope of the credential; (10) require contractor liability insurance coverage for firms that install, remove, test, line, clean, or perform assessment, for tank systems; and (11) require that same liability coverage for tank system removers and cleaners.

Two sets of proposed changes relate to chapter Comm 47. The first set consists of expanding the reasons for denial, suspension or revocation of a credential to include (1) submittal of false or routinely inadequate reports to the Department; (2) performance of activities that result in both exceeding a cost cap established by the department, and submittal of a claim to the department for the cost in excess of that cost cap; and (3) failure to pay a financial penalty assessed under chapter Comm 47 for a grossly ineligible cost. The second set of changes expands a current requirement for PECFA consultants and consulting firms to have liability coverage, by requiring consultants and firms to submit proof of that coverage when applying for or renewing a credential.

6. Summary of, and Comparison With, Existing or Proposed Federal Regulations.

In Title 40 of the Code of Federal Regulations, under Section 20 of Part 280, a corrosion expert must design and oversee installation of field-installed cathodic protection systems for underground steel storage tanks and piping for flammable, combustible, and federally regulated hazardous liquids. Section 31 of 40 CFR 280 requires that a qualified cathodic protection tester periodically inspect all cathodic protection systems for these tanks and piping. Section 12 of 40 CFR 280 establishes definitions for corrosion expert and cathodic protection tester. Those definitions require corrosion experts to be accredited professionals, and require cathodic protection testers to meet specified criteria for education and experience. The proposed rules would incorporate these requirements and definitions into chapter Comm 5.

7. Comparison With Rules in Adjacent States.

Cathodic protection credential

In Michigan, corresponding cathodic protection professionals are required to be so certified by the National Association of Corrosion Engineers (NACE). Illinois requires the contractor to be State-certified to perform cathodic protection testing activities, and a NACE-certified individual must perform any design activity. Minnesota requires either Steel Tank Institute (STI) or NACE certification for cathodic protection testing activities, and a NACE-certified individual must perform any design activity. Iowa is revising their code to require certification from a recognized program, such as NACE or STI.

Contractor liability insurance

Under section 324.21107 of the Michigan Statutes, any person who installs or removes underground storage tank systems must maintain pollution liability insurance with limits of not less

than \$1,000,000 per occurrence. In Title 41 of the Illinois Administrative Code, section 172.40 (b) (1) (C) requires underground storage tank contractors to annually maintain a certificate of general liability insurance in a minimum of \$1,000,000 – with the Office of the State Fire Marshall as certified holder. In Iowa, Administrative Code section 591–15.5(455G) requires all licensed installers, liners, testers and inspectors to have environmental liability insurance with minimum liability limits of \$250,000 per occurrence and in the aggregate, as approved by the administrator of the Iowa comprehensive petroleum underground storage tank fund program. Iowa expects to increase the \$250,000 limit to \$1,000,000 during 2007. In Minnesota’s Rules, chapter 7105 requires contractors who install, repair or remove regulated underground storage tanks to have general liability insurance coverage, bonding or liquid company assets, equal to five times the largest regulated UST project completed by the contractor within the previous two years. Consequently, the contractor liability insurance coverage that would be required under the proposed rules would not be more restrictive than the coverage required in adjacent states.

8. Summary of Factual Data and Analytical Methodologies.

Cathodic protection has proven to be highly effective for protecting underground metal tanks and piping from corrosion, provided the protection system is properly designed, installed, operated, maintained, and tested. Over the past several years, the Department has become aware of a significant number of cathodic protection systems that have not provided adequate protection or have caused interference with adjacent protection systems or structures.

Factory-installed, galvanic, cathodic protection systems are relatively simple in construction and operation. They include anodes that are sacrificed or consumed in the process of generating a protective current which is required to prevent corrosion. However, for older, existing underground storage tank systems, impressed current is often needed, because any dielectric coating provided on the tank is usually deteriorated or nonexistent, and a bare-metal or poorly coated tank system needs significantly more protective current than can be generated by a reasonable number of sacrificial anodes. An effective cathodic protection system must be engineered to provide the correct amount of protection – too little or too much protection can potentially be as defective as no protection.

Testing of cathodic protection systems is an important part of assuring the integrity of an underground storage tank system. However, soil and seasonal conditions affect the accuracy of cathodic protection testing methods, and site-specific factors can result in false and otherwise misleading indicators that a tank system is or is not adequately protected against corrosion. Improper interpretation of the test measurements has led to many false conclusions about whether a tank system is adequately protected or unprotected. Also, because no standard currently accounts for every situation and site-specific environmental and soil conditions, experience and training in corrosion control is warranted.

Requiring Wisconsin-based certification of cathodic protection professionals would enable Wisconsin to directly enforce the associated requirements, rather than depend on federal enforcement. This direct enforcement would provide further assurance that cathodic protection activities are performed at a minimum level of competency, following nationally established and accepted standards. In addition, Wisconsin certification would establish a database of certified individuals that could be used to communicate to the general public those individuals who are

qualified to perform the work. The Department could also use this database for communicating new or proposed requirements or informational announcements to certified individuals.

The proposed changes for chapter Comm 5 were developed with assistance from the Department's advisory committee for flammable, combustible and hazardous liquids. The members of that advisory committee are as follows:

<u>Name</u>	<u>Representing</u>
Randy Shervey	Wisconsin Fire Inspectors Association
Erin Roth	Wisconsin Petroleum Council
Tim Clay	Wisconsin Federation of Cooperatives
Paul Knower	Wisconsin Petroleum Equipment Contractors Association
Steve Danner	Wisconsin Aviation Trades Association
Elizabeth Hellman	Wisconsin Utilities Association
Gary Pate	Wisconsin Insurance Alliance
Bill Noel	Wisconsin Paper Council
Dale Safer	Wisconsin Innkeepers
Bob Bartlett	Wisconsin Petroleum Marketers and Convenience Store Association

9. Analysis and Supporting Documents Used to Determine Effect on Small Business or in Preparation of an Economic Impact Report.

The primary document that was used to determine the effect of the proposed rules on small business was Part 280 of Title 40 of the *Code of Federal Regulations*. As noted in the above summary of federal regulations, the proposed Wisconsin credential requirements for corrosion experts and cathodic protection testers are essentially the same as the federal credential requirements in 40 CFR 280. Federal guidelines produced by the Small Business Administration's Office of Advocacy were also used in considering the potential effects on small business. The analysis for the expected effect of the new requirement for contractor liability insurance coverage was particularly based on outreach to current contractors.

10. Effect on Small Business.

The proposed rules are not expected to impose significant costs or other impacts on small businesses because the included requirements for performing cathodic protection activities, and the corresponding certifications, would not be significantly more restrictive than current, applicable federal requirements. Although the deletion of continuing-education requirements for three certification categories would reduce costs and impacts for individuals in those categories, that reduction may be offset by codifying a common practice of tank specialty firms, to have contractor liability insurance coverage. Outreach efforts to firms currently performing these activities indicate that this insurance is readily available, beneficial, and reasonably priced.

11. Agency Contact Person.

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