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CLEARINGHOUSE RULE 95–053

Comments

[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated October 1994.]

1. Statutory Authority

a. ***Environmental Impact***

Section 1.11, Stats., requires a review of various governmental actions, including administrative rules, that may have a significant effect on the quality of the human environment. The department typically undertakes environmental review when drafting administrative rules, rather than when approving individual permits. There is no indication in the materials submitted to the Legislative Council Rules Clearinghouse of the status of the environmental assessment. Is this being done?

b. ***Department of Natural Resources Approval***

Section 144.025 (2) (p), Stats., requires the department to obtain the approval of the Department of Natural Resources (DNR) as a condition of promulgating any provision of the State Plumbing Code related to private on-site waste disposal. There is no indication in the material submitted to the Legislative Council Rules Clearinghouse of the status of this approval. Is the department in the process of obtaining this approval?

c. ***Subdivision Plat Review***

Section 236.13 (1) (d), Stats., makes approval of a preliminary or final subdivision plat conditional upon compliance with rules of the department relating to "lot size and lot elevation necessary for proper sanitary conditions in a subdivision not served by a public sewer." In cur-

rent ch. ILHR 85, the department has promulgated rules to implement this statute. The department proposes to repeal all of its requirements for subdivision plat approval.

The statute does not give the department the option of withdrawing from the plat review process. In the analysis of the rule, the department gives two reasons for repealing ch. ILHR 85. First, the department claims that the plat review is premature, because it requires the selection of a type of privately owned wastewater treatment system without knowing the kind of building to be served and its wastewater needs and the preferences of the owner. Second, the department claims that the plat review is duplicative, because plans are required to be submitted subsequently when a private sewage system is installed.

These arguments tend to overstate the case for repealing ch. ILHR 85. Current ch. ILHR 85 does not require that a system be designed for a site, or that the type of building to be served and its wastewater needs be known and does not require that plans be submitted for a system for each lot. Rather, ch. ILHR 85 requires identification of areas which are suitable or not suitable for privately owned wastewater treatment systems.

Although the department chose not to make this argument, a more pertinent argument for the repeal of ch. ILHR 85 is that new ch. ILHR 83 allows for the construction of an on-site system of either conventional or innovative design on virtually every area of land within the state. Clearly, this tends to undermine the need for advance planning for the construction of privately owned wastewater treatment systems. However, even though the department has provided a great deal more flexibility in ch. ILHR 83, it does not necessarily mean that there is no conceivable rationale for department review of unsewered subdivision plats, and that the statutory directive for unsewered subdivision plat review has been rendered meaningless. For example:

(1) The purpose for department review of unsewered subdivision plats, as expressed in s. 236.13 (2m), Stats., is to protect public health and safety. Is the department confident that under new ch. ILHR 83 there is no threat whatever to public health or safety from privately owned wastewater treatment systems? Is it possible that some types of on-site systems might pose a greater threat to public health and safety than others, and that there is value in subdividing property so that the greatest number of the safest types of on-site systems can be used? Similarly, in the event of failure, will on-site systems on some lots pose a greater threat to public health and safety than others, and is there a value in minimizing the risks associated with failure of on-site systems by reviewing and modifying the decisions made when property is subdivided?

(2) The department's review can serve a consumer protection function. If no thought is given to where lot lines are placed in relation to the need for privately owned wastewater treatment systems, it is possible that some owners, to overcome site limitations, may be required to install on-site systems at great expense, both in the initial capital investment and in maintenance. Should the department have a responsibility to steer the decisions made when a subdivision is planned so that lot owners can take advantage of simpler and less expensive on-site systems, and systems that are less likely to fail?

(3) Even though new ch. ILHR 83 allows the installation of a privately owned wastewater treatment system on most sites, there will be some lots where it is impossible to install an on-site system. For example, new ch. ILHR 83 contains setback requirements. Depending on

the size and shape of a lot and the structures and facilities contained or proposed to be contained within it, it is possible that no on-site system could be installed on the lot. Is there any reason why the department should not continue to review unsewered subdivision plats to minimize unbuildable lots?

d. ***Groundwater Law***

(1) Section ILHR 83.02 (1) provides that new ch. ILHR 83 is applicable to new privately owned wastewater treatment systems and to alterations and modifications of existing systems. Although not expressly stated, this implies that existing systems which do not require alteration or modification are subject to earlier versions of the administrative rules. As such, this represents a policy decision by the department to continue applying current ch. ILHR 83, and perhaps its predecessors, to existing privately owned wastewater treatment systems.

(2) Section 160.19 (1), Stats., requires a regulatory agency to review existing rules to ensure that the activities, practices and facilities regulated by the regulatory agency comply with the groundwater law. Section 160.19 (2) (a), Stats., requires a regulatory agency to promulgate rules which are designed, to the extent technically and economically feasible, to minimize the level of substances in groundwater and to maintain compliance with preventive action limits, unless compliance with preventive action limits is not technically and economically feasible. If existing rules do not maintain compliance with preventive action limits and a regulatory agency does not amend the existing rules, the regulatory agency is required by s. 160.19 (2) (b), Stats., to include in the rule a statement that it does not maintain preventive action limits, and to include a summary of the rationale for not amending the substance of the rule in the notice of public hearing for the rule. Do existing ch. ILHR 83 and its predecessors meet the requirements of the groundwater law? If not, the required notices should be provided.

(3) Section ILHR 83.03 (2) establishes effluent limitations for total nitrogen based on the date that a sanitary permit is issued for the installation of a privately owned wastewater treatment system. The table does not include effluent limitations for sanitary permits issued prior to January 1, 1996. Does this imply that there are no standards for nitrogen if the sanitary permit is issued prior to that date? Does this meet the requirements of the groundwater law?

The DNR has established groundwater quality standards for nitrates in s. NR 140.10. How do the effluent limitations in s. ILHR 83.03 (2) relate to the standards established by the DNR? If the standards in s. ILHR 83.03 (2) are less stringent than the standards established by the DNR, what authority does the department have to establish less stringent standards? If the rule will not meet the groundwater quality standards for nitrate as established by DNR, the department has not complied with the requirement of s. 160.19 (2) (b), Stats., to include with the rule and the public hearing notice for the rule a statement to that effect.

(4) Section ILHR 83.29 establishes a range of responses that the department may take "if the minimum effluent requirements as specified in s. ILHR 83.43 (7) are exceeded at a point of standards application." The cross-referenced provision requires a privately owned wastewater treatment system to be designed to comply with preventive action limits, to the extent technically and economically feasible, at points of standards application. This is an incorrect application of the regulatory responses. Section 160.21 (1), Stats., requires the regulatory responses to be established if a preventive action limit or an enforcement standard is attained or exceeded at a point of standards application, without reference to technical and economic feasibility.

Also, s. ILHR 83.29, as the result of the applicability provision in s. ILHR 83.02 (1), apparently applies only to new privately owned wastewater treatment systems or to alterations and modifications to existing systems. Is there any reason why the department does not provide a range of responses for existing systems, as required by the groundwater law?

The range of responses in s. ILHR 83.29 is fairly brief. Section 160.21 (3), Stats., lists some regulatory responses that are not included in Table 83.29, and others can be readily suggested. Should any of the following be included as additional regulatory responses in Table 83.29?

- Abandonment of the privately owned wastewater treatment system.
- Replacement of the system.
- A requirement to add additional treatment or dispersal components to the system.
- A restriction on the volume of flow, contaminant load or type of contaminants that may be introduced into the system.
- Training requirements for operators of the system.
- Limitation on the time during the year when the system may be used.

(5) Section ILHR 83.43 (7) purports to be established pursuant to s. 160.21, Stats. That statute, as pertinent to this portion of the administrative rule, contains a methodology for determining points of standards application to determine compliance with preventive action limits and enforcement standards. However, s. ILHR 83.43 (7) (a) also includes a requirement that the privately owned wastewater treatment system be designed to comply with the preventive action limit to the extent technically and economically feasible. This is adopted pursuant to s. 160.19 (2), Stats., rather than s. 160.21, Stats. Furthermore, s. 160.19 (2) (a), Stats., requires that the design criteria minimize the level of substances in groundwater to the extent technically and economically feasible, in addition to the requirement for complying with the preventive action limit to the extent technically and economically feasible.

The points of standards application described in s. ILHR 83.43 (7) (a) do not correspond with the points of standards application as required by s. 160.21 (2), Stats. There are two options for establishing points of standards application under the statute. The first option, in s. 160.21 (2) (a), Stats., applies if monitoring is required under existing rules for the facility, activity or practice, and the second alternative, in s. 160.21 (2) (b), Stats., applies if monitoring is not required. New ch. ILHR 83 does not require monitoring, so it would appear that the latter method of establishing points of standards application should be used in the rule. However, the contents of s. ILHR 83.43 (7) (a) suggest that the model used for drafting the requirement for points of standards application is s. 160.21 (2) (a), Stats., because of the similarity between s. ILHR 83.43 (7) (a) 3. and s. 160.21 (2) (a) 2. c., Stats. In addition to this confusion, the rule and the statute, although similar, are different enough to raise questions about precisely what is meant by the point of standards application described in s. ILHR 83.43 (7) (a) 3.

2. Form, Style and Placement in Administrative Code

a. In s. ILHR 2.51 (5), the phrase "shall be" should be replaced by the word "is." [See also ss. ILHR 2.65 (3), 2.66 (2) (a) and 2.67 (1) (a) and (b).]

b. In s. ILHR 20.09 (5) (b) 1. b., the notation ", Stats.," should be inserted following the reference to "s. 66.036." [See also s. ILHR 50.06 (3).]

c. The introductory material in s. ILHR 52.63 (1) should be renumbered as par. (a). The remaining paragraphs should be renumbered accordingly. The entire rule should be reviewed for the misnumbering of introductory material. If introductory material does not grammatically lead into following subunits of a rule, the introduction should be separately numbered as an appropriate subsection, paragraph or subdivision. [See s. 1.03 (8), Manual.]

d. In s. ILHR 80.01 (92), the phrase "this code" should be replaced by the defined term "state plumbing code" or by a numerical reference to particular provisions in the Administrative Code. The entire rule should be reviewed for this problem.

e. In the Note to s. ILHR 80.01 (179), the correct statutory cross-reference is s. 101.01 (2) (f), Stats. Also, the statutory provision included in the Note is not repeated from the statutes in its entirety. The correct statutory language should be included in the Note. [See also the Note to s. ILHR 80.01 (180). In the restatement of s. 145.01 (10) (b), the word "with" should be replaced by the word "within." Also, statutory language is missing from the restatement of s. 145.01 (10) (e), Stats.]

f. In s. ILHR 80.01 (190), the defined terms should be "preventive action limit" or "PAL" rather than "preventive action limit or PAL." Also, the second occurrence of the notation "NR" should be deleted.

g. In s. ILHR 80.61 (3), the phrase "It shall be the applicant's responsibility" should be replaced by the phrase "The applicant shall." Also, the phrase "shall not be" should be replaced by the phrase "is not."

h. In s. ILHR 81.62, "shall be" should be replaced by "is."

i. In s. ILHR 81.63 (1), "may not be" should be replaced by "is not."

j. The amendment of s. ILHR 82.10 (8) adds an ampersand, which should not be used in the proposed rule, and "dispersal," which is not underlined. The amendments should be shown in the proper form.

k. The title of s. ILHR 82.34 (5) (a) 2. is amended. This should be indicated by inserting "(title)" before the new title.

l. In s. ILHR 83.20 (5) (b) 2., the correct cross-reference is to "subs. (3) and (4)."

m. In s. ILHR 83.43 (7) (d), the notation "par." should be inserted before the notation "(b)."

n. "As per" should be replaced by "under" in s. ILHR 83.44 (1).

o. In s. ILHR 83.52 (1) (b) and (2) (b) (intro.) and (d) 6., the notation "as per" should be replaced by the word "under."

p. In s. ILHR 83.52 (2) (d) 5., par. (a) should conclude with a semicolon and subpar. b. should conclude with the notation "; and."

q. In s. ILHR 84.25 (9) (b), the phrase "shall be" should be replaced by the word "is."

r. New material should be inserted after deleted material. See ss. ILHR 84.30 (2) (d) 3. and 4. (as renumbered) and 84.50 (3) (g) 7.

s. The cross-reference to par. "(d)" in s. ILHR 84.30 (2) (e) should not be deleted and then recreated. Also, a period should be included after "par."

t. In s. ILHR 85.60 (3) (f) 3., the phrase "local station(s)" should be replaced by the phrase "any local station." Also, in sub. (4) (c) 5. and (d) 3., the word "are" should be replaced by the phrase "shall be." Finally, in sub. (5) a. 2., the word "be" should be inserted before the word "ordered."

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

The rule makes numerous references to forms prepared by the department. The agency should ensure that the requirements of s. 227.14 (3), Stats., are met.

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

a. In s. ILHR 2.51 (5), should "to" be substituted for "on"?

b. Should the cross-reference in s. ILHR 2.61 (3) (which is not amended by the rule) be changed?

c. In s. ILHR 2.65 (2), the word "in" should be inserted before the word "accordance."

d. Can a cross-reference be provided in s. ILHR 2.65 (3) to the rule providing for the monitoring of studies and reports?

e. The term "POWTS" is not defined for purposes of s. ILHR 2.66 (2) (a).

f. Throughout the rule, notes are used to refer the reader to appendices. Many of these notes merely state: "See appendix for further explanatory material," as after s. ILHR 20.09 (5) (b) 1. b. These notes would be substantially more useful if they referred specifically to the kind of explanatory material that is available in the appendix, such as the text of s. ILHR 83.25 (2) in the example cited in this paragraph and the location of the appendix.

g. It appears that the restatement of s. ILHR 83.25 (2) (intro.) should insert the word "or" before the word "municipality." [See also SECTION 24 and s. ILHR 83.25 (2) (intro.).]

h. There is a typographical error in the subsection number in SECTION 17.

i. Can the reference to "construction" in s. ILHR 80.01 (1) be made more specific? What field of construction? Accepted by whom?

j. "An" should be replaced by "a" in s. ILHR 80.01 (3). See also s. ILHR 80.01 (8).

k. "Flood level" is hyphenated in s. ILHR 80.01 (7) and not hyphenated in s. ILHR 80.01 (6). This term should be treated consistently. Similarly, "receptor" is used in s. ILHR 80.01 (6) and "receptacle" is used in s. ILHR 80.01 (7).

l. "Utilized" should be replaced by "utilizes" in s. ILHR 80.01 (8).

m. What is the frequency of measurement to determine the annual average in s. ILHR 80.01 (9)?

n. "Areawide" is one word in the statutes, rather than two as in s. ILHR 80.01 (13).

o. Can the definition of "backflow" be more specific in s. ILHR 80.01 (20)? This presumably means the reverse flow of liquids in a pipe.

p. Should the material after the last comma in s. ILHR 80.01 (22) be redrafted as follows: "with the venting means internally forced loaded..."?

q. "Blackwater" is defined in s. ILHR 80.01 (34) to mean human body waste and other contaminants. However, as used in the rule in s. ILHR 83.43 (4), this term clearly means wastewater contaminated by human body waste and other contaminants. The same comment applies to "graywater" in s. ILHR 80.01 (112).

r. Section ILHR 80.01 (41) defines "public building" by placing the noun first, followed by a comma, and the adjective. This form is used at several other places in the rule. However, many other terms, such as "bench mark" or "building drain" place the adjective first. Is there any reason for this inconsistency? The use of this format is awkward. If the term "public building" is used in the rule, then the definition section should include the term "public building" in the correct alphabetical order. It is much easier for the reader of the rule to find the definition of a used term by searching the definition section alphabetically.

s. The last phrase of s. ILHR 80.01 (56) is difficult to understand. How can a certified plumbing inspector have inspection responsibilities where no certified plumbing inspector is available? Would the provision be clarified by inserting "I" before the phrase "is available"?

t. The definition of "clear water wastes" in s. ILHR 80.01 (61) refers to a minimum concentration considered harmful by the department. Can a note be added explaining how the department makes this determination or, if the determination is made in the administrative rules, providing a reference to such rules?

u. The definition of "corporation cock" includes a description of where the valve is located. Can similar material be included in the definition of "curb stop" in s. ILHR 80.01 (74)?

v. The terms defined in s. ILHR 80.01 (90) should be "elevation" or "EL." See also s. ILHR 80.01 (99) and (100).

w. "Floodfringe," as used in s. ILHR 80.01 (101), is one word in ch. NR 116, Wis. Adm. Code.

x. The last phrase in s. ILHR 80.01 (117) should be "dentists or doctors."

y. The comma after "include" in s. ILHR 80.01 (119) should be deleted.

z. The reference to "regional flood" in s. ILHR 80.01 (122) should be made more specific. Does this refer to the hundred-year flood or some other flood?

aa. Section ILHR 80.01 (125) defines "horizontal reference point." Is there any reason why a "vertical reference point" is not defined for purposes of determining elevation?

ab. The colon in the Note after s. ILHR 80.01 (129) should be replaced by a quotation mark.

ac. The definition in s. ILHR 80.01 (131) could be clarified by redrafting it as follows: "Incinerating toilet" means a self-contained device for the treatment of nonwater carried human wastes which deposits the wastes directly into a combustion chamber, reduces the solid portion to ash and evaporates the liquid portion.

ad. In the definition of "low hazard" in s. ILHR 80.01 (151), is a solution the only substance that could result in a low hazard contamination to a water supply system?

ae. In s. ILHR 80.01 (158), "neither" should be replaced by "not" and "nor" should be replaced by "or."

af. The definition of "place of employment" in s. ILHR 80.01 (179) includes a definition of "farming." Has the department determined how this definition interacts with the definition of "farm" in s. ILHR 80.01 (94)?

ag. In s. ILHR 80.01 (181), the word "or" should be inserted before the phrase "a measured volume of weight."

ah. The last phrase in s. ILHR 80.01 (189), "exclusive of gravity type flushing systems," appears to be unnecessary.

ai. Section ILHR 80.01 (193) defines both "privately owned wastewater treatment system" and "private sewage system." Is the latter term used anywhere in the State Plumbing Code, as modified? If not, a better definition might be: "'Privately owned wastewater treatment system' has the meaning given for 'private sewage system' in s. 145.01 (12), Stats." Does the department plan to submit legislation to change the term "private sewage system" in the statutes?

aj. The second occurrence of the word "type" in s. ILHR 80.01 (201) should be deleted.

ak. Should "dwelling units" be used instead of "living units" in s. ILHR 80.01 (209)?

al. The definition of "scum" in s. ILHR 80.01 (213) means floating solids, but the definition of "sludge" in s. ILHR 80.01 (219) means solids. As defined, "scum" is a subset of "sludge." Is this correct?

am. In s. ILHR 80.01 (249), it appears that the last comma should be deleted.

an. In the Note to s. ILHR 80.01 (285), the term "water course" should be presented as one word.

ao. The statement of scope in s. ILHR 81.601 should be made consistent with the definition of "certified soil tester" in s. ILHR 80.01 (57).

ap. Should s. ILHR 81.61 (4) specify the minimum time period for prior notice?

aq. "His or her" should replace "their" in s. ILHR 81.61 (5) and (6).

ar. Section ILHR 81.61 (5) requires the department to keep certification examinations for "no longer than 30 days." This requirement would be satisfied if the department kept the examinations for a single day. Should this provide that examinations are kept for "at least" 30 days?

as. Section ILHR 81.61 (6) allows an applicant to review the examination by appearing "in person before the department." A note would be appropriate indicating where this appearance must be made.

at. It appears that s. ILHR 81.61 (7) should be a part of s. ILHR 81.62.

au. In s. ILHR 81.63 (2) (d) 1., "shall" should be replaced by "may."

av. The effect of s. ILHR 81.63 (2) (d) 3. is unclear. Thirty minutes of attendance obviously equals 30 minutes of continuing education.

aw. There is an inconsistency between s. ILHR 81.63 (2) (d) 2. and 6. b. The former allows a request for course approval to be submitted 30 or more days prior to the first day of the course, but the latter prohibits the department from revoking course approval less than 30 days prior to the course, based on false representations. If the request for course approval is submitted 30 days prior to the course, the department may not be able to revoke the approval. Is there any reason for the 30-day limit for revocation based on false representations?

ax. Should "has" be replaced by "is" in s. ILHR 81.63 (2) (e) 2.?

ay. Can s. ILHR 81.64 be clarified by adding "for any person other than the county" after the second "services"?

az. "State uniform plumbing code" is used in s. ILHR 81.65 (1). The defined term is "state plumbing code."

ba. Section ILHR 81.65 (3) provides that a person whose certificate has been revoked may apply for recertification after the period of revocation has passed. Should s. ILHR 81.65 (2) similarly provide that a person whose certificate has been suspended may apply for reinstatement after the period of suspension has passed?

bb. "Is" should be replaced by "are" in SECTION 31.

bc. Section ILHR 82.37 (2) (intro.) refers to sanitary dump stations; that term should also be used in s. ILHR 82.37 (2) (a).

bd. Can s. ILHR 82.37 (2) (b) 2. be clarified? Does this mean that the cover for the drain receptor must be openable by using one's feet?

be. What is the unit for "1/4" in s. ILHR 82.37 (2) (c) 1.?

bf. The second Note after s. ILHR 83.01 should include the proper contact within the Department of Natural Resources for questions of overlapping jurisdiction.

bg. Both "domestic wastewaters" and "sewage" are used in s. ILHR 83.02 (1) (intro.). As these terms are defined, "domestic wastewaters" is a type of "sewage." That subsection also uses the term "plumbing drain systems," whereas the term "drain systems" is defined.

bh. Section ILHR 83.02 (1) (a) and (b) provide that new ch. ILHR 83 applies to new privately owned wastewater treatment systems and to alterations and modifications of existing systems. The rule does not expressly state what standards are applicable to the continued maintenance of an existing system that does not require alteration or modification. Are existing systems subject to current ch. ILHR 83, or are existing systems subject to the rules in effect at the time the system was installed?

bi. Section ILHR 83.02 (1) (a) requires conformance with rules in effect at the time a sanitary permit is issued. Should s. ILHR 83.02 (1) (b) also refer to rules in effect at the time a sanitary permit is issued?

bj. The phrase "held in trust by the federal government" should be deleted in s. ILHR 83.02 (2) (b) because that term is included in the definition of "Indian land."

bk. In s. ILHR 83.03 (1), reference is made to systems existing "prior to the effective date of this chapter." The phrase ".... [revisor inserts date] should be inserted after the word "chapter." The entire rule should be reviewed for this clarification that will alert the reader of the final rule to a particular date certain.

bl. In s. ILHR 83.20 (intro.), "outlines the" should be replaced by "establishes the following."

bm. The rule uses the acronym "POWTS" both in the singular and plural. As a general rule, this term should be used in singular form, such as by inserting "a" before the acronym in s. ILHR 83.20 (1).

bn. Throughout the rule, the department includes additional material to modify the term "governmental unit." For example, see s. ILHR 83.21 (3) (a) Note and (b) 1. In most cases, the additional modifying language appears to be unnecessary. For example, s. ILHR 83.21 (3) (b) 1. should simply require that the application for a sanitary permit be submitted to the governmental unit where the POWTS is located or will be located.

bo. In addition to the information required to be provided by s. ILHR 83.21 (4) (b) 2. a., s. 145.20 (2) (c), Stats., requires the governmental unit to provide notice of the right to an appeal.

bp. Section ILHR 83.21 (6) (b) 2. is awkwardly written and should be redrafted substantially in the following form: "If the sanitary permit expires, the owner shall obtain...."

bq. Section ILHR 83.21 (7) provides a procedure for the department to revoke a sanitary permit based on false statements or misrepresentations. How will this procedure work if the POWTS is already installed? See also s. ILHR 83.22 (7).

br. The rules require the owner of the property to obtain a sanitary permit. Should s. ILHR 83.21 (7) (c) refer to the owner of the property rather than the owner of the POWTS? Also, should s. ILHR 83.21 (7) (d) refer to "commence or continue" rather than just "continue"?

bs. In s. ILHR 83.21 (8) (intro.), a reference is made to "sub. (2)." This section of the rule does not contain a sub. (2).

bt. Table 83.22-1 refers to "nonresidential type wastewater," but this term is not defined.

bu. Section ILHR 83.22 (3) (a) describes how plans are submitted to the department or the department's agent, but does not indicate how plans are to be submitted to the governmental unit. Also, that provision uses the phrase "designated agent." The use of "agent" as a defined term is discussed earlier in this report. Depending on how the issue is resolved, the use of "designated agent" rather than the defined term "agent" should be carefully considered.

bv. It appears that "perform relative to" in s. ILHR 83.22 (3) (a) 3. b. should be replaced by "effectuate." Also, "wastewater" should be singular.

bw. In s. ILHR 83.22 (3) (b) 4., "parameters" should be replaced by "requirements."

bx. Section A-E 1.04 describes the qualifications of a private sewage system designer. Is the department working with the Department of Regulation and Licensing to modify this rule, which is referred to in s. ILHR 83.22 (3) (c), to substitute the term POWTS?

by. Section ILHR 83.22 (4) (b) establishes requirements for conditional approval, and requires conditions to be complied with before and during installation. Is it possible that conditions may be imposed that continue after installation?

bz. Section ILHR 83.22 (5) (b) is not well drafted, because it imposes a requirement on the department. The requirement should be imposed on the installer: "The installer may not commence changes or modifications until written approval of the department is obtained."

ca. Section ILHR 83.22 (6) limits the liability of the department if conditional approvals are granted. Should this also apply if an approval is granted without conditions? This provision applies to the department or the department's agent. Should it also apply to a governmental unit?

cb. Section ILHR 83.22 (8) (a) refers to the department or its agent, and par. (c) refers to the department or the governmental unit. Is there a reason for this difference? Also, the reference to "sub. (1)" in s. ILHR 83.22 (8) (a) should be placed in the proper format.

cc. "Review of" in s. ILHR 83.23 (1) should be replaced by "responsibility to review." Also, in that subsection, "with" should be replaced by "within."

cd. The phrase "sufficient and adequate capabilities and methods" in s. ILHR 82.23 (3) (intro.) is fairly gaseous. "Capabilities to complete the reviews" would be enough.

ce. Section ILHR 83.23 (4) (a) is a good example of the confusing syntax that results from failure to use the active voice. The entire rule suffers from this condition. The subject of this sentence is "the department," and the subject should be at the beginning of the sentence. The proper form of this sentence is: "The department shall provide the governmental unit with a written decision of delegation or denial of delegation."

cf. Section ILHR 83.23 (4) (b) relates to the submission of plans rather than agent status, and would appropriately be placed in s. ILHR 83.22. Also, is there any reason why this paragraph uses "delegated governmental unit" rather than the defined term "agent"?

cg. Section ILHR 83.23 (5) should be modified by substituting "under" for "in accordance with" and "are" for "may have been."

ch. "Rule" should be replaced by "provision" in s. ILHR 83.24.

ci. The first sentence of s. ILHR 83.25 (1) should be rewritten. The point of the sentence is that a governmental unit may delegate administration and enforcement responsibilities to a town sanitary district or public inland lake protection and rehabilitation district. However, "governmental unit" does not appear in the sentence. Consistent use of the active voice would resolve this and many similar problems in the rule. How will the requirements for department oversight under s. 145.20 (3), Stats., be met for town sanitary districts or inland lake districts that administer the program? Also, should requirements comparable to those for delegation in s. ILHR 83.23 (3) be included in the delegation by a governmental unit?

cj. "County" is unnecessary in s. ILHR 83.25 (2) (intro.) and (a), because "county" is included in the definition of "municipality." See also s. ILHR 83.25 (2) (b) 1. and (c) (intro.) and 1. (intro.) and 2.

ck. Should the reference in s. ILHR 83.25 (2) (b) 2. (intro.) be to this "paragraph"?

cl. The Note after s. ILHR 83.25 (2) (c) (intro.) refers to setback limitations in the prior code. It would be useful to include the prior setback limitations in the appendix. Also, should the last phrase in that Note relate to "if no sanitary permit was required or obtained"?

cm. Section ILHR 83.26 (2) (intro.) prohibits covering a POWTS prior to inspection. Could this be clarified by specifying that the system may not be covered with soil or fill?

cn. The list of regulatory responses in s. ILHR 83.29 would more appropriately be drafted as subsections of the rule. There is no reason to present this information in the form of a table.

co. The first five responses in Table 83.29 provide a clear indication of the consequence of taking the regulatory response. However, the sixth item in the table has no consequence. What will be done if the "situation" is determined to be a health hazard?

cp. "Domestic wastewater" is a defined term. Is there any reason to also use "domestic wastes" in s. ILHR 83.30 (1)?

cq. Section ILHR 83.30 (2) refers to materials "recognized" under the State Plumbing Code. Should this be "approved"?

cr. "Industrial wastewater" is a defined term. Is there any reason to use "industrial wastes and wastewater" in s. ILHR 83.31 (1) (a)?

cs. Does s. ILHR 83.31 (1) (b) refer to enforcement standards or preventive action limits in ch. NR 140?

ct. Section ILHR 83.31 (1) (c) refers to "deleterious substances." That term is not defined in the rule, and the term "deleterious waste materials" is used in the cross-referenced provision in s. ILHR 82.34. Can one of the defined terms in s. ILHR 80.01 be used or a definition be provided for deleterious substances? Should the term be "deleterious waste materials"?

cu. The cross-reference in s. ILHR 83.31 (1) (d) should be made more specific. There is no way to determine which of the wastes referred in s. ILHR 82.36 (3) are "permitted."

cv. "The" after "unless" in s. ILHR 83.31 (5) (a) and (b) should be deleted.

cw. "Governmental unit" should be deleted in s. ILHR 83.31 (6) (intro.). That term is included within the definition of "municipality."

cx. The two prohibitions in s. ILHR 83.31 (6) (a) should be combined to "prohibit or limit the installation and use of a holding tank...." Also, in par. (b), the word "used" should be replaced by the word "use." Finally, par. (b) is unclear as written.

cy. It is not correct in s. ILHR 83.31 (7) (intro.) to say that a tank was "at one time a part of a POWTS." In fact the tank continues to be a part of a POWTS--the point is that it is no longer used.

cz. The Note following s. ILHR 83.31 (7) should be rewritten to read: "Municipalities and sanitary districts may determine the availability of, and require the connection to, public sewers."

da. Generally, "POWTS" should be used in the singular form. See ss. ILHR 83.40, 83.41 and 83.43 (2) (title).

db. To the extent that s. ILHR 83.43 (7) (a) determines the "point of standards application" for privately owned wastewater treatment systems, the title should be redrafted accordingly.

dc. "Preventative" in s. ILHR 83.43 (7) (a) (intro.) should be "preventive."

dd. In s. ILHR 83.43 (7) (b) 1. (intro.), should "using" be replaced by "consisting in part of"?

de. Should s. ILHR 83.43 (7) (d) refer to other treatment or dispersal components?

df. Chapter NR 113 relates to disposal of wastes, not to "pumping" of wastes as stated in s. ILHR 83.43 (9).

dg. Does s. ILHR 83.43 (10) (a) 2. refer to treatment components? Dispersal components? Both?

dh. Should "tolerances" in s. ILHR 83.43 (10) (f) be replaced by "conditions"?

di. Should "soil" be inserted before "erosion" in s. ILHR 83.43 (10) (g)?

dj. What is the purpose of the virgules in s. ILHR 83.43 (10) (h) 3.? Should these be quotation marks?

dk. "An" should be "a" in s. ILHR 83.43 (10) (h) 4.

dl. A measurement is required in s. ILHR 83.43 (10) (i) 2. from the "most distal point." This provision should be clarified so it can be determined what is the most distal point.

dm. "Holding tanks" should be plural in s. ILHR 83.43 (10) (k) 1. a.

dn. Section ILHR 83.43 (10) (L) 2. requires a horizontal measurement, but the cross-reference is to a vertical measurement.

do. Should there be a limit on the distance for installing a treatment or dispersal component upslope from a water well in s. ILHR 83.43 (10) (L) 3.?

dp. The second sentence of s. ILHR 83.44 (3) (a) 1. should be clarified.

dq. The Note after Table 83.44-1 establishes a substantive requirement and should be included either in the table or in the text of the rule. Also, additional information could be included in Table 83.44-2 to indicate the relation of that table to Table 83.44-1.

dr. What is the basis for the limit on applying nutrients in s. ILHR 83.44 (8) (g) 2--limited to what?

ds. Section ILHR 83.50 (1) should commence: "Require monitoring and maintenance of...."

dt. Section ILHR 83.51 (1) requires the owner of a POWTS to operate and maintain the system. Should this refer to the owner of the land? Section ILHR 83.21 requires the property owner to obtain the sanitary permit.

du. Section ILHR 83.52 (2) (c) 3. refers to "existing water distribution systems." The use of the term "existing" is confusing and should be replaced by a reference to water distribution systems existing before a date certain. [See also sub. (3) (c) and (d).]

dv. The last sentence in s. ILHR 83.52 (5) (a) 3. and (e) is confusing. How can the owner act as he owner's agent?

dw. Should s. ILHR 84.20 (5) (j) require performance in accordance with assertions "submitted to and approved by the department"?

dx. The phrase "in accordance with pars. (a) to (c)" in s. ILHR 84.25 (1) (intro.) should be replaced by "as required under this subsection," or the phrase should be deleted.

dy. How is the area of the property related to the legal description in s. ILHR 85.40 (3) (b) 2.?

dz. Can the size in inches also be included in s. ILHR 85.40 (3) (b) 4. a.?

ea. "Governmental unit" should be used rather than "county" in s. ILHR 85.50 (2) (a). See also s. ILHR 85.60 (3) (d) 2. a.

eb. In s. ILHR 85.60 (3) (a), the use of the word "their" is incorrect.

ec. The cross-reference to "subpars. a to k" in s. ILHR 85.60 (3) (d) 4. (intro.) should be changed to "this subd."

ed. How is the "appropriate permanent USGS groundwater well" determined under s. ILHR 85.60 (4) (d) 2.?

ee. "Governmental unit" should be used in place of "county" in s. ILHR 85.60 (6) (a).

6. Potential Conflicts With, and Comparability to, Related Federal Regulations

Section ILHR 83.02 (2) (b) provides that ch. ILHR 83 does not apply to "Indian lands." According to the definition of "Indian lands" in s. ILHR 80.01 (134), land within the boundaries of a federally recognized reservation that is owned by a non-Indian is not considered to be "Indian land." Therefore, it appears that the rule attempts to apply ch. ILHR 83, which is a civil/regulatory law, to land owned by non-Indians within the boundaries of all reservations in the state.

The courts have recognized that a state does not have jurisdiction to impose its civil/regulatory laws on reservations in all cases. In California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987), the U.S. Supreme Court held that "under ***certain circumstances*** a State may validly assert authority over the activities of ***non-members*** on a reservation, and...in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members" [Cabazon, 480 U.S., at 215, quoting New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331-332 (1976) (emphasis added)].

The Cabazon Court clearly held that P.L. 83-280 [67 Stat. 588, codified as amended at 18 U.S.C. s. 1162, 25 U.S.C. ss. 1321 to 1326 and 28 U.S.C. s. 1360 (commonly known as "Public Law 280")] did ***not*** grant to states civil/regulatory jurisdiction in Indian country. Although Congress has not delegated such authority to Wisconsin, the courts have occasionally held that a state may apply a state civil/regulatory law on a reservation on the basis of federal common law. Case law is inconsistent as to the basis for determining whether a state may validly assert jurisdiction

on a reservation with respect to a particular civil/regulatory law. For example, see Cabazon (federal preemption test and infringement test combined into balancing of state, federal and tribal interests); Rice v. Rehner, 463 U.S. 713 (1983) (lack of tribal tradition of regulation and balancing of state, federal and tribal interests may accord less weight to backdrop of tribal sovereignty); Montana v. United States, 450 U.S. 544 (1981) and South Dakota v. Bourland, 113 S. Ct. 2309 (1993) (tribe can regulate nonmembers who enter into consensual relationships with tribe or tribal members and may exercise civil authority over conduct of non-Indians on fee lands in reservation when conduct threatens or has some direct effect on the political integrity, economic security or health or welfare of the tribe); and Department of Taxation and Finance of New York v. Milhelm Attea & Bros., 114 S. Ct. 2028 (1994) (particularized inquiry into nature of state, federal and tribal interests). Also, see generally, 78 OAG 122 (1989).

In summary, each case could be debated as to whether it involves those "certain circumstances" referred to by the Cabazon Court as permitting a state to validly assert civil/regulatory jurisdiction over nonmembers on a reservation. Therefore, it is not clear that federal law permits the application of ch. ILHR 83 to land owned by non-Indians within the boundaries of all reservations in the state.