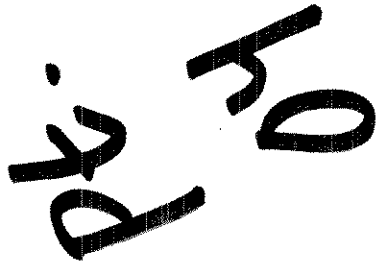
ILHR 47. PECFA
COMMERCE 98-065



FINAL REGULATORY FLEXIBILITY ANALYSIS

Department of Commerce

CLEARINGHOUSE RULE NO.: 98-065

RULE NO.: Chapter ILHR 47

RELATING TO: The Petroleum Environmental Cleanup Fund

☐ Final regulatory flexibility analysis not required. (Statement of determination required.)

1. Reason for including or failing to include the following methods for reducing impact of the rule on small businesses: Less stringent compliance or reporting requirements; less stringent schedules or deadlines for compliance or reporting requirements; simplification of compliance or reporting requirements; establishment of performance standards to replace design or operational standards; exemption from any or all requirements.

   The rule does have elements that soften the regulatory impact on small businesses. The most significant element of flexibility is the provision that allows more frequent progress payments, under the fund, for the smallest owners and operators. The rule also allows reduced reporting and complexity for sites that are remediated for $80,000 or less. Although not all of these sites will be small businesses, the provision is expected to apply to many owners and operators who qualify as small businesses.

2. Issues raised by small businesses during hearings, changes in proposed rules as a result of comments by small businesses and reasons for rejecting any alternatives suggested by small businesses.

   The hearing and written comments received did not generate significant small business issues.

(Continued on reverse side)

3. Nature and estimated cost of preparation of any reports by small businesses.

The rule change should not materially impact the cost of report preparation by small businesses. The rule does contain some simplification of reporting for sites that are remediated for $80,000 or less. Beyond that, reports and similar activities are framed by the Department of Natural Resources' NR 700 rule. That document establishes certain reporting standards that have to be met. These standards are applicable to PECFA sites and, consequently, the primary determinant of reporting cost is not Commerce 47 but NR 700 which is not within the control of the Department of Commerce.

4. Nature and estimated cost of other measures and investments required of small businesses.

The rule package does not change the total estimated costs and expenses for small businesses. The timing of reimbursement and the manner in which costs are managed changes, based upon the rule, but the total reimbursement is not impacted.

5. Additional cost to agency of administering or enforcing a rule which includes any of the methods in 1. for reducing impact on small businesses.

The rule package does not change the agency cost to administer the program. .

6. Impact on public health, safety and welfare caused by including any of the methods in 1. for reducing impact on small businesses.

The provisions of the rules, that benefit small businesses, do not negatively impact the health, safety and welfare of the public.

RULE REPORT
Department of Commerce

Rule No.: Chapter ILHR 47

Relating to: The Petroleum Environmental Cleanup Fund

Agency contact person for substantive questions:

Name William J. Morrissey

Title Acting Deputy Administrator, Environmental and Regulatory Services Division

Telephone Number 608-266-7605

Agency contact person for internal processing:

Name Sam Rockweiler

Title Code Consultant

Telephone Number 608-266-0797

1. Agency statutory authority under which the agency intends to promulgate the rule(s).

101.143 and 101.144, Stats.

2. Citation of federal regulations which require adoption or which are relevant to the proposed rule(s).

None known.

3. Citation of court decisions which are applicable to the proposed rule(s).

None known.

Continued on reverse side

4. Description of the proposed rule(s).

The proposed rule changes include (1) refining the administrative elements of the rules; (2) using progress payments to encourage more efficient cleanup work; (3) introducing risk-based analysis of environmental factors to steer expensive solutions away from low- or no-risk cleanup sites; (4) expanding the reimbursement options to allow a public bidding process, encourage focused remediations that utilize all possible closure tools, and allow bundling of services at multiple sites in order to achieve economies of scale; and (5) increasing the Department's ability to redirect actions and impose cost-saving measures for sites that are already undergoing remedial actions.

5. Reason for the proposed rule(s).

The cost-saving measures that comprise the proposed rules are needed to mitigate an extensive backlog of payment claims for the PECFA fund. Claims made against the fund are currently about $15 million per month, and only about $7.5 million is allotted per month to the fund for paying these claims. The current backlog is $250 million, which represents a 30-month backlog of payments to be made.

1997 Session

FISCAL ESTIMATE
DOA-2048 (R02/97)

[x] ORIGINAL
[ ] CORRECTED
[ ] UPDATED
[ ] SUPPLEMENTAL

LRB or Bill No./Adm. Rule No.
ILHR 47

Amendment No. if Applicable

Subject
Petroleum Environmental Cleanup Fund

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

[ ] Increase 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 Revenues
   [ ] 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 [x] SEG [ ] SEG-S

Affected Ch. 20 Appropriations

Assumptions Used in Arriving at Fiscal Estimate

The proposed rules implement cost control provisions in an existing program that pays claims from the Petroleum Environmental Cleanup Fund. They are not expected to result in extensive changes in the number or complexity of claims that are reviewed by existing staff.

Long-Range Fiscal Implications

The impact of the cost control provisions of the proposed rules will probably be in the area of remedial equipment costs and consulting costs. Remedial equipment costs run approximately 13.4% of the fund's costs. Consultant charges are 36.5 % of the fund. The use of the two-tier approach to remediation will reduce remedial equipment costs. An estimated reduction would be 50%. Similarly, through the use of remediation bundling and bidding, consultant costs could potentially be reduced as much as 25%. Based on the estimate of $15 million in claims per month, a reduction of the type estimated could result in remedial equipment savings of $1,005,000 per month and consultation cost savings of $1,368,750 per month.

Agency/Prepared by: (Name & Phone No.)	Authorized Signature/Telephone No.	Date
Bill Morrissey 266-7605		4-17-98

1997 Session

FISCAL ESTIMATE WORKSHEET
Detailed Estimate of Annual Fiscal Effect
DOA-2047(R02/97)

[x] ORIGINAL [ ] UPDATED
[ ] CORRECTED [ ] SUPPLEMENTAL

LRB or Bill No./Adm. Rule No.	Amendment No.
ILHR 47	

Subject
Petroleum Environmental Cleanup Fund

I. One-time Costs or Revenue Impacts for State and/or Local Government (do not include in annualized fiscal effect): None.

II. Annualized Costs:	**Annualized Fiscal impact on State funds from:**	
	Increased Costs	**Decreased Costs**
A. State Costs By Category State Operations - Salaries and Fringes	$ 0	$ -0
(FTE Position Changes)	(0 FTE)	(- 0 FTE)
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	**Increased Costs**	**Decreased Costs**
GPR	$	$ -
FED		-
PRO/PRS		-
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.)	**Increased Rev.**	**Decreased Rev.**
GPR Taxes	$	$ -
GPR Earned		-
FED		-
PRO/PRS		-
SEG/SEG-S	0	-0
TOTAL State Revenues	$ 0	$ -0

NET ANNUALIZED FISCAL IMPACT

	STATE	LOCAL
NET CHANGE IN COSTS	$ 0	$
NET CHANGE IN REVENUES	$ 0	$

Agency/Prepared by: (Name & Phone No.)	Authorized Signature/Telephone No.	Date
Bill Morrissey 266-7605		4-17-97

DEPARTMENT OF COMMERCE
PUBLIC HEARING ATTENDANCE RECORD

RULE NO.: Chapter ILHR 47
RELATING TO: The Petroleum Environmental Cleanup Fund
LOCATION: 201 West Washington Ave., Room 3B

DATE: May 29, 1998
TIME: 9:30 AM
CITY: Madison

Name	Representation (Business, Assoc., Group, Self, etc.)	City and State	Appearing in Support	Appearing in Opposition	Appearing for Information
Al Scheer	Davy Engineering Co.	LaCrosse, WI			✓
Don Johnsky	U.S. Oil Company, Inc.	Combined Locks, WI			✓
Jim Hutchins	Envirogen	Pewaukee WI			✓
John Swissler	Legislative Audit Bureau	Madison			✓
Mike Quatio	Firstar Bank Wisconsin	Sheboygan, WI			X
Tom Gaiek	Ayres Assoc.	Madison			✓
Boyd Possin	FCCI	GREEN BAY	✓		
Dale Ziege	WDNR	Madison			✓
Dennis Mattsson	Commerce	Madison			X
Chuck Elliott	Wis. Petroleum Council	"			X
Terry Tuscher	State Senator Rod Moen	"			X
Ken Konicek	Key Engineering	Cedarburg			
D.J. Klauser	DeWitt Ross	Madison			X

COM-10532 (N.03/97)

4. Direct the site to a public bid process to establish a lower maximum reimbursable amount to achieve a closed remedial action.

(b) Criteria for department decisions. In determining the course of action to take on a remedial action plan, the department's consideration may include the following points:

1. Whether the plan will achieve a closed remedial action status for $80,000 or less in total remedial action costs, including consultant plus commodity costs but excluding interest.

2. Whether a combination with another remedial action or site would possibly accomplish a net reduction in the cost to achieve a closed remedial action.

3. If costs included in remedial action plan reflect reasonable costs in terms of dollars per pound of contaminant reduction.

4. Whether a bidding process might accomplish a reduction in the cost to achieve a specific closed remedial action status or identify new alternatives for the site that would reduce total costs.

5. Whether bidding or bundling is able to accomplish a reduction in the cost per pound of contaminant reduction.

6. Whether the remedial action plan under consideration presents an alternative that is reasonably expected to result in the appropriate agency approval for a closed remedial action.

(5) CLAIMANT NOTICE. As a means of verifying that the claimant is aware of the remedial action plan which has been submitted to the department, the department may require the submittal of an owner-signed statement verifying knowledge of the remedial action plan proposed.

(6) CLAIMANT OPTIONS. (a) After receiving an approval of a remedial action plan from the department, a claimant may elect to either implement the alternative or to select another alternative. If the claimant elects to implement a higher cost remedial strategy, the claimant shall notify the department in writing of the intent to use a higher cost alternative. The notification shall include the statement that the claimant agrees that the department approved alternative establishes the maximum reimbursable amount for consulting and commodity services under the fund and that additional costs for the occurrence, excluding interest, will not be submitted to the fund.

(b) The department may elect to approve reimbursement for a higher cost remedial strategy if it furthers the objectives of the program.

ILHR 47.338 REVIEW OF EXISTING SITES. (1) GENERAL. The department may review the remedial performance and costs associated with any existing sites. As part of the review, the department may elect to do any or all of the following:

(a) Deny any or all funding, after July 1, 1998, if a claimant failed to carry out site recommendations developed by the DNR in its "PECFA Efficiency Project."

Note: "PECFA Efficiency Project" refers to a study conducted by the DNR.

(b) Deny any or all funding if a claimant fails to provide information required by the department as part of a review of existing sites.

(2) EXISTING SITE CAPS OR ESTIMATES. The department may require a redetermination of costs for any existing site to establish a total cost, excluding interest but including all closure costs, to achieve the status of a closed remedial action. After reviewing the total cost, the department may do any or a combination of the following: approve and establish a cap on total costs, excluding interest; deny approval of costs; approve system enhancements; bundle the site with another remediation(s); or direct the site through a public bid process to establish a lower site cost. A claimant may elect either to implement the alternative or to select another alternative. If the claimant elects to implement a higher cost remedial strategy, the claimant shall notify the department in writing of the intent to use a higher cost alternative. The notification shall include the statement that the claimant agrees that the department-approved alternative establishes the maximum reimbursable amount for consulting and commodity services under the fund and that additional costs for the occurrence, excluding interest, will not be submitted to the fund.

ILHR 47.339 COST EFFECTIVE REMEDIATIONS. (1). FLEXIBILITY. If a claimant can achieve a closed remedial action, and the total costs incurred are equal to or less than $80,000, excluding interest, the department will allow the claimant to complete their remedial efforts without the requirements to:

(a) Develop and submit investigation and other interim environmental reports, if the site closure decision falls under the department's authority.

(b) Develop and submit a remedial action plan and be potentially subject to caps, bundling and public bidding.

(c) Adhere to the $40,000 cap on investigation costs.

(2) NOTIFICATION AND REQUIREMENTS. If a claimant and his or her consultant elects to attempt to achieve a closed remedial action within the $80,000 limit, the department shall be notified in advance of implementation of the remediation process of the intended attempt. If the effort is not successful, the department shall be notified as soon as it is known or should have reasonably been expected to be known that the site will not be completed within the $80,000 limit. The $80,000 limit shall not be exceeded without prior notice to and approval from the department. After notification of the failure to accomplish a closed remedial action, the department will provide direction on whether additional action will be funded, or whether a remedial action plan is to be prepared and submitted. If any expenses above the $80,000 limit

are incurred, excluding interest, without department approval, they will be the sole responsibility of the consultant and cannot be claimed for reimbursement under the PECFA fund.

(3) DISQUALIFICATION. If a consulting firm or consultant, in the opinion of the department, exhibits a pattern of attempting and failing to complete remediations under this section, the department will notify the consultant or the firm of the general restriction from attempting the remediations. The department may also disqualify the consultant from performing all work under PECFA.

SECTION 29. ILHR 47.35 (title), (1), and (2) (a) (intro.) are amended to read:

ILHR 47.35 (title) AWARD PAYMENTS FOR CLAIMS RECEIVED BY THE DEPARTMENT BEFORE APRIL 21, 1998. (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) (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~~ necessary approvals and the complete claim package have been received by the department.

SECTION 30. ILHR 47.35 (2) (a) 1. is repealed.

SECTION 31. ILHR 47.35 (2) (a) 2. and 3. are renumbered ILHR 47.35 (2) (a) 1. and 2. and ILHR 47.35 (2) (a) 1., as renumbered, is amended to read:

ILHR 47.35 (2) (a) 1. Progress payments may be made to entities ~~who~~ that 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~~ Fund Application form (~~SBD-8069~~ERS-8067). The department may conduct field or financial audits or inspections to verify completion of each phase of remediation prior to payment.

SECTION 32. ILHR 47.35 (2) (b) (intro.) is amended to read:

ILHR 47.35 (2) (b) Other interim payments. In addition to the progress payments identified in ~~sub. (2) (a) 3.~~ par. (a) 2., the department shall also make awards ~~after DNR approval~~ at the following points:

SECTION 33. ILHR 47.35 (3) (a) (title) is amended to read:

ILHR 47.35 (3) (a) (title) Emergency actions.

SECTION 34. ILHR 47.355 is created to read:

ILHR 47.355 AWARD PAYMENTS FOR CLAIMS RECEIVED BY THE DEPARTMENT ON OR AFTER APRIL 21, 1998. (1) GENERAL. Awards shall be made if funds are available at the time of completion of a claim review.

(2) SEQUENCING PAYMENTS. (a) Except for those cases 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 any required state agency approval and the complete claim package have been received by the department.

(b) Closure. Payments shall be made for closed remedial actions.

(c) Progress payments. Progress payments may not be made to entities who have met or have the ability to meet the test of self-insurance in s. ILHR 10.82. All requests for progress payments shall be accompanied by a completed Remedial Action Fund Application form (ERS-8067). The department may conduct field or financial audits or inspections to verify completion of each phase of remediation prior to payment. Progress payments may be made only at the following times:

1. Completion of an emergency action.

2. After completion of an investigation, submittal of the remedial action plan and receipt of written approval by the department to submit the investigation claim.

3. Approval of a closed remedial action.

4. Approval of natural attenuation as a final remedial response or at the end of each two-year cycle of the monitoring necessary to show that remediation by natural attenuation will occur.

5. At the end of each two-year cycle of monitoring required for off-site contamination.

6. After implementation and two years of actual operation, or monitoring, or combination thereof, and every two years thereafter.

7. For financial hardship claimants: after completion of the site investigation, submittal of the remedial action plan and receipt of written approval by the department to submit the investigation claim; after implementation of an approved remedial action; or annually after completion of each year of operation and maintenance or monitoring.

8. For sites selected by the department for progress payments based upon extreme life safety and environmental risk and where the claimant has demonstrated to the department's satisfaction that he or she does not have the financial means to conduct a remediation without progress payments; after completion of the site investigation, submittal of the remedial action plan and receipt of written approval by the department to submit the investigation claim; after implementation of an approved remedial action; or annually after completion of each year of operation and maintenance or monitoring. The department shall be the sole determiner of whether progress payments are to be allowed, and an appeal of the decision to the department is not allowed.

Note: Claimants, who have met or have the ability to meet the test of self-insurance, may also file for a payment after implementation and two years of actual operation, sampling, and monitoring of an active treatment system and every two years thereafter.

(d) Other interim payments. The department shall also make awards at the following points:

1. When a lender terminates a funding relationship with a claimant and requests reimbursement for the funds expended. A completed Assignment of PECFA Reimbursement form (ERS-8523) shall be submitted to the department prior to payment and the check shall be jointly paid to the claimant and the lender.

2. When a claimant has incurred eligible expenses equal to the occurrence maximum plus the applicable deductible.

(3) PRIORITY PROCESSING. (a) Emergency actions. 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 claimant can achieve a closed remedial action, and the total costs incurred are equal to or less than $80,000, excluding interest, 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).

SECTION 35. ILHR 47.405 (2) is repealed and recreated to read:

ILHR 47.405 (2) Application for admission shall be submitted to the department on forms provided by the department. Notification of changes in consultant or firm status shall be provided to the department.

(END)

****

EFFECTIVE DATE

Pursuant to s. 227.22 (2)(intro.), Stats., these rules shall take effect on the first day of the month following publication in the Wisconsin Administrative Register.

****

File ref: ILHR 47 rule draft lr

State of Wisconsin \ Department of Commerce

RULES in FINAL DRAFT FORM

Rule No.: Chapter ILHR 47

Relating to: The Petroleum Environmental Cleanup Fund

Clearinghouse Rule No.: 98-065

COM-10535 (N.03/97)

The Wisconsin Department of Commerce proposes an order to repeal ILHR 47.025 (1)(c), 47.03 (1), 47.10 (1)(b)3.c., 47.33 (3) and (4), and 47.35 (2)(a)1; to renumber ILHR 47.01 (4)(d) and (e), 47.33 (5), (6), and (8), and 47.35 (2)(a)3; to renumber and amend ILHR 47.03 (2), 47.33 (7), and 47.35 (2)(a)2; to amend ILHR 47.01 (2), (3)(a), (4)(c) and (5), 47.025 (1)(b) and (5)(a), 47.10 (1)(a)1 and (b)1 and 3.a. and b., 47.115 (1), 47.12 (2)(c), 47.31, 47.335 (3)(c)1 and (4), 47.35 (title), (1), (2)(a)(intro.) and (b)(intro.), and (3)(a)(title); to repeal and recreate ILHR 47.015, 47.02, 47.11, 47.12 (1), 47.30 (4), 47.305 (1)(c) to (f), 47.33 (intro.) to (2), 47.335 (1), and 47.405 (2); and to create ILHR 47.01 (4)(d) and (e), 47.305 (1)(g), 47.336 to 47.339, and 47.355, relating to the petroleum environmental cleanup fund.

****

Analysis of Proposed Rules

Statutory Authority: ss. 101.143 and 101.144

Statutes Interpreted: ss. 101.143 and 101.144

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. Claims made against the PECFA fund are currently averaging over $15,000,000 per month. Approximately $7,500,000 per month is allotted to the fund for the payment of claims. The fund currently has a backlog of $250,000,000 representing almost a 30-month backlog of payments to be made to claimants. Immediate cost saving measures shall be implemented to mitigate this problem.

The rules make the following changes to manage and reduce remediation costs:

Administrative Elements

These changes include updating the scope and coverage of the rules to match current statutes, clarifying decision-making for remedial action approvals and providing new direction to owners, operators and consulting firms.

Progress Payments

Progress payments are proposed to be reduced for some owners and sites. The criteria that trigger payments will now also be based on outcomes. The timing of payments from the fund is designed to benefit those that get sites successfully remediated and to create incentives for the use of the flexible closure tools and natural attenuation tools that were created by the Department

of Natural Resources. Applications submitted before the effective date of the new rules would still be subject to the current rules.

Remedial Alternative Selection

These provisions would create two different paths for funding for sites. Through the use of a group of environmental factors, the risk of a site will be determined. Active treatment systems that use mechanical, engineered or chemical approaches would not be approved for a site without one or more environmental factors present. Approved treatments for sites without environmental factors would be limited to non-active approaches, excavation, remediation by natural attenuation and monitoring of the contamination. The five environmental factors are:

- A documented expansion of plume margin;
- A verified contaminant concentration in a private or public potable well that exceeds the preventive action limit established under ch. 160;
- Soil contamination within bedrock or within 1 meter of bedrock;
- Petroleum product, that is not in the dissolved phase, present with a thickness of .01 feet or more, and verified by more than one sampling event; and
- Documented contamination discharges to a surface water or wetland.

Reimbursement Provisions

Several incentives are added to encourage owners and consultants to reduce costs whenever possible. Provisions are added for the bundling of services at multiple sites to achieve economy of scale and for using a public bidding process to reduce costs. In addition, owners are encouraged to conduct focused remediations that utilize all possible closure tools. To encourage this approach, if a site can be investigated and remedied to the point of closure for $80,000 or less, the consultant can complete the action without remedial alternative approvals or the risk of the site being bundled or put out for bidding. The consultant is provided additional freedom under the structure of the fund in order to facilitate remediation success. Special priority processing of these cost-effective remediations would also be provided.

Review of Existing Sites

These changes give the Department more ability to redirect actions and impose cost saving measures for sites that are already undergoing remedial actions. Reevaluations, including the setting of cost caps, would be done on sites chosen by the Department.

SECTION 1. ILHR 47.01 (2), (3) (a), and (4) (c) are amended to read:

ILHR 47.01 (2) STATUTORY AUTHORITY. This chapter is adopted pursuant to ss. 101.143 ~~(4)(a) 1. and (8)(a)~~ and 101.144, Stats., as created by 1987 Wis. Act 399 and subsequent acts through ~~1993 Wis. Act 16~~ 1997 Wis. Act 27.

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

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

SECTION 2. ILHR 47.01 (4) (d) and (e) are renumbered ILHR 47.01 (4) (f) and (g).

SECTION 3. ILHR 47.01 (4) (d) and (e) are created to read:

(d) The use of environmental factors to determine the eligible range of responses on a site;

(e) The use of site bundling and competitive bidding to reduce costs;

SECTION 4. ILHR 47.01 (5) is amended to read:

ILHR 47.01 (5) MOST COST-EFFECTIVE REMEDIATION ALTERNATIVE. The PECFA fund shall ensure that awards are made for only the most cost-effective remediation alternative. The department may allow a higher cost alternative provided ~~the responsible party assures~~:

(a) ~~Personal~~ The responsible party assures personal payment of the difference in cost between the lowest cost remediation and the higher cost alternative desired; or

(b) ~~That~~ The department determines that the objectives of the PECFA program would be furthered by the use of a specific remedial technology.

SECTION 5. ILHR 47.015 is repealed and recreated to read:

ILHR 47.015 DEFINITIONS. In this chapter:

(1) "Active Treatment" means a remedial activity that is not natural attenuation or monitoring but is conducted in situ. Active treatment includes use of biological or chemical agents to augment remediation of contamination.

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

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

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

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

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

(7) "Closed remedial action" means that the department or the DNR has determined, based on information available at the time, that no further action is necessary. A closed remedial action includes the approval of remediation by natural attenuation as a final site remedy. A determination that no further action is required might include one or more deed or use restrictions placed on a property, or other requirements, which are conditions for approval.

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

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

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

(11) "Department" means the Wisconsin department of commerce.

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

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

(14) "Emergency action" means an immediate response to protect public health or safety.

Note: An emergency action would normally be expected to be directly related to a sudden event or discovery. Simple removal of contaminated soils, recovery of free product, or relief from financial hardship are not considered emergency actions.

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

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

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

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

(16) "Financial hardship claimant" means a claimant that has employed no more than 4 individuals, who are not immediate family members, at any time during the year prior to claim submittal and is able to document this through payroll or tax records.

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

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

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

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

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

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

(21) "Immediate family members" means parents, stepparents, grandparents, children, stepchildren, grandchildren, brothers (and their spouses), sisters (and their spouses), aunts, uncles, sons-in-law or daughters-in-law of the claimant or the claimant's spouse.

(22) "Independent" means entirely and completely free from any common control, guidance, ability to influence, significant financial interest or mutual benefit. Significant financial interest means ownership of more than 5% of a firm or business entity by the consulting firm, consultant or the consultant's family.

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

(24) "Investigation awards" means awards that are made for investigative activities when no discharge is found, if the owner, operator or person owning a home heating oil tank system has written direction from the department to conduct an investigation under s. ILHR 47.025 (5).

(25) "Loan secured" means the point at which a financial organization and customer have completed all documents associated with a commitment of funds and an agreement to repay the funding. The term applies to original loans and to the creation of additional funding.

(26) "Natural attenuation" means the reduction in the concentration and mass of a substance and its breakdown products in groundwater or soils, or both, due to naturally occurring physical, chemical or biological processes.

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

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

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

Note: Section 101.143 (1) (d), Stats., defines operator as:

(a) A person who operates a petroleum product storage system, regardless of whether the system remains in operation and regardless of whether the person operates or permits the use of the system at the time the environmental pollution occurs; or

(b) A subsidiary or parent corporation of the person specified under par. (a).

(29) "Outstanding unreimbursed loan amount" means funds that have been disbursed by the financial organization for actual costs incurred by the borrower's service providers and any earned interest charges, less any amounts reimbursed by the PECFA program.

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

Note: Section 101.143 (1) (e), Stats., defines owner as:

(a) A person who owns, or has possession or control of, a petroleum product storage system or who receives direct or indirect consideration from the operation of a system regardless of whether the system remains in operation and regardless of whether the person owns or receives consideration at the time the discharge occurs;

(b) A subsidiary or parent corporation of the person specified under subd. 1.

(31) "Passive bio-remediation" has the same meaning as "natural attenuation".

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

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

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

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

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

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

Note: Section 101.143 (1) (fg), Stats., defines a petroleum product storage system as a storage tank that is located in Wisconsin and is used to store petroleum products together with any on-site integral piping or dispensing system. The term does not include pipeline facilities; tanks of 110 gallons or less capacity; residential tanks of 1,100 gallons or less capacity storing petroleum products that are not for resale; farm tanks of 1,100 gallons or less capacity storing petroleum products that are not for resale, except as provided in sub. (4) (ei) ; tanks used for storing heating oil for consumptive use on the premises where stored, except for heating oil tanks owned by school districts and heating oil tanks owned by technical college districts and except as provided in sub. (4) (ei) ; or tanks owned by Wisconsin or the federal government.

(36) "Pollution impairment" means bodily injury or property damage arising from the actual, alleged or threatened discharge, dispersal, seepage, migration, release, or escape of a petroleum product.

(37) "Prime rate" means the most recent rate published in the *Wall Street Journal* under Money Rates – Prime Rate.

Note: The prime rate is the base rate on corporate loans posted by at least 75% of the nation's 30 largest banks.

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

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

(39) "Progress payment" means an award made prior to the full completion of a remediation and may include payments after completion of an emergency action, site investigation, remediation, maintenance or operation, or other points as defined in this chapter.

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

Note: Section 101.143 (1) (gm), Stats., defines property damage as not including those liabilities which are exclusions in liability insurance policies for property damage, other than liability for remedial action associated with petroleum product discharges from petroleum product storage systems. The statute also excludes loss of fair market value.

(41) "Remedial action plan" means a document that reports a remedial action alternative and provides the basis for its recommendation along with projected costs and other required detail.

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

(43) "Site bundling" means providing investigation or remedial action services, or both, for multiple occurrences while utilizing one consulting firm or common commodity services and providers, or both.

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

Note: Section 101.143 (1) (gs) defines service provider as a consultant, testing laboratory, monitoring well installer, soil boring contractor, other contractor, lender or any other person who provides a product or service for which a claim for reimbursement has been or will be filed under this section (ch. ILHR 47), or a subcontractor of such a person.

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

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

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

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

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

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

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

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

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

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

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

(a) Conduct leak detection procedures;

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

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

(d) Conduct a required product inventory;

(e) Comply with tank system use permit requirements;

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

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

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

SECTION 6. ILHR 47.02 is repealed and recreated to read:

ILHR 47.02 COVERAGE. (1) PETROLEUM PRODUCT STORAGE TANK SYSTEMS. Owners or operators of a petroleum product storage systems are eligible for reimbursement from the fund provided claims are for underground or aboveground petroleum storage systems that are one or more of the following:

(a) Commercial tank systems larger than 110 gallons capacity.

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

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

(d) Tank systems storing gasoline, diesel fuel or other vehicle fuel, other than residential tanks of 1,100 gallons or less capacity.

(e) Farm vehicle fuel systems of 1,100 gallons or less capacity, which meet the requirements in s. 101.143 (4) (ei) 1. a. regarding farm size and farm income, and is used to store products not for resale.

(f) Heating oil tank systems owned by public school or technical college districts, supplying heating oil for consumptive use on the premises.

(g) Tank systems located on trust lands of an American Indian tribe or band if the owner or operator's tank system would be otherwise covered under pars. (a) to (f) and the owner or operator complies with this chapter and ch. ILHR 10 and obtains all applicable agency approvals.

(2) HEATING OIL TANK SYSTEMS. A person owning a home heating oil tank system is eligible for reimbursement from the fund provided the claim is for a heating oil tank system that is an underground home heating oil tank system and the person complies with this chapter and ch. ILHR 10.

(3) EXCLUSIONS. The fund does not cover a claim for any of the following:

(a) A pipeline facility.

(b) A commercial tank system of 110 gallons or less capacity.

(c) A residential motor fuel tank system of 1,100 gallons or less capacity.

(d) Any tank system that is federal or state owned.

(e) Any tank system of 110 gallons or less capacity which is not used for the storage of home heating oil.

(f) A nonresidential heating or boiler tank system where the product is used on the premises where it is stored.

(g) An underground petroleum product storage tank system or home oil tank system that meets the performance standards in 40 CFR 280.20 or s. ILHR 10.51, was installed after December 22, 1988, and from which a release was confirmed after December 31, 1995.

(h) An underground petroleum product storage tank system or home oil tank system that meets the upgrading requirements in 40 CFR 280.21 (b) to (d) or s. ILHR 10.52 (2) to (4) and a discharge is confirmed after December 31, 1995, and the discharge is confirmed, or remedial activities begun, after the day on which the system first met the upgrading requirements.

(i) A new aboveground petroleum product storage tank system that meets the performance standards promulgated in rules by the department, installed after April 30, 1991, and from which a discharge is confirmed after December 22, 2001.

(j) An aboveground petroleum product storage tank system that meets the upgrade requirements promulgated by the department and a discharge is confirmed after December 22, 2001, and the discharge is confirmed, or remedial activities begun, after the day on which the petroleum system first met the upgrading requirements in rules promulgated by the department.

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

SECTION 7. ILHR 47.025 (1) (b) is amended to read:

ILHR 47.025 (1) (b) The department may not issue an award before all eligible costs have been incurred ~~and written approval received under s. ILHR 47.35~~ unless the department determines that the delay in issuing the award would cause a financial hardship to the owner, operator or the person owning a home oil tank system. The department may issue progress payments when sufficient evidence of completion of various ~~remedial~~ activities, as specified in ss. ILHR 47.12, ~~and 47.33~~ 47.35 and 47.355, are received.

SECTION 8. ILHR 47.025 (1) (c) is repealed.

SECTION 9. ILHR 47.025 (5) (a) is amended to read:

ILHR 47.025 (5) (a) The department shall issue an award for a claim filed after August 9, 1989 for eligible costs incurred on or after August 1, 1987, by an owner, operator or person owning a home oil tank system in investigating the existence of a discharge or investigating the presence of petroleum products in soil or groundwater if the investigation is undertaken at the written direction of the department ~~or the DNR~~ to conduct an investigation under this provision, and no discharge or contamination is found.

SECTION 10. ILHR 47.03 (1) is repealed.

SECTION 11. ILHR 47.03 (2) is renumbered ILHR 47.03 and ILHR 47.03 (title) is amended to read:

ILHR 47.03 (title) EMERGENCY AWARDS.

SECTION 12. ILHR 47.10 (1) (a) 1., and (b) 1. and 3. a. and b. are amended to read:

ILHR 47.10 (1) (a) 1. If a responsible party is not the sole owner of the site, an Owner Assignment Certification form (~~SBD-8079~~ERS-8070) shall be filed with the department to establish one entity to submit the claim and receive the award under this chapter.

(b) 1. 'Individuals as agents.' Except as specified in subd. 2., an owner or operator or the person owning a home oil tank system may, with the written approval of the department, enter into a written agreement with another person to act as an agent. An agent, in order to be approved and receive payment under the fund, shall agree to complete the remediation up to the point of operation and maintenance or long-term monitoring. The agent and the owner, operator, or person owning the home oil tank system shall jointly submit a claim for an award after completing all applicable requirements under this chapter and submittal of a Current Agent Assignment Certification form (~~SBD-8070~~ERS-8079) to the department. An award made under this paragraph shall be made payable to both the agent and owner, operator or person owning the home oil tank system.

3. a. Completing the site investigation to determine the degree and extent of the environmental ~~damage~~ contamination caused by the discharge from a petroleum product storage tank system or a home oil tank system and preparing the analysis and report ~~of remedial alternatives~~ as specified in s. ILHR ~~47.33 (5);~~ 47.337.

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

SECTION 13. ILHR 47.10 (1) (b) 3. c. is repealed.

[NOTE TO REVISOR: Please change the Notes after ILHR 47.10 (1) (b) 3. c. and 47.12 (1) and (3), and insert Notes after 47.115 (1), 47.35 (2) (a) 2., newly created 47.355 (2), and 47.405 (2), to all read as follows: Note: Copies of the department forms required in this code are available from the department at the address shown in the Appendix.]

SECTION 14. ILHR 47.11 is repealed and recreated to read:

ILHR 47.11 TANK REGISTRATION. (1) The department has the authority to inventory and determine the location of aboveground and underground petroleum storage tanks systems as specified in s. 101.142 (2), Stats. Tank systems shall be registered with the department on forms provided by the department. Eligibility determination of awards under the scope of this chapter requires prior tank registration.

(2) All aboveground petroleum product storage tank systems shall be registered with the department. Exceptions are for any of the following:

(a) Pipeline facilities.

(b) Tank systems of 110 gallons or less capacity.

(c) Residential tank systems of 1,100 gallons or less capacity.

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

SECTION 15. ILHR 47.115 (1) is amended to read:

ILHR 47.115 (1) All aboveground and underground petroleum storage tanks not previously registered, having no completed Underground Petroleum Product Tank Inventory form (~~SBD~~ERS-7437) or Aboveground Petroleum Product Tank Inventory form (~~SBD~~ERS-8731) on file with the department, shall be registered prior to submitting a claim for an award under the scope of this chapter.

SECTION 16. ILHR 47.12 (1) is repealed and recreated to read:

ILHR 47.12 (1) APPLICATION. A claimant shall submit a claim on a Remedial Action Fund Application form (ERS-8067) furnished by the department, and shall include all of the following:

(a) For a claim covering the site investigation and the preparation of a remedial action plan, a copy of the report providing the information detailed in s. NR 716.15 and the letter provided by the department indicating that the remedial action plan submittal requirements have been complied with and that submittal of the claim is authorized.

(b) A copy of the Underground Petroleum Product Tank Inventory form (ERS-7437) for each underground tank system at the site and a copy of the Aboveground Petroleum Product Tank Inventory form (ERS-8731) for each aboveground tank system at the site.

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

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

(e) Proof of payment for all invoices including copies of both sides of canceled checks or money orders or alternate proofs of payment approved by the department.

(f) Properly detailed and itemized receipts for remedial activities and services performed.

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

(h) Other records or statements that the department determines to be necessary to complete the application.

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

SECTION 17. ILHR 47.12 (2) (c) is amended to read:

ILHR 47.12 (2) (c) PECFA claims for awards may not be processed without proper and complete documentation including, but not limited to, Underground Petroleum Product Tank Inventory ~~form~~ forms (~~SBD~~ ERS-7437), Aboveground Petroleum Product Tank Inventory ~~form~~ forms (~~SBD~~ ERS-8731), Remedial Action Fund Application form ~~furnished by the department~~ (ERS-8067), ~~DNR Site Investigation and Remedial Action Plan Review form (SBD-8069), closure assessment,~~ department letter indicating compliance with remedial action plan submittal requirements (investigation claim), report providing information detailed in s. NR 716.15 (investigation claim), proof of payment of costs incurred in remediation, ~~site closure report, approval by the DNR~~ approval of closed remedial action, responsible party's social security number or federal tax identification number, and other forms available from the department necessary for claim processing.

SECTION 18. ILHR 47.30 (4) is repealed and recreated to read:

ILHR 47.30 (4) CONTAMINATIONS CONTAINING ELIGIBLE AND INELIGIBLE PRODUCTS. When a contamination is identifed which contains both eligible and ineligible products under the fund, the following shall apply:

(a) Only the costs associated with the eligible products may be claimed. Eligible costs of remediation, which are only associated with the eligible product, may be claimed in their

entirety, as specified in this section. Any costs required because of the presence of an ineligible product may not be claimed even if a remedial benefit may be derived by the remediation of the eligible product.

(b) The owner or operator and the department shall be notified immediately. The consultant, in conjunction with the owner or operator, shall propose a methodology to the department for dividing the costs of remediation between the eligible and ineligible products. Department approval of a methodology shall be obtained by the owner or operator prior to the submittal of any claims.

SECTION 19. ILHR 47.305 (1) (c) to (f) are repealed and recreated to read:

ILHR 47.305 (1) (c) Maximum interest and related costs. 1. The following maximum rates are established for loans secured after January 31, 1993, and before October 15, 1997, for the purposes of a remediation:

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

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

2. The following maximum rates are established for loans secured on or after October 15, 1997, for the purposes of a remediation:

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

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

(d) Annual loan service fees. Annual loan service fees charged on or before April 20, 1998, shall be reimbursable at no more than 1% of the unreimbursed amount and remaining available loan balance. Annual loan service fees charged after April 20, 1998, shall be reimbursable at no more than 1% of the outstanding unreimbursed loan amount.

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

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

SECTION 20. ILHR 47.305 (1) (g) is created to read:

ILHR 47.305 (1) (g) Other items. In addition to the maximum rates established in par. (c), the following shall apply:

1. Annual loan service fees shall be charged no more frequently than once annually.

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

SECTION 21. ILHR 47.31 is amended to read:

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 or participate in the voluntary bundling of sites for remediation purposes.

(2) INCENTIVES. For claimants who participate in the voluntary bundling of sites or for remediations that have ~~DNR~~ approval ~~for closure, or passive bio-remediation with long-term monitoring~~ as closed remedial actions and eligible costs not exceeding ~~$50,000~~ $80,000, excluding interest, the claim may receive priority ~~reimbursement~~ review in the award process.

SECTION 22. ILHR 47.33 (intro.) to (2) are repealed and recreated to read:

ILHR 47.33 COMPARATIVE PROPOSALS AND BID PROCESSES FOR REMEDIATION ACTIVITIES AND SERVICES. Except for home oil tank owners and department approved emergency actions, the purchase of consulting and commodity services, not already covered by a detailed written contract, as of February 1, 1993, shall conform to the 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.

(1) GENERAL. (a) Consulting firm selection. 1. An owner or operator shall select a qualified consulting firm to conduct the site investigation and the development of a remedial action plan. The owner or operator shall select and contract with a consulting firm after making a comparison of qualified consulting firms by obtaining and reviewing a minimum of 3 proposals for services or utilizing another selection process approved by the department.

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 shall 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 independent of the consulting firm or project consultants may provide any of the commodity services required in the remediation.

(b) Purchase of commodity services. 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 employee 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 employee'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, from qualified firms that respond to the specifications and estimated volume of work provided by the consulting firm. Only PECFA-eligible laboratory work shall be included in the analysis to determine the lowest cost service provider. 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 request of the department approval to select other than the lowest cost commodity service provider. The department may approve a request 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 that will result in a closed remedial action. The responsible party may select a higher cost alternative if he or she certifies 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. For sites for which a remedial alternative was received by the department before April 21, 1998, the following shall apply:

(a) The estimated cost for the selected remediation alternative contained in the remedial action plan shall provide a separate dollar amount for consulting services and for 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.

(b) A dollar amount approved by the department shall establish the maximum reimbursable amount for consulting services during the remediation.

(c) The cost detail for the selected remediation alternative shall establish the total estimated cost for the remediation up to receiving approval as a closed remedial action. The estimate may be used to establish a maximum reimbursable amount. If the estimated consulting or commodity costs are established as maximum reimbursable amounts, and one or both will be exceeded, the consultant shall immediately notify in writing the claimant and the department of the anticipated actual cost.

(d) If it is determined that the consulting or commodity 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 obtain written approval of the additional costs by providing justification acceptable to the department shall constitute grounds for disallowing the additional expenses. Cost guidelines, as published by the department, may be used as one factor in determining if an approval for additional work is warranted.

SECTION 23. ILHR 47.33 (3) and (4) are repealed.

SECTION 24. ILHR 47.33 (5) and (6) are renumbered ILHR 47.33 (3) and (4).

SECTION 25. ILHR 47.33 (7) and (8) are renumbered ILHR 47.33 (5) and (6) and ILHR 47.33 (5) (a), as renumbered, is amended to read:

ILHR 47.33 (5) (a) Commodity items with a purchase price of ~~$500~~ $1,000 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~~ $1,000.

SECTION 26. ILHR 47.335 (1) is repealed and recreated to read:

ILHR 47.335 (1) GENERAL. Site investigations which were not started as of January 15, 1993, and for which a remedial alternative was received by the department before April 21, 1998, shall conform to this section.

SECTION 27. ILHR 47.335 (3) (c) 1 and (4) are amended to read:

ILHR 47.335 (3) (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~~ proposed 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.

(4) START OF INVESTIGATION. An investigation shall be considered started if, after confirmation of a contamination is obtained, additional soil borings, soil sampling or monitoring-well construction have begun. In addition, the work on the site shall have an element of continuity. If work on a site stops for a period of two years or more, the site shall then fall under ILHR 47.335 (2) and (3) or ILHR 47.337 depending on whether a remedial alternative was received by the department as of April 20, 1998.

SECTION 28. ILHR 47.336 to 47.339 are created to read:

ILHR 47.336 FEASIBILITY TESTING. Feasibility testing is considered part of remedial action and cannot be included in an investigation claim filed on or after April 21, 1998, without prior department approval for inclusion of the costs. Additionally, feasibility testing costs may only be claimed when they are directly associated with a remedial action that is approved by the department for reimbursement.

Note: Sampling and laboratory testing of groundwater or soils for geochemical, nutrient and bacterial levels is not considered feasibility testing.

ILHR 47.337 SITE INVESTIGATION AND REMEDIAL ACTION. (1) GENERAL. Sites for which site investigations were not started as of January 15, 1993, and for which a remedial alternative has not been received by the department as of April 20, 1998, shall conform to this section. The scope of the site investigation shall include determining the presence of the environmental factors specified in sub. (3) (a).

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

(b) If the investigation will exceed $40,000, the claimant 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.

(c) The consultant is responsible for monitoring the costs incurred in the investigation and remedial action plan development and identifying that the $40,000 maximum may be exceeded. The consultant shall notify the claimant, 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.

(d) If interim actions are performed during the course of an investigation or prior to the approval of a remedial action plan, costs above $5000, excluding interest, shall not be reimbursed. The department shall be informed prior to the implementation of any interim action.

(3) ENVIRONMENTAL FACTORS. (a) Environmental factors. Consultants shall determine the presence of any of the following environmental factors:

1. Documented expansion of plume margin.

2. Verified contaminant concentrations in a private or public potable well that exceeds the preventive action limit established under ch. 160, Stats.

3. Contamination within bedrock or within 1 meter of bedrock.

4. Petroleum product that is not in the dissolved phase is present with a thickness of .01 feet or more, and verified by more than one sampling event.

5. Documented contamination discharges to a surface water or wetland.

(b) Presence of environmental factors. Consultants for sites that exhibit one or more environmental factors shall complete an analysis of remedial alternatives and prepare a remedial action plan. The analysis shall identify the lowest cost remedial strategy that will address the environmental factor and the remediation of the site. Included within the action plan shall be a cost detail providing separate dollar amounts for consulting and commodity activities. The cost detail shall provide the total cost, excluding interest but including all closure costs, for the remediation up to approval as a closed remedial action. The remedial action plan, cost detail, information on any interim actions conducted during the site investigation, and a separate report providing the information detailed in s. NR 716.15, and including an estimate of total contaminant mass, shall be submitted to the department and approval of the cost detail received before conducting any remedial action for which reimbursement will be claimed under the PECFA fund.

(c) Absence of environmental factors. If no environmental factors are identified during or after a site investigation, the consultant will develop an analysis of remedial alternatives and prepare a remedial action plan utilizing a non-active treatment approach. The analysis shall identify the lowest cost remedial strategy that will address the remediation of the site. Included within the analysis shall be a cost detail providing separate dollar amounts for consulting and commodity activities. The cost detail shall provide the total cost, excluding interest but including all closure costs, for the remediation up to approval as a closed remedial action. The remedial action plan, cost detail, and a separate report providing the information detailed in s. NR 716.15, and including an estimate of total contaminant mass, shall be submitted to the department and approval of the cost detail received before conducting any remedial action for which reimbursement will be claimed under the PECFA fund. The alternative proposed may include only the use of the following:

1. Non-active source control, which may include soil excavation.

2. Development and remediation to site specific residual contamination levels.

3. Monitoring to evaluate the potential for remediation by natural attenuation.

4. Remediation by natural attenuation.

5. Monitoring.

6. Institutional controls and site restrictions.

7. Other non-active remedial approaches.

(d) Additional controls. Any alternative proposed to the department shall identify whether it assumes or includes the use of any institutional controls, groundwater use restrictions, deed notices or other restrictions or notifications.

(4) REMEDIAL ACTION PLAN APPROVAL DECISIONS. (a) Department options. After the review of a submitted remedial action plan, the department may elect to do any or a combination of the following:

1. Approve the plan with cost caps.

2. Require the submittal of an additional specific remedial action plan for the purpose of determining whether there is a lower cost option to achieve a closed remedial action status.

3. Bundle the site with another remediation in order to reduce costs while still achieving a status of a closed remedial action.