Answer:

The direction of the current budget bill is to use a GIS registry as a means for tracking groundwater contamination that remains in place. Until the full development of the GIS system is complete, GW use restrictions will be used as the method of documenting contamination remaining in place in both developable and non-developable groundwater. After its development, the GIS system is expected to form the standard basis for documentation.

10. *Section Comm 46.06 (1) (d) provides a "No additional risk" evaluation. What is meant by the terms "no additional risk" and "source control"? Please define.*

Answer:

The term "no additional risk" means that there will be no increase in risk to the public and/or the environment by leaving the contamination in place and not taking a more aggressive response action. The term "source control" encompasses actions which either remove or treat contamination in the soil or groundwater, or both, and those actions which minimize the leaching of contamination to groundwater via installation of an impermeable cap, such as asphalt. Source control actions are targeted at the most contaminated areas of a site (hot spots) and are designed to prevent plume migration, facilitate natural attenuation and reduce the risk to the public from the contamination at the site.

11. *Section Comm 46.06 (1) (e) describes remedial efforts. In short, how will risk-based considerations be applied to management of sites, which do not meet the simple screening criteria of Comm 46.05?*

Answer:

As noted in the response to question #2, risk criteria are used for the purpose of determining the range of responses that must be taken to address petroleum contamination. The criteria attempt to classify the risk that a site poses to human health and the environment with the purpose of separating those that can close after only an investigation and those that must continue on to implement a remedial action.

All sites will receive a response based upon the risk that they pose to human health and the environment. The site will be first evaluated at the time that the site investigation is completed and again when a remedial action is proposed, if that is necessary.

12. *Comm 46.07 (4) describes the list of sites. Please define "target levels." Is this the same as "remediation targets" 46.02(9) and "action levels" 46.05(1)? What are expected closure costs and how are they calculated?*

Answer:

The terms "target levels" and "remediation targets" refer to the same thing. These represent the point at which a site will be granted closure and no further action is required. The term "action level" is used to identify an action that would bring the site into compliance with a

remediation target established for the site. These actions could include a source control measure or it could be a closure utilizing a specific institutional control.

"Expected closure costs" are the caps on total funding that are established through Comm 47. These total caps can be created through the approval of a remedial alternative, through the competitive bid process or through the recosting of an existing remediation. In all cases, the cap will be inclusive of the total cost to bring the site to a point where closure can be offered.

13. *Will the creation of ch. Comm 46 necessitate amendments to the NR 700 series of rules and, in particular, to ch. NR 726? If so, when will these amendments be undertaken?*

Answer:

When Comm 46 is adopted as a permanent rule by DNR it will be renumbered and added to the NR 700 rule series as a new chapter, NR 746. Additional changes to the NR 700 rule series are anticipated as follows:

- Amend ch. NR 722.07 and 722.09 to exempt sites that fall under the Comm 46 risk-based protocol from requirements to "identify and evaluate an appropriate range of remedial action options in accordance with the requirements of this section", and to select an option "from the range of technically feasible options".
- Amend ch. NR 720.11 to exempt sites that fall under the Comm 46 risk-based protocol from other provisions which require, "Determining residual contaminant levels based on protection of human health from direct contact with contaminated soil."
- Add a note or provision to ch. NR 726.05, which currently says that sites will be closed when "the concentration or mass, or both, of a substance and its breakdown products existing in soil or groundwater, or both, have been reduced if the actions are deemed necessary to restore groundwater within a reasonable period of time". This note or provision would provide that sites which fall under the Comm 46 risk-based protocol will be closed when the contaminant concentrations reach the levels specified in Comm 46.

The schedule for permanent rulemaking is still being developed, and should be available by mid-April.

14. *How many contaminated sites exist in Wisconsin in which both petroleum and another hazardous substance are factors? Does PECFA apply to such sites and, if so, will the program pay for all or part of the cleanup?*

Answer:

An accurate number of the contaminated sites that have both petroleum and other hazardous substance contamination is not available at this time. DNR did an informal, qualitative survey of a number of field staff on this question in August of 1998. The response indicated that approximately 5% of petroleum contaminated sites also were contaminated with another hazardous substance. (Earlier reports have stated as many as 20% of petroleum sites might have co-contamination. However, recent information indicates that this estimate was too high and 5% is a more realistic number.) On March 9, 1999, the DNR began a file survey of approximately 5,000 open petroleum sites under its jurisdiction in order to get detailed

information on the type, degree and extent of contamination and site geology. The presence of co-contamination is one of the questions in the survey. The results of this survey are expected to be available in 6 months.

PECFA does apply at these sites However, it will only cover eligible costs for addressing impacts associated with the petroleum portion of the release. Costs attributable to non-petroleum compounds have to be separated out and are not reimbursable under PECFA.

15. *Do the departments believe that statutory authority exists for the promulgation of a rule that requires a consultant to pay for a cost overrun if notice of the problem has not been provided to a site owner?*

Answer:

The departments believe that some level of legislative direction is needed in this area before implementing a requirement that consultants pay for cost overruns. This issue is complex and includes questions of who asked for or directed the non-reimbursable work and what level of notification is required to an owner. To successfully implement an owner "hold harmless" provision, legislation is necessary to help define terms and conditions under which the consultant would be liable for the additional costs. In addition, the legislation would need to address financial tests for the consultant so that there is an assurance that they will have the financial means to pay the cost overruns and how the owner achieves access to the financial guarantee.

16. *In comparison to current law, what percentage of PECFA sites do the departments expect to close because of the promulgation of ch. Comm 46?*

Answer:

Nothing in Comm 46 changes any of the process requirements of the NR 700 rule series, ch. NR 140 or ch. 160, Stats., pertaining to site closure. However, Comm 46 does make it much clearer to the public, consultants and agency staff when sites meet the criteria for closure. The rule also codifies an assumption that natural attenuation will remediate the petroleum contamination in non-developable groundwater within a reasonable period of time, making it unnecessary for such sites to complete that demonstration. Even though all sites seeking closure under Comm 46 could be closed under current law, we believe that there will be a significant increase in sites actually being closed, due to the clarity and simplification that the rule adds to the process.

In the last few weeks, we have had the opportunity to review a sample of remedial alternatives at existing sites. From this very small initial sample, we believe that 25% or more of sites can be impacted by the provisions of Comm 46. In addition, as mentioned in the response to question #14, DNR is now conducting a review of approximately 5000 case files to compile a more detailed analysis of the impact of Comm 46. The results of this evaluation are expected to be available in 6 months.

17. With the promulgation of ch. Comm 46, what percentage of sites will be moved from the jurisdiction of the Department of Natural Resources to the jurisdiction of the Department of Commerce?

Answer:

As stated in the answer to question #2, the main focus and impact of Comm 46 is the development of protocols for setting specific criteria by which sites will be evaluated for remedial action or closure. The rule does assign sites with groundwater contamination below the enforcement standard to Commerce, where it was previously set at or below the preventive action limit. This change will move a number of sites to the Department of Commerce. The most significant provision for changing the current assignment of sites, however, is contained in the current budget bill.

18. At previous meetings, protocols were discussed with regard to differentiating between sand, silt, and clay. Why wasn't this done in Comm 46?

Answer:

After evaluating the various circumstances that were applicable to the use of the risk-based protocol, it became clear that, regardless of the soil type, the same criteria applied at all sites. We also recognized that in most situations a strictly clay versus sand environment rarely exists at a given site.

To address concerns raised by JCRAR regarding the risk posed by petroleum contamination at clay sites, we recognized the non-developable groundwater concept. This approach encompasses all water-bearing formations that cannot yield at least 0.2 gallons per minute (gpm). We believe this approach addresses not only clay formations, but all formations, such as silt and glacial tills, which are unable to yield 0.2 gpm. We discussed this approach, based on yield, with staff in the Bureau of Drinking Water and Groundwater within DNR. Staff concurred that, in most cases, a potable well would not be constructed in a formation yielding less than 0.2 gpm, excluding bedrock. However, in those rare instances where someone has no choice but to install a potable well in such a formation, the driller in consultation with the DNR would be required to use special well construction features or water treatment, or both, to ensure safe water is delivered.

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JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

March 10, 1999

Secretary George Meyer
Department of Natural Resources
101 South Webster Street
Madison, WI 53702

Secretary Brenda Blanchard
Department of Commerce
123 W. Washington, Room 922
Madison, WI 53702

Dear Secretaries Blanchard and Meyer:

On February 25, 1999, the Joint Committee for Review of Administrative Rules (JCRAR) held a public hearing on the subject of the Petroleum Environmental Cleanup Fund Award (PECFA) program. At the hearing, representatives of your departments described the contents of an emergency rule, ch. Comm 46, relating to petroleum environmental cleanup fund interagency responsibilities. The members of the Joint Committee raised numerous questions regarding the meaning and application of ch. Comm 46.

Because of JCRAR's ongoing review of PECFA, we would appreciate answers to the following questions about ch. Comm 46 and PECFA prior to the committee's next meeting in late March:

1. Section Comm 46.02 (3) defines the term "developable groundwater." Will the creation of this new term have any impact on the interpretation or implementation of the statutory provisions relating to groundwater protection standards contained in ch. 160, Stats? How and what measures will be employed to determine if a groundwater unit is developable or not developable?

2. Section Comm 46.02 (6) (b) defines the term "high priority site" in part to mean a site that exhibits contamination to an area of exceptional environmental value where the discharge would pose a greater than normal threat. Please define the phrases "exceptional environmental value" and "greater than normal threat." How are risk criteria considered in designation of "high", "medium", and "low" priority sites? How will the caseload be managed to prioritize response to sites, which do not have risk criteria?

3. Section Comm 46.04 (2) provides that the departments will develop a methodology for investigating expanding plumes of contamination. When will the methodology be completed and will it be promulgated as an administrative rule? Would the procedures outlined in the ASTM Standard for Groundwater Remediation by Natural Attentuation (RNA) be sufficient?

4. Section Comm 46.05 (1) provides that jointly created risk assessment protocols will be used to measure risk associated with petroleum contamination and to determine appropriate responses to that contamination. When will the protocols be created and will they be promulgated as administrative rules?

5. Section Comm 46.05 (2) (b) describes environmental risk factors. What is meant by the terms "identified" and "addressed" with regard to COMM 47 environmental factors? Will risk-based procedures be applied to "address" environmental factors?

6. Section Comm 46.05 (2) (c), (h), (i) provides risk criteria in regard to groundwater. Do these risk criteria refer just to "developable" groundwater or to any groundwater? How is an ES exceedance in non-developable groundwater a risk factor? If there is an ES exceeedance in non-developable groundwater 999 ft from a public water supply well, does this represent a risk to public health? How would this affect ch. 160?

7. Section Comm 46.05 (2) (d) provides that decisions regarding the remediation and closure of sites will be based on the application of various risk criteria including whether no contamination occurs above stated values in Table 1 within 4 feet of the ground surface. How were the figures in Table 1 determined? Are the figures higher than standards set by the Environmental Protection Agency (nationally or in region 5), ASTM standards or standards used in Michigan. If so, why?

8. Section Comm 46.05 (2) (g) describes another risk factor in terms of the impact or potential impact to a receptor of concern as defined by the departments. Please define the phrase "receptor of concern." What other "receptors of concern" need to be evaluated that are not already addressed by risk criteria?

9. Section Comm 46.06 (1) (b) describes use of groundwater use restriction or GIS registry. Does a requirement for groundwater use restriction or GIS registry apply only to developable groundwater or any groundwater?

10. Section Comm 46.06 (1) (d) provides a "No additional risk" evaluation. What is meant by the terms "no additional risk" and "source control"? Please define.

11. Section Comm 46.06 (1) (e) describes remedial efforts. In short, how will risk-based considerations be applied to management of sites, which do not meet the simple screening criteria of Comm 46.05?

12. Comm 46.07 (4) describes the list of sites. Please define "target levels." Is this the same as "remediation targets" 46.02(9) and "action levels" 46.05(1)? What are expected closure costs and how are they calculated?

13. Will the creation of ch. Comm 46 necessitate amendments to the NR 700 series of rules and, in particular, to ch. NR 726? If so, when will these amendments be undertaken?

14. How many contaminated sites exist in Wisconsin in which both petroleum and another hazardous substance are factors? Does PECFA apply to such sites and, if so, will the program pay for all or part of the cleanup?

15. Do the departments believe that statutory authority exists for the promulgation of a rule that requires a consultant to pay for a cost overrun if notice of the problem has not been provided to a site owner?

16. In comparison to current law, what percentage of PECFA sites do the departments expect to close because of the promulgation of ch. Comm 46?

17. With the promulgation of ch. Comm 46, what percentage of sites will be moved from the jurisdiction of the Department of Natural Resources to the jurisdiction of the Department of Commerce?

18. At previous meetings, protocols were discussed with regard to differentiating between sand, silt, and clay. Why wasn't this done in Comm 46?

Sincerely,

Senator Judith B. Robson
Senate Co-Chair

Representative Glenn Grothman
Assembly Co-Chair

Cc: Members, JCRAR

WISCONSIN WATER WELL ASSOCIATION

April 6, 1998

William J. Morrissey
Environmental and Regulatory Services Division
Wisconsin Department of Commerce
P. O. Box 7839
Madison, WI 53707-7839

Re: PECFA Code Changes

Dear Mr. Morrissey:

The purpose of this letter is to provide you with comments on the March 27, 1998 proposed changes to the Administrative Rules, COMM 47, governing the administration of the PECFA program. The Wisconsin Water Well Association (WWWA) appreciates the opportunity to serve on the Advisory Committee and to provide comments on this rule package.

While the WWWA understands the need to institute cost control measures to save the PECFA program money, it is concerned that this rule package will not bring about the intended cost savings.

Quite honestly I question whether the program is being managed or administered. A managed fund or program would continuously review where expenditures are being made. Trends analysis would be studied to see if there were any patterns developing which would have a positive or negative impact on the fund. An administrated fund is one which simply pays out money. This rule does not provide additional tools to the Department which would allow the fund to be managed.

Under the rules, progress payments are eliminated, which extends the time between the expenditure of funds and the review of claims. This results in commodity providers and consultants developing practice patterns which are not reviewed for a period of up to three and one half years after the costs have been incurred. To effectively manage the program there is a need to continuously monitor the program costs. The concept of regular reports and/or progress payments should be explored to ensure that there is a review of all active cases on a timely basis. The concept of requiring the quarterly or semi-annual submittal of reports indicating progress made and providing a summary of expenditures would allow the department the opportunity to review future claims and respond with necessary guidance or rule changes.

The Association requests that 47.01 (1) be modified to include a reference to the need for sites to comply with all appropriate environmental regulations which are administered by the Department of Natural Resources (DNR). While the PECFA program is a reimbursement program, the purpose is to reimburse costs associated with protecting the public's health and restore the environment.

The Association would also like to take this opportunity to raise its concerns on landspreading of contaminated soils. The WWWA has been an active participant on the NR 718 Advisory Committee which was assigned the task of providing comments on proposed landspreading rules. During the Committee's deliberations there was considerable discussion on issues relating to the need to ensure that the landspreading site was monitored and if the soils did not meet NR 720 standards within a time certain other remedial activities would be considered. In our recent conversations, it became apparent that if natural attenuation did not work at the landspreading site, the remedy would be considered a failed remedy

and would not be eligible for reimbursement. If this is the Department's position it is unlikely that any landowner would allow contaminated soil to be spread on their property. This decision will result in an increase in disposal costs. Consideration should be given to incorporating language which would recognize the costs of treatment at landspreading site which have residual contaminant levels above state standards.

In light of the changes that are incorporated in this draft, specifically those which eliminate the references to the DNR, we believe that there is a need to define the term "goal of the fund". The term is used in COMM 47.32 (1). A similar concern relates to the use of the term "objectives of the program" as contained in 47.337 (5) (b). The public needs to understand the goals, objectives and intent and purpose of the program.

The WWWA is concerned that the definition section 47.015 of the rules does not attempt to define a reasonable period of time. We note that NR 726 also fails to define this term and are hopeful that a definition or approach to defining the term can be agreed on by all interested parties.

While DNR and COMM have entered into a Memorandum of Understanding governing the administration of PECFA cases which spells out who has the authority to close out cases, we are concerned that there is no reference to DNR's approval of a remedial action prior to closure. In light of the elimination of the references to the DNR we request that the framework of the MOU be outlined in the rules or that additional clarification be given to address who may grant approval of closure requests.

I have had the opportunity to review the changes to COMM 47.33 (1) (b) (2) as it relates to calendar year bidding for drilling services with several firms engaged in the business. There is uniform opposition to this approach on the part of the drillers. They are concerned that the annual bid will not allow for consideration of site specific conditions. Geology varies considerably throughout Wisconsin and there are different drilling techniques or rigs used depending on the site conditions. It will be difficult if not impossible to award a contract to a driller which incorporates all potential site conditions. Drillers represent a small portion of the overall expenditures of the PECFA program. Their costs have been controlled through real competition. An issue that arises out of the annual bidding process is what criteria will be used to evaluate the proposals to determine if they are the same. Failure to develop guidance documents could result in costs being disallowed in the future if the wrong driller is selected.

We continue to have concerns that the lack of progress payments favors remedies which are cheap and not necessarily protective of the environment. Cleanups of sites where there are significant levels of contamination are at financial risk under the proposed changes. These sites are likely to be more expensive to clean up than those using natural attenuation. By delaying the progress payment a greater portion of the award will be applied to interest payments and fewer dollars will be available for cleanup. Consideration needs to be given to the impact that the proposed change will have on the ability to adequately fund the cleanup of these sites.

The WWWA is also concerned over the Department's piecemeal approach to modifying COMM 47. While the Advisory Committee has bee meeting for over one year, some of the changes and much of the language were not shared with it. In addition, there are other pending changes to the rules dealing with ineligible costs, bundling and bidding which should be considered as part of this package. Each member of the Advisory Committee brings with them a different perspective which should be sought out during the rule making process. The Advisory Committee provides the Department with a forum to solicit different viewpoints and build a consensus for developing and implementing meaningful cost containment strategies.

The WWWA appreciates this opportunity to provide you with our comments and looks forward to working with you in the future. Please feel free to contact me at (715) 675-9784 with any questions. Thank you for your consideration.

Sincerely,

John Robinson

cc: WWWA Board of Directors

REISHARE/Robinson/WaterWell/COMM4

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JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

March 25, 1999

Secretary Brenda J. Blanchard
Department of Commerce
PO Box 7970
201 West Washington Avenue
Madison, WI 53707-7970

Secretary George E. Meyer
Department of Natural Resources
PO Box 7921
101 South Webster Street
Madison, WI 53707-7921

Dear Secretary:

We are writing to inform you that the Joint Committee for the Review of Administrative Rules (JCRAR) held a public hearing on March 25, 1999. At that meeting, JCRAR received public testimony regarding **COMM 47,** relating to the review of policies regarding risk protocols developed by the Department of Commerce and the Department of Natural Resources in response to the motion adopted by the Joint Committee at its February 25, 1999 Executive Session.

The Joint Committee for the Review of Administrative Rules met in Executive Session on March 25, 1999 and adopted the following motion:

Carried unanimously: Pursuant to § 227.19(4)(d), *Wisconsin State Statutes,* the Joint Committee for the Review of Administrative Rules extends the suspension period of **COMM 47** by 36 days.

Ayes:	(10) Senators Robson, Grobschmidt, *Shibilski, Welch, and *Darling; Representatives Grothman, Seratti, Gunderson, Kreuser, and Black
Noes:	(0)
Absent:	(0)* Roll held open, voted by phone

Motion Carried: Extension Granted.
10 Ayes, 0 Noes, 0 Absent.

Pursuant to § 227.19, *Wisconsin State Statutes,* we are notifying the Secretary of State and the Revisor of Statutes of the Committee's action through copies of this letter.

Sincerely,

Judith B. Robson
State Senator
15th Senate District

Glenn Grothman
State Representative
59th Assembly District

JBR:chmiv

cc: Secretary of State La Follette
Revisor of Statutes Gary Poulson

STATE OF WISCONSIN
DEPARTMENT OF COMMERCE

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101 East Wilson Street, Madison, Wisconsin

TOMMY G. THOMPSON
GOVERNOR
MARK D. BUGHER
SECRETARY

Mailing Address:
Post Office Box 7864
Madison, WI 53707-7864

February 16, 1999

The Honorable Judy Robson
Senate Chair
Joint Committee for the Review of
Administrative Rules
15 South, State Capitol
Madison, WI 53702

The Honorable Glenn Grothman
Assembly Chair
Joint Committee for the Review of
Administrative Rules
125 West, State Capitol
Madison, WI 53702

Dear Senator Judy Robson and Representative Glenn Grothman:

Attached is a risk assessment process that will be immediately promulgated by the Department of Commerce as an amendment to the COMM 46 emergency rule. The Department of Natural Resources and the Natural Resources Board are expected to promulgate a companion rule within the next two weeks. The emergency rule represents the risk assessment element of the Governor's proposed comprehensive redesign of the PECFA program. Other key elements of the redesign include the following:

- state borrowing to reduce financial costs and ameliorate site owner collateral constraints;
- limits on site owner benefits under the program as suggested by the Legislative Audit Bureau;
- accountability measures to monitor site cleanup performance;
- funding for a geographic information system-based registry for sites with contamination above state enforcement standards; and
- authority to prioritize sites based on environmental and other factors.

The emergency rule and the Governor's budget represent the core changes necessary to repair the PECFA program. Implementation of only selected elements from the package will not create a long-term solution to the program's difficulties.

The risk assessment process included in the attached emergency rule applies to all sites and soil conditions, including clay formations. It establishes clear thresholds for site closure and links those thresholds to remediation targets at sites that need further action. Sites that meet the risk assessment criteria in the emergency rule will be closed immediately after the site investigation with no additional financial assistance except for eligible post closure costs (e.g., removal of wells, etc.).

The risk assessment process consists of threshold criteria and conditions that establish eligibility for immediate site closure. The criteria establish the following elements as indicators of "low environmental risk":

- Absence of environmental factors listed in COMM 47 (or those factors, if present, must be addressed).

- Contamination is below state enforcement standards off-site (a public roadway or right of way is not considered off-site).

- Contamination is located 4 or more feet below the surface (no exceedence of direct human contact contamination limits within 4 feet of the surface).

- On-site contamination, in a water sample from non-developable groundwater, is less than 300 times the enforcement standard (it is expected that allowable soil contamination will be orders of magnitude higher).

  [Developable groundwater is defined as a formation, excluding bedrock, that can yield 0.2 gallons per minute or more of groundwater, determined by an open bore hole.]

- Contamination in non-developable groundwater is at least 5 feet from developable groundwater, or the contamination is decreasing in the soil as it approaches developable groundwater.

- No receptors, as defined by the departments, are impacted.

- No enforcement standard exceedence in any groundwater within 1000 feet of a public well or within 100 feet of a private well.

The above criteria dictate the following outcomes at PECFA-eligible contaminated sites:

- Sites below the enforcement standard on and off-site and with no presence of environmental factors will be closed and additional funding will not be provided after investigation except for otherwise eligible post closure costs.

- Sites above the enforcement standard on-site but below the enforcement standard off site in developable groundwater, with no environmental factors or requirement for source control and below 300 times the enforcement standard in non-developable groundwater, shall be offered closure with a groundwater use restriction or a GIS registration. If the off-site owner does not agree to a groundwater use restriction or GIS registration, additional funding will not be provided after investigation except for otherwise eligible post closure costs. No remedial action will be required other than natural attenuation.

- Sites that meet all of the risk criteria will be closed and additional funding will not be provided after investigation except for otherwise eligible post closure costs.

- Sites that do not meet all of the risk criteria may be closed after only the investigation, if it is determined that the site poses no additional risk and it has been determined that no additional source control is needed.

- Sites that do not meet all of the risk criteria and are determined to pose an additional risk shall conduct remedial efforts to address and resolve the risk provisions identified unless the site can be closed with a groundwater use restriction or GIS registration.

We appreciate the opportunity to convey these changes to the Committee. Please feel free to contact us if you have any questions.

Sincerely,

Mark D. Bugher
Secretary of
Administration

Brenda J. Blanchard
Secretary of
Commerce

George E. Meyer
Secretary of
Natural Resources

CC: Governor Tommy G. Thompson
Members, Joint Committee for the Review of Administrative Rules

SECTION 1. Chapter Comm 46 is created to read:

CHAPTER Comm 46
PETROLEUM ENVIRONMENTAL CLEANUP FUND INTERAGENCY RESPONSIBILITIES

Comm 46.01 Purpose. The purpose of this rule is to identify the roles, processes and procedures that guide the Departments of Commerce and Natural Resources in the administration of their respective responsibilities for high, medium and low priority petroleum contaminated sites. The requirement, which is the basis of this rule, was established in 1995 Act 27 and mandated that the two agencies determine the:

(1) Respective functions of the two departments.

(2) Procedures to ensure that remedial actions taken under this section are consistent with actions taken under s. 292.11, Stats.

(3) Procedures, standards and schedules for determining whether the site of a discharge of a petroleum product from a petroleum storage tank is classified as high, medium or low priority.

Comm 46.02 Definitions. In this chapter:

(1) "Commerce" means the Department of Commerce

(2) "Discharge" means, but is not limited to, spilling, leaking, pumping, pouring, emitting, emptying or dumping.

(3) "Developable groundwater" means a formation, excluding bedrock, that can yield 0.2 gallons per minute or more of groundwater, determined by an open bore hole.

(4) "DNR" means the D

(5) "Enforcement standa
concentrations of a substance in
and s. NR 140.10 or s. 160.09, S

(6) "High priority site"
following criteria:

(a) Presence of a hazard
product storage tank system.

(b) Contamination to ar
discharge would pose a greater

(3) Volatiles
160.14
Need to call it non developable groundwater

07, Stats.,

ıore of the

etroleum

ere the

(c) Confirmed groundwater contamination where any compound detected is equal to or greater than an established enforcement standard.

(7) "Low priority site" means a remediation site where:

(a) There is only petroleum contamination and no threat to groundwater , and

(b) No evidence of a hazardous substance other than the petroleum product that was discharged from the petroleum product storage tank system.

(8) "Medium priority site" means a remediation site that meets the following criteria:

(a) No evidence of contamination by a hazardous substance other than the petroleum product, which was discharged from the petroleum storage tank system; and

(b) No confirmed groundwater contamination at or above the enforcement standard.

(9) "Remediation target" means the contamination concentration level(s) at which a site will be granted, or eligible for, closure utilizing an institutional control option, including a groundwater use restriction, or any other appropriate tool.

Comm 46.03 Site authority. (1) GENERAL. The assignment of authority for high, medium and low priority petroleum contaminated sites shall be determined according to the following:

(a) The DNR shall have authority for high priority sites.

(b) Commerce shall have authority for low and medium priority sites.

(2) AUTHORITY. The authority for a site falling under an agency's jurisdiction includes but is not limited to enforcement, remediation supervision and direction, referrals for legal action, and decision making regarding granting or denying closure or an approval for no further action.

(3) JOINT ADMINISTRATION. The departments of Commerce and DNR shall implement a system of joint decision making for:

(a) The setting of remediation targets for sites that are competitively bid or bundled with another site(s). When the targets are achieved, the site shall be closed without requiring or reimbursing for additional remedial efforts except for otherwise eligible post closure costs.

(b) The selection of remedial bids.

(4) CLOSURE DECISIONS. For any site with confirmed groundwater contamination equal to or greater than the enforcement standard following completion of the site investigation and for which a closure request has been submitted, the following steps will be taken:

(a) A site closure request is prepared and submitted to DNR with the appropriate fee.

(b) The DNR reviews the request and makes a determination on closure, either with or without institutional controls or tools.

(c) The DNR will forward a copy of all closure determinations to Commerce.

(d) If Commerce identifies a site they believe has met its remediation target(s), but has not submitted a closure request, they may request DNR take action to solicit a closure request from the site owner.

(5) DISPUTE RESOLUTION. Any disputes between the agencies under (3) or (4) will be subject to the following dispute resolution process. Project managers will discuss their differences, and the basis for them, in an attempt to resolve the dispute. If the dispute is not resolved, the decision will be referred to the appropriate Division Administrators; if the dispute still remains unresolved, the Department Secretaries shall be the final decision-makers.

Comm 46.04 Site investigation. (1) GENERAL. The investigation of petroleum contaminated sites shall be conducted in a manner designed to meet NR 716 and to minimize costs while providing sufficient data necessary for risk assessment and remediation decision making.

(2) The departments shall develop an agreed upon methodology for determining if there is evidence of an expanding plume and the actions to take if the data provided through the investigation is not adequate. This methodology will be part of the investigation process.

Comm 46.05 Risk Assessment. (1) GENERAL Jointly created risk assessment protocols, shall be used to measure the environmental, safety and health risks associated with petroleum contaminations and to determine a required action level which could include, but not be limited to, adequate source control and measures to address environmental risk factors, or whether the site may be closed without additional action.

(2) RISK CRITERIA. Decisions regarding the remediation and closure of sites shall be based upon an application of risk criteria. The following risk criteria will be used in decision making:

(a) No environmental factor(s), as defined in Comm 47, exists;

(b) Site closure may not take place until environmental factors, that are identified, are addressed;

(c) Contamination in groundwater is below the enforcement standard off-site except in a public roadway or right of way;

(d) No contamination above Table 1 values occurs within 4 feet of the ground surface;

(e) On-site contamination, in a water sample from a non-developable groundwater water sample, does not exceed 300 times the enforcement standard;

(f) There is a separation distance between contamination and the developable groundwater of 5 feet or more, **or** the contamination is decreasing, in the soil, as it approaches the developable groundwater;

(g) There is no impact or potential impact to a receptor of concern as defined by the departments;

(h) There is no enforcement standard exceedance in any groundwater within 1000 feet of a public well;

(i) There is no enforcement standard exceedance in any groundwater within 100 feet of a private well.

Comm 46.06 Site closure. (1) GENERAL. The actions of the DNR and Commerce in making site closure or no further action decisions and in approving remedial actions on a site shall incorporate that:

(a) Sites where contamination is determined to be below the enforcement standard on site and below the enforcement standard off site, and no environmental factors exist, shall be closed without requiring or reimbursing for additional remedial efforts except for otherwise eligible post closure costs.

(b) Sites with contaminants above the enforcement standard on site but below the enforcement standard off site in the developable groundwater, and not greater than 300 times the enforcement standard in the non-developable groundwater, and no environmental factor(s) or requirement for source control, shall be offered closure with a groundwater use restriction or a GIS registration. Additional funding will not be provided except for otherwise eligible post closure costs. If the of site owner does not accept the GIS registration or the groundwater use restriction, additional funding will still not be provided except for otherwise eligible post closure costs and additional remedial efforts, beyond natural attenuation, will not be required.

(c) Sites that meet the criteria of 46.05 (2) will be closed after investigation without requiring or reimbursing for additional remedial efforts except for otherwise eligible post closure costs.

(d) Sites that do not meet all ... may be closed after only the investigation, ...ional risk and it has been determined th...

(e) Sit... ...d are determined to pose additional risk ... ...l resolve the risk.

(f) The ... ...constitute risk factors. The elements establ... ...by the departments in the process of setti... ...hether to grant closure or no further action.

(3) DE... [THE ENFORCEMENT STANDARD. ... below either the enforcement sta... ...t, recognition shall be made of the impact of ... ...esults and statistical significance. The DNR and Commerce shall develop, by June 30, 1999, a process for taking these considerations into account and then revise and/or adopt administrative rules as appropriate.

(4) TRACKING OF REMEDIATION PROGRESS

(a) The departments shall establish a system for electronically tracking the achievement of remediation targets. They shall use the tracking system to determine if remediation funding should end and if a site closure request should be submitted.

(b) The departments shall jointly require and enforce the use of the electronic reporting system by claimants.

Comm 46.07 Transfer of sites. (1) GENERAL. The DNR will establish the responsibility of either Commerce or DNR for a site within 60 days of the receipt of the site investigation report, unless any of the following apply:

(a) The DNR has requested additional information after reviewing the site investigation report and the requested information has not been submitted.

(b) The site is the subject of an enforcement action initiated by the DNR.

(c) Other circumstances over which the DNR has no control have prevented the DNR from making a site classification determination.

(2) CONSULTANT DETERMINATION. Consultants performing site investigations may determine, as part of a joint agency site classification pilot, whether a site is high, medium or low priority and submit the investigation report directly to the agency they believe has jurisdiction.

(3) CHANGES IN CLASSIFICATION. If a site is classified as high, medium or low priority, and the DNR or Commerce determines that the classification is incorrect, that agency will transfer the site and all related data to the other agency within 14 days.

(4) LIST OF SITES IN REMEDIATION. The departments will develop and maintain a reconciled list of sites in remediation including data on target levels, risk factors, expected closure costs and other relevant data .

Appendix A

Table 1

Benzene	0.620 mg/kg
1,2 DCA	0.340 mg/kg
Ethylbenzene	230.0 mg/kg
Toluene	520.0 mg/kg
Xylene	860.0 mg/kg

Proposed rulemaking on NR 720

Department of Natural Resources
Form 1000-6 Rev. 12-94

RULE AGENDA/BOARD ACTION CHECKLIST

Bureau for Remediation and Redevelopment
Bureau

☒ Original December, 1996
Date

Natural Resources Board Order Number (If Applicable) RR-

☐ Amended _____
Date

1. Subject of the administrative code action/nature of board action.

   Permission to add additional compounds to the soil standards table in ch. NR 720, Soil Quality Standards, to develop guidance and outreach efforts for the continuing implementation of the NR 720 rule series.

2. Description of policy issues to be resolved, include groups likely to be impacted or interested in the issue.

   On 4/1/95, the soil standards code, NR 720, went into effect. It has been the intention of the department to add chemicals to the tables within the code for both the groundwater protection pathway and the direct contact protection pathway. Since the promulgation of this code, it has become apparent that the department must provide supporting guidance on certain elements critical to implementation of this code. The department is proposing to calculate standards for additional compounds based upon the same process used to establish the existing soil standards. The attached memorandums discusses this topic in more detail.

3. Does rule/board action represent a change from past policy? ☐ Yes ☒ No

   Explain the facts that necessitate the proposed change.

4. Who will participate in board action/rule development and what is the anticipated time commitment?

	Name of Person Responsible	Time Before Hearing	Time After Hearing	Acknowledgement
a. Drafting bureau	Mark Giesfeldt/Carol McCurry	40/200 hrs.	100 hrs.	
b. Legal	Judy Ohm	40 hrs.	40 hrs.	
c. BEAR	George Albright	8 hrs.	8 hrs.	
d. M&B	Al Shea	8 hrs.	20 hrs.	
e. Other Department staff	Please Note: The department will request DH&SS-DOH support on the development of the direct contact pathway standards. Expected time before and after hearing is 40 hrs.			

f. Recommended Public Participation: An external advisory committee will be formed to discuss and hopefully resolve the issues identified in the attached memorandums.

5. Which federal statute, regulation, state statute or judicial decision is the authority for the proposed rule/board action?

a. ☒ The proposed rule/board action conforms to and does not exceed requirements of a federal or state statute or controlling judicial decision.

b. ☐ The proposed rule/board action exceeds the minimum requirements of a federal or state statute or controlling judicial decision.

c. ☐ The proposed rule/board action is based on general authorization that requires rule making, but contains no specific standards.

d. ☐ The proposed rule/board action is based on a general authorization, with no specific direction that rules must be developed.

Donna D. Johnson
Bureau of Legal Services

6. Proposed schedule (Fill in blanks applicable)

a. Month of green sheet for requesting authorization for hearing or briefing on proposed board action: August, 1997

b. Hearing(s) - Number: 6

Date(s): September/October, 1997

Location(s): Milwaukee, Spooner, Wausau, Eau Claire, Green Bay and Madison

c. Rule adoption or action by Board: January, 1998

d. Anticipated timing of Legislative review - Start: February, 1998

End: May, 1998

e. Anticipated effective date: May, 1998

Initials of Bureau Director MFG

FOR DIVISION ADMINISTRATOR'S USE

7. a. If paragraph 5a. is checked ☒ Approved ☐ Approved as amended ☐ Disapproved

b. Recommendation to Secretary if paragraph 5b., 5c. or 5d. is checked ☐ Approved ☐ Approved as amended ☐ Disapproved

c. Other Board actions ☐ Approved ☐ Approved as amended ☐ Disapproved

Division Administrator's Signature	Date Signed
M J Kopecky for Jay	12/20/96

8. Paragraph 5b., 5c. and 5d. rules require the Secretary's approval before drafting begins.

Drafting ☒ may ☐ may not proceed on rule or action.

Secretary's Approval	Date Approved
[signature]	12/30/96

Completed original to be filed with the Bureau of Legal Services.

CORRESPONDENCE/MEMORANDUM

State of Wisconsin
Department of Natural Resources
Bureau for Remediation & Redevelopment

DATE: December 20, 1996

FILE REF:

TO: Herb Behnke, Chairman
Natural Resources Board

Stephen Willett, Chair
Air, Waste and Water Management/Enforcement Committee

FROM: George E. Meyer George

SUBJECT: Amended Schedule for the Development of Additional Generic Soil Standards in Chapter NR 720 - Soil Cleanup Standards

Previously, I sent you a memo dated August 20, 1996 (copy attached) requesting your approval to proceed with the development of additional soil standards to be included in Chapter NR 720. We have been developing values for a variety of compounds for the protection of the groundwater and direct contact pathways. A key element of our proposal is gaining the input of the various interest groups we regularly meet with to discuss cleanup issues. Based upon the recent input we received, we are amending the rule development schedule to allow us more time to work with our external customers.

Specifically, the following areas need more discussion and understanding before we believe additional soil standards should be authorized for hearings:

1. Misinterpretation and application of the existing direct contact numbers. Several external participants are concerned with how lenders and developers have demanded the generic table values be applied to sites because they are the most stringent.

2. Relationship and understanding of supporting guidance. How to properly interpret the guidance, training program, fact sheets, etc., are key items of interest and should greatly assist in a proper understanding of any rule proposal.

3. Many of external participants want the Department to reassess the two tiered approach currently found in Chapter NR 720 for direct contact for industrial and non-industrial uses. The risk levels, application, understanding effective remedies, etc., need to be better understood.

4. Understanding how the streamlined methodology to develop the groundwater pathway soil standards is equivalent to the previous computer modeling approaches. The assumptions, process and comparison with key elements need to be well understood.

To effectively deal with these issues, we will be forming an external advisory committee to work with us before seeking hearing authorization. Based upon the feedback we received, we believe we will be able to bring a proposal to the Natural Resources Board for hearing authorization at the August 26-27 meeting instead of the January 21-22 meeting as originally proposed. I have attached a revised "pink sheet" and the August 20, 1996 background memorandum for your reference.

Please let me know if you have any questions regarding this change.

cc: Jay Hochmuth - AD/5
Mark Giesfeldt - RR/3
Mary Jo Kopecky - AD/5

State of Wisconsin

CORRESPONDENCE/MEMORANDUM

DATE: August 20, 1996 FILE REF: RRPO

TO: Natural Resources Board (Sent to: Herb Behnke, Stone Willett)

FROM: George Meyer

SUBJECT: Issues relating to development of soil standards for addition to NR 720

The soil standards code, NR 720, has a limited number of substances in the generic soil standard tables for protection of the groundwater and direct contact pathways. It is important that additional substances be added to these tables for the benefit of the people using the generic soil standards as a basis for the closure of contaminated sites. At the present time, compounds not in the table must be determined on a site-by-site basis. Not only does this cause additional costs for many responsible parties, but also may add additional review time for department personnel. Some of the cases that now have to wait for department review will be closed under the simple site process available in NR 700, once additional compounds have generic standards. This addition to the rule will save both time and money for site owners dealing with contaminants not yet listed in the generic soil standards tables.

Before additional standards can be developed, a number of issues need to be resolved. These issues are basically divided into two major categories: issues dealing with the basic assumptions used in the calculation of standards for human health protection based on direct contact and issues dealing with developing additional standards based on groundwater protection.

Direct Contact Issues:

The specific issues in the direct contact category include: using a different particulate model for the inhalation pathway; adding inhalation of volatile compounds to the direct contact exposure route and dealing with dermal contact in the direct contact exposure pathway.

- The particulate model should be changed to be consistent with the standard model EPA is now using. There was no standard model when the NR 720 code was developed. EPA has updated their models and evaluates the risks, of ingestion of contaminated soil and the inhalation of particulates with contaminants adhered to them, separately. Consultants have requested that the department change this parameter to be more in step with EPA's currently accepted exposure assumptions. This change will be negligible in terms of changing the direct contact cleanup values, but will solidify the technical basis of the standards.

- With the addition of more volatile compounds to the list of generic standards

it is important to make sure inhalation of vapors from those additional compounds will not cause a threat to public health and safety. This issue is important because inhalation of volatilizing compounds are not considered presently, in the direct contact pathway.

- Contact of some chemicals with the skin (dermal contact) is an important exposure pathway. There is not a lot of data on dermal contact but it is an important consideration for compounds such as pentachlorophenol (wood preservative). Dermal contact is dealt with on a case by case basis, until better scientific data is available, and will be clarified in the rule.

Groundwater Protection Issues:

The issues for the soil standards based on groundwater protection: providing a list of sorption coefficients and using a simpler model for development of generic baseline concentrations.

- The most important issue for the groundwater protection pathway is the determination of appropriate sorption coefficients. This is important for both the development of additional generic standards as well as for use in site specific evaluations, under NR 720.19. Sorption is critical to contaminant attenuation in soils. Sorption determines the amount of contaminant that will stay adsorbed to soil and not contribute to groundwater contamination. In general, the greater the adsorption of the contaminant to soil the higher the residual contamination that may be left in the soil without resulting in groundwater contamination. A list of appropriate sorption values should be provided in guidance for use in developing soil standards. Also, on a site-by-site basis, consultants should be able to use researched or developed sorption coefficients as they are scientifically valid.

- The use of a simpler model to develop additional generic standards should be considered. The major reason that the first round of soil standard development used the SESOIL modeling methodology was that the department was trying to develop a generic matrix for multiple soil cleanup values for different site characteristics. We can use the soil water partitioning model which would produce a baseline value to which a dilution attenuation factor would be applied to develop the generic standards. In addition the reportable detection limit for all volatile compounds in soil is now 25μg/kg with the requirement for methanol preservation. Therefore, any of the soil standards that fall below 25μg/kg will, by default, become 25μg/kg. For example, the generic groundwater pathway protection soil standard in Table 1 of NR 720 for benzene is presently 5.5μg/kg. With the promulgation of s. NR 720.13, methanol preservation of volatile organic compounds (VOC's), the default standard becomes 25μg/kg. This effect will also impact many of the other VOC's with low standards. Therefore, altering the model will have little effect on compounds that would have very low generic cleanup standards.

Guidance:

In addition to more numeric standards, guidance development is a significant part of the implementation of NR 720. Since the soil standards code was promulgated many questions have arisen about specific methods for determining cleanup standards. The department has determined the needs for guidance by evaluating the most frequently asked questions and areas of difficulty. These guidance documents will be of tremendous help for both consultants and department personnel. The staff are currently developing guidance documents on the following topics and will provide more detail on each as requested.

Guidance on development of site specific soil cleanup levels:

- Guidance on Soil cleanup levels for Polycyclic Aromatic Hydrocarbons (PAHs)
- Guidance on application of transport and fate models for the development of site-specific soil cleanup levels
- Guidance on modeling documentation
- Guidance on the application of leaching tests for determination of site-specific soil cleanup levels
- Guidance on the application of performance based standards
- Guidance on the derivation of algorithms used for determining direct contact pathway exposures
- Guidance on the use of groundwater mixing zones in determination of soil cleanup levels

The department will be working with the advisory groups that have been involved with the review of the NR 700 rule series in addition to the NR 720 Focus Group and the NR 700 External Advisory Committee.

ILHR 47

CHAPTER ILHR 47. PETROLEUM ENVIRONMENTAL CLEANUP FUND

NOTES

Note: Chapter ILHR 47 was created as an emergency rule effective January 1, 1993.

SUBCHAPTER I. PURPOSE, AUTHORITY AND APPLICATION

ILHR 47.01 Purpose.

(1) PECFA Fund. The purpose of this chapter is to provide information on the Petroleum Environmental Cleanup Fund program, also referred to as the Petroleum Storage Environmental Remedial Action Fund and the Petroleum Storage Remediation Fund; outline the processes and procedures for filing a claim for an eligible remediation and specify the process of determining award amounts.

(2) Statutory authority. This chapter is adopted pursuant to s. 101.143 (4) (a) 1 and (8) (a), Stats., as created by 1987 Wis. Act 399 and subsequent acts through 1993 Wis. Act 16.

(3) Intent of PECFA. (a) The PECFA fund does not relieve a responsible party from liability. The individual or organization responsible for a contaminated property shall carry out the remediation of that property as specified by the department of natural resources. PECFA's role is to provide monetary awards to responsible parties who have completed and paid for remediation activities and services. The availability or unavailability of PECFA funding shall not be the determining factor as to whether a remediation shall be completed.

(b) The responsible party shall be the primary point for the control of costs within the PECFA program. The focus of the program will be to maintain the responsible party as the central control point throughout the claim process.

(4) Control of costs. The framework for the control of costs within the PECFA program shall be based upon the responsible party minimizing costs in all phases of the remediation. The primary structural factors for the control of costs include the following:

(a) The selection of a consulting firm through a comparison of at least 3 proposals. Once selected, the firm may only provide professional consulting services on the remediation;

(b) The requirement to purchase or contract for commodity services through the use of competitive bids;

(c) The consideration of the costs and benefits of at least 3 remediation alternatives, one of which shall be passive bio-remediation;

(d) The registration for participation in the PECFA program, only those consultants and consulting firms which

meet specific qualifying criteria and standards of conduct; and

(e) The publication of cost guidelines for cost-effective remediations.

(5) Most cost-effective remediation alternative. The PECFA fund shall ensure that awards are made for only the most cost-effective remediation alternative. The department may allow a higher cost alternative provided the responsible party assures:

(a) Personal payment of the difference in cost between the lowest cost remediation and the higher cost alternative desired; or

(b) That the objectives of the PECFA program would be furthered by the use of a specific remedial technology.

History: Cr. Register, February, 1994, No. 458, eff. 3-1-94.

ILHR 47.015 Definitions.

In this chapter, the following definitions shall apply. The dictionary meaning shall apply for all other words.

(1) "Agent" means a person or organization designated by an owner, operator or person owning a home oil tank system to act on behalf of the owner or operator or person owning the home oil tank system in conducting the remedial activities.

(2) "Annual aggregate" means the total amount of awards that an owner or operator may obtain during a program year under the scope of this chapter.

(3) "Award" means the reimbursement provided to an owner or operator or person owning a home heating oil tank system for eligible costs incurred because of a petroleum product discharge from a petroleum product storage system or home oil tank system.

(4) "Bodily injury" has the meaning under s. 101.143 (1) (ad), Stats., however, this term shall not include those liabilities which, consistent with standard insurance industry practices, such as specified in s. Ins 6.35, are excluded from coverage in liability insurance policies for bodily injury.

(5) "Claimant" means any party who is eligible to submit a claim for an award under this chapter. Under this chapter, the claimant may also be the responsible party.

(6) "Consultant" means a person who performs or provides professional level investigation, interpretation, design or technical project management services including, but not limited to, conducting site investigations, preparing remedial action plans and alternatives, and interpretation of data for passive or active bio-remediation systems. An owner or operator may prepare bid documents and complete other requirements of the bid process without being designated as a consultant.

(7) "Consulting firm" means a corporation, partnership, sole proprietor or independent contractor who performs or provides professional level engineering or hydrogeology services including but not limited to conducting site investigations, preparing remedial action plans and alternatives, designing and supervising the installation of remedial systems and plans for passive bio-remediation with long-term monitoring.

(8) "Costs incurred" means costs integral to the remediation of a site which have been paid by a responsible party. Costs are considered incurred when funds are disbursed to the creditor, i.e.; invoices have been paid and verification is available.

(9) "Department" means the Wisconsin department of industry, labor and human relations.

(10) "Discharge" means spilling, leaking, pumping, pouring, emitting, or emptying, but does not include dumping.

(11) "DNR" means the Wisconsin department of natural resources.

(12) "Emergency or emergency action" means a situation which requires an immediate response to protect public health or safety. Simple removal of contaminated soils, recovery of free product or financial hardship are not considered emergencies. An emergency action would normally be expected to be directly related to a sudden event or discovery.

(13) "Entity" means any of the following:

(a) A person owning a home oil tank system;

(b) A business required to maintain a worker's compensation insurance policy under ch. Ind 80; or

(c) An owner or operator who is totally independent of any other business or corporation with coverage under the PECFA program.

(14) "Fund" means the petroleum environmental cleanup fund administered by the department.

(15) "Grossly negligent" means the conscious or reckless disregard for the negative consequences of one's actions or inactions.

(16) "Heating oil" has the meaning set forth in s. ILHR 10.01 (43).

Note: Section ILHR 10.01 (43) defines heating oil as petroleum that is No. 1, No. 2, No. 4-light, No. 4-heavy, No. 5-light, No. 5-heavy, and No. 6 technical grade of fuel oil; other residual fuel oils, including Navy Special Fuel Oil and Bunker C; and other fuels such as kerosene when used as substitutes for one of these fuel oils used for heating purposes. Heating oil is typically used in the operation of heating equipment, boilers or furnaces.

(17) "Home heating oil tank systems" has the meaning set forth in s. 101.143 (1) (cm), Stats.

Note: Section 101.143 (1) (cm), Stats., defines home heating oil tank systems as underground home heating oil tank used for consumptive use on the premises together with any on-site integral piping or dispensing system.

(18) "Interim action" means a response action taken to contain, stabilize or recover a discharge of a hazardous substance, in order to minimize any threats to public health or safety, while other response actions are being taken or planned for the site or facility.

(19) "Investigation awards" means awards that are made for investigative activities when no discharge is found, if the owner, operator or person owning a home heating oil tank system has written direction from the department or DNR to conduct an investigation.

(20) "Occurrence" has the meaning set forth in s. 101.143 (1) (cs), Stats.

Note: Section 101.143 (1) (cs), Stats., defines occurrence to mean a contiguous contaminated area resulting from one or more petroleum product discharges.

(21) "Operator" has the meaning set forth in s. 101.143 (1) (d), Stats.

Note: Section 101.143 (1) (d) 1, and 2, Stats., defines operator as:
1. A person who operates a petroleum product storage system, regardless of whether the system remains in operation and regardless of whether the person operates or permits the use of the system at the time environmental pollution occurs; or
2. A subsidiary or parent corporation of the person specified under subd. 1.

(22) "Owner" is an entity under the PECFA program or a trust and in addition has the meaning set forth in s. 101.143 (1) (e), Stats.

Note: Section 101.143 (1) (e), Stats., defines owner as:
1. A person who owns, or has possession or control of, a petroleum product storage system, or who receives direct or indirect consideration from the operation of a system regardless of whether the system remains in operation and regardless of whether the person owns or receives consideration at the time the environmental pollution occurs;
2. A subsidiary or parent corporation of the person specified under subd. 1.

(23) "Passive bio-remediation" means the process by which petroleum products naturally degrade within soils without the introduction of nutrients or enhancements; also known as natural bio-degradation.

(24) "PECFA" means the petroleum environmental cleanup fund, as established in s. 101.143, Stats.

(25) "Person" has the meaning set forth in s. ILHR 10.01 (66).

Note: Section ILHR 10.01 (66) defines person as an individual, trust, firm, joint stock company, federal agency, corporation, state, municipality, commission, political subdivision of the state, or any interstate body. "Person" also includes a consortium, a joint venture, a commercial entity, and the United States government.

(26) "Petroleum product" has the meaning set forth in s. 101.143 (1) (f), Stats.

Note: Section 101.143 (1) (f), Stats., defines a petroleum product as gasoline, gasoline-alcohol fuel blends, kerosene, fuel oil, burner oil, diesel fuel oil and used motor oil.

(27) "Petroleum product storage system" has the meaning set forth in s. 101.143 (1) (fg), Stats.

Note: Section 101.143 (1) (fg), Stats., defines a petroleum product storage system as a storage tank that is located in this state and is used to store petroleum products together with any on-site integral piping and dispensing system. Exclusions are:
(a) Pipeline facilities;
(b) Tanks of 110 gallons or less capacity;
(c) Farm and residential tanks of 1,100 gallons or less capacity storing petroleum products that are not for resale;
(d) Tanks used for storing heating oil for consumptive use on the premises where stored; or
(e) Tanks owned by this state or the federal government.

(28) "Pollution impairment" means bodily injury or property damage arising out of the actual, alleged or

threatened discharge, dispersal, seepage, migration, release, or escape of a petroleum product, as defined in sub. (26).

(29) "Program year" has the meaning set forth in s. 101.143 (1) (g), Stats.

Note: Section 101.143 (1) (g), Stats., defines program year as the period beginning on August 1 and ending on the following July 31.

(30) "Progress payment" means an award made for completion of an emergency action, site investigation, remediation, annual maintenance or operation, and other points as defined in this chapter, which the DNR has approved under the scope of this chapter.

(31) "Property damage" has the meaning set forth in s. 101.143 (1) (gm), Stats.

Note: Section 101.143 (1) (gm), Stats., defines property damage as not including those liabilities which are excluded from coverage in liability insurance policies for property damage, other than liability for remedial action associated with petroleum product discharges from petroleum product storage systems.

(32) "Remedial action plan" means a report which identifies and evaluates various remedial action alternatives and provides a recommended alternative along with required detail.

(33) "Responsible party" means either the owner, operator, person owning a home oil tank system or claimant who is financially responsible for all costs of remediation of a discharge of petroleum product.

(34) "Service provider" has the meaning set forth in s. 101.143 (1) (gs), Stats.

Note: Section 101.143 (1) (gs) defines service provider as a consultant, testing laboratory, monitoring well installer, soil boring contractor, other contractor, lender or any other person who provides a product or service for which a claim for reimbursement has been or will be filed under this section, or a subcontractor of such a person.

(35) "Site investigation" means the investigation of a petroleum product discharge to provide the information necessary to define the nature, degree and extent of a contamination and to allow a remedial action alternative to be selected.

(36) "Subsidiary or parent corporation" has the meaning set forth in s. 101.143 (1) (h), Stats.

Note: Section 101.143 (1) (h), Stats., defines subsidiary or parent company as a business entity, including a subsidiary, parent corporation or other business arrangement, that has elements of common ownership or control or that uses a long-term contractual arrangement with a person to avoid direct responsibility for conditions at a petroleum product storage system site.

(37) "Tank" has the meaning set forth in s. ILHR 10.01 (90).

Note: Section ILHR 10.01 (90) defines tank as a stationary device designed to contain an accumulation of regulated substances and constructed of non-earthen material, such as concrete, steel or fiberglass, that provides structural support.

(38) "Third-party claim" means a claim against a claimant for personal injury or property damage associated with a discharge from an underground petroleum product storage tank system under this chapter.

(39) "Totally independent" means entirely and completely free from any common control, guidance, ability to influence, significant financial interest or mutual benefit. Significant financial interest means ownership of more than

5% of a firm or business entity by the consulting firm, consultant or the consultant's family.

(40) "Underground petroleum product storage tank system" has the meaning set forth in s. 101.143 (1) (i), Stats.

Note: Section 101.143 (1) (i), Stats., defines underground petroleum product storage tank system as an underground storage tank used for storing petroleum products together with any on-site integral piping or dispensing system with at least 10% of its total volume below the surface of the ground.

(41) "Upgrade" means the addition or retrofit of a petroleum product storage tank system with cathodic protection, lining or spill and overfill controls.

(42) "Used motor oil" means oil from internal combustion engines collected and stored in accordance with s. ILHR 10.335.

(43) "Willful neglect" means the intentional failure to comply with the laws or rules of the state concerning the storage of petroleum products and may include, but is not limited to, the failure to:

(a) Conduct leak detection procedures;

(b) Take out of service a tank system that by reason of operational characteristics or leak detection is suspected of causing a discharge to the environment;

(c) Immediately shut down and repair a leaking tank system;

(d) Conduct a required product inventory;

(e) Comply with tank system use permit requirements;

(f) Comply with plan review, installation or inspection requirements under the scope of ch. ILHR 10;

(g) Register or actions to de-register an underground or aboveground tanks system in order to avoid regulation under ch. ILHR 10; or

(h) Maintain corrosion protection on a system's tank or lines.

Note: Cr. Register, February, 1994, No. 458, eff. 3-1-94.

ILHR 47.02 Coverage.

(1) Petroleum product storage tank systems. Owners and operators of petroleum product storage systems are eligible for reimbursement from the fund provided claims are for underground and aboveground petroleum storage systems that are:

(a) Commercial tanks larger than 110 gallons capacity;

(b) Heating oil tank systems where the product is sold;

(c) Farm and residential tanks larger than 1,100 gallons capacity and not storing heating oil for consumptive use on the premises; or

(d) Tanks storing gasoline, diesel fuel or other vehicle fuels, other than farm and residential tanks of 1,100 gallons or less capacity.

(2) Heating oil tank systems. Persons owning home heating oil tank systems are eligible for reimbursement from the fund provided the claims are for heating oil tank systems that are underground home heating oil tank systems.

(3) Exclusions. The fund does not cover claims for any of the following:

(a) Pipeline facilities;

(b) Commercial tank systems of 110 gallons or less capacity;

(c) Farm or residential motor fuel tank systems of 1,100 gallons or less capacity;

(d) Any tank systems that are federal or state owned;

(e) Any tank systems of 110 gallons or less capacity which are not used for the storage of home heating oil;

(f) Nonresidential heating or boiler tank systems where the product is used on the premises where it is stored;

(g) A petroleum product storage tank system or home oil tank system that, as of January 1, 1994 meets the performance standards in 40 CFR 280.20 or s. ILHR 10.51 or the upgrading requirements in 40 CFR 280.21 (b) to (d) or s. ILHR 10.52 (2) to (4);

(h) Petroleum product discharges that meet all of the following:

1. Originating on a property on which another petroleum product discharge originated that necessitated remedial action activities for which the department issued an award under this chapter, unless the DNR requires further remedial activities at the location; and

2. Originating within the area on which the remedial activities, as specified in subd. 1., were conducted; and

(i) Any other tank system not included under sub. (1).

History: Cr. Register, February, 1994, No. 458, eff. 3-1-94.

ILHR 47.025 Awards.

(1) General. (a) If the department determines that the claimant meets all of the eligibility requirements of this chapter, the department shall determine a deductible amount and issue an award to reimburse the claimant for eligible costs incurred in a remediation.

(b) The department may not issue an award before all eligible costs have been incurred and written approval received under s. ILHR 47.33 unless the department determines that the delay in issuing the award would cause a financial hardship to the owner, operator or the person owning a home oil tank system. The department may issue progress payments when sufficient evidence of completion of various remedial activities, as specified in ss. ILHR 47.12 and 47.33, are received.

(c) The department shall allocate $500,000 in each fiscal year to make awards for home heating oil tank system

discharges, and shall make these awards in the order that claims are received, as specified in s. ILHR 47.35. The department may conditionally approve awards which exceed the total of $500,000 in any fiscal year and make those awards first in the following fiscal year.

(2) Underground storage tank systems. (a) Award schedule. The department shall issue an award under this subsection for a claim filed after July 31, 1987, for eligible costs incurred on or after August 1, 1987, and before July 1, 1998, by the owner or operator of an underground petroleum product storage tank system. Otherwise eligible costs incurred because of a product discharge, for which investigation or emergency actions are taken prior to July 1, 1998, shall be determined to be costs incurred before July 1, 1998, as specified in s. 101.143 (4) (d) 1, Stats.

(b) Award maximums. The department shall issue an award under this subsection without regard to fault in an amount equal to the amount of the eligible costs that exceeds a deductible amount, as specified in s. ILHR 47.34. An award issued under this paragraph may not exceed the following for each occurrence:

1. For an owner or operator of an underground petroleum product storage tank system that is located at a facility at which petroleum is stored for resale or an owner or operator of an underground petroleum product storage tank system that handles an annual average throughput of more than 10,000 gallons of petroleum per month, $1,000,000; and

2. For an owner or operator other than an owner or operator under subd. 1., $500,000.

(c) Annual aggregates. The department may not issue awards under this subsection to an owner or operator for eligible costs incurred in one program year that total more than the following:

1. For an owner or operator of 100 or fewer underground petroleum product storage tank systems in the state of Wisconsin during a program year, $1,000,000; and

2. For an owner or operator of more than 100 underground petroleum product storage tank systems in the state of Wisconsin, at least at one point during a program year, $2,000,000.

(3) Other petroleum product storage systems. (a) Awards for certain owners or operators. 1. The department shall issue an award under this subsection for a claim for eligible costs incurred by the owner or operator of a petroleum product storage system that is not an underground petroleum product storage tank system or for eligible costs incurred on or after July 1, 1998, by the owner or operator of an underground petroleum product storage tank system where no investigation or emergency actions took place before July 1, 1998.

2. The department shall issue an award for a claim under this subsection without regard to fault in an amount equal to the amount of the eligible costs, as specified in s. ILHR 47.35, that exceeds a deductible amount for eligible costs incurred before July 1, 1993, or a deductible amount of $10,000 for eligible costs incurred on or after July 1, 1993. An award issued under this subsection may not exceed $195,000 for eligible costs incurred before July 1, 1993, or $190,000 for eligible costs incurred on or after July 1, 1993, for each occurrence.

(b) Annual aggregates. The department may not issue awards under this subsection to an owner or operator for eligible costs incurred in one program year that total more than $195,000 for eligible costs incurred before July 1, 1993, or $190,000, for eligible costs incurred on or after July 1, 1993.

(4) Home heating oil tanks. (a) The department shall issue an award for a claim filed for eligible costs incurred on or after August 1, 1987, by a person who owns a home oil tank system.

(b) The department shall issue the award under this subsection without regard to fault for each home oil tank system in an amount equal to 75% of the amount of the eligible costs.

(c) An award issued under this subsection may not exceed $7,500.

(5) Investigations. (a) The department shall issue an award for a claim filed after August 9, 1989 for eligible costs incurred on or after August 1, 1987, by an owner, operator or person owning a home oil tank system in investigating the existence of a discharge or investigating the presence of petroleum products in soil or groundwater if the investigation is undertaken at the written direction of the department or the DNR, and no discharge or contamination is found.

(b) If an award has been made under this subsection and a discharge or contamination is found in a subsequent investigation, the department shall reduce the award under s. ILHR 47.35, by the amount paid under this subsection.

(6) Third-party claims. For owners or operators of underground storage tank system discharges eligible for PECFA, third-party damages resulting from petroleum product discharges may be eligible for reimbursement under the PECFA fund. Items which may not be reimbursed include, but are not limited to, costs for which the owner or operator is not legally liable; costs associated with discharges based on or attributed to a criminal act; intentional, willful or deliberate noncompliance with any statute or administrative rule; punitive or exemplary damages; and federal, state or local fines, forfeitures or other penalties.

History: Cr. Register, February, 1994, No. 458, eff. 3-1-94.

ILHR 47.03 Administration.

(1) Fund management. Pursuant to s. 168.12, Stats., the department shall collect oil inspection fees to cover costs incurred by owners, operators or persons owning home oil tank systems for remediation of environmental pollution from petroleum product discharges. The department shall reserve a portion of this fund, not to exceed 20% of the amount annually appropriated under s. 20.445 (1) (v), Stats., primarily for awards for emergency remedial actions and claims that exceed the claim amount initially anticipated. Any funds remaining in this segregated account at the end of the fiscal year may be used to make awards for other eligible claims.

(2) Emergency awards. The department may, after determining that an emergency exists, make an award in advance of claims received prior to the emergency claim. The finding of an emergency shall be made based upon an immediate need to protect public health or safety. The finding of an emergency may not be based upon financial hardship of the responsible party or its agent. A determination that no emergency exists may not be appealed to the department.

History: Cr. Register, February, 1994, No. 458, eff. 3-1-94.

SUBCHAPTER II. PROGRAM ELIGIBILITY

ILHR 47.10 Initial claim eligibility.

(1) General. (a) Responsible parties. Responsible parties may submit claims to the department pursuant to s. 101.143 (4), Stats., for reimbursement of eligible costs incurred because of a petroleum product discharge or discharges from a petroleum product storage system or home oil tank system.

1. If a responsible party is not the sole owner of the site, an Owner Assignment Certification form (SBD-8079) shall be filed with the department to establish one entity to submit the claim and receive the award under this chapter.

2. The responsible party, owner or operator, agent or an assignee, as established in subd. 1, may submit a claim if all of the following are performed:

a. Documentation that the source of a discharge or discharges is from a petroleum product storage system or home oil tank system;

b. Notification to the department, before conducting a site investigation or remedial action activity, of the potential for submitting a claim under this chapter, except in emergency situations as provided under s. 101.143 (3) (g), Stats.;

Note: Notification to the department means contacting the department and providing demographic information on the potential PECFA site. Notification does not mean the original report to the DNR of a release to the environment.

c. Registration of the petroleum product storage system or the home oil tank system with the department under s. 101.09, Stats.;

d. Report of the discharge in a timely manner to the division of emergency government in the department of military affairs or to the DNR, according to the requirements under s. 144.76, Stats.;

e. Investigation of the degree and extent of environmental damage caused by the discharge from a petroleum product storage system or home oil tank system;

f. Recovery and proper disposal of any recoverable petroleum products in the discharge from a petroleum product storage system or home oil tank system;

g. Disposal of any residual solid or hazardous waste in a manner consistent with local, state and federal laws, rules and regulations;

h. Verification that the owner has maintained the site in compliance with laws and rules of the state concerning the storage of petroleum products; and

i. Restoration of the environment according to applicable standards using the most cost-effective approvable alternative available.

(b) Agents. 1. 'Individuals as agents.' Except as specified in subd. 2., an owner or operator or the person owning a home oil tank system may, with the written approval of the department, enter into a written agreement with another person to act as an agent. An agent, in order to be approved and receive payment under the fund, shall agree to complete the remediation up to the point of operation and maintenance or long-term monitoring. The agent and the owner, operator, or person owning the home oil tank system shall jointly submit a claim for an award after completing all applicable requirements under this chapter and submittal of a Current Agent Assignment Certification

form (SBD-8070) to the department. An award made under this paragraph shall be made payable to both the agent and owner, operator or person owning the home oil tank system.

2. 'Department of transportation as agent.' With prior written approval of the department and the owner, operator or the person owning the home oil tank system, the department of transportation may act as an agent as specified in subd. 1., when the petroleum product storage system or home oil tank system is located on property that is or may be affected by a transportation project under the jurisdiction of the department of transportation. The scope of the department of transportation shall be limited to the activities under subd. 3. The department of transportation shall submit the claim for an award as specified under this section with the award to be jointly paid to the owner, operator or the person owning the home oil tank system and the department of transportation for eligible costs incurred by the department of transportation in conducting the activities specified under subd. 3.

3. 'Activities of agents.' All agents shall be limited to the following activities:

a. Completing the site investigation to determine the degree and extent of the environmental damage caused by the discharge from a petroleum product storage tank system or a home oil tank system and preparing the analysis and report of remedial alternatives as specified in s. ILHR 47.33 (5);

b. Conducting bids for all commodity services necessary at the site to restore the environment and minimize the harmful effects from the petroleum products discharge up to point of operation and maintenance or long-term monitoring; and

c. Obtaining written approval from the DNR that the remedial action activities performed under subpars. a. and b. meet the requirements of s. 144.76, Stats.

Note: Copies of the Owner Assignment Certification form (SBD-8079) and the Current Agent Assignment Certification form (SBD-8070) are available on request from the Department of Industry, Labor and Human Relations, Division of Safety and Buildings, Bureau of Petroleum Inspection and Fire Protection, P.O. Box 7969, Madison, Wisconsin 53707-7969.

(2) Provisions of eligibility letter. (a) When an owner, operator or person owning a home oil tank system has registered the tank systems on the property associated with the discharge and notified the department as specified under s. ILHR 47.11, the department shall upon request of the responsible party provide a letter of eligibility determination. This letter may include information on the PECFA program and the department's initial determination of the eligibility for an award under this chapter.

(b) The initial eligibility determination is made by the department based upon the information made available prior to the determination.

(c) This letter of eligibility may be used in securing loans to cover estimated costs for a proposed remediation.

(d) The initial estimate of eligibility shall not be binding if subsequently the owner, operator, person owning a home heating oil tank system or other source provides the department with additional information which necessitates a subsequent ineligibility determination to be made by the department.

History: Cr. Register, February, 1994, No. 458, eff. 3-1-94.

ILHR 47.11 Tank registration.

(1) General. (a) The department has the authority to inventory and determine the location of aboveground and underground petroleum storage tanks systems as specified in s. 101.142 (2), Stats. All aboveground and underground tanks shall be registered with the department on forms provided by the department. Eligibility determination of awards under the scope of this chapter requires prior tank registration.

(b) Aboveground petroleum product storage tanks. All aboveground petroleum product storage tank systems are required to be registered with the department. Exceptions are for the following:

1. Pipeline facilities;

2. Tank systems of 110 gallons or less capacity;

3. Farm and residential tank systems of 1,100 gallons or less capacity; and

4. Tank systems used for storage of heating oil for consumption on the premises where stored.

(c) Underground petroleum product storage tanks. All underground petroleum product storage tank systems larger than 60 gallons capacity shall be registered with the department.

History: Cr. Register, February, 1994, No. 458, eff. 3-1-94.

ILHR 47.115 Nonregistered tanks and out-of-service tanks.

(1) All aboveground and underground petroleum storage tanks not previously registered, having no completed Underground Petroleum Product Tank Inventory form (SBD-7437) or Aboveground Petroleum Product Tank Inventory form (SBD-8731) on file with the department, shall be registered prior to submitting a claim for an award under the scope of this chapter.

(2) For all underground petroleum storage tanks removed, closed or out-of-service prior to the date of tank registration, as specified in s. 101.09, Stats., the present owner, operator or person owning a home oil tank system shall submit documentation to the department as to the existence of the tank, the product stored, the size and type of tank, and other information to substantiate prior ownership and use. This documentation may include, but is not limited to, neutral third-party testimony, county tax records, land titles, and blue prints of initial tank installations.

(3) Failure to register, de-registering or attempting to de-register a tank system in order to avoid regulation by the department shall be considered willful neglect, as specified in s. ILHR 47.20 (7).

History: Cr. Register, February, 1994, No. 458, eff. 3-1-94.

ILHR 47.12 Claim process.

(1) Application. A claimant shall submit a claim on a Remedial Action Fund Applica- tion form (SBD-8067) furnished by the department, and shall include the following:

(a) A copy of the closure assessment report;

(b) Record of the site investigation, findings and interpretation of data;

(c) A DNR Site Investigation and Remediation Plan Review form (SBD-8069) with the approval of the DNR for conduct of the site investigation and development of the remedial action plan, remediation, long-term monitoring, operation and maintenance or other milestone established under this chapter;

(d) A copy of the Underground Petroleum Product Tank Inventory form (SBD-7437) for underground tank systems at the site and a copy of the Aboveground Petroleum Product Tank Inventory form (SBD-8731) for each aboveground tank system at the site;

(e) The bid specifications and a summary of the bids for commodity services as required in s. ILHR 47.33;

(f) Documentation verifying actual costs incurred because of the petroleum product discharge, which shall include receipts, invoices including contractor's and subcontractor's invoices, interest costs, loan fees, accounts, and processed payments;

(g) Proof of payment for all invoices including copies of both sides of cancelled checks or money orders;

(h) Properly detailed and itemized receipts for remedial activities and services performed;

(i) Owner's, operator's, home oil tank owner's or the responsible party's social security number or federal tax identification number;

(j) Other records or statements that the department determines to be necessary to complete the application; and

(k) Signature of the owner, operator or person owning home oil tank systems on the application.

Note: Copies of forms referenced in this section are available on request from the Department of Industry, Labor and Human Relations, Division of Safety and Buildings, Bureau of Petroleum Inspection and Fire Protection, P.O. Box 7969, Madison, Wisconsin 53707-7969.

(2) Incomplete claims. (a) Incomplete claims, lack of verification of payment of costs, lack of signatures, and other factors may delay processing of claims or change the schedule of the review.

(b) Claims received by the department which contain unpaid invoices shall, at the department's discretion, be assigned a review date no earlier than the date proof of payment was provided to the department.

(c) PECFA claims for awards may not be processed without proper and complete documentation including, but not limited to, Underground Petroleum Product Tank Inventory form (SBD-7437), Aboveground Petroleum Product Tank Inventory form (SBD-8731), Remedial Action Fund Application form furnished by the department, DNR Site Investigation and Remedial Action Plan Review form (SBD-8069), closure assessment, remedial action plan, proof of payment of costs incurred in remediation, site closure report, approval by the DNR, responsible party's social security number or federal tax identification number, and other forms available from the department necessary for claim processing.

(3) Request for additional information. (a) Once the department has begun the review of a claim, the department may request that additional information be submitted 15 business days from the date of the request. Otherwise, the claim may be deemed incomplete and progress payments may be denied. These claims, when complete, may be

rescheduled for review after more recently received complete claims.

(b) The department may request additional information from owners, operators or persons owning home oil tank systems, agents, consultants, contractors or subcon-tractors as necessary.

(c) Failure to respond to a request, within the 15 business day response period for additional information, may result in a delay in payment, disallowance of interest costs accrued, action against a consultant, or scheduling a meeting with the responsible party and the department or other individuals.

1. The department may disallow interest costs accrued during the period when no response has been received, by issuing a letter stating the intent, on a specified date, to disallow payments on interest costs accrued during this period as specified in par. (c).

2. Appeal of disallowed interest costs, shall be conducted as specified in s. ILHR 47.53.

Note: Copies of forms referenced in this section are available on request from the Department of Industry, Labor and Human Relations, Division of Safety and Buildings, Bureau of Petroleum Inspection and Fire Protection, P.O. Box 7969, Madison, Wisconsin 53707-7969.

(4) Costs incurred in remediation. (a) Forms shall be made available by the department which shall be completed by the owner, operator or person owning a home oil tank system, or agent prior to award payment. All invoices for costs incurred in a remediation shall be submitted with proof of payment verified.

(b) Only eligible costs, as specified in s. ILHR 47.30, that have been paid, shall be submitted for an award. The department may use its published cost guidelines to determine if the level of reimbursement requested is excessive and may disallow costs if they are determined to be excessive.

History: Cr. Register, February, 1994, No. 458, eff. 3-1-94.

ILHR 47.13 Exclusive remedy and liability.

The PECFA fund awards for remediation activities and is not intended to result in owners or operators or persons owning home oil tank systems making any profit or receiving duplicate payment in a remediation. As specified in s. 101.143 (7) (am), Stats., an award made under this chapter is the exclusive method of recovery for costs reimbursed under the fund.

Note: Section 101.143 (7), Stats., states that no common law liability and no statutory liability, which is provided in a statute other than this section, for damages resulting from a petroleum product storage system or home oil tank system is affected by this section. Exceptions being that the authority, power and remedies provided in any other statute or law are in addition to any authority, power or remedy provided in any statute or common law.

History: Cr. Register, February, 1994, No. 458, eff. 3-1-94.

ILHR 47.14 Right to recover actions.

The department reserves the right to take action against an owner, operator or person owning a home oil tank system, or their agents or designees to recover any award or portion of an award resulting from a fraudulent claim.

(1) Right of action. A right of action under this section shall accrue to the state against an owner, operator or other person if the owner, operator or other person submits a fraudulent claim or does not meet the requirements under this chapter or if an award is issued under this section to the owner, operator or other person for ineligible costs under this section.

(2) Action to recover awards. The department shall request the attorney general to take action as is appropriate to recover awards to which the state is entitled or when the department discovers a fraudulent claim after an award is issued.

Note: Section 101.143 (5) (c), Stats., states that recovered funds shall be credited to the petroleum environmental cleanup fund.

History: Cr. Register, February, 1994, No. 458, eff. 3-1-94.

ILHR 47.15 Assignment of awards.

By written notification to the department, a claimant may make an assignment of an award to an institution which lends money to the claimant for the purpose of conducting remediation activities reimbursed under this chapter, as specified in s. 101.143 (4m), Stats. This assignment of an award creates and perfects a lien in favor of the assignee in the proceeds of the award.

Note: Section 101.143 (4m), Stats., states the lien secures all principal, interest, fees, costs and expenses of the assignee related to the loan. The lien under this subsection has priority over any previously existing or subsequently created lien, assignment, security interest or other interest in the proceeds of the award.

History: Cr. Register, February, 1994, No. 458, eff. 3-1-94.

SUBCHAPTER III. PROGRAM DISQUALIFICATION

ILHR 47.20 Ineligibility for an award.

If the owner, operator or the person owning the home heating oil tank system had knowledge of, had previous involvement in, or whole or partial control over the operation or maintenance of the petroleum product storage system at the site, the owner, operator or the person owning the home heating oil tank system shall be ineligible for reimbursement under the scope of this chapter if any of the conditions in sub. (2) apply. The department shall deny a claim for an award under s. ILHR 47.10 if any of the following conditions apply:

(1) The claim is not within the scope of this chapter;

(2) The claimant submits a fraudulent claim or fraudulent cost items;

(3) The claimant has been grossly negligent in the maintenance of the petroleum product storage system or home oil tank system;

(4) The claimant intentionally damaged the petroleum product storage system or home oil tank system;

(5) The claimant is unable to provide adequate documentation that clearly demonstrates the degree and extent of

soil or water contamination resulting from a petroleum product discharge;

(6) The claimant intentionally falsified petroleum product storage records; or

(7) The claimant was guilty of willful neglect in complying with laws or rules of this state concerning the storage and handling of petroleum products.

Note: Section 101.143 (4) (f), Stats., states that contributory negligence shall not be a bar (barrier) to submitting a claim under this subsection and no award under this subsection may be diminished as a result of negligence attributable to the claimant or any person who is entitled to submit a claim.

History: Cr. Register, February, 1994, No. 458, eff. 3-1-94.

SUBCHAPTER IV. REIMBURSEMENT PROCEDURES

ILHR 47.30 Eligible cost items for remediation.

(1) Eligible costs. Eligible costs for an award issued under this chapter may be determined by the department based upon cost guidelines published by the department. Costs related to the following categories may be reimbursed under the scope of this chapter:

(a) Claims submitted for an award by owners or operators who were not owners or operators, or persons owning home oil tank systems when a petroleum product discharge occurred and who meet all of the conditions of s. ILHR 47.10, may submit a claim for an award under the scope of this chapter.

(b) Costs associated with emergency action, site investigation and remedial plan development, remediation, long-term monitoring or operation and maintenance:

1. Investigation of potential sources of contamination by precision testing to determine tightness of tanks and lines if the method used is approved by the department and the tester is certified by the department as specified in ch. ILHR 10 and the testing is not designed to meet the regular leak detection responsibilities of the owner or operator;

2. Costs of eligible work performed after confirmation of a contamination;

3. Preparation of remedial action alternatives and plans;

4. Laboratory services for testing specific to this chapter, including full VOC testing during the investigation phase;

5. Full VOC testing after the investigation phase if required by the DNR for monitoring PECFA eligible products and PVOC testing during subsequent work phases; and

6. Investigation and assessment of the degree and extent of contamination caused by a petroleum product discharge from a petroleum product storage tank system or home oil tank system.

(c) Costs associated with excavation and disposal of contaminated soils:

1. Removal of contaminated soils;

2. Actual costs incurred which are associated with equipment mobilization;

3. Removal of petroleum products from surface waters, groundwater or soil; and

4. Treatment and disposal of contaminated soils including DNR approved procedures for bio-remediation.

Note: All soils shall be reported in tons when included in a claim.

(d) Costs associated with monitoring and other remedial action activities:

1. Monitoring of natural bio-remediation progress;

2. Actual charges for maintenance of equipment used for petroleum product recovery or remedial action activities;

3. Other costs identified by the department as necessary for proper investigation, remedial action planning and remedial action activities to meet the requirements of s. 144.76, Stats.;

4. State or municipal permits for installation of remedial equipment;

5. Actual costs for the purchase or rental of temporary building structures of a size adequate to house remedial equipment; and

6. Restoration or replacement of a private or public potable water supply.

(e) Costs associated with personnel, travel and related expenses:

1. Contractor or subcontractor costs for remedial action activities;

2. Labor and fringe benefit costs associated with inspection and supervision other than specified in subd. 4.;

3. Actual costs incurred for travel and lodging which are not in excess of state travel rates; and

4. Actual verified labor, fringe benefit and equipment costs when claimants use their own personnel or equipment to conduct a remediation.

Note: A listing of state travel and meal rates may be obtained by writing to the department, Safety and Buildings Division, P.O. Box 7969, Madison, Wisconsin 53707.

(f) Costs associated with the preparation of a claim package under the scope of this chapter and other related costs:

1. Fees up to $500 for a certified public accountant, contractor, or other independent preparer for compiling a claim under this chapter; and

2. For an owner or operator only, compensation to third parties for bodily injury and property damage caused by a petroleum product discharge from an underground petroleum product storage tank system.

(g) Costs associated with the support or protection of existing utilities or structures located within the

remediation area during a remediation.

Note: Reimbursement for the re-installation of utilities or structures, without prior department approval, may not be made.

(2) Exclusions from eligible costs. The department has identified various costs determined to be ineligible for reimbursement. Section 101.143, Stats., lists specific cost items which may not be reimbursable under the PECFA program. In order to control costs and provide awards for the most cost-effective remediations of petroleum-contaminated sites within the scope of this chapter, the following costs may not be reimbursed:

(a) Costs determined to be unrelated to remedial action activities under the scope of this chapter:

1. Costs incurred on or before August 1, 1987 for a remediation;

2. Any costs not supported by cancelled checks or other absolute proof of payment at time of submittal;

3. Costs for cleanup resulting from spills from petroleum transportation equipment;

4. Any costs, excluding an emergency action, incurred before a confirmed discharge is reported to the DNR;

5. Any overtime labor charge, excluding an emergency action, billed at other than a straight time rate;

6. Costs for contamination cleanups from non-residential heating oil or boiler tank systems and discharges from mobile fueling tanks or fuel storage tanks on vehicles;

7. Costs associated with used oil remediations, if the oil is not from internal combustion engines;

8. Costs for investigations or remedial action activities conducted outside the State of Wisconsin;

9. Costs associated with environmental audits, environmental reconnaissance or real estate transactions, construction projects, new construction or long-term loan transactions;

10. Costs associated with investigation activities to locate petroleum product storage systems or home oil tank systems to determine eligibility for an award under the scope of this chapter;

11. Costs associated with emptying, cleaning, disposing of storage tank systems and other costs normally associated with closing or removing any petroleum product storage tank system or home oil tank system after November 1, 1991, unless the claimant has a signed contract for these services before November 1, 1991 or has a loan agreement, note or commitment letter for a loan for the purposes of conducting these services before November 1, 1991;

12. Laboratory rush charges, priority mail or priority shipping fees unless related to an approved emergency action;

13. Air travel;

14. Costs incurred after the DNR determines that no further remedial action is required, except for abandonment of monitoring wells and finalization of site closure; and

15. Other costs that the department determines to be associated with, but not integral to, the remediation of a

petroleum product discharge from a petroleum product storage system or home oil tank system.

(b) Costs related to improper or incompetent remedial activities and services:

1. Costs associated with incompetent or non-effective cleanup actions which were not based upon sound professional and scientific judgment;

2. Costs of redoing remedial action activities or remedial action work which was incomplete or incompetent;

3. Costs associated with rework on remedial systems to accommodate construction, upgrades, retrofits, or redevelopment projects;

4. Any costs associated with actions that exceed the necessary activities to bring a site to the required level of remediation;

5. Costs associated with the repair or replacement of damaged buildings, sewer lines, water lines, electrical lines, phone lines, fiber optic lines or other utilities on the property;

6. Costs associated with the re-installation of damaged remedial equipment or the re-installation or modification of the remedial equipment for purposes other than effective remediation;

7. Additional interest costs accrued due to improper or incomplete filing of claims or non-response to department requests for additional information, exceptions being delays caused by the DNR or the department claim process; and

8. Any late service charges or any costs related to invoices or bills for which payment verification is unobtainable.

(c) Costs for testing or sampling unrelated to the investigation for the extent of contamination under the scope of this chapter:

1. Costs for sampling and testing for heavy metals, except lead testing when the discharge is verified to be from leaded gasoline, or lead and cadmium when the source is used motor oil;

2. Costs associated with the analysis for inappropriate constituents not normally part of or associated with an eligible petroleum product even if required by the DNR; and

3. Costs associated with full VOC testing after the investigation phase, unless required by the DNR for monitoring PECFA eligible products and the DNR letter documenting the requirement is submitted with the claim.

(d) Costs associated with tank system upgrades or retrofits, requirements for complying with other state or federal rules or laws, and future business plans:

1. Costs of repairing, retrofitting or replacing a petroleum product storage system or home oil tank system such as, but not limited to, tank bedding materials or fill for setting tanks, lines or canopies;

2. Costs associated with capital improvements, reinstallation of electrical, dispensers, pumps, or other items for retrofits, upgrades or new construction;

3. Costs for remedial action activities funded under 42 USC 6991, unless the owner or operator or the person

owning the home oil tank system repays the funds provided under 42 USC 6991;

4. Expenditures required by the DNR or the department in order to meet the groundwater protection standards, ch. 160, Stats., ch. ILHR 10 or other administrative rules but not related to a petroleum product discharge under this chapter;

5. Costs associated with loss of business;

6. Costs associated with the razing of buildings, removal of roads, removal of footings and foundations or other destruction of structures or other redevelopment costs;

7. Costs associated with loss of interest or dividends, or interest costs from a loan other than one for the remediation; and

8. Costs associated with cement, blacktop replacement, on-site landscaping or other improvements, except for depreciation costs for third-party actions.

(e) Costs associated with site closure:

1. Costs associated with the closure of a tank system;

2. Costs associated with tank closure assessments;

3. Costs of removing tank systems that have previously been closed in place with inert materials, sand, pea gravel, water or other substances; and

4. Costs associated with the abandonment of wells not related to the remedial action.

(f) Costs associated with legal issues:

1. Costs, other than costs for compensating third parties for bodily injury and property damage, which the department determines to be unreasonable or unnecessary to carry out the remedial action activities as specified in the approved remedial action plan;

2. Costs associated with third-party actions by adjoining property owners for the installation of monitoring wells or other cleanup-related items unless a court judgment has been obtained;

3. Costs associated with third-party damages from a discharge originating from an aboveground storage tank;

4. Attorney fees associated with third-party actions;

5. Any costs associated with an appeal of a determination specific to the scope of this chapter; and

6. Other attorney fees including, but not limited to, legal advice, appeals, or other representation on behalf of the responsible party or agent.

(g) Supervisory and management costs that the department determines to be unreasonable or unnecessary in carrying out the remedial action activities under this chapter:

1. Supervisory or management costs when a municipality or company uses their own personnel or personnel

from a wholly- or partially-owned subsidiary for remedial activities;

2. Costs for supervisory or management activities conducted by owners or operators;

3. Costs incurred by a responsible party associated with bid requirements or project administration such as consultant selection, monitoring or supervising subcontractors or consultants;

4. Costs for right of entry or trespass fees; and

5. Separate vehicle and mileage costs.

(h) Costs determined by the department to be excessive.

(i) Subcontractor markups for work performed after January 31, 1993.

(j) Costs associated with general program support and office operation which are expected to be included in the hourly staff rates, including but not limited to:

1. Telephone charges;

2. Photocopying, faxes, paper, and printing;

3. Postage;

4. Hand tools and personal protective equipment; and

5. Computer equipment, CAD and software charges.

Note: For the purposes of this section, HnU meters, PID's, FID's, electronic equipment and sampling kits are not considered hand tools.

(k) Costs reimbursed by insurance companies unless performing in an agent role.

(3) Claims including ineligible costs. Claims submitted which include ineligible costs shall be considered incomplete and may be returned to the claimant for recalculation, revision and re-submittal. The claim shall be rescheduled for review when the ineligible costs have been removed and the claim received by the department. The department may disallow interest costs accrued during the non-response period, as specified in s. ILHR 47.12 (3) (a).

(4) Contaminations containing eligible and ineligible products. When a contamination is identified which contains both eligible and ineligible products under the fund, only the costs associated with the eligible products may be claimed. Eligible costs of remediation, which are only associated with the eligible product, may be claimed in their entirety, as specified in this section. Any costs required because of the presence of an ineligible product may not be claimed even if a remedial benefit may be derived by the remediation of the eligible product.

Note: Cr. Register, February, 1994, No. 458, eff. 3-1-94.

ILHR 47.305 Costs associated with loans.

(1) Interest expense. (a) Allowability of interest costs. The fund will reimburse interest expense if a loan is specifically secured for a remediation and the proceeds are applied only to the cleanup at the site. To be eligible,

interest costs cannot be combined with retrofits or construction loans and shall be site specific. Reasonable money management shall be practiced to avoid unnecessary accrual of interest charges. Interest expenses shall be managed in the most cost-effective manner possible and invoices shall be paid in a timely manner to avoid interest costs or late charges. If a line of credit is used to provide funding for a remediation, clear documentation shall be provided on the disbursements and interest expenses.

(b) Ineligible interest expenses. The PECFA fund shall not reimburse for the following items:

1. The opportunity cost of money or interest income or dividend income lost because of a decision to use internal funding for a remediation;

2. Interest costs which are not clearly documented;

3. Interest costs or late charges on invoices or bills; and

4. Additional interest costs accrued because of poor money management or the use of PECFA loan proceeds to earn money or for investment purposes.

(c) Documentation. A copy of the loan agreement documenting the interest rate, loan origination fees, and other costs, shall be submitted when requested by the department.

(d) Maximum interest and related costs. The following maximum rates are established for loans secured after January 31, 1993 for the purposes of a remediation:

1. Interest rate shall be reimbursable at no more than 2% above the prime rate;

2. Loan origination fees shall be reimbursable at no more than 2 points of the loan principal; and

3. Renewal loan fees shall be reimbursable at no more than 1% of the unreimbursed amount and remaining available loan balance.

(e) Lending agreements. In lieu of the maximum rates specified in par. (d), the department may negotiate agreements with lending institutions to obtain lower rates. The department may solicit proposals from lending institutions to supply loans for PECFA remediations.

(f) Other items. In addition to the maximum rates established in par. (d), the following shall apply:

1. Renewal fees shall be charged no more frequently than once annually;

2. When a loan renewal fee is charged, the established cost of the remaining work shall be calculated and the loan balance adjusted downward if the use of the total originally available monies is not anticipated. Any loan renewal fee shall be charged on the adjusted loan balance; and

3. Original and re-estimated loan amounts, to the extent feasible, shall reflect a sound estimate of the cost to perform the remediation. Excessive estimates which result in excessive or unnecessary interest costs may not be reimbursed by the PECFA fund.

(2) Minimum loan amounts. A lending institution may unilaterally establish a minimum loan amount of $100,000 or less. Minimum loan amounts of more than $100,000 and loan origination fees on minimum loans of