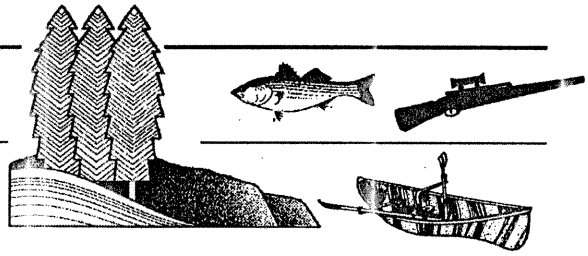
Assembly Committee on:
Natural Resources
State Representative
DuWayne Johnsrud, Chair



MEMORANDUM

DATE: November 14, 1995

TO: Members, Assembly Natural Resources Committee

FROM: DuWayne Johnsrud, Chair

RE: rule referral

The following Rules have been referred to our committee:

Clearinghouse Rule 95-108	Relating to the nonpoint source pollution abatement program. Submitted by Department of Natural Resources.
Clearinghouse Rule 93-203	Relating to changes to public notice procedures for nonsubstantive WPDES permit modifications. Submitted by Department of Natural Resources.
Clearinghouse Rule 95-076	Relating to the assessment and collection of fees and the establishment of application and review procedures for the contaminated lands recycling program. Submitted by Department of Natural Resources.
Clearinghouse Rule 95-077	Relating to natural resources board policies for land acquisition. Submitted by Department of Natural Resources.
Clearinghouse Rule 95-091	Relating to actions taken by the department to implement chs. NR 700 to 736. Submitted by Department of Natural Resources.
Clearinghouse Rule 95-132	Relating to the administration of private forestry assistance. Submitted by Department of Natural Resources.

Our current review period extends through December 11, 1995. Copies of each rule summary are enclosed. Please contact my office if you would like a copy of any rule.

State Capitol • Post Office Box 8952 • Madison, Wisconsin 53708-8952 • (608) 266-3534
Message Hotline (800) 362-9472

E

Assembly Committee on:
Natural Resources
State Representative
DuWayne Johnsrud, Chair

December 6, 1995

George Meyer, Secretary
Department of Natural Resources
GEF II, Fifth Floor
INTER-DEPARTMENTAL

Dear George:

As Chair of the Assembly Committee on Natural Resources, I am writing to inform you that pursuant to 227.19(4)(b)1.a., I would like to convene a meeting with the Department regarding Clearinghouse Rule 95-091.

Please be aware that I had previously requested a meeting on CR 95-076 in error. It was at the time of the previous request that I intended on making this request. I do not wish to meet with the department on CR 95-076.

While this notice constitutes a request of meeting with the agency and extends the Committee's review period of CR 95-091 for 30 days from the date of this letter, I would concur that the extention should begin from the date of the previous letter.

Thanks for your intention to this matter. Staff will contact the Department in order to arrange a mutually acceptable meeting time.

Sincerely,

DuWayne Johnsrud
State Representative
96th Assembly District

DJ/tml

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Message Hotline: (800) 362-9472

Post-It™ brand fax transmittal memo 7671	# of pages ▸
To SHERYL ALLERS	From Tom LIEBE
Co.	Co.
Dept.	Phone #
Fax # 7275084	Fax #

CORRESPONDENCE/MEMORANDUM -

DATE: November 14, 1995

TO: District S&HW Program Supervisors
ERR Unit Leaders
District Environmental Enforcement Specialists

FROM: Pat McCutcheon - SD

SUBJECT: NR 728.11, regarding the recording of Deed Affidavits

At the October Board meeting, NR 728.11, authorizing the recording of deed affidavits, was adopted. The Board did debate this rule and ultimately adopted it with several changes. This memo is meant to provide you with an update of those changes as well as to direct you to begin the process at those sites where you feel a deed affidavit would be applicable. I have attached a copy of the rule, as it was sent to the Legislative Council, along with the procedures for applying the rule, any applicable letters to be sent and the affidavit to be used. The letters and affidavit are structured as merge documents, however I have not prepared them as such. If you would like me to, please let me know and I will.

The most significant change the Board required, and the one they made before the public hearings, was to exempt sites with contamination resulting solely from a residential fuel oil tank. Therefore, sites with contamination from these tanks cannot have an affidavit recorded by the Department and will need to be pursued through our existing enforcement options, if we are unable to get a cooperative approach. The Board was clear however that fuel oil tanks serving anything other than a residential property, such as a business or farm operation, could fall under this rule coverage and have an affidavit recorded. This exemption does <u>not</u> apply to gasoline tanks on residential properties, only fuel oil tanks.

The Board also inserted a Sunset Clause in the rule. One year after the effective date of this rule it will lapse. At that time, or hopefully sometime before, we plan to go back to the Board and present them with a status update and evaluation of how effective this rule has been. If the Board determines this rule should be made permanent, we will be required to go through the rule making process to delete the Sunset Clause. This Sunset Clause shows up at the end of the rule as subsection 4.

Lastly, the Board wanted us to provide one more opportunity for the RP to discuss their site issues with staff. We agreed to modify our procedures (now labeled Attachment I) to require the scheduling of an enforcement conference prior to recording of an affidavit. To accomplish this we have modified the first certified letter sent (Attachment II) to include a date, time and place for this meeting, along with the option of directly responding to us within 30 days. The RP has several options. They can respond within the 30 days, attend the enforcement conference or completely ignore us. If the RP fails to commit to do the required investigation and/or clean-up, either by letter or at the enforcement conference, or fails to respond at all and does not attend the enforcement conference, we can assume they do not intend to comply and we should go forward with recording the deed affidavit. I don't believe this added step will significantly increase our workload or create problems for staff.

If the Legislative Council decides not to hold hearings, the rule will more than likely become effective on February 1, 1996. If a hearing is required, the effective date could be delayed by a month or more. Assuming even a March 1, 1996, effective date, as the process is laid out in the procedures document (Attachment I) it will take 60+ days after the first certified letter is sent (Attachment II) before the affidavit can actually be recorded. Given that, you should proceed with the process for recording these affidavits now, where appropriate, as long as they aren't actually recorded until after the rule becomes effective. As soon as we have a date of publication, I will pass that information on to you. Likewise, if a hearing is held and problems are encountered with this rule, I will advise you of same. For now, we need to start the process, especially in light of the one year sunset, so that when we return to the Board we will have some examples of how this rule does or doesn't work.

We need your help and assistance in order to accomplish that. The new comprehensive tracking system being developed for the ERR Unit of the Solid & Hazardous Waste program will have an element allowing us to track sites where a deed affidavit has been recorded, so coming up with the number of sites with these affidavits should be easy. The real key to the success of this rule is the number of sites that move forward with an investigation and/or clean-up after the deed affidavit option has been pointed out to them but before its recorded. There isn't any good way to track these sites, however we need to. This number will be a better barometer as to how well this rule is or isn't working. What I am asking you to do, at least during this first year, is to some how keep track of these sites. If you would like to pass the site name and location down to me as soon as you make a determination that they won't need a deed affidavit that would be fine. I'm willing to be responsible for tracking this number in order to have an accurate portrayal back to the Board. If you have a means to track it within your District, and you are willing to do so, then by all means keep track. As long as I know who will be keeping this record within each District, so that I can contact them next year for a summary, this approach will work even better for me. Regardless of who keeps track of the sites that proceed, this is the most important number to report back to the Board.

If you have concerns or questions regarding this rule, the procedures we need to follow or how/what to keep track of it, please feel free to give me a call. The key to the success of this rule is not only how we use it but also how well we document its use. If I have failed to copy someone who you believe should receive this information, please either forward a copy to them or let me know who else should receive it. Thanks.

cc: Jay Hochmuth, AD/5
Ron Kazmierczak, SED
Scott Humrickhouse, WD
Kevin Kessler, SW/3
Brenda Hagman, EE/5
Mark Giesfeldt, SW/3
Laurie Egre, SW/3
Bob Strous, SW/3
Deborah Johnson, LC/5
Linda Meyer, LC/5
Joe Renville, LC/5
Joanne Kloppenburg, DOJ

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Linda Meyer, LC/5
Joe Renville, LC/5
Joanne Kloppenburg, DOJ

ORDER OF THE STATE OF WISCONSIN
NATURAL RESOURCES BOARD
CREATING RULES

The Wisconsin Natural Resources Board proposes an order to create NR 728.11, relating to actions taken by the Department to implement chs. NR 700 to 736.

SW-28-95

Analysis Prepared by the Department of Natural Resources

Statutory authority: ss. 144.76 and 227.11, Stats.

Statutes interpreted: s. 144.76, Stats.

Section 144.76, Stats., known as the Hazardous Substance Spills Law, provides that a person who possesses or controls a hazardous substance that is discharged, or who causes the discharge of the hazardous substance, must take the necessary actions to restore the environment to the extent practicable and minimize the harmful effects from the discharge to the air, land or waters of this state. This responsibility applies not only to a person who causes the discharge of a hazardous substance, but also to an owner of contaminated property where a hazardous substance is continuing to discharge to the environment.

Chapters NR 700 to 736, Wis. Adm. Code, establish the minimum standards for conducting an investigation and remediation of environmental contamination resulting from a discharge of a hazardous substance. Chapter NR 728 describes the tools which are available to the Department to enforce those chapters. The proposed s. NR 728.11 sets forth the process to be used by Department staff to record affidavits to give notice of the existence of contamination from a hazardous substance discharge.

The Department currently has the authority to initiate enforcement actions when responsible parties don't fulfill their obligations under s. 144.76, Stats. However, the initiation of enforcement action requires significant staff resources to be committed to develop and manage the necessary followup, and it may be wasted effort if the responsible parties are insolvent and unable to pay for an investigation or cleanup. Given the existing staffing levels, workload dictates that Department resources be directed towards the highest priority sites, oftentimes resulting in many of the lower priority sites making little or no progress towards cleanup. This new rule will mean that, rather than having to choose between issuing an administrative order or doing nothing, Department staff will have the option of putting a lower priority site on hold by recording an affidavit, after contacting the property owner and any mortgagees of record, to flag the property so that the public, lenders and prospective purchasers are aware that a problem exists.

SECTION 1. NR 728.11 is created to read:

NR 728.11 RECORDING A NOTICE OF CONTAMINATION. (1) GENERAL. Except for contamination caused by a discharge from a fuel oil tank used solely for residential purposes, the department may, after following the procedures in sub. (2), record an affidavit at the office of the

register of deeds for the county in which the property is located which specifies the legal description of the property, indicates that contamination from a hazardous substance discharge has been identified on the property which has not been adequately defined or remediated and gives notice to the public, and any prospective purchaser, of the existing contamination and the environmental liability associated with the property.

(2) PROCEDURE. Where the department has information to demonstrate that the source of contamination is on the property and the property owner or other responsible party has failed to take adequate response action, the department may record an affidavit at the office of the register of deeds for the county in which the property is located once the following steps have been taken:

(a) The department shall send the property owner a letter, by certified mail, stating the department's intention to record an affidavit at the county register of deeds office giving notice of the contamination, unless the property owner responds by the deadline in the letter indicating that the property will be promptly investigated and remediated in compliance with applicable statutes and rules or provides information which clearly demonstrates that there is no environmental contamination on the property.

(b) If the department receives no response, or an unacceptable response, to the letter sent in par. (a), the department shall send a second letter to the property owner and to any mortgagee of record, by certified mail, indicating the department's decision to record an affidavit at the county register of deeds office unless the property owner responds by the deadline in the letter indicating that the property will be promptly investigated and remediated in compliance with applicable statutes and rules or appeals the department's determination. The deadline in this letter may not be less than 30 days from the date the property owner receives this letter. A copy of the affidavit to be recorded shall be attached to this letter.

(c) If an acceptable response is not received within the time period set forth in the letter sent in par. (b), the department may, as soon as practicable but in no case less than 15 days after the deadline in the letter sent in par. (b), record the affidavit at the office of the register of deeds for the county in which the property is located.

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(c) If an acceptable response is not received within the time period set forth in the letter sent in par. (b), the department may, as soon as practicable but in no case less than 15 days after the deadline in the letter sent in par. (b), record the affidavit at the office of the register of deeds for the county in which the property is located.

(3) SUBSEQUENT FILINGS. If the contamination identified in the affidavit is subsequently remediated or otherwise addressed to the satisfaction of the department, the department shall record a second affidavit at the office of the register of deeds for the county in which the property is located to supersede an affidavit filed under sub. (2), after giving written notice to the property owner. A second affidavit shall specify the legal description of the property and indicate whether or not there is any residual contamination exceeding existing state standards on the property that is inaccessible or otherwise impracticable to remediate.

(4) SUNSET CLAUSE. This rule will sunset one year after the effective date of this rule.....[Revisor insert date].

The foregoing rule was approved and adopted by the State of Wisconsin Natural Resource Board on October 26, 1995.

The rule shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22(2)(intro.), Stats.

Dated at Madison, Wisconsin _____.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By _____
George E. Meyer, Secretary

(SEAL)

Attachment I

Procedures for Recording Affidavits

A. Affidavits should be used as an enforcement option in the Emergency and Remedial Response (ERR) program under the following circumstances:

a. There is documented evidence of a discharge to the environment which includes the results of soil and/or groundwater sampling on the property. There must sufficient evidence documented in Department files to show that the contamination originated on the property in question and the release was from a source other than a residential fuel oil tank. We cannot record an affidavit based on unsupported suspicions that contamination may exist.

b. The responsible party (RP) has failed to take the actions necessary to identify the extent of contamination and adequately address it.

c. The RP has failed to respond to Department correspondence and has been offered the opportunity to commit to address the contamination or accept an affidavit (model letter attached - Attachment II). This letter offers the RP an opportunity to meet with the Department in a formal Enforcement Conference to discuss their site and, in addition, offers a 30 day grace period during which no formal Department action will be initiated. If the RP fails to commit, in writing, on a timely basis to conduct an investigation and/or cleanup, they are informed of the Department's decision to record an affidavit on their property deed and are given notice of appeal rights (model letter attached - Attachment III).

B. Procedures for recording affidavits are as follows:

a. District ERR staff compile the technical information needed for the affidavit to complete items 1 through 8 in Attachment IV (the model affidavit).

b. The District ERR Unit Leader and the District S&HW Program Supervisor approve and sign-off on issuance of the affidavit.

c. The District forwards a draft of the affidavit to Legal Counsel for their review and comments.

d. Legal Counsel returns the affidavit, to District ERR staff, with their comments and/or corrections within 7 days of their receiving it.

e. District ERR staff sign the affidavit in the presence of a notary **[most Districts have a notary working on staff]** and then record the affidavit with the appropriate County Register of Deeds. Recording may be done by mail as long as the recording fee is included.

f. The District ERR tracking system is then updated to reflect recording of the affidavit, and the District Environmental Enforcement specialist is notified.

g. Should the Department receive information at some future date which confirms that the contamination no longer exists or that it has been adequately addressed to Department standards, a new affidavit will be recorded, following the above procedures, which updates the earlier affidavit.

WISCONSIN
DEPT. OF NATURAL RESOURCES

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURC.

101 South Webster Street
Box 7921
Madison, Wisconsin 53707
TELEPHONE 608-266-2621
TELEFAX 608-267-3579
TDD 608-267-6897

George E. Meyer
Secretary

Attachment II

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
date

File Ref:

address

Subject: Environmental Contamination on Property Located at (**location of site**)

Dear :

In a letter dated ^C (**date of RP letter**) the Department notified you that we believe you are responsible for environmental contamination at property you own, located at ^C (**location**), under s. 144.76, Wis. Stats. (Hazardous Substance Spills Law). This statute requires you to "take the actions necessary to restore the environment to the extent practicable". My letter of ^C (**date of RP letter**) requested that you provide written notification of your intent to respond to the contamination on your property.

I have ^C (**not yet received your response or received an inadequate response**) to this request. If you believe that there is no environmental contamination on your property, or that your property is not the source of the contamination identified, you should notify the Department within 30 days of the date of this letter. If you intend on hiring an environmental consultant to investigate and clean up the contamination, please provide a written and signed statement to that effect as soon as possible. If you have questions about this, you may call me at ^C. I have also scheduled an Enforcement Conference for ^C (**date, time**) to be held at ^C (**location**). The purpose of this conference is to offer you an opportunity to dispute any of the facts we have and/or to discuss the situation and attempt to reach agreement on what needs to be done.

If I do not receive a response from you within 30 days after the date of this letter or if you fail to attend the scheduled Enforcement Conference, I will initiate the process to record at the county register of deeds office, as soon as practicable, an affidavit that gives notice of the contamination on this property. This affidavit will give notice to potential purchasers of the property that the property is the site of environmental contamination. If the contamination is satisfactorily responded to, the Department will file a second affidavit noting the actions that have been taken to clean up the property. In the event you do not take actions to cleanup this property after the affidavit is recorded, the Department intends on taking further actions, which may include appropriate enforcement actions, to restore the environment to the extent practicable at this location.

[Opt.] If you are having difficulty financing the investigation and cleanup of this property, you may provide me with a net worth statement and a written statement regarding your attempts to find funding to undertake an investigation and cleanup. These statements will not change the Department's decision to record an affidavit, but it will be placed in your case file as a record of your efforts to respond to the contamination.

Sincerely,
cc: - SW/3
- LC/5

WISCONSIN
DEPT. OF NATURAL RESOURCES

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

George E. Meyer
Secretary

101 South Webster Street
Box 7921
Madison, Wisconsin 53707
TELEPHONE 608-266-2621
TELEFAX 608-267-3579
TDD 608-267-6897

Attachment III

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

date

File Ref:

address

Subject: Environmental Contamination on Property Located at (**location of site**)

Dear :

In a letter dated ^C (**date of RP letter**) the Department notified you that we believe you are responsible under s. 144.76, Wis. Stats. (Hazardous Substance Spills Law) for environmental contamination at property you own located at ^C (**location**). In a second letter dated ^C (**date of Certified letter - Attachment II**) you were notified that we did not receive ^C (**an adequate response or any response**) to our initial letter and that the Department had determined that recording of an affidavit is necessary unless we received a response within 30 days. We have not yet received a response to that request. That letter also established a date, time and place for an Enforcement Conference to discuss this issue. You ^C (**failed to attend/refused to commit to do the necessary work at**) that meeting, therefore we can only assume you have no intentions to proceed with the required work.

We have therefore determined that the recording of an affidavit is necessary and intend to proceed with that as soon as practicable. A copy of the affidavit the Department intends to record is attached to this letter.

The Department of Natural Resources has made the finding that ^C (**contaminant/contaminants**) discharged to ^C (**property name**), which is located at ^C (**address**), in the Township of ^C, County of ^C, and which has the above captioned legal description, is the source of ^C (**soil/groundwater**) in the vicinity. The Department has concluded that petroleum products and their constituents ^C (**include other substances if appropriate**) are "hazardous substances" as defined in s. 144.01(4m), Wis. Stats.

The Department of Natural Resources believes that removal or treatment of the ^C (**contaminated soil**), and ^C (**groundwater monitoring/treatment**), are required on the property under the authority of s. 144.76, Wis, Stats.

Because the Department of Natural Resources believes that ^C (**contaminant and contaminant components**) currently found in the ^C (**soil/groundwater**) on the property with the above legal description, will continue to discharge into the environment, subsequent purchasers of the property could be held responsible for clean-up costs under section 144.76, Wisconsin Statutes. The recording of this affidavit is necessary to protect future owners and/or operators of this property by notifying them that contamination remains which has not been properly addressed according to chs. NR 700 to 726, Wis. Adm. Code.

NOTICE OF APPEAL RIGHTS

If you believe that you have the right to appeal the Department's decision to record the attached affidavit and would like to request a contested case hearing to prevent the recording of a deed affidavit, you are required to file a written request for a contested case hearing with the Department within 30 days after the date this letter is mailed. All hearing requests shall be filed either by delivery to the Office of the Secretary of the Department of Natural Resources at 101 South Webster Street, Madison, Wisconsin 53707, or by certified mail addressed to the Office of the Secretary, Department of Natural Resources, P.O.Box 7921, Madison, Wisconsin 53707.

All requests for a contested case hearing must be made in accordance with s. NR 2.05(5), Wis. Adm. Code, and must identify the grounds for the petition.

If you would like to request judicial review, you have 30 days after the decision is mailed, or otherwise served by the Department, to file your petition with the appropriate circuit court and serve the petition on the Department, pursuant to ss. 227.52 and 227.53, Wis. Stats. Such a petition for judicial review shall name the Department of Natural Resources as the respondent.

This notice is provided pursuant to s. 227.48(2), Wis. Stats.

Dated at Madison, Wisconsin, this _____ day of _____, 1994.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES
By:

_____

^C District Director

Attachment IV

AFFIDAVIT

In Re: Property Located in the
Township of ^C, ^C County,
more particularly described as:

A piece of land in the ^C Quarter of the ^C Quarter (^Cl/4 ^Cl/4) of Section ^C, Township ^C, Range ^C, that is also known as ^C (address) described as: Commencing at a point on ^C ; thence ^C; thence ^C; thence ^C to the point of beginning of this description.

STATE OF WISCONSIN)
) SS
COUNTY OF ^C)

^C (**staff name**), being first duly sworn, states that:

1. He/she is a ^C (**job title**) employed by the Wisconsin Department of Natural Resources at its ^C (**district, area or other office**).

2. He/she has personal knowledge of the facts herein set forth and believes the same to be true.

3. The Department of Natural Resources has determined that ^C (**contaminant/contaminants**) discharged to ^C (**property name**), which is located at ^C (**address**), in the Township of ^C, County of ^C, and which has the above captioned legal description, has contaminated ^C (**soil/groundwater**) in the vicinity.

4. The Department of Natural Resources believes that removal or treatment of the ^C (**contaminated soil**), and ^C (**groundwater monitoring/treatment**), are required on the property under the authority of s. 144.76, Wis, Stats.

5. On ^C (**date**), the Department of Natural Resources sent a letter to ^C (**responsible party**), d/b/a ^C (**property name**) advising him/her of the statutory requirement to restore the environment at that location. ^C (**No or an inadequate**) response to that letter has been received by the Department.

6. On ^C the Department of Natural Resources sent a certified letter to ^C (**responsible party**) advising that an affidavit of contamination would be recorded if satisfactory action to restore the environment did not commence. That letter requested a written response by ^C. ^C (**No or an inadequate**) response to that letter has been received by the Department.

7. On ^C (**date**), the Department sent a certified letter to ^C (**responsible party**) advising that the Department would record an affidavit.

8. Because the Department of Natural Resources believes that ^C (**contaminant and contaminant components**) currently found in the ^C (**soil/groundwater**) on the property with the above legal description, will continue to discharge into the environment, subsequent purchasers of the property could be held responsible for clean-up costs under section 144.76, Wisconsin Statutes.

(name) _____

Subscribed and sworn to before me this _____ day of _____, 19__.

_____
Notary Public, State of Wisconsin
My commission expires on:_____

This document was drafted by the Department of Natural Resources.