more than $100,000 shall require prior written approval of the department.

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

## ILHR 47.31 Incentives for cost-effective remediation.

(1) General. The department may make incentives available to responsible parties who use the most cost-effective remediation methods and alternatives.

(2) Incentives. For remediations that have DNR approval for closure, or passive bio-remediation with long-term monitoring and eligible costs not exceeding $50,000, the claim may receive priority reimbursement in the award process.

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

## ILHR 47.32 Cost guidelines.

(1) General. The goal of the fund, as specified in s. ILHR 47.01, is to assure the cost-effective remediation of eligible sites. As one tool in evaluating the costs of services and activities under the program, the department shall establish and publish cost guidelines.

(2) Application. The cost guidelines established by the department may be used as one element in evaluating the cost effectiveness of investigation and remedial plan development efforts, requests for funding in excess of the investigation and remedial action plan cap, the estimated costs of a selected remedial alternative and other issues of cost related to a remediation.

(3) Use of the cost guidelines. In those instances where cost guidelines are used, they may form the basis for disallowing costs which are determined by the department to be excessive in nature or for denying additional funding when actual or proposed costs are determined to be excessive.

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

## ILHR 47.33 Comparative proposals and bid processes for remediation activities and services.

Except for home oil tank owners, the purchase of consulting and commodity services, not already covered by a detailed written contract, shall conform to the proposal and bidding procedures in this section. In order to qualify as an existing contract, the document shall be with a specific service provider and shall specify contract items, such as but not limited to, the project details, time limitations, projected completion dates, payment terms and other standard contract language.

Note: The provisions of this section became effective as of February 1, 1993. The remediation of a petroleum-contaminated site is expected to be completed in 2 phases; Phase I and Phase II.

(1) General. The department requires that the owner or operator or its agent follow the procedures outlined in

this section. Phase I shall include the site investigation, the analysis of remedial action alternatives and costs, the recommendation of a remedial alternative and the development of a remedial action plan which meets the requirements of the DNR. Phase II shall include feasibility testing, the implementation of the approved remedial alternative, up to site closure or long-term monitoring.

(a) Consulting firm selection. 1. An owner or operator shall select a qualified consulting firm to conduct the site investigation, development of a remedial action plan and to perform other required environmental consulting services. The owner or operator shall select and contract with a consulting firm after reviewing a minimum of 3 proposals. The owner or operator shall make a comparison of qualified consulting firms by obtaining and reviewing a minimum of 3 proposals for the services.

2. The proposals at a minimum, shall include the consulting firm's approach to the site, schedule of fees charged by the consulting firm, a statement of qualifications and experience, names of individuals for whom work has been performed who may be contacted for references and the following statement:

"Although the Petroleum Environmental Cleanup Fund (PECFA) may reimburse a substantial share of the cost of conducting a remediation of a petroleum contamination, the owner will have a program deductible which they must pay. In addition, there may be costs that are not covered by the PECFA fund or are above the maximums that will be reimbursed for by the fund. A remediation may cost you more than the deductible."

3. The services of the selected consulting firm shall be limited to providing the consulting services or scientific evaluations necessary to conduct an environmental response. Neither the consulting firm nor any company or consultant not totally independent of the consulting firm or project consultants may provide any of the commodity services required in the remediation.

(b) Commodity purchases. 1. All commodity services which include, but are not limited to, soil borings, monitoring-well construction, laboratory analysis, excavation and trucking shall be obtained through a competitive bid process. A minimum of 3 bids are required to be obtained and the lowest cost service provider shall be selected. An employe of a commodity service provider may not participate in the preparation of bid documents or other requirements of the bid process, except for providing technical material, if the employe's firm is a bidder.

2. Consulting firms may elect to bid laboratory services on a calendar-year basis in order to obtain volume discounts and reduce the number of bids that shall be completed for each remediation. In completing the competitive bid process, the consulting firm shall obtain a minimum of 3 written bids. The lowest bid shall be accepted. All discounts, rebates and savings shall be reflected in the PECFA claim.

3. The analysis of laboratory tests for passive or active bio-remediation and the performance of pump or pilot tests may be accomplished by either consultants or commodity providers. If these services are obtained by a consulting firm, as part of their consulting service, then the bidding of this service shall not be required.

4. An owner or operator may appeal to the department to obtain approval to select other than the lowest cost commodity service provider. The department may approve an appeal if it determines that the use of another service provider will further the goals of the program.

(c) Remediation alternative. 1. The owner or operator shall select the lowest cost remediation alternative which is approvable by the DNR. The responsible party may select a higher cost alternative if they certify to the department in writing that the additional costs will not be claimed for PECFA reimbursement.

2. A higher cost remediation alternative may be allowed by the department if it determines that the alternative would further the goals of the program.

(2) Remediation. The estimated cost for the selected remediation alternative shall provide a separate dollar amount for consulting services, and the remediation and commodity items. The estimated costs for these items shall be submitted to the department as part of the comparison of remedial alternatives or, if the submittal of the alternatives is not required as specified in s. ILHR 47.335 (3) (c), prior to the start of the remedial activities.

(a) The dollar amount for consulting, shall establish the maximum reimbursable amount for consulting services during the remediation.

(b) The cost detail for the selected remediation alternative shall establish the total estimated cost for the remediation up to the point of long-term monitoring or long-term operation and maintenance. The estimate shall establish a projected reimbursable amount. If the estimated remediation cost will be exceeded, the consultant shall notify the owner and the department in writing of the anticipated actual cost.

(c) If a contamination is identified which contains both eligible and ineligible products, the owner or operator and the department shall be notified immediately. The consultant, in conjunction with the owner or operator, shall establish a methodology for dividing the costs of remediation between the eligible and ineligible products. The approach used to divide the costs of remediation shall be approved by the department prior to the submittal of the claim.

(3) Long-term monitoring and long-term operation and maintenance. At the point that a site is to enter long-term monitoring or long-term operation and maintenance, a schedule of costs shall be developed which separately identifies the cost of consulting and other required services.

(a) The identified consulting costs shall establish the maximum amount reimbursable for the consulting services.

(b) The cost detail for the other required services shall establish a total estimated cost. The estimate shall establish a projected reimbursable amount. If the estimated cost will be exceeded, the consultant shall notify the owner and the department in writing of the anticipated actual cost.

(4) Change orders. (a) If it is determined that the consulting services may not be completed within the original estimate, the owner or operator and the consultant shall provide a written account, to the department, of the additional work to be performed in order to prove the need for additional funding. Failure to provide justification acceptable to the department shall constitute grounds for disal-lowing the additional costs. The cost guidelines, as published by the department, may be used as one factor in determining if an approval for additional work is warranted.

(b) If it is determined that the remediation, long-term monitoring or operation and maintenance may not be completed within the original cost estimates, the owner or operator and the consultant shall provide written notice to the department and the DNR of the additional work to be performed. Consulting firms, which continually have remediations that exceed the original estimates, shall be subject to review specified in s. ILHR 47.41.

(5) Commodity items requiring competitive bidding. The following items shall be competitively bid. All bids shall be in units standard to the industry.

(a) Excavation of petroleum-contaminated soils;

(b) Trucking of petroleum-contaminated soils or backfill material;

(c) Thermal treatment of petroleum-contaminated soils;

(d) Laboratory services including mobile labs;

(e) Backfill material;

(f) Drilling and installing monitoring wells;

(g) Soil borings;

(h) Surveying if the service requires a registered land surveyor; and

(i) Other non-consulting services.

(6) Commodity bundles. The owner or operator may combine individual commodity items into one bid. These bundles of commodities shall be bid by at least 3 service providers and the lowest cost service provider shall be selected.

(7) Exemptions. (a) Commodity items with a purchase price of $500 or less shall be exempt from the competitive bid requirement. The exclusion from commodity bidding may not be used if a service is to be used multiple times and the cumulative cost exceeds $500.

(b) The department may exempt specific services from the competitive bid process if the department determines that the conduct of the bid proposal process is unlikely to further the remediation process or the goals of the program.

(8) Documentation. The owner or operator shall maintain the documents and data used in the competitive bid and selection process. These records shall be maintained and provided to the department if requested as part of the claim review or audit processes.

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

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**ILHR 47.335 Site Investigation and remedial action plan development cap.**

(1) General. Site investigations which have not been started as of January 15, 1993, shall conform to this section.

(2) Maximum allowable cost. The maximum allowable cost for a site investigation and the development of a remedial action plan shall be no more than $40,000, ex- cluding interest, feasibility testing, and interim action costs, unless approved under par. (a).

(a) If the investigation will exceed $40,000, the responsible party or its agent, shall contact the department in writing and provide an estimate of additional work and funding required and obtain the department's approval. If the additional approval is not obtained, costs above the $40,000 level will not be reimbursed.

(b) The consultant is responsible for monitoring the costs incurred in the investigation and remedial plan development and identifying that the $40,000 maximum may be exceeded. The consultant shall notify the owner, in writing, at the earliest point at which the consultant may know, or may have been reasonably expected to know, that the maximum allowable cost may be exceeded and that the approval of the department shall be obtained before any

costs above $40,000 will be reimbursed by the department. The notification to the owner shall be made before the owner has incurred liabilities above the $40,000 maximum.

(3) Consideration of alternatives. (a) The remedial action plan developed for the site shall include a consideration of at least 3 alternatives, one of which shall be passive bio-remediation with long-term monitoring. The consideration of alternatives shall include a basic comparison of costs and the recommended alternative shall have a detailed cost estimate. If passive bio-remediation with long-term monitoring is feasible but not the recommended alternative, a clear rationale shall be provided as to why this alternative is not acceptable. Costs of long-term monitoring, or operation and maintenance shall be included in the comparison of costs in considering the alternatives.

(b) If the consideration of the passive bio-remediation or monitoring alternative shall be excluded because of site characteristics, the alternative shall be replaced by consideration of another alternative. If an alternative is substituted for the passive bio-remediation or monitoring al- ternative, the reason for this change shall be documented in the analysis.

(c) 1. The comparison of alternatives shall be a concise document written so that the responsible party and the department may easily compare alternatives. Only alternatives which are reasonably expected to be approved by the DNR may be included in the comparison. The comparison of alternatives shall be submitted to both the DNR and the department if the selected alternative is greater than $80,000. The comparison submitted to the department shall not include the full remedial action plan, unless requested by the department.

2. If the comparison document is determined by the department to be excessive or non-approvable alternatives are included, the department may require that the comparison be revised and resubmitted.

(4) Start of investigation. An investigation shall be considered started if, after confirmation of a contamination is obtained, and additional soil borings, soil sampling or monitoring-well construction have begun. In addition, the work on the site shall have an element of continuity.

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

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## ILHR 47.34 Deductibles for underground and aboveground tanks.

All awards made under the scope of this chapter shall be subject to a deductible per occurrence.

(1) Underground tanks. (a) For a claim filed after July 31, 1987 for costs incurred after July 31, 1987 and before August 15, 1991, the department shall issue an award less a deductible amount of $5,000 per occurrence.

(b) For a claim filed after July 31, 1987 for costs incurred on or after August 15, 1991, but before July 1, 1995, the department shall issue an award less a deductible amount of $2,500 plus 5% of the eligible costs, but not more than $7,500 per occurrence.

(c) For a claim filed after July 31, 1987 for costs incurred after July 1, 1995, the department shall issue an award less a deductible amount of $10,000 per occurrence.

(2) Aboveground tanks. (a) For a claim filed after July 31, 1987 for costs incurred after July 31, 1987 and before August 15, 1991, the department shall issue an award less a deductible amount of $5,000 per occurrence.

(b) For a claim filed after July 31, 1987 for costs incurred on or after August 15, 1991, and on or before July 1,

1993, the department shall issue an award less a deductible amount of $2,500 plus 5% of the eligible costs, but not more than $7,500 per occurrence.

(c) For a claim filed after July 31, 1987 for costs incurred after July 1, 1993, the department shall issue an award less a deductible amount of $10,000 per occurrence.

(3) Other tanks. For a claim filed for a home oil tank system remediation, within the scope of this chapter, no deductible amount shall be charged. Only 75% of the amount of eligible costs but no more than $7,500 shall be reimbursed.

(4) Rebate or reimbursement of deductible. No service provider, consultant or subcontractor shall reimburse the responsible party for the deductible amount established by the department.

Note: Section 101.143 (4) (ee), Stats., provides that the department may waive the deductible amount if the department determines that the responsible party is unable to pay the deductible amount or is indigent as determined by the department.

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

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**ILHR 47.35 Award payments.**

(1) General. Awards shall be made if funds are available at the time of completion of a claim review. A reserve of 20% of the annual allotment shall be reserved for emergency claims, as specified in s. ILHR 47.03.

(2) Sequencing payments. (a) Awards. Except for those cases as specified in sub. (3) (a) and (b), claims shall be paid on a strict first-in first-out basis with the claim date being established when both the approval of the DNR and the complete claim package have been received by the department.

1. Payments shall be made for remedial actions that have been verified by the DNR as complete. Payments may be made for sites at which long-term monitoring is in place. The DNR Site Investigation and Remedial Action Plan Review form (SBD-8069) shall be signed by the DNR and submitted to the department before a PECFA claim can be paid.

2. Progress payments may be made to entities who have not met or do not have the ability to meet the test for self-insurance included in s. ILHR 10.82. All requests for progress payments shall be accompanied by a completed and signed DNR Site Investigation and Remedial Action Plan Review form (SBD-8069). The department may conduct field or financial audits or inspections to verify completion of each phase of remediation prior to payment.

3. Progress payments may be made only at the following times:

a. Completion of an emergency action;

b. Completion of a site investigation and remedial action plan;

c. Completion of remedial action activities; and

d. Annually for maintenance, monitoring and operation costs.

(b) Other interim payments. In addition to the progress payments identified in sub. (2) (a) 3., the department

shall also make awards after DNR approval at the following points:

1. When $100,000 of unreimbursed costs have been incurred for a site; or

2. If the department fails to approve reimbursement above the $40,000 cap for the completion of a site investigation and remedial action plan development, and the lender terminates their funding relationship with the responsible party and requests reimbursement.

(3) Priority processing. (a) Emergency remediations. 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 and safety. The finding of an emergency may not be based on financial hardship or indigence of the responsible party or agent. The department shall be the sole determiner of whether an emergency exists and an appeal of the decision to the department is not allowed.

(b) Cost-effective remediations. If a responsible party is able to complete a remediation, at least up to the point of long-term monitoring or where passive bio-remediation is approved by the DNR, and the total costs incurred are equal to or less than $50,000, the claim may receive priority processing. Claims received under this paragraph may be processed and awards made before other complete claims, except for emergency claims under par. (a).

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

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**ILHR 47.36 Third-party claims.**

(1) General. A responsible party may file a claim with the department for the re- imbursement of an amount paid to third parties for personal injury to another individual or off-site property damage associated with a petroleum product discharge from an underground petroleum product storage tank system within the scope of this chapter. The existence of these claims shall be made known to the department, by the responsible party shall notify the department of these claims, no later than 30 calendar days from the date that they knew or could have reasonably have been expected to have known of the occurrence of the injury or personal property loss. Rules established by the office of the commissioner of insurance, as specified in s. Ins 6.35, concerning ineligible costs for third-party claims shall apply.

(2) Third-party compensation for underground storage tanks. Costs incurred from environmental pollution and remediation actions, including compensation to third parties for property damage and individual bodily injury, may be deemed eligible costs as specified in s. ILHR 47.30 (1).

Note: Liabilities which are excluded from coverage in liability insurance policies for bodily injury and liabilities which are excluded in liability insurance policies for property damage, for the purpose of this chapter, are defined by the state of Wisconsin commissioner of insurance, as specified in s. Ins 6.35, as required in s. 101.143 (1m), Stats.

Note: If a person conducts a remedial action activity for a discharge from a petroleum product storage tank system or home oil tank system, whether or not the person files a claim under this chapter, the claim and remedial action activity conducted are not evidence of liability or an admission of liability for any potential or actual environmental pollution, as specified in s. 101.143 (7) (b), Stats.

(3) Intervention in third-party claims. The owner or operator of an underground petroleum product storage system eligible for an award under the scope of this chapter, shall notify the department in writing of any action by a third party against the owner or operator for compensation. The department may intervene in any third-party actions

against an owner or operator of an underground petroleum product storage tank system for compensation for bodily injury or property damage. The department of justice may assist the department in this intervention.

(4) Third-party compensation for aboveground storage tank systems. Third-party damages are not a reimbursable expense if the damage is the result of a discharge from an aboveground petroleum product storage system.

(5) Reasonable judgment determination. (a) Third-party personal injury. The department may establish a peer review adjudicator panel to review third-party personal injury reimbursement claims resulting from a dis- charge from an underground petroleum product system under the scope of this chapter. The review panel shall make a monetary determination for reimbursement based upon reasonable health care service costs and other com- putation methods established by the department.

(b) Peer review adjudicator panel. The panel may make a recommendation to the department for an award from the fund to compensate the third party for personal injury or property damage. The department shall review the recommendation and make a decision regarding an award amount under the program.

(c) Third-party property claims. For third-party claims associated with the removal of property items such as, but not limited to, blacktop and cement, the depreciated value of the property may be reimbursed. The basis of the value of the property shall be included in the claim. Full replacement costs may not be reimbursed by the fund.

(6) Eligible costs. (a) A responsible party may include the reimbursement for personal injury or property damage costs on a claim for an award within the scope of this chapter. Reimbursement of a claim shall be based upon a showing that the cost was caused by the petroleum product discharge and that the amount claimed is reasonable.

(b) If third-party claims exceed the maximum allowed under this chapter for the applicable type of underground petroleum product storage tank system, costs shall be reimbursed in the following order:

1. Eligible costs of on-site and off-site remediation and replacement of drinking water wells;

2. Eligible costs for personal injury; and

3. Eligible costs for property damage.

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

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## ILHR 47.37 Disposal of remedial equipment and materials purchased through PECFA.

(1) General. If materials or an equipment item, which was purchased and reim- bursed for through the PECFA fund, is no longer required at the site, the item or material shall be sold and the funds returned to the PECFA fund for deposit to the segregated account for the payment of claims.

(2) Sale of remedial equipment or materials. The sale of remedial equipment or materials no longer required shall be accomplished as follows:

(a) The claimant shall obtain the best available bid for the equipment item or materials;

(b) The claimant shall submit the bid price obtained and the original purchase price of the item to the PECFA

program for authorization to sell; and

(c) The department may, after review of the bid, determine that the sale may be completed. A check payable to the department, indicating that it is from the sale of remedial equipment or materials, shall be provided to the department for deposit to the segregated account.

(d) If the bid price is not at fair market value or for any other reason not acceptable to the department, the department may at its discretion take possession of the equipment or materials for disposal through government surplus sale.

(e) The department, at its discretion, may publish a listing of remedial equipment or materials available for use at remediation sites. The department may require the use of this equipment or materials rather than the purchase of new materials and equipment for a remediation.

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

## SUBCHAPTER V. CONSULTANTS, CONSULTING FIRMS, LABORATORIES AND DRILLING FIRMS

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**ILHR 47.40 Admission to participation.**

(1) General. (a) All consultants and consulting firms shall be required to register with the department for admission to participate in the PECFA program. Consultants conducting work under this chapter may normally be defined as, but not limited to, principal engineers, project engineers, hydrogeologists, and environmental scientists or specialists. Eligibility for admission shall be based upon receipt and approval of the application.

(b) Remedial consulting services and activities performed by individuals and firms, who have not registered to participate in the PECFA program may not be reimbursed under the scope of this chapter unless the department determines that denying reimbursement would conflict with the achievement of the goals of the PECFA program.

Note: Admission to participate initially included an interim provision which required all consulting firms and consultants to meet all criteria as specified in sub. (1) as of February 28, 1993.

(2) Consultants. (a) General. Consultants shall meet all applicable consultant qualifications that may be established by the DNR and shall be registered to participate in the PECFA program by application to the department. All consultants shall also meet and demonstrate compliance with the following criteria:

1. Provide a signed statement to the department verifying agreement to abide by the provisions of the statutes and administrative laws under the PECFA program;

2. Certify knowledge of the PECFA program and this chapter.

(b) Ineligibility. Consultants not meeting the criteria as specified in par. (a) shall no longer be eligible to participate in the PECFA program.

(3) Consulting firms. (a) General. Companies or other organizations that provide environmental or remedial

consulting services under the scope of this chapter shall register to participate in the PECFA program by application to the department.

(b) Documentation. In order to be registered to participate, consulting firms shall meet and demonstrate compliance with the following criteria:

1. Provide a signed statement to the department verifying agreement to abide by the statutes and administrative rules under the PECFA program and to include a signed statement with each claim that all costs claimed by the consulting firm are a true and accurate account of services performed;

2. Provide a signed statement that the firm shall make available for inspection and audit records requested by the department for field or financial audits under the scope of this chapter;

3. Certify knowledge of the PECFA program and this chapter; and

4. Certify that they will comply with all OSHA training and safety requirements related to remedial activities and services performed under the scope of this chapter even if the firm is not required to have OSHA trained staff for other projects or professional activities.

Note: Initially all consultants and consulting firms were required to meet the criteria outlined in par. (b) by February 28, 1993.

(c) Insurance. 1. All consulting firms shall obtain and maintain errors and omissions (professional liability) coverage, including pollution impairment liability, of no less than $1,000,000 per claim, $1,000,000 annual aggregate and with a deductible of no more than $100,000 per claim.

2. A certificate or certificates verifying the existence of the required insurance coverage for all environmental consultants who performed work included in a claim, shall be submitted with the PECFA claim.

3. The insurance coverage shall be provided by a firm that has an A.M. Best rating of at least "A-".

4. A consulting firm may request the department's approval of an alternate mechanism for meeting the requirement of the maximum deductible of $100,000 per claim. The department shall review the request and determine whether it meets the requirement of the rule.

Note: Initially all consulting firms were required to meet the insurance provisions as specified in par. (c) by June 1, 1993.

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

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## ILHR 47.405 Application for admission to participate.

(1) Application by a consultant or consulting firm for admission to participate shall be made in writing and include the name of the person or contact person, a complete name and mailing address, telephone and fax numbers, the federal tax identification number or social security number, and all items included in s. ILHR 47.40 (2) or (3), whichever is applicable. Consultants and consulting firms shall inform the department in writing within 30 business days of any change in the information previously provided to the department.

(2) Application for admission shall be made to the department on forms provided by the department. Application

and notification of changes in consultant or firm status shall be made to:

Department of Industry, Labor and Human Relations
Bureau of Petroleum Inspection and Fire Protection
P.O. Box 7969
Madison, WI 53707

(3) Failure to comply with s. ILHR 47.40 shall immediately disqualify a consultant or consulting firm participation in the PECFA program. The department shall not reimburse for services performed by consultants or consulting firms that are not registered to participate unless the department determines that reimbursement would further the goals of the program.

(4) Upon receipt of the completed application form, the department shall review and evaluate the application and make all necessary notifications to the applicant within 30 days of the receipt of the application.

(5) If the department determines that the applicant does not qualify for admission to participate, the applicant shall be notified of the findings in writing and instructed on the appeals procedure provided under s. ILHR 47.53.

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

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**ILHR 47.406 Issuance of certificate of admission.**

Upon verifying the completion of the requirements for admission, the department shall notify the applicant in writing and shall issue the appropriate certificate. The certificate shall bear the name of the applicant, certification number and certification category of individual consultant or consulting firm. The department may periodically require submittal of proof that individuals or firms continue to comply with the conditions in s. ILHR 47.40 (2) or (3), whichever is applicable. The department shall issue the certificate within 30 business days of full completion of the requirements for admission by the applicant.

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

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**ILHR 47.41 Method of disqualification.**

(1) General. The department may disqualify a consultant or consulting firm from admission to participate or make claims under the PECFA program, if the department has investigated and determined that the consultant or consulting firm has failed to comply with this chapter. Defrauding the PECFA program shall be considered a criminal offense, as specified in s. 101.143 (3) (g), Stats.

(a) Disqualification. The notice of disqualification shall be made by certified mail sent to the address filed with the application. Service shall be verified by the certified mail receipt. The following types of conduct may constitute the basis for disqualification from participation in the PECFA program:

1. Intentional cost shifting;

2. Intentional billing for activities not undertaken at a specific cleanup site, rebating of the deductible or

structuring of a claim to provide a responsible party with a rebate or reimbursement of the deductible;

3. Intentionally submitting fraudulent invoices or bills, or fraudulent or incomplete claims;

4. Conducting unnecessary, ineffective or incomplete remedial activities or services;

5. Attempts to defraud, including but not limited to false or double billing clients for work conducted;

6. Violations of the administrative rules of the department;

7. Violation of the state of Wisconsin Statutes;

8. Failure to obtain or maintain criteria for participation as established in s. ILHR 47.40 (2) or (3), whichever is applicable;

9. Charging of a fee that the department has determined to be excessive, after written notice from the department that the fee is excessive and should not be charged; and

10. Denial of access to requested records.

(b) Reinstatement to participation. A consultant or consulting firm no longer registered to participate may be reinstated after a specified period dependent upon the number of occurrences of prior disqualification as specified in par. (a). The following periods of disqualification may be used to determine reinstatement to participate in the PECFA program:

1. A first period of disqualification, shall be no less than 3 months;

2. A second or subsequent period of disqualification, shall be no less than 6 months but may be for an indefinite period depending on the severity of the violation; and

3. Criminal or fraudulent actions, within the scope of the PECFA program, shall result in permanent disqualification.

(c) Hearings and appeals of decisions regarding disqualification. When the department determines that a consultant or consulting firm is no longer registered to participate, the affected party may appeal as specified in s. ILHR 47.53. The right to hearing shall be considered waived if the applicant fails to submit the request within 30 calendar days of receipt of the determination. The department shall conduct a hearing and record the proceedings. The department shall conduct a hearing and make a determination within 30 business days of the hearing regarding disqualification to participate.

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

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## ILHR 47.415 Laboratories and drilling firms.

(1) Insurance. (a) As of March 1, 1994, all laboratories performing work under the PECFA program shall obtain and maintain errors and omissions (professional liability) coverage of no less than $1,000,000 per claim, $1,000,000 annual aggregate and a deductible of no more than $100,000 per claim.

(b) As of March 1, 1994, all drilling firms performing work under the PECFA program shall obtain and maintain

general liability coverage, including pollution impairment liability, of no less than $1,000,000 per claim, $1,000,000 annual aggregate and a deductible of no more than $100,000 per claim.

(2) Coverage. The insurance obtained by laboratory and drilling firms shall cover work performed under PECFA on or after March 1, 1994. For all laboratory and drilling firms included in a claim, a certificate or certificates verifying the existence of the insurance coverage as specified in sub. (1), shall be submitted with the PECFA claim.

(3) Rating. The insurance coverage shall be provided by a firm that has an A.M. Best rating of at least "A-".

(4) Alternate mechanisms. A laboratory or drilling firm may request the department's approval of an alternate mechanism for meeting the requirement of the maximum deductible of $100,000 per claim. The department shall review the request and determine whether the mechanism meets the requirement of the rule.

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

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**ILHR 47.42 Field and financial audits.**

(1) General. The department shall routinely investigate remediation sites to establish that the remediation is appropriate and that costs incurred reflect the remediation services and activities.

(2) Applicability. The department may conduct field and financial audits as deemed necessary in order to further the goals of the PECFA program. Activities which may warrant the conduct of a field or financial audit may include, but not be limited to, the following:

(a) Complaints;

(b) High cost sites;

(c) Cases where retrofits are being undertaken;

(d) New construction activities;

(e) Receipt of additional information which may result in modifying the initial determination of eligibility;

(f) More than one occurrence on a specific site; and

(g) Sites having intermingled plumes.

(3) Maintenance of and access to records. (a) General. All consultants and consulting firms registered to participate, all organizations and individuals, including but not limited to service providers and others who perform remedial action services, all owners, operators, and persons owning home oil tank systems who file or attempt to file a claim under the PECFA program shall maintain records relevant to a claim for 6 years after claim submittal and make available for inspection, upon request of the department, all financial and work records deemed by the department as necessary to support or investigate a claim or attempted claim.

(b) Failure to maintain records and denial of access. Failure to maintain and denial of access to records, as specified in par. (a), requested by the department shall constitute grounds for denial of participation in the PECFA program and penalties as specified in par. (c) may apply.

(c) Penalties. Penalties shall be established for violations to this section, as per s. 101.143 (10), Stats.

1. Any owner or operator or person owning a home oil tank system or service provider who fails to maintain a record as specified under this chapter, may be required to forfeit not more than $2,000. Each day of continued violation constitutes a separate offense.

2. Any owner or operator or person owning a home oil tank system or service provider who intentionally destroys a document that is relevant to a claim for reimbursement under the fund, may be fined not more than $1,000 or imprisoned for not more than 10 years or both.

(d) Notification of work performed. The department may, at its request, require consultants and consulting firms registered to participation and all organizations and individuals who perform remedial action services and all owners, operators and persons owning home oil tank systems to notify the department no less than 10 calendar days in advance of any work being performed at a site or sites.

(e) Parallel sampling requirement. At the request of the department, consultants or firms registered to participate or organizations or individuals who perform remedial action services shall, as directed by the department, take soil or groundwater samples and submit these samples to a laboratory specified by the department. The cost of preparing and submitting these samples shall be an eligible cost to the PECFA program independent of any cost cap or cost estimate. The laboratory reports, for requested samples, shall be sent to the department directly from the specified laboratory. The cost of the laboratory analysis shall be paid by the owner and submitted as part of the PECFA claim.

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

## SUBCHAPTER VI. LEGAL ISSUES

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### ILHR 47.50 Noticing the department of actions.

(1) Property transfer. (a) Owner or operator responsibility. The owner or operator or person owning a home oil tank system shall have the responsibility of notifying the department of a property transfer which occurs during a remediation.

(b) Sale agreement. The sale agreement for a property being transferred during a remediation or prior to the completion of a remediation shall contain language defining the party responsible for the completion of the remediation, responsible for the payment of costs incurred and the recipient of the PECFA award.

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

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### ILHR 47.51 Petroleum storage environmental cleanup council.

(1) The Council. As per s. 15.227 (18), Stats., the petroleum storage environmental cleanup council is created in the department.

(2) Frequency of meetings. The council shall meet at least annually and at the call of the chair, a majority of its

members or at the request of the department.

(3) Reimbursement. Each member shall be reimbursed for actual and necessary travel and meal expenses incurred in the performance of their duties in accordance with current state travel and expense guidelines.

(4) Responsibilities. The council shall have the following responsibilities:

(a) Advise the department on any rules promulgated to implement s. 101.143, Stats.;

(b) Review and advise the secretary of the department and the secretary of the DNR on the implementation of the petroleum storage remedial action program established in this chapter;

(c) Review estimates of funds and fees needed to sustain the petroleum storage remedial action program; and

(d) Consult on processes and procedures for awarding claims under this chapter.

(5) Quorum. A majority of members of the council shall constitute a quorum to conduct business and take actions.

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

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## ILHR 47.52 Dispute resolution procedures.

(1) Individuals, including owners, operators, persons owning home oil tank systems and their agents may submit a written complaint to the department regarding a consultant or consulting firm alleged to be involved in any violation of the law or this chapter.

(2) The department may investigate alleged violations on its own initiative or upon the receipt of a complaint. The department may conduct an investigation and make a determination regarding a complaint within 30 business days of the receipt of the complaint. The department shall take appropriate action based on its determination. If it is determined that no further action is warranted, the department shall notify the persons affected.

Note: Section 101.09 (5), Stats., states "(5) Penalties. Any person who violates this section or any rule or order adopted under this section shall forfeit not less than $10 nor more than $1,000 for each violation. Each violation of this section or any rule or order under this section constitutes a separate offense and each day of continued violation is a separate offense."

Note: Each remedial activity, cost item fraudulently claimed, or other activities conducted or information submitted in violation of any section of this chapter shall be considered a separate violation.

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

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## ILHR 47.53 Appeals and hearings.

(1) Hearings. (a) General. A responsible party, agent, consultant or consulting firm may request a hearing with the department, as specified in s. 101.02 (6) (e), Stats., on any provision or decision made within the scope of this chapter except as specified in ss. ILHR 47.03 (2), 47.35 (3) and par. (b) 2.

(b) Appeal requirements. All appeals pursuant to this chapter shall be filed no later than 30 calendar days from

the date of the decision being appealed. The department may make a determination not to proceed with a request for a hearing depending on the nature of or amount of the cost item being appealed.

1. Costs of consultants or individuals preparing and participating in appeals shall not be eligible for reimbursement under the PECFA program.

2. Appeals of items identified as ineligible, as listed in s. ILHR 47.30 (2), shall not be allowed.

(c) Response. Upon receipt of notification of hearing from the department, the affected party may submit to the department a written response within 30 calendar days of the date of service. Failure to respond within the prescribed time limit, or failure to appear at the scheduled hearing, may result in the allegations specified in the complaint being accepted as true and accurate.

(d) Conciliation agreement prior to hearing. If the department and the affected party are able to reach agreement on disposition of a complaint prior to a hearing, such agreement shall:

1. Be transmitted in writing to the secretary of the department;

2. Not be binding upon any party until accepted by the secretary of the department; and

3. Not be considered a waiver of any defense nor an admission of any fact until accepted by the secretary of the department.

(e) Witness fees. Witness fees and mileage of witnesses subpoenaed on behalf of the department shall be paid at the rate prescribed for witnesses in circuit court.

(2) Conduct of hearings. All hearings will be conducted by persons selected by the department. Persons so designated may administer oaths or affirmations and may grant continuances and adjournments for cause shown. The affected party shall appear in person and may be represented by legal counsel. Witnesses may be examined by persons designated by the department.

(3) Determinations. The department may make determinations and enter its order on the basis of the facts revealed by its investigation. Any determinations as a result of petition or hearing shall be in writing and shall be binding unless appealed to the secretary of the department.

(4) Appeal arguments. Appeal arguments shall be submitted to the department in writing unless otherwise ordered.

(5) Reimbursements. An award or portions of an award under the scope of this chapter may be withheld until a decision or an appeal shall be finalized.

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

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## Appendix A

Contacts and Addresses

The material included in the appendix is provided for informational and clarification purposes only.

·Department of Industry, Labor and Human Relations

·Consulting Firm and Consultant Admission to Participation

Department of Industry, Labor and Human Relations
Bureau of Petroleum Inspection and Fire Protection
P.O. Box 7969
Madison, Wisconsin 53707
·PECFA Claim Submittal and Status PECFA

Department of Industry, Labor and Human Relations
Bureau of Petroleum Inspection and Fire Protection
P.O. Box 7969
Madison, Wisconsin 53707
·Tank Registration

Department of Industry, Labor and Human Relations
Bureau of Petroleum Inspection and Fire Protection
Box 7969
Madison, Wisconsin 53707
·Department of Natural Resources

·Certified Laboratories

Department of Natural Resources
Office of Technical Services
P.O. Box 7921
Madison, Wisconsin 53707
·Office of the Insurance Commissioner

·Office of the Insurance Commissioner

121 East Wilson Street
Madison, Wisconsin 53703

Department of Commerce

Emergency Rule Relating to the Petroleum Environmental Cleanup Fund Interagency Responsibilities

Finding of Emergency and Rule Analysis

The Department of Commerce finds that an emergency exists and that adoption of the rule included in this order is necessary for the immediate preservation of public health, safety, and welfare.

The facts constituting the emergency are as follows. Under sections 101.143 and 101.144, Wisconsin Statutes, the Department protects public health, safety, and welfare by promulgating rules for and administering the Petroleum Environmental Cleanup Fund (PECFA Fund). The purpose of the fund is to reimburse property owners for eligible costs incurred because of a petroleum product discharge from a storage system or home oil tank system. In administering this fund, the Department has relied upon a Memorandum of Understanding with the Department of Natural Resources for classifying contaminated sites, disbursing funds, and addressing other statements of policy that affect the two Departments.

On September 17, 1998, the Joint Committee for Review of Administrative Rules adopted a motion pursuant to s. 227.26(2)(b), Stats., that directs the Department and the Department of Natural Resources to jointly adopt the above portions of the Memorandum of Understanding and related policy issues as an Emergency Rule. The rule included with this order is in response to that directive.

Pursuant to s. 227.24, Stats., this rule is adopted as an emergency rule to take effect upon publication in the official state newspaper and filing with the Secretary of State and Revisor of Statutes.

Dated at Madison, Wisconsin, this
27th day of December, A.D. 1998,
By the Department of Commerce

Philip Edw. Albert, Acting Secretary

*File ref.: finding of emer2*

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) "DNR" means the department of natural resources.

(4) "Enforcement standard" means a numerical value expressing the concentrations of a substance in groundwater which is adopted under s. 160.07, Stats., and s. NR 140.10 or s. 160.09, Stat., and s. NR 140.12.

(5) "High priority site" means a remediation site that meets one or more of the following criteria:

(a) Presence of a hazardous substance other than petroleum from a petroleum product storage tank system.

(b) Contamination to an area of exceptional environmental value where the discharge would pose a greater than normal threat.

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

(6) "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.

(7) "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.

(8) "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 selection of remedial bids.

(b) The setting of remediation targets for sites which are competitively bid or bundled with another site(s).

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

(2) METHODOLOGY. 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.** The departments shall develop, by April 15, 1999, an agreed upon risk assessment protocol to measure environmental, safety and health risks associated with petroleum contamination 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. The features of the protocol shall include:

(a) Allowing sites, with contaminants above the enforcement standard on site and below the enforcement standard off site to be closed after investigation;

(b) Allowing the joint setting of remediation target levels for sites that can not be closed at the end of the investigation stage, and

(c) Determining the extent to which the protocol applies during the site investigation.

**Comm 46.06 Site closure decisions.** (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 all of the following:

(a) Sites where contamination is determined to be below the enforcement standard on site and below the enforcement standard off site shall be closed without requiring or reimbursing for additional remedial efforts.

(b) Sites, which will be competitively bid or bundled with other sites shall have established, through joint agency decision-making, a remediation target at which point the site shall be closed without requiring or reimbursing for additional remedial efforts.

(c) Sites, for which the original remedial action plan is approved, shall have a jointly established remediation target at which point the site shall be closed without requiring or reimbursing for additional remedial efforts.

(2) JOINT 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.

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

(d) If Commerce identifies a site they believe has met the remediation target(s), they may request DNR take action to solicit a closure request from the site owner.

(e) Any disputes between the agencies as to whether a site qualifies for closure under (d) 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.

(3) DETERMINATION OF COMPLIANCE WITH THE ENFORCEMENT STANDARD. When determining whether a site is above or below either the enforcement standard or any other contaminant level or target, recognition shall be made of the impact of error of measurement, repeatability of test results 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. 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.

(a) 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.

(End)

**FISCAL ESTIMATE**
DOA-2048 (R10/92)

[X] ORIGINAL
[ ] CORRECTED

[ ] UPDATED
[ ] SUPPLEMENTAL

LRB or Bill No./Adm. Rule No.
ILHR 46

Amendment No. if Applicable

**Subject:** Petroleum Environmental Cleanup Fund Interagency Responsibilities

**Fiscal Effect**

**State:** [X] No State Fiscal Effect
Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation

- [ ] Increase Existing Appropriation
- [ ] Decrease Existing Appropriation
- [ ] Create New Appropriation
- [ ] Increase Existing Revenues
- [ ] Decrease Existing Revenues

- [ ] Increases Costs - May be possible to Absorb Within Agency's Budget [ ] Yes [ ] No
- [ ] Decrease Costs

**Local:** X No local government costs

1. [ ] Increase Costs
   [ ] Permissive [ ] Mandatory
2. [ ] Decrease Costs
   [ ] Permissive [ ] Mandatory
3. [ ] Increase Revenues
   [ ] Permissive [ ] Mandatory
4. [ ] Decrease Revenue
   [ ] Permissive [ ] Mandatory
5. Types of Local Governmental Units Affected:
   [ ] Towns [ ] Villages [ ] Cities
   [ ] Counties [ ] Others _____
   [ ] School Districts [ ] WTCS Districts

Fund Sources Affected
[ ] GPR [ ] FED [ ] PRO [ ] PRS [ ] SEG [ ] SEG-S

Affected Ch. 20 Appropriations

Assumptions Used in Arriving at Fiscal Estimate

The department is promulgating the rule, as directed by the Joint Committee for Review of Administrative Rules, to implement new provisions in the Memorandum of Understanding that controls the working relationship between the Departments of Natural Resources and Commerce in the administration of the PECFA program. At this point in time, the longer term fiscal impact of some of these changes cannot be determined.

Long-Range Fiscal Implications

None known.

| Agency/Prepared by: (Name & Phone No.) | Authorized Signature/Telephone No. | Date |
|---|---|---|
| Bill Morrissey 266-7605 | (608) 267-0770 | 12/27/98 |

**FISCAL ESTIMATE WORKSHEET**
Detailed Estimate of Annual Fiscal Effect
DOA-2047(R10/92)

☒ ORIGINAL ☐ UPDATED
☐ CORRECTED ☐ SUPPLEMENTAL

| LRB or Bill No/Adm. Rule No. | Amendment No. |
|---|---|
| ILHR 46 | |

**Subject:** Petroleum Environmental Cleanup Fund Interagency Responsibilities

**I. One-time Costs or Revenue Impacts for State and/or Local Government (do not include in annualized fiscal effect):**

| **II. Annualized Costs:** | **Annualized Fiscal impact on State funds from:** Increased Costs | Decreased Costs |
|---|---|---|
| **A. State Costs By Category** State Operations - Salaries and Fringes | $ | $ - |
| (FTE Position Changes) | ( 0 FTE) | ( - 0 |
| State Operations - Other Costs | | - |
| Local Assistance | | - |
| Aids to Individuals or Organizations | | - |
| TOTAL State Costs By Category | $ 0 | $ - 0 |
| **B. State Costs By Source of Funds** GPR | $ Increased Costs | $ Decreased Costs - |
| FED | | - |
| PRO/PRS | 0 | - 0 |
| SEG/SEG-S | 0 | - 0 |
| **III. State Revenues-** Complete this only when proposal will increase or decrease state revenues (e.g., tax increase, decrease in license fee, etc.) GPR Taxes | $ Increased Rev. | $ Decreased Rev. - |
| GPR Earned | | - |
| FED | | - |
| PRO/PRS | 0 | - 0 |
| SEG/SEG-S | 0 | - 0 |
| TOTAL State Revenues | $ 0 | $ - 0 |

**NET ANNUALIZED FISCAL IMPACT**

| | STATE | LOCAL |
|---|---|---|
| **NET CHANGE IN COSTS** | $ 0 | $ 0 |
| **NET CHANGE IN REVENUES** | $ 0 | $ 0 |

Agency/Prepared by: (Name & Phone No.)
Bill Morrissey 266-7605

Authorized Signature/Telephone No.
(608) 267-0770

Date
12/27/98

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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January 26, 1999

The Honorable Judith B. Robson
State Senator – 15th Senate District
15 South, State Capitol
Madison, WI 53702

Dear Senator Robson:

Attorney General Doyle has asked me to respond to your letter dated January 14, 1999. In that letter you ask whether the use of risk-based methodologies, such as the American Society for Testing and Materials' (ASTM) Risk-Based Corrective Action (RBCA), to respond to petroleum contamination under PECFA, would be consistent with the provisions in chapter 160 of the Wisconsin Statutes. In order to answer your question, I have reviewed the relevant state statutes and regulations, ASTM's "Standard Guide for Risk-Based Corrective Action Applied at Petroleum Release Sites" (ASTM Standard Guide), and information from the Department of Commerce and the Department of Natural Resources.

Many components of ASTM's RBCA, notably the risk-based assessment and cost-saving objectives, are expressly authorized by chapter 160 and are already incorporated in the regulations in chapter NR 700 of the Wisconsin Administrative Code, which address the investigation and remediation of any kind of environmental pollution. However, certain key elements of RBCA, namely the unconditional allowance of continued contamination above enforcement standards both on- and off-site, and the development of standards other than enforcement standards and preventive action limits, violate both the letter and intent of chapter 160. The following review of chapter 60, NR 700, and RBCA, makes this conclusion clear.

Chapter 160 of the Wisconsin Statutes was developed to meet the need to maintain groundwater resources "at some level of quality for both consumptive and non-consumptive uses." Legislative Council Memorandum No. 2 to Members of the Special Committee on Groundwater Management, May 24, 1982, at 1. Chapter 160 establishes a process for the protection of the state's groundwater resources based on numerical standards. Wis. Stat. § 160.001. The numerical standards are statutorily defined enforcement standards and preventive action limits, and they are to be developed and used to minimize the concentration of polluting substances in groundwater. Wis. Stat. § 160.001(1). These numerical standards must be used and achieved by all groundwater programs. Wis. Stat. § 160.001(intro.), (1), (3), (4). Regulations that provide greater protection than enforcement standards and preventive action limits are also allowed. Wis. Stat. § 160.001(5).

These numerical standards are to be set for substances which are in or likely to enter the groundwater resources of the state, and which are of public health concern or of public welfare concern. Wis. Stat. §§ 160.05(1) and(6), 160.07, 160.09, 160.15. In categorizing substances of public welfare concern, the suitability of water for human use and for uses other than drinking water, and the effect on plants and animals, are to be considered. Wis. Stat. § 160.05(6)(d)1.-3. Any other characteristics of a substance connected to public welfare may also be considered. Wis. Stat. § 160.05(6)(e).

The Department of Natural Resources is required to mandate monitoring for these substances of concern in certain situations. Wis. Stat. § 160.27. Monitoring is required at contaminated sites, both to determine whether enforcement standards or preventive action limits are violated, and to determine the appropriate response to any such violations. Wis. Stat. § 160.27(2)(b). Where monitoring is required, preventive action limits may not be allowed to continue to be violated wherever groundwater is monitored on a contaminated site, unless it is not technically or economically feasible to comply. Wis. Stat. §§ 160.21(2)(a)1., 160.23(1)(b). Where monitoring is required, enforcement standards may never be allowed to continue to be violated at any point of present groundwater use, and beyond the property lines off-site. Wis. Stat. §§ 160.21(2)(a)2., 160.23(1)(c).[1]

These points where the concentration of a substance of concern is measured to determine compliance with preventive action limits and enforcement standards, are points of standards application. Wis. Stat. § 160.01(5). The department may by rule establish points of standards application, or measurement, at additional points to those identified above, to protect future groundwater uses and the public interest in state waters. Wis. Stat. § 160.21(2)(b)2.

Responses to contamination may vary depending on many factors, including risk and cost effectiveness. Wis. Stat. §§ 160.21(3) and (4). However, whatever response is chosen must ensure compliance with enforcement standards at all points of standards application. Wis. Stat. §§ 160.23(1)(c), 160.25(1) and (2).

All regulations promulgated by any agency must comply with chapter 160. Wis. Stat. § 160.19(1). Chapter 160 was enacted in 1983. Since 1994, a series of regulations have been passed in chapters NR 700-750 of the Wisconsin Administrative Code to address the identification, investigation and remediation of contaminated sites, in a consistent but flexible and cost-effective, even cost-saving, way. Wis. Admin. Code § NR 700.01(2); Adoption of Order SW-12-96, Memorandum to Natural Resources Board Members, June 12, 1996, at 13 (Response to Comment 4); Authorization for Hearing, January 11, 1996. Under these comprehensive environmental clean-up rules, contaminated sites are prioritized (NR 710),

[1] Where monitoring is not required, enforcement standards may still not be allowed to continue to be violated off-site, and at any point of present groundwater use, unless the use is of nonpotable water and will not be affected by the contamination. Wis. Stat. §§ 160.21(2)(b)1., 160.23(1)(c).

investigated so as to determine the full extent of violations of soil and groundwater standards (NR 716), remediated in a technically feasible and cost-effective way (NR 722), monitored based on actual site measurements (NR 724), and closed upon compliance with soil and groundwater standards (NR 726).

The only circumstances in which a remedial response and closure are allowed where chapter 160 groundwater enforcement standards are not met, are where 1) adequate source control measures have been implemented (for example, enough work has been done to control a groundwater plume so as to prevent additional contamination in violation of groundwater standards), 2) natural attenuation is, and is shown to be, reducing the contamination so as to attain groundwater standards in a reasonable period of time, 3) there is no off-site violation of groundwater preventive action limits, and 4) a groundwater use restriction is placed on the property deed. Wis. Admin. Code § NR 726.05.

The NR 700 regulations prescribe a process for remediating contamination at almost any site, with remediation determined in part on coming into compliance with chapter 160 groundwater standards. ASTM's RBCA is a process for addressing contamination at petroleum-contaminated sites, with remediation dependent on exposure and determined by margins of safety. Under RBCA, petroleum-contaminated sites are assessed; classified (prioritized); evaluated so as to identify sources, receptors and pathways of chemicals of concern, and with reference to a table of risk-based screening levels derived for standard exposure scenarios (tier 1); evaluated further if warranted based on site-specific scenarios (tiers 2 and 3); remedied if the screening levels or site-specific levels (target levels) are exceeded at points of compliance; and closed when the screening or site-specific levels are met at the points of compliance. ASTM Standard Guide, §§ 6.2-6.7, 6.10, 6.12, 6.13.

Measurements for response and closure are taken at points of compliance, which are points between source areas (where chemical concentrations are highest) and potential points of exposure. ASTM Standard Guide, § 3.1.23. Points of exposure are points of human contact with a chemical (such as a drinking well). ASTM Standard Guide, § 3.1.24. If there are no points of human contact on a site, then there are no measurements to be made and no basis for remediation. ASTM Standard Guide, §§ 3.1.23, 3.1.24, 6.7.1.

If points of human contact do exist at a site, points of compliance must be selected for measurement. Because points of compliance must be between the points of human contact and source areas, and source areas are most likely to be onsite (hence use of the term source), only onsite points need to be selected for measurement. When screening or site-specific levels are met at those points, no additional response is necessary and the site is closed. ASTM Standard Guide, §§ 6.7.1.1 and 6.7.3. No response at all is necessary if no receptors (people, structures, utilities, surface waters or drinking wells adversely affected by contamination) exist. ASTM Standard Guide §§ 3.1.29, 6.6.2, 6.6.4.

Many of the points at which the NR 700 rules and RBCA diverge are merely variants of similar processes based on similar factors. As is apparent from the above overviews of the two schemes, other points of divergence are precisely the points where RBCA is not consistent with Chapter 160:

1) Chapter 160 requires measurements of contamination to determine compliance with preventive action limits wherever groundwater is monitored, and compliance with enforcement standards at any point of groundwater use and off-site. RBCA requires measurements only onsite and only if there are points of human contact.[2]

2) Chapter 160 prohibits off-site exceedances of preventive action limits (subject to technical and economic feasibility) and enforcement standards (without qualification). RBCA does not require measurement of off-site contamination and so requires no action if off-site contamination exists but is not identified.

3) Chapter 160 allows additional points of measurement to protect future groundwater uses and the public interest in all state waters. RBCA limits measurement of contamination.

4) Chapter 160 requires action if a plume is expanding so as to exceed groundwater standards. RBCA requires no additional action if there are no receptors or points of human contact, even if contamination is spreading.

5) Most importantly, chapter 160 mandates only two numerical groundwater standards, preventive action limits and enforcement standards. RBCA calls for the development of other numerical standards not authorized by chapter 160. The chapter 160 standards are uniform throughout the state, based primarily on federal or state drinking water standards. RBCA's standards are specific to a site or class of sites, based on exposure at that site or within that class. There is no authority under chapter 160 to generate RBCA's table of screening levels or to develop RBCA's tier 2 or 3 site-specific target levels, which are different from chapter 160 preventive action limits and enforcement standards.

6) Chapter 160 does not allow a site to be closed without its coming (or its being shown to be coming) into compliance with enforcement standards (and also with preventive action limits if technically and economically feasible). Contrary to this statutory mandate, RBCA unconditionally allows violations of both standards to persist, on-site if there are no receptors or human exposure, and off-site if off-site contamination is not measured.

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[2] One result of RBCA's more limited measurement requirements could be that the extent of a plume is not fully identified under RBCA.

These inconsistencies between chapter 160 and RBCA appear to stem from their different orientations. Chapter 160 requires regulatory oversight for the sake of the groundwater (see Wis. Stat. § 160.001), whereas RBCA requires regulatory oversight for the sake of who is at risk (see ATSM Standard Guide, § 1.1). In sum, because RBCA allows exceedances of enforcement standards, and of technically and economically feasible preventive action limits, and because RBCA bases corrective action on standards other than enforcement standards and preventive action limits, RBCA is not consistent with chapter 160.

Sincerely,

JoAnne F. Kloppenburg

JoAnne F. Kloppenburg
Assistant Attorney General

JFK:hms

# ART'S SERVICE

43 N WISCONSIN ELKHORN, WI 53121
414-723-3270
fischer5@elknet.net

January 27, 1999

Senator Judy Robson
PO Box 7882
Madison, WI 53707-7882
(fax 608-267-5171)

Dear Senator Robson:

We wanted to thank you and Mr. Mason for your time and concern regarding the PECFA fund and all of the individuals it affects. We appreciate you having forwarded the information, which we have requested previously from other agencies, with no avail regarding the payment schedule on our claims. When election time rolls around, please feel free to contact us, if we are still in business, should you be looking for a location for campaign signage. You are the first person in our government who has listened to our dilemma and tried to help.

We are sorry, but with our schedule, we will be unable to attend the hearings on Thursday, January 28th. Therefore, we have tried to somewhat highlight problems we see inherent in the current PECFA program.

Although our property was owned by a major oil company for 50+ years, and we purchased the property before PECFA or the program was begun, we alone are responsible for the clean-up on the property. We purchased the property in good faith, having rented for several years from Amoco Oil Company, not knowing there were undisclosed USTs. Major contributors on properties like this are not liable according to state regulations. I would imagine, major companies, such as Amoco Oil, with all of their political lobbyists, were aware of future changes and began "dumping" properties such as ours on individuals who are just trying to make a living.

The geo probes currently are done by the engineering consultants, or independent contractors, hired by the consultants. Common sense leads one to believe that the contractor who makes a lot money from "contamination", should have no stake in the company taking the samples. The saying, "You scratch my back, I'll scratch yours," comes to mind. If a state agency did the testing, the possibility of eliminating fraud would be greatly reduced. I have never heard of anyone currently in the state, on the multitude of clean-ups, taking the samples and rechecking the results themselves.

When we had tank coatings done, during the time the legislature allowed current USTs be brought up to certain specs, we made sure the contractor was on the state certified list of qualified companies. The work they did was inferior, ultimately causing contamination on

the site. Fiberglass coating of the tank was approved by the state, which we found out the hard way, should be banned. The contractor told us the state would allow us to keep one tank in place, abandoned, to use as our monitoring well. We later learned from the state, there was never such a regulation. The state approved the company and when we contacted the state to talk to someone regarding the "approved contractor", we were told the state would not get involved or even look at any evidence. The state approves companies, but does not stand behind their decisions. For us to sue the contractor, it would have cost more money just to see the lawyer than what we could have recovered. Financially, we were hit on by both sides.

We have a very small site, a one bay station and room for 4 pumps. Initially the engineering contractor thought our site should be handled as two clean-up sites. Then one engineer left the company and another came in and changed our site to one clean-up. We found out through the process that contractors know there is a specific dollar limit (very large) on site plans. Wouldn't it be better to have two claims, get paid for two separate claims, although both "sites" would be taken care of at the same time. Once again, there is a fraud factor. As the property owner, we are at the mercy of these contractors and what they deem as a necessary cost and what that cost will be. The state gives them cart blanche to spend x amount of dollars up front and the engineering contractors know the limit. Where is the price control?

Also, why do we put up everything we own, while the state decides if our contractor did everything to specs and standards. Shouldn't the state be asking that contractor to wait for their PECFA fund payment? If there is a problem with the clean-up, it more than likely is not the small property owner, but something inherently done wrong by the contractor. It seems as though if the contractors had to wait for state funding, they might be more conscientious of the quality of work in regard to regulations. If the contractor has done the work and then not approved by the state, the small property owner once again has been stuck with an enormous bill they are responsible for, as well as ordered to clean-up again. The process would start all over again. Our clean-up was completed approximately the middle of 1997. Interest rate on the loan is approximately 10%. Interest began in 1995 when we began the clean-up process. We recently found out we will receive some payment November 1999 and another payment December 2000. State tax dollars and the current PEFCA policy allows for the contractor to be paid immediately. There has to be an awful lot of taxpayer money paying for the interest alone. This seems like a racquet for free money, taxpayer money, an entity you never meet. For the small owner who is just trying to work honestly and has to work very hard, this process is not only financially a hardship, but emotionally, a nightmare. Sometimes it seems that the government wants to get rid of all of the small businesses, the true backbone of our country, because they don't have time to deal with real people, only entities.

On sites, where there is minor contamination, and ground water is not involved, should the state be spending the huge amounts of money to dig up ground and put it in another pile of other like soil? There have been many advances since the beginning of this program in regards to chemical and bio degrading processes. The dig and haul method makes the middle men wealthy (banks, contractors, haulers, land fill sites) and can take the soil to

distances as close as 8 miles away. The cost is astronomical because of that word "contamination". I would venture to say that the trucks that haul the "contaminated" soil in do not get cleaned in any way before the same truck is used for other types of hauling business. Is that new soil or gravel now contaminated?

On older sites, such as ours, there are other problems that arise. We had crushed sewer lines, which we had to pay for to find the problem and correct. Drains were interrupted and had to be replaced. This was all done, while trying to run a business. Much of our time was spent trying to correct the problems instead of working. Initially when the tanks were removed, new clean gravel was put into place with a lining of plastic to keep it clean. We had to pay for the clean gravel out of pocket, no cost to PECFA. Although, have you ever tried to fill a good size hole and keep a plastic lining in place? Therefore, when the dig and haul method was done, the "clean" gravel was now considered "contaminated". Added costs again. And nothing comes cheap for the small property owner.

The initial idea for the program was put into place for the good of the public. But like any program, if not run efficiently, loses it's purpose. Right now the purpose of this program is to provide a free ride for all of the contractors and related who are in the business. We are trying to run our business within the guidelines set up by the state and federal governments, as well as trying to instill in our children the necessity for guidelines and regulations. There has been a great amount of dissolutionment of our government because of how it affects us so directly in our daily lives. Financially, we have been hurt tremendously, but also our support and pride in our government has changed even more so. We don't just shuffle papers, we are real, we have a family to raise. Because of this hearing, I tried to get the figures for the interest charged our these PECFA loans and have been unable to get. The bank shuffled me from one person to another, messages have been left, and once again, we are at the mercy of the corporate world.

We have only touched the tip of the iceberg in this letter, but if we met someone in our situation at this time and just beginning the process, our recommendation would be to walk away from the property, not pay the property taxes and take your losses up front, even if you would have to start from scratch. No one cares about the average small business owner. By our self, we do not make an entity and the government doesn't deal with individuals!

Sincerely,

Art & Barb Fischer

Arthur A. and Barbara A. Fischer

January 27, 1999

The Honorable Judith B. Robson
State Capitol, Room 15-South
Madison, WI 53702

Dear Senator Robson:

In a paper issued November 16, 1998 (see attachment), we recommended the use of two simple environmental screening criteria to improve the ability of the Wisconsin state regulatory authorities to expedite response actions for actual drinking water well impacts and to make prudent use of public and private resources in pursuit of environmental goals:

1) NFA for Groundwater at Clay Sites; and

2) Expedited Use of RNA at Low-Risk Non-Clay Sites.

These screening criteria do not conflict with Chapter 160 of the Wisconsin Statutes (a.k.a. the "groundwater law") and, consequently, do not require amendment of this law for implementation. Chapter 160 sets forth procedures for development and application of numerical standards for groundwater protection, which apply to all waters occurring in a saturated subsurface geological formation of rock or soil. These numerical standards serve as the ultimate remediation objective for all releases to groundwater.

However, it is important to note that the statute does not say how or when these numerical criteria are to be achieved or what specific cleanup actions are to be required by the DNR or COMM. In fact, Section 160.21(3) provides for broad flexibility in selection of appropriate response actions based upon "the type and age of the facility, the hydrogeological conditions of the site and the cost effectiveness of alternative responses that will achieve the same objectives under the conditions of the site." Furthermore, the statute specifies that "responses shall take into account the background water quality at the site, the uses of the aquifer, the degree of risk..."

The DNR has previously recognized the flexibility afforded by Chapter 160 in the selection and implementation of response measures, and they have relied upon this interpretation to issue their "closure flexibility initiative" under NR 726.05. As explained to us in a meeting with the DNR staff on January 19, 1999, the DNR determined that they could close a case in advance of achieving ES limits if they had determined that the ES limits would *ultimately* be achieved via

natural attenuation. By their interpretation, the ES remains the numerical standard (as required by Chapter 160); however, DNR no longer needs to *administer* the case. The groundwater law doesn't say that they have to administer the case until the ES is achieved; it just says that the ES is the number to achieve. They're proud of the closure flexibility initiative because it's designed to close out cases that require no further action, freeing up resources to address more pressing concerns.

Our proposed environmental screening criteria are admissible under Chapter 160 in the same manner that the closure flexibility initiative is admissible under Chapter 160. We are <u>not</u> proposing to change the numerical criteria for groundwater cleanup. Rather, we are identifying cases which will ultimately achieve the ES limits without need for further administrative oversight by DNR. Our proposals are consistent with Section 160.21(3), in that they specifically consider the use of the aquifer and the degree of risk posed to water users. In the case of groundwater at clay sites, our NFA proposal is based on the fact that natural attenuation processes will achieve ES limits prior to a time at which humans could use the clay unit as a water supply or be exposed to groundwater at the rates assumed for derivation ES levels (i.e., 2 liters/day, 300 days/yr, 30 yrs) – an exposure which will likely never happen.

In the case of our second screening criteria (expedited RNA application for non-clay sites), we are simply providing better definition of the conditions which qualify a site for immediate closure by natural attenuation. If the site meets these conditions, the DNR need not require a further "natural attenuation demonstration" or a groundwater use restriction. This is not a statutory issue; it's just a clarification of the current NR 726.05 language intended to: 1) provide more practical guidance than the current "reasonable time" criteria; and 2) remove the impediment of groundwater use restrictions where they are unnecessary (e.g., sites with no groundwater use within 750 feet and no risk of surface exposure).

So, if DNR has interpreted the groundwater law to determine that the closure flexibility initiative of NR 726.05 is OK, then they must also recognize that our two proposals are consistent with the groundwater law in the same manner. We don't want to change the ES numbers. We only want the DNR to allow use of response measures that designate non-risk groundwater sites for case closure so that available resources can be properly focused on real problems.

We are available to further discuss this letter and other details of RBCA at your convenience. If you wish to schedule a meeting, please contact me at (703) 849-3429.

Sincerely,

Mark Malander

Mark Malander
Environmental Specialist
Mobil Oil Corporation

Attachments

*November 16, 1998*

# Petroleum Environmental Cleanups in Wisconsin:
## Recommended Actions for Effective Program Management

## OVERVIEW

In recent years, environmental cleanups at petroleum storage tank sites in Wisconsin have posed an increasingly pressing concern due to the high cost and limited effectiveness of soil and groundwater remediation efforts. At many sites, Wisconsin remedial action regulations impose a significant expense on Wisconsin taxpayers, tank owners, and brownfield redevelopment efforts, yet fail to achieve a measurable reduction in risk posed to public health or the environment. This memorandum reviews the scope of this environmental management crisis and recommends key steps to improve the efficiency and economy of current cleanup efforts.

## CURRENT PROBLEMS

For protection of public health and the environment, Wisconsin regulations require thorough assessment and remediation of soil and groundwater impacts caused by product leaks and spills. Under this regulatory program, all subsurface pore water within the zone of soil saturation is to be remediated to below drinking water standards, regardless of the suitability of the water for use as a drinking water supply (e.g., based on natural water quality or sustainable well yield) or the likelihood of such use (e.g., proximity of existing drinking water wells). Although designed to protect state water resources, these uniform numeric standards actually undermine effective environmental management in the following manner:

1) *Failure to target current water-supply impacts*: Of the over 11,000 leaking underground storage tank sites presently under investigation in Wisconsin, a very small number involve actual impacts on drinking water supply wells. However, the current regulatory program does not serve to expedite action at these sites. Rather, strained public and private resources are expended in a scatter-shot approach which treats all spill sites exceeding groundwater enforcement standards (e.g., clay vs. sand, usable vs. unusable water, no current use vs. existing wells) as equal concerns.

2) *High remediation costs with no health/resource protection benefit*: At an estimated 50% to 80% of the tank sites where groundwater investigation/remediation efforts are underway in Wisconsin, groundwater contamination is confined to clay soils which cannot yield water in sufficient quantities for human use. Remediating groundwater in clay soils to drinking water standards is not only technically difficult and costly, but,

more importantly, provides no benefit with regard to human health or resource protection, as the clay unit cannot serve as a drinking water supply. In financial terms, this means that, of the $100 million expended to date by the Wisconsin PECFA fund, $50 million or more may have been spent on remediation of groundwater which poses no tangible risk to public health or ecological receptors.

3) *Program bankruptcy and economic development impacts*: Costs associated with investigation/remediation of petroleum tank sites in Wisconsin are projected to exceed $1.5 billion, greatly outstripping the capacity of the tax-financed PECFA Fund. At present, property owners are required to make advance payment for remedial actions but must wait over 3 years to receive their PECFA reimbursement, severely limiting their ability to finance business improvements and, in some cases, contributing to personal bankruptcy. In addition, the costs associated with groundwater cleanup requirements (many at clay sites) discourage brownfield redevelopment efforts that are critical to the economic health of urban areas.

These problems constitute an environmental management crisis which demands a renewed commitment from Wisconsin state officials to i) expedite response to actual drinking water supply impacts and ii) make prudent use of public and private resources in pursuit of environmental protection goals.

## RECOMMENDED SOLUTIONS

As a first step toward improved management of groundwater remediation efforts in Wisconsin, we recommend that the current program be revised to target remediation resources toward sites with usable groundwater and to facilitate increased use of groundwater remediation by natural attenuation (RNA), where appropriate. For this purpose, many states have employed *environmental screening criteria* to identify those sites which qualify for simple, cost-effective management measures. Table 1 provides examples from several state regulatory programs. Environmental screening criteria recommended for immediate adoption in Wisconsin are:

1) *No further action for groundwater in clay soils*: Groundwater within clay soils should be designated for no further action with respect to the site investigation and remedial action requirements of NR 140, NR 716, and NR 722, based on presumed natural attenuation of pore water contaminants prior to use as a water supply. For this purpose, clay soils should be characterized either on the basis of i) a Unified Soil Classification System (U.S.C.S.) designation of CH, CL, or SC or ii) a saturated hydraulic conductivity of less than or equal to 1.0E-4 cm/sec, as determined from an appropriate field or laboratory measurement.

2) *Expedited use of natural attenuation remedies for low-risk groundwater in non-clay soils*: Subject to certain conditions, case closure based on groundwater remediation by natural attenuation (RNA) should be approved without either i) recordation of a groundwater use restriction or ii) demonstration of the restoration timeframe and absence of off-site migration, as presently required for all RNA case closures under NR 726.05. To qualify for this expedited natural attenuation response to groundwater concerns, the site must meet the following conditions:

- **Stable/diminishing plume**: Affected groundwater plume has been shown to be stable or diminishing per the demonstration procedures outlined in the "ASTM Standard for Groundwater Remediation by Natural Attenuation at Petroleum Release Sites."
- **No proximate use of affected groundwater unit**: Use of groundwater from the affected unit is prohibited under an applicable law or regulation *or* no drinking water wells are screened within the affected water-bearing unit within a distance of 750 ft from the discharge point.
- **No potential for surface exposure to affected groundwater**: The depth at which a surface excavation would encounter affected groundwater flow from the non-clay water-bearing unit is greater than or equal to 15 ft below grade.
- **No mobile non-aqueous phase liquids**: Mobile non-aqueous phase liquids present within the water-bearing unit have been recovered to the extent practicable.

Application of these screening criteria will serve to expedite remediation/closure at sites posing no tangible risk, freeing available resources for more aggressive action at higher-risk sites. In environmental management terms, this approach can be expected to reduce groundwater remediation costs to both PECFA and brownfield sites by over 50%, while improving protection of human health and the environment.

# Table 1
## Examples of State Environmental Screening Criteria for Groundwater Remediation Activities
### Petroleum Environmental Cleanups in Wisconsin

| State Regulatory Authority | Citation | Groundwater Remediation Criteria |
|---|---|---|
| California Regional Water Quality Control Board (CRWQCB) - North Coast Region | CRWQCB Interim Guidance on Petroleum Hydrocarbons Cleanups, 12/8/95 | • **Low-Risk Groundwater Criteria**: LUFT sites are to be designated as low-risk groundwater case requiring no active remediation if DTW ≤ 50 ft and no drinking water well is screened within the affected water-bearing unit within 250 ft of leak source. |
| California State Water Resources Control Board (CSWRCB) | CSWRCB Draft Resolution 1021b, 11/15/96 | • **Low-Risk Groundwater Criteria**: LUFT sites are to be designated as low-risk groundwater case if benzene concentration ≤ 1 ppm and no surface water discharge or drinking water well within 750 ft of leak source. |
| Iowa Department of Natural Resources (DNR) | Title X, Iowa Administrative Code, 567-135.2 (455B) | • **Groundwater Exposure Pathway Screening**: Groundwater ingestion pathway applies if there is an existing water supply well within 1000 ft of source or if affected unit meets definition of "protected groundwater resource" (i.e., hydraulic conductivity > 0.44 m/day, TDS < 2500 mg/L). |
| Illinois Environmental Protection Agency (IEPA) | 35 IAC 620.450(4)(B)<br><br>35 IAC 742.320 | • **Alternate Risk-Based Groundwater Standards:** Site may be closed with exceedance of state water quality criteria if beneficial use of groundwater is protected to extent practicable and threat to public health or environment is minimized.<br>• **Groundwater Exposure Pathway Screening**: Potable groundwater exposure pathway may be eliminated from further consideration if NAPL removed to extent practicable, no groundwater impacts likely within setback zone of potable water supply, no impacts likely to surface water, and groundwater use prohibited by government ordinance within 2500 ft of source of release. |

NOTE: DTW = Depth to water; GW = Groundwater; LUFT = Leaking underground fuel tank; LUST = Leaking underground storage tank
NAPL = Non-aqueous phase liquid; NFA = No further action; SW = Surface water

# Table 1
## Examples of State Environmental Screening Criteria for Groundwater Remediation Activities
## Petroleum Environmental Cleanups in Wisconsin

| State Regulatory Authority | Citation | Groundwater Remediation Criteria |
|---|---|---|
| Massachusetts Department of Environmental Protection (MDEP) | 310 CMR 40.0000, Massachusetts Contingency Plan | **GW Classification and Pathway Screening**: Groundwater classified by one or more of 3 categories.<br>• GW-1: Current or future drinking water source.<br>• GW-2: Shallow plume (< 15 ft) within 30 ft of occupied building, posing indoor air concern.<br>• GW-3: Groundwater potentially discharging to SW (applies to all sites).<br>For GW-1, potential drinking water resource defined based on proximity to water supply well or distribution system (500 ft) or classification as Potentially Productive Aquifer (PPA). PPA is a unit classified as a high or medium yield aquifer by U.S.G.S. or a specific coastal aquifer. GW-1 category does not apply to Non-Potential Drinking Water Source Areas (NPDWSA), which are areas of 100 acres or more, located in municipalities with population density ≥ 4400 persons per square mile with industrial, commercial, dense residential, or otherwise urban development. |
| Michigan Department of Environmental Quality (MDEQ) | MDEQ Operational Memorandum No. 11, 8/25/97 | • **Groundwater Exposure Pathway Screening**: Potable groundwater exposure pathway may be eliminated from further consideration if i) groundwater formation yields insufficient water (as determined by one of several criteria), ii) affected water-bearing unit is not in communication with lower adjacent aquifer, iii) site conditions have been documented in a site investigation and closure reports, and iv) monitoring wells used in study have been properly constructed and developed. |
| Minnesota Pollution Control Agency (MPCA) | MPCA LUST Investigation and Cleanup Policy, Fact Sheet 3.1, April 1996 | • **GW Exposure Pathway Screening and Remediation Methods:** Groundwater aquifers are classified as "resource aquifers" (serving as only viable water service in area or producing at least 5 gpm per well and meeting minimum thickness requirements) and "non-aqueous aquifers" (which do not meet these criteria). For non-resource aquifers or "soils-only" impacts, no active groundwater remediation is needed, unless necessary to protect a resource aquifer. For resource aquifers, stable groundwater plumes less than 200 ft in length are eligible for immediate case closure. For all other plumes in resource aquifers, point of drinking water standards application is to be 200 ft from source. (MPCA data shows that 80% of groundwater plumes at LUST sites are less than 200 ft long.) |

NOTE: DTW = Depth to water; GW = Groundwater; LUFT = Leaking underground fuel tank; LUST = Leaking underground storage tank
NAPL = Non-aqueous phase liquid; NFA = No further action; SW = Surface water

# Table 1
## Examples of State Environmental Screening Criteria for Groundwater Remediation Activities
## Petroleum Environmental Cleanups in Wisconsin

| | | |
|---|---|---|
| Texas Natural Resource Conservation Commission (TNRCC) | TNRCC Petroleum Storage Tank (PST) Division, Interoffice Memorandum, 2/10/97 | **GW Exposure Pathway Screening**: Groundwater pathway may be excluded from further consideration if NAPL has been recovered to extent practicable, there are no existing impacts to water supply wells or surface water in excess of applicable limits, and the following conditions are met:<br>• For GW Plumes Delineated to Drinking Water Limits: If no future groundwater use anticipated in plume area and maximum plume concentration < Class III ground-water limits (e.g., benzene ≤ 0.14 mg/L), NFA for groundwater. Otherwise, show plume stable, and then NFA.<br>• For GW Plumes Not Delineated to Drinking Water Limits: If no existing water supply wells or surface water discharge within 1200 ft and no anticipated use within 1200 ft, NFA for GW if maximum plume concentrations < Class III limits (e.g., benzene ≤ 0.14 mg/L). If Class III limits exceeded, show plume stable and then NFA. |

NOTE: DTW = Depth to water; NAPL = Non-aqueous phase liquid; GW = Groundwater; NFA = No further action; LUFT = Leaking underground fuel tank; SW = Surface water; LUST = Leaking underground storage tank

**Petroleum Marketers Assn of WI/**
**WI Assn of Convenience Stores, Inc.**
**(PMAW/WACS, Inc.)**
**121 South Pinckney Street, Suite 210**
**Madison WI 53703-3338**
**(608) 256-7555**
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PMAW

WACS

**FAX TRANSMISSION COVER SHEET:**

**Date:** Jan 29, 1999

**To:** Senator Judy Robson attn Cory

**Fax:** 267-5171

**Subject:** PECFA & JCLAR

**Sender:** Jennifer Rasch

**YOU SHOULD RECEIVE ( ) PAGE(S), INCLUDING THIS COVER SHEET. IF YOU DO NOT RECEIVE ALL THE PAGES, PLEASE CALL .**

Here is a Rebuttal to the Assistant A.G. Letter. We strongly strongly believe that risk-based standards ARE possible under existing statute.

See you at JCLAR.

Jennifer

MICHAEL BEST & FRIEDRICH LLP
Attorneys at Law

MEMORANDUM

**TO:** Robert J. Bartlett

**FROM:** Donald P. Gallo, Esq., P.E.
Mark C. Treter, Esq.

**DATE:** January 28, 1999

**RE:** Review Comments on DOJ Opinion Letter Dated January 26, 1999 to the Honorable Judith B. Robson

---

I have read the DOJ opinion letter and have the following comments. The DOJ's opinion misses the issue for two reasons:

1) "Can Do Approach Versus Why You Can Not". The question is not why can't the WDNR utilize RBCA concepts under Chapter 160[1], the question is whether you can further utilize RBCA methodologies under Chapter 160 and into NR 700 et seq. and what are the statutory limitations. Although correctly stated in the first paragraph of DOJ's letter: "whether the use of risk-based methodologies . . . would be consistent with the provisions in chapter 160 of the Wisconsin Statutes" the DOJ analysis does not evaluate this at all.

2) Further, the DOJ letter incorrectly analyzes the inconsistencies between the NR 700 et seq. regulations and RBCA. The NR 700 et seq. regulations were developed by WDNR and are WDNR's view of what the legislature intended by Chapter 160 stats. How can one look to the NR 700 et seq. regulations to determine whether RBCA methodologies could be incorporated into the NR 700 et seq. regulations consistent with what the legislature intended in the promulgation of Chapter 160 Wis. Stats. The analysis breaks down.

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[1] The DOJ letter focuses entirely on how the RBCA "process" is inconsistent with Chapter 160 (see page 4 of DOJ letter) but virtually not at all on how the RBCA "methodologies" are consistent with and could be further incorporated into NR 700. DOJ and WDNR both have stated that "Many components of ASTM's RBCA, notably the risk-based assessment and cost-saving objectives, are expressly authorized by chapter 160 and are already incorporated in the regulations in chapter NR 700 of the Wisconsin Administrative Code".

The DOJ letter appears to be focused on the impediments of using RBCA and does not consider how over 35 States have already implemented the RBCA methodologies. Wisconsin can do this also.

The point is the WDNR rules already utilize much of the RBCA concepts and, with refinement, could incorporate more, the DOJ letter provides a statement which may reveal their intent. This sentence reads:

> "Regulations that provide greater protection than enforcement standards and preventive action limits are also allowed. Wis. Stat. §160.001(5)".

This focuses on the negative more restrictive analysis versus the "can do" analysis.

No one is questioning the NR 140 groundwater standards; nor the requirement for monitoring; nor the point of standards application. These aspects are clear in Chapter 160. The point is that WDNR may be too narrowly and too restrictively applying Chapter 160. One example is how WDNR too restrictively uses the PAL point of standards application as a component of determining site closure under NR 726.05(2)b3 where it applies the PAL to the property boundary. Reading this section of NR 726.05(2)b, paragraph 3 is inconsistent with and illogical with requirements 1, 2, 4 and 5. Meeting a PAL at the property boundary is not a hard requirement of Chapter 160, and in almost all situations probably too restrictive and generally not technically or economically feasible.

DOJ does essentially the same thing when it states: (Page 2, Paragraph 4) "response...must ensure compliance with enforcement standards at <u>all</u> points of standards application." The statement should be at <u>a</u> point of standards application; specifically at i.e. point of present groundwater use, property boundary or design management zone but within the property boundary. The WDNR and DOJ create requirements more restrictive than necessary under Chapter 160 Wis. Stats. My memorandum of January 21, 1999 provides additional areas where the NR 700 et seq. regulations could be further refined to incorporate more of the RBCA methodologies.

Please note that the DOJ letter does not address §160.21(2), (3), and (4). These sections of Chapter 160 provide the basis and the opportunity for further integration of the RBCA process into the NR 700 remedial action process to save costs. The corrective actions and management practices for site specific applications also have considerable latitude to "take into account...the uses of the aquifer, the degree of risk,...and the probability of whether...the enforcement standard will be exceeded at the point of

standards application."[2] These concepts are quite consistent with the RBCA methodology; and WDNR, or any administrative agency, can take into account the risk-benefit considerations, the hydrogeological considerations, and the management and practice considerations[3] which are also consistent with the RBCA methodology. These specific Wisconsin Statutes subsections provide opportunity for cost savings by further implementation of these RBCA methodologies into the NR 700 regulations.

DOJ indicates, at the top of page 2, that in "categorizing substances of public welfare concern, the suitability of water for human use and for uses other than drinking water,...are to be considered Wis. Stat. §160.05(6)(d)1.-3. This section also provides recognition for uses of groundwater other than drinking water such as non-potable shallow pore water in clay or clay-like areas which are unsuitable for development of a water supply. It is important to recognize that this water may, however, interconnect with usable or potable aquifers and that aspect must be thoroughly evaluated on a site specific basis.

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[2] §160.21(3) Wis. Stats.

[3] §160.21(4) Wis. Stats.

ENGINEERING
ARCHITECTURE
ENVIRONMENTAL

OMNNI ASSOCIATES

OMNNI ASSOCIATES, INC.
ONE SYSTEMS DRIVE
APPLETON, WI 54914-1654
920-735-6900
FAX 920-830-6100

January 28, 1999

Mr. Bill Morrissey
Department of Commerce
Environmental Regulatory Services Division
201 West Washington Avenue
P.O. Box 7838
Madison, WI 53707

Re: **Proposed PECFA Changes**

Dear Mr Morrissey,

We are writing this letter to voice our concerns and offer some alternatives to the recent events and proposed changes to the PECFA program.

## BIDDING

In general the concept of bidding, to inrease competition, is a great common sense approach to save money. What currently is/is not being addressed:

1. The Request for Proposals (RFPs) are non-specific. For instance, the bid sheet is identical for all jobs and yet all jobs are different.
2. Reasonable and pertinent questions being asked by bidders are not being answered by COMM staff.
3. Many sites being bid require additional investigation. It is our understanding that when COMM intends to bid a site, they inform the responsible party and the DNR. The DNR has a period of time to review the site investigation and provide comments back to COMM. This is done to prevent incomplete investigations from being bid. To date, this scenario has not been happening. Many of the sites that are bid have incomplete investigation reports. What this means is consultants are not bidding apples to apples, and may lead to future litigation. This disconnect needs to be addressed immediately.
4. Contamination on adjacent property. Currently, we are asked to bid a job to achieve closure. This level of closure can only be forced upon the client. However, if the contamination plume extends onto adjacent properties, those owners do not have to accept anything short of clean closure. In turn, a conditional closure would not be granted. Therefore, the level of effort required for adjacent properties must be addressed prior to additional sites being bid. If this is not done, many clients may walk away from their properties if their efforts through the PECFA program do not reach an endpoint (i.e. they have to spend additional monies to clean their neighbors property after PECFA funds are no longer an alternative). The end result...more brownfields.

5. The majority of bids appear to be heading towards limited excavations and long-term monitoring for remediation by natural attenuation (RNA). The associated costs of these bids are obviously based on the assumption of risk-based corrective action (RBCA) becoming a

more viable alternative. If COMM is currently accepting these bids as responsible, then COMM should bid these projects accordingly. If all consultants were bidding to that end, additional monies would be saved because bidders would be bidding the same work. COMM technical staff could determine the amount of soil to be removed. The consultant would continue to prepare the remedial action plan if the site is determined to be high priority.

6. If the goal is to save money and COMM intends to bid the majority of future remediations, then let all bidders propose any method of remediation, including active means, to achieve closure regardless of the sites priority ranking. This would take a revision of the emergency rule enacted by COMM last year which dictates what type of remediation can occur on a site depending on its priority ranking.

**PROPOSED COST CAPS**

For several years we have been an advocate, and voiced our opinion, of setting charge-out rates similar to programs administered by the Department of Transportation (DOT) or Department of Administration (DOA). These agencies audit individual firms and sets their rates based on a number of variables. Consultants are then chosen on a qualification based process.

You are proposing to set our rates based on a recent PECFA survey and national data. We question the survey accuracy. Did it take a representative slice of the pie? Also, how can the national average alone be used to set Wisconsin rates when we have our own our own unique Department of Natural Resources (DNR) and unique State laws.

Secondly, task caps have also been proposed. We feel this would be a moot point if charge-out rates were set and bidding continues. Task caps will create additional paperwork for your staff and ours. This would be counterproductive.

If task caps must be imposed, then the proposed limits need to be revisited. The current proposed limits in many cases are not adequate and do not incorporate all related tasks. Administrative, customer/consultant interaction, consultant/regulatory interaction, and principal engineering costs are not included. These are all real costs of doing business.

We have repeatedly heard how COMM wants clients to take more of an active role in the PECFA process. In the past we have attempted to educate our clientele on the PECFA program and on the specifics of their project. The reasons being:

1. Many of our clients are not highly educated in this arena and have a fear of the unknown.
2. COMM and DNR want individual clients to take more of an active role in their sites.
3. Consultants in general are not held in high esteem in the PECFA arena and many clients are suspect of work performed because we are providing a service that many feel is overkill and because of some "bad apples" in the industry.
4. It is a good business practice, is done on a regular basis in all aspects of the consulting world, and is a reimbursable cost in both the private and public sector.

Additionally, some projects warrant direct communication with the DNR. For example, if we orally review, a case closure request, with a DNR project manager before he reads it, then he generally can review it quicker and has far less questions. If we converse with the COMM project manager (PM) prior to crafting a RAP, then it typically reduces the time spent by that PM reviewing the RAP and subsequent revisions by the consultant. These all equate to real cost savings via increased communication.

In summary, the general proposal of capping charge-out rates is feasible. Task cost caps we feel are not. However, if this is the route you wish to take we urge you to consider realistic caps and the inclusion of additional hard costs associated with doing business.

## Money in Equals Money Out

Put all remediations into a queue system. Continue with all investigations. Set aside a certain number of dollars each year for sites that warrant immediate action, as determined by a joint DNR/COMM committee. Hold off on all other sites until the backlog is paid up. When the fund is back on track, continue with remediations on a first-come first-serve basis, but do not exceed the yearly revenues. If a landowner wants to move forward with a remediation because of a pending property transaction, (s)he may elect to do so and all costs would potentially be reimbursable except the interest. Their site would get closure sooner but their claim would not be reimbursed any sooner. Additionally, as a side note, there are banks currently providing funding for property transactions with petroleum contamination once they have a letter of eligibility from COMM.

Reasons to introduce this:

1. It will help to reduce interest.
2. It will continue to address sites where emergency action is needed.
3. It will allow more time between natural attenuation sampling to more accurately determine if it is taking place.

Finally, great strides have been made to work together and improve communications between DNR and COMM. We feel the program would greatly benefit if representatives from COMM, DNR, RP's and consultants would get together to meet on every site. This may cost a little extra upfront, but in the long run would greatly reduce all costs associated with getting a site to closure.

If you have any questions please feel free to contact OMNNI at (920) 735-6900.

Sincerely,

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Program Manager, Environmental Services

Dave Fries, P.G.
Senior Hydrogeologist

Ross A. Royer
Project Manager

Don Brittnacher
Project Manager

**American Automobile Association of Wisconsin**
**Kwik Trip Stores**
**Midwest Hardware Association**
**Milwaukee Metro Association of Commerce**
**National Federation of Independent Business**
**Petroleum Marketers Association of Wisconsin/Wisconsin Association of Convenience Stores**
**Wisconsin Agri-Business Council**
**Wisconsin Agri-Service Association, Inc.**
**Wisconsin Automobile and Truck Dealers Association**
**Wisconsin Builders Association**
**Wisconsin Economic Development Authority**
**Wisconsin Farm Bureau Federation**
**Wisconsin Federation of Cooperatives**
**Wisconsin Manufacturers and Commerce**
**Wisconsin Merchants Federation**
**Wisconsin Mortgage Bankers Association**
**Wisconsin Motor Carriers Association**
**Wisconsin Petroleum Council**
**Wisconsin Realtors Association**
**Wisconsin Towns Association**
**Wisconsin Transportation Builders Association**
**Wisconsin Utilities Association**

## PECFA Remediation Program Recommendations

In 1995, the Partnership in RBCA Implementation (PIRI) undertook a joint industry-U.S. EPA evaluation of the Wisconsin corrective action process to determine how to make more effective use of both public and private resources in pursuit of environmental goals. This project was part of a national initiative to promote use of the ASTM Risk-Based Corrective Action (RBCA) process, a new approach developed as a cooperative effort among EPA, states, the oil industry, banking, and insurance companies.

PIRI issued a final report in December 1995, entitled "Implementability of Risk-Based Corrective Action in Wisconsin," which noted that the Wisconsin rules share many of the same risk management objectives as RBCA but are significantly different from the RBCA process as defined by ASTM. Specifically, the Wisconsin rules limit options for site-specific risk-based analyses, which is the core of the ASTM RBCA process. Time has proven that these program limitations are undermining the ability to achieve remediation goals in a timely and cost-effective manner.

Today, cleanups at Wisconsin UST sites continue to be very costly and time consuming. Due to a failure to adequately distinguish between low-risk and high-risk sites and provide effective oversight, the process is facing financial and administrative gridlock. The cleanup program is not being implemented in a way that integrates exposure and risk assessment practices with appropriate corrective action to insure cost-effectiveness.

We have made four key recommendations to help the state achieve the goals of human health and environmental protection in a cost-effective and timely manner:

1) **Groundwater Cleanup Requirements:**
To achieve a 50% or greater reduction in groundwater remediation costs while protecting human health and the environment, amend current program to require application of drinking water standards to usable groundwater only. At present, the rules dictate cleanup of unusable groundwater in clay soils at great cost and with no public health or environmental benefit.

2) **Groundwater Remediation by Natural Attenuation:**
Enhance appropriate use of natural attenuation remedies by establishing simple "exit criteria" for groundwater impact concerns and removing requirement for groundwater use restriction. Presently, this "closure flexibility" initiative is seeing very limited use due to overly complex and restrictive guidelines.

3) **Soil Cleanup Requirements:**
Provide appropriate and protective soil cleanup standards and reduce associated costs by amending existing regulations to allow for site-specific derivation of Residual Containment Levels (RCLs). To achieve the full benefits of ASTM RBCA, such site-specific analysis is needed.

4) **Program Administration:**
Complete the draft DNR regulatory guide to Wisconsin Corrective Action Rules developed with PIRI assistance and issue in conjunction with training program for regulatory agency staff, regulated community, and consultants. This effort will improve consistency among various regional offices of DNR and enhance the consultants' ability to pursue economical and timely site remediation and closure options.

**We are confident that these changes will greatly enhance the ability of the state regulatory agencies to achieve health and environmental protection goals in a cost-effective and timely manner and provide the best value for the taxpayers' investment in this program.**