ILHR 47. PECFA
COMMERCE 98-065

p. 55

RESPONSE TO LEGISLATIVE COUNCIL CLEARINGHOUSE REPORT

Department of Commerce

CLEARINGHOUSE RULE NO.: 98-065

RULE NO.: Chapter ILHR 47

RELATING TO: The Petroleum Environmental Cleanup Fund

Agency contact person for substantive questions.

Name: William Morrissey

Title: Acting Deputy Administrator, Environmental and Regulatory Services Division

Telephone No. 608-266-7605

Legislative Council report recommendations accepted in whole.

[ ] Yes [X] No

1. Review of statutory authority (s.227.15(2)(a))

   a. [X] Accepted

   b. [ ] Accepted in part

   c. [ ] Rejected

   d. [ ] Comments attached

2. Review of rules for form, style and placement in administrative code (s.227.15(2)(c))

   a. [ ] Accepted

   b. [X] Accepted in part

   c. [ ] Rejected

   d. [X] Comments attached

(Continued on reverse side)

3. Review rules for conflict with or duplication of existing rules (s.227.15(2)(d))

a. [X] Accepted

b. [ ] Accepted in part

c. [ ] Rejected

d. [ ] Comments attached

4. Review rules for adequate references to related statutes, rules and forms (s.227.15(2)(e))

a. [X] Accepted

b. [ ] Accepted in part

c. [ ] Rejected

d. [ ] Comments attached

5. Review language of rules for clarity, grammar, punctuation and plainness (s.227.15(2)(f))

a. [ ] Accepted

b. [X] Accepted in part

c. [ ] Rejected

d. [X] Comments attached

6. Review rules for potential conflicts with, and comparability to, related federal regulations (s.227.15(2)(g))

a. [X] Accepted

b. [ ] Accepted in part

c. [ ] Rejected

d. [ ] Comments attached

7. Review rules for permit action deadline (s.227.15(2)(h))

a. [X] Accepted

b. [ ] Accepted in part

c. [ ] Rejected

d. [ ] Comments attached

RESPONSE COMMENTS TO LEGISLATIVE COUNCIL CLEARINGHOUSE REPORT

2.d. The statement on institutional controls simply attempts to define that a closure with institutional controls is still a closure and not another type of action or approval.

2.e. The second sentence is essential to the definition as it clarifies the term "paid". It clarifies that recognizing a payable does not constitute a cost incurred but rather that there has to be a disbursement of funds.

2.h. The wording comes from the DNR rule and should match between the two rules.

2k. Fiberglass is a commonly understood term for referring to a specific tank construction material and cannot be replaced by the term plastic.

2.l. Changing the wording, as suggested, would additionally limit what would be determined to be willful neglect. The addition of the word intentional would further restrict the provision and foster arguments on what constitutes doing something intentionally. This is existing wording in the administrative rule.

2.m. The plural should be used because the coverage relates to multiple types of systems and this section attempts to detail them.

4a. The PECFA program covers discharges from petroleum storage tank systems. Dumping of petroleum products is not a discharge and is not covered. The inclusion of the word discharge would imply coverage under the fund.

4c. There is no other brief way of describing the full range of requirements that an owner or operator must comply with.

5b. Remedial alternative, remediation and remedial action are different terms and would be used differently in the code. Remedial efforts, remedial activity and remedial action describe a similar process and can be used in most but not all cases, interchangeably.

5d. Agent and award are both important terms in the rule and their definition is helpful.

5f. Additional information is provided in the definition beyond that found in the statute.

5g. Term claimant was included because of the confusion caused by the different owner types included in the statute. This creates a unifying term and its inclusion is helpful to guarantee that persons using the code know that claimant is a reference to all having coverage under the fund.

5i. The two defined terms are both used in the rule text, for different purposes.

5j. A financial hardship claimant could be a person with no employes.

5k. The program recognizes that the term is no longer current but it is used in the statute and there is a body of program knowledge that has built up around the term.

5l. The material after the comma is key because it conveys that the simple investigation of a site, where no contamination is found, is not the same as one where the investigative effort has been ordered by the department. The order process is very specific and used in enforcement situations. A voluntary investigation does not fit into the same classification and should not receive reimbursement.

5o. Reference to owner is important because owner is statutorily different than a home oil tank owner.

5p. The term passive bio is being largely replaced by the term natural attenuation. There are many documents that reference the passive bio term and cross-referencing the terms will assist claimants in understanding documents that were provided to them in the past.

5q. Partnerships and associations would not be excluded by this definition. A partnership would be a firm and an association could fit under a number of provisions depending on their method of structure.

5r. A note setting forth the text of the cross-referenced statute was deleted in this rule change because the cross-referenced statute has been changed frequently and is expected to continue to change frequently, which makes the note quickly out-of-date and misleading.

5s. Terms are different and come from the insurance industry.

5v. "Occurrences" should not be replaced by "discharges" because an occurrence can include more than one discharge, and occurrences relate to the charging of deductibles.

5x. The reference to 10.335 provides that it must be stored in conformance with the code or it is not defined as a used motor oil. It could be identified as other waste.

5aa. The tank system does not have to produce revenue, such as may occur at a taxi company.

5ab. No, product here means heating oil.

5ac. Under the PECFA program, "trust lands" refer to only the sovereign lands of American Indian tribes, and any other lands that are held in trust by tribes are treated no differently than lands held in trust by other parties. Ownership is not a key element in determining eligibility on "trust lands."

5ad. The term person is drawn from the ILHR 10 rule that addresses both state and federal tank system owners.

5ae. The department must make payments and issue 1099's for tax purposes. These activities require the provision of a tax or social security number.

5af. The statement is necessary to convey that the department may move away from the current interest reimbursement system. Clearly stating this capability will prevent future disagreements.

5ag. The section would apply to sites not covered by a detailed written contract on 2/1/1993 and before the effective date of the emergency rule. Rule text to clarify this has been inserted in place of the note.

5ai. The term it appears to be derogatory. Also, using you is intended to convey the message that it is a personal responsibility.

5aj. Depending on the bid structure, different approaches may be used. Additional guidance is provided in the rule on unit costs that will guide the selection.

5am. The first deals with a service provider and the second deals with approval of a remedial alternative. These are different work activities.

5ao. The estimated cost for the remediation is submitted to the department who then determines the maximum reimbursable amount. The rule has been changed to clarify this.

5ap. Passive bio and natural attenuation are two examples of non-active treatment systems.

5ar. It would be an error to limit the issues that can be considered in the approval of a remedial alternative to the current list. New factors may emerge based upon technology and other advances that can be included in the decision making process.

5as. "Dollars per pound" is the accepted terminology throughout the industry, including the USEPA.

5at. A higher cost remedial alternative can be approved because, in a comparison of the original alternative and those secured through bids, etc. the lowest cost option may not be the best approach for the Department and, consequently, other than the lowest cost approach may be approved. The sentence prohibiting appeals has been deleted from the rule.

LCRC FORM 2

WISCONSIN LEGISLATIVE COUNCIL STAFF

RULES CLEARINGHOUSE

Ronald Sklansky
Director
(608) 266–1946

Richard Sweet
Assistant Director
(608) 266–2982

David J. Stute, Director
Legislative Council Staff
(608) 266–1304

One E. Main St., Ste. 401
P.O. Box 2536
Madison, WI 53701–2536
FAX: (608) 266–3830

CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

CLEARINGHOUSE RULE **98–065**

AN ORDER to repeal ILHR 47.025 (1) (c), 47.03 (1), 47.10 (1) (b) 3. c. and Note, 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) and (3) (c) 2. Note, 47.31, 47.335 (3) (c) 1. and 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), 47.305 (1) (c) to (f), 47.33 (intro.) Note, (1) and (2) and 47.335 (1); and to create ILHR 47.01 (4) (d) and (e), 47.305 (1) (g), 47.337 to 47.339 and 47.355, relating to the petroleum environmental cleanup fund.

Submitted by **DEPARTMENT OF COMMERCE**

04–29–98 RECEIVED BY LEGISLATIVE COUNCIL.

05–28–98 REPORT SENT TO AGENCY.

RS:MCP:jt;kjf

LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

   Comment Attached YES ☐ NO ☑

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

   Comment Attached YES ☑ NO ☐

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

   Comment Attached YES ☐ NO ☑

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS [s. 227.15 (2) (e)]

   Comment Attached YES ☑ NO ☐

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

   Comment Attached YES ☑ NO ☐

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL REGULATIONS [s. 227.15 (2) (g)]

   Comment Attached YES ☐ NO ☑

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

   Comment Attached YES ☐ NO ☑

WISCONSIN LEGISLATIVE COUNCIL STAFF

RULES CLEARINGHOUSE

Ronald Sklansky
Director
(608) 266–1946

Richard Sweet
Assistant Director
(608) 266–2982

David J. Stute, Director
Legislative Council Staff
(608) 266–1304

One E. Main St., Ste. 401
P.O. Box 2536
Madison, WI 53701–2536
FAX: (608) 266–3830

CLEARINGHOUSE RULE 98–065

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.]

2. Form, Style and Placement in Administrative Code

a. In the portion of the analysis relating to remedial alternative selection, the reference to "s. 160" should be replaced by a reference to "ch. 160, Stats."

b. In s. ILHR 47.01 (2), the notation "s." should be amended to read "ss."

c. Section ILHR 47.015 (intro.) should read: "In this chapter:". The reference to dictionary definitions is unnecessary.

d. The acronym "DNR" should be used in s. ILHR 47.015 (7). Also, it appears that the last sentence of this subsection is substantive and should be placed elsewhere in the rule.

e. In s. ILHR 47.015 (10), the second sentence should be placed in a note to the rule.

f. The definition in s. ILHR 47.015 (14) combines the emergency situation and the response to the situation. The first sentence relates to the emergency (a "situation"), the second sentence refers to the response and the third sentence refers to both. These concepts should be separated into two definitions. The third sentence belongs in a note to the rule. Finally, the phrase "'emergency or emergency action'" should be replaced by the phrase "'Emergency' or 'emergency action'."

g. In s. ILHR 47.015 (23), the notation "s." should be inserted before the cross-reference.

h. In s. ILHR 47.015 (25), it appears that the first occurrence of the word "and" should be replaced by the word "or" and a comma should be inserted after the word "both."

i. In s. ILHR 47.015 (27) and (29), it appears that the statutory cross-references should be reversed. That is, sub. (27) should refer to s. 101.143 (1) (d), Stats., and sub. (29) should refer to s. 101.143 (1) (e), Stats. Also, in par. (b) of the Note to sub. (29), it appears that the language after the semicolon is not included in current statutes.

j. In s. ILHR 47.015 (33) Note, it appears that the word "and" should be replaced by the word "or."

k. In s. ILHR 47.015 (46) Note, it appears that the word "fiberglass" should be replaced by the word "plastic."

l. The form for the definition of "wilful neglect" in s. ILHR 47.015 (52) should substitute "includes" for "may include, but is not limited to." Also, "intentional" should be inserted before "failure."

m. In general, the singular form should be used when drafting. [See s. ILHR 47.02 (1) (intro.).]

n. In s. ILHR 47.02 (1) (g), the phrase "(a) through (f)" should be replaced by the phrase "pars. (a) to (f)." In sub. (3) (d), the word "Federal" should not be capitalized.

o. The first sentence of s. ILHR 47.33 (1) is not introductory material that grammatically leads into following subunits. Consequently, this sentence should be renumbered as par. (a) and the remaining paragraphs renumbered accordingly. The entire rule should be reviewed for this problem.

p. The commas in s. ILHR 47.33 (1) (b) 1. should not be underlined.

q. Section ILHR 47.337 should be reviewed for the use of the word "must" rather than the word "shall" to convey a requirement. Also, in sub. (3) (a) 2., the word "Chapter" should be replaced by the notation "ch."

r. The parenthetical "s" to indicate the alternative singular or plural ("factor(s)", for example, in s. ILHR 747.337 (3) (b)) is inappropriate and unnecessary.

s. "Department approved" should be hyphenated in s. ILHR 47.338 (2). Also, in sub. (1) (a), the phrase "the department of natural resources" should be replaced by the acronym "DNR."

t. "Off site" should be hyphenated in s. ILHR 47.355 (2) (b) 5. Also, in sub. (2) (c) (intro.), the period should be replaced by a colon.

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

a. Why is the definition of "discharge" different from the definition of that word in s. 292.01 (3), Stats.? To be consistent with the statutory definition, "means" should be replaced by "includes," and the term should include, rather than exclude, "dumping."

b. Can a cross-reference to the "statutory requirements" referred to in s. ILHR 47.02 (1) (e) be provided, or can a note describing these requirements be provided?

c. "Rules promulgated in" should be deleted in s. ILHR 47.02 (1) (g) and (2), and the cross-reference should be to "this chapter and ch. ILHR 10." Also, this cross-reference is extremely broad, and some thought should be given to whether it can be more focused.

d. The rule refers to several forms, such as in s. ILHR 47.10 (1) and other places in the rule. The rule should comply with the requirements of s. 227.14 (3), Stats., for references to applicable forms.

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

a. In the portion of the analysis relating to administrative elements, a hyphen should be inserted after the word "decision." In the portion relating to remedial alternative selection, in the third sentence, the word "factor" should be replaced by the word "factors." Finally, in the portion relating to review of existing sites, the phrase "Reevaluations including, the setting of cost caps would" should be replaced by the phrase "Reevaluations, including the setting of cost caps, would."

b. The rule does not have a consistent way of referring to remedial actions. Various terms are used, with no apparent reason for the differences, including "remedial activity," "remediation," "remedial action," "remedial alternative" and "remedial efforts." Consistent terminology should be used unless the terms actually convey different meanings.

c. What does "bio" mean in s. ILHR 47.015 (1)? The term "chemical augmentation" is used in s. ILHR 47.015 (1) but is not defined. The meaning of this term is not apparent.

d. The definitions of "agent" and "award" in s. ILHR 47.015 (2) and (4) seem obvious and unnecessary.

e. "The scope of" in s. ILHR 47.015 (3) is superfluous.

f. The definition of "bodily injury" in s. ILHR 147.015 (5) appears to be the same as the statutory definition.

g. The first sentence of the definition of "claimant" in s. ILHR 47.015 (6) appears to be unnecessary. The second sentence of that definition appears to be more appropriate for the provisions of the rule related to who may submit a claim.

h. In s. ILHR 47.015 (7), what is the meaning of the term "institutional restrictions"? [See also s. ILHR 47.337 (3) (d).]

i. The word "level" in s. ILHR 47.015 (8) and (9) is superfluous. Also, it is not clear why the definitions are different.

j. The definition of "financial hardship claimant" in s. ILHR 47.015 (16) is unclear. It refers to a person who has employed no more than four individuals. Does this definition apply if the person had no employes?

k. In the definition of "grossly negligent" in s. ILHR 47.015 (18), the more common legal definition would substitute "intentional" for "conscious."

l. In s. ILHR 47.015 (20) Note, the phrase "home heating oil tank systems as underground" should be replaced by the phrase "a home heating oil tank system as an underground." Also, in sub. (26) Note, the word "occurrences" should be replaced by the phrase "an occurrence."

m. The material after the comma in s. ILHR 47.015 (23) is unnecessary.

n. In s. ILHR 47.015 (28), it appears that the definition should in some way state that the funds disbursed or the interest charges earned have not been repaid in order to comport with the defined term "outstanding unreimbursed loan amount."

o. In s. ILHR 47.015 (29), the phrase "under the PECFA program" is superfluous.

p. There is no reason to use two terms to mean the same thing in the rule. The definition of either "passive bio-remediation" or "natural attenuation" should be eliminated.

q. The cross-referenced definition of "person" in s. ILHR 47.015 (32) includes "municipality" and "political subdivision," which substantially overlap. Also, does this definition fail to include partnerships and associations?

r. For consistency, a note setting forth the text of the cross-referenced statute should be included in s. ILHR 47.015 (34).

s. Section ILHR 47.015 (35) uses the defined term "discharge." It is unclear whether the additional terms "dispersal, seepage, migration, release or escape" are different from the defined term or from each other. Also, "as defined in sub. (33)" is superfluous.

t. Should the definition of "prime rate" in s. ILHR 47.015 (36) refer to the "most recent" rate that is published? "Wall Street Journal" should be printed in italics rather than within quotes. The last phrase in that definition is merely explanatory and should be included as a note.

u. In the Note after s. ILHR 47.015 (39), the statute excludes loss of "fair market" value, not "property" value.

v. The definition of "site bundling," "the process of" and "to reduce total remediation cost" are superfluous. "Across" should be replaced by "for." Also, should "occurrences" be replaced by "discharges?"

w. The word "totally" in the definition of "totally independent" in s. ILHR 47.015 (48) is inappropriate. The definition allows financial interest up to 5% of a firm or business entity. This term could be clarified by eliminating "totally." Note also the use of this term in s. ILHR 47.015 (15) (c).

x. In s. ILHR 47.015 (51), the phrase "collected and stored in accordance with s. ILHR 10.335" should be deleted. "Used motor oil" is oil from an internal combustion engine whether or not it is collected and stored as provided.

y. "The scope of" under s. ILHR 47.015 (52) (f) is superfluous.

z. "Tank" should be substituted for "tanks" in s. ILHR 47.015 (52) (g).

aa. Is the meaning of "commercial tank systems" in s. ILHR 47.02 (1) (a) clear? Does this mean that the tank has to produce revenue, or merely be associated with a commercial activity?

ab. "Product" is used alone in s. ILHR 47.02 (1) (b). Should the defined term "petroleum product" be used?

ac. In s. ILHR 47.02 (1) (g), "trust lands" should not be capitalized and the rule should refer to an American Indian tribe ***or band***. In this paragraph, the department should consider whether there needs to be a distinction in the applicability of the rule to land held in trust by the tribe or band or land held in trust for individuals by the tribe or band. Also, the department should consider how this paragraph relates to the definition of "owner" if the tribe or band owns the tank system. The definition of "owner" does not appear to include an American Indian tribe or band.

ad. Section ILHR 47.02 (3) (d) excludes tank systems that are owned by the federal or state government. Why are the state and the federal governments included in the definition of "person," which is incorporated into the definition of "owner"?

ae. Section ILHR 47.12 (1) (g) requires a claimant to provide a Social Security number or federal tax identification number. The department should ensure that it has the authority under federal law to require the submission of a Social Security number.

af. It is not clear why s. ILHR 47.305 (1) (f) is needed, because par. (d) specifies a maximum interest rate and nothing appears to preclude the department from negotiating lower rates.

ag. The Note after s. ILHR 47.33 (title) does not appear to be accurate, because the new section becomes effective upon its repeal and recreation. Is the department stating that s. ILHR 47.33 applies to claims submitted on or after February 1, 1993?

ah. Section ILHR 47.33 (1) (intro.) states the obvious and is unnecessary.

ai. In the first sentence of the quoted material in s. ILHR 47.33 (1) (a) 2., the word "they" should be replaced by the word "it" and, in the last sentence of the quoted material, the word "you" should be replaced by the phrase "the owner."

aj. The provision on commodity purchases in s. ILHR 47.33 (1) (b) requires the lowest cost provider to be selected, but s. ILHR 47.33 (1) (a) does not specify the method for selecting among the three proposals by consulting firms.

ak. Section ILHR 47.33 (1) (b) relates to commodities services, but the title is "Commodity purchases." Is there any reason for this difference? Should the title be "Purchase of commodity services"?

al. "PECFA eligible" should be hyphenated in s. ILHR 47.33 (1) (b) 2.

am. Is there any reason for the difference between s. ILHR 47.33 (1) (b) 4. and (c) 2.?

an. The comma after "services" in the first sentence of s. ILHR 47.33 (2) (intro.) should be deleted.

ao. It is not clear in s. ILHR 47.33 (2) (a) who establishes the maximum reimbursable amount. Also, the comma after "consulting" should be deleted.

ap. How does "non-active" in s. ILHR 47.337 (3) (c) (intro.) relate to the defined terms "natural attenuation" and "passive bio-remediation"?

aq. "But not be limited to" should be deleted from s. ILHR 47.337 (4) (b) (intro.).

ar. "Possibly" in s. ILHR 47.337 (4) (b) 2. is superfluous and should be deleted.

as. It is not clear what is meant by "market" costs in s. ILHR 47.337 (4) (b) 3. Is "costs" sufficient? Also, is it appropriate for the measure to be in "dollars per pound"?

at. Section ILHR 47.337 (5) (a) in part provides that when a claimant elects to implement a higher cost remedial strategy, the claimant agrees that additional costs will not be submitted to the fund. However, par. (b) provides that the department may elect to approve reimbursement for a higher cost. How can the department approve a higher cost if the additional costs will not be submitted? Further, par. (b) provides that a decision not to approve a higher cost alternative cannot be appealed. If this provision means, as other provisions in the rule state, that an appeal may not be taken to the department, the rule should so state. If this provision means that the decision cannot be appealed to a court, it probably is contrary to the provisions of ch. 227, Stats.

au. Can some reference describing the PECFA Efficiency Project be included in a note after s. ILHR 47.338 (1) (a)?

av. "Recosting" in s. ILHR 47.338 (2) does not appear to be a real word.

aw. "Site" is not used properly in s. ILHR 47.339 (1) (intro.). The "site" does not complete the remedial efforts.

ax. The beginning of the third sentence in s. ILHR 47.339 (2) should be rewritten to read: "The $80,000 limit may not be exceeded . . . ."

ay. "Included" should be deleted in s. ILHR 47.355 (2) (b) (intro.).

PUBLIC HEARING COMMENT AND AGENCY RESPONSE
DEPARTMENT OF COMMERCE

Rule Number: ILHR 47

Relating To: The Petroleum Environmental Cleanup Fund

DIVISION OF ENVIRONMENTAL AND REGULATORY SERVICES

Hearing Location: Madison

Hearing Date: May 29, 1998

Commenting In Sup.	Commenting In Opp.	For Info.	Exh. No.	Presenter, Group Represented, City, State	Comments/Recommendations	Agency Response
X		X	1	Don Johnston US Oil Company, Inc. Combined Locks, WI	Requests the code require the Department to document how any rejection or modification of a proposed remediation is based on sound, scientific principles and that such modifications will allow the site to either reach closure or remove any of the five new environmental factors. This would discourage the Department from making indiscriminate cutbacks on remedial action costs. Requests the Department be held liable for all costs resulting from additional remedial actions needed because of a Department-required change to a remedial alternative, where the change is not supported by sound, scientific principles. States owners need to be able to select a higher than lowest cost alternative if the low cost bidder has a poor performance history or if the low bid would lead to excessive non-PECFA eligible costs. Departmental approval should not be required for this selection if the owner pays the cost differential.	The public bidding processes, included in the code, should reduce the extent to which the department has to determine the appropriate remedial alternative. Under the code, public bidding will be a primary means of determining remedial approach and cost caps. Claimants have appeal rights on agency decisions. If a claimant believes that a decision is not science based, they have the ability to make that argument before an administrative law judge. Claimants are allowed to select higher cost alternatives if they pay the additional cost and do not request PECFA assistance for the additional expenses.
X				Boyd Possin Environmental Compliance Consultants, Inc. DePere, WI	States the rule change will only reduce the program costs by about 20 percent, but a reduction of more than 50 percent is needed to correct the PECFA funding shortfall. Believes the main problem is the PECFA program is trying to clean up far too many sites, particularly where the groundwater cleanup costs are large and the benefits are quite small or nonexistent. Wisconsin spends more than twice as much per capita on LUST site cleanups than the next most costly state, and may be spending more total public funds on these cleanups than any other state. This spending is being forced by an out-of-control groundwater law that applies generic numerical standards mindlessly to all groundwater regardless of the water's present or potential use. For example, hundreds of millions of dollars are being spent attempting to clean up groundwater in clay aquitards beneath cities that get their drinking	Costs within the PECFA program are driven by many factors including state groundwater standards and cleanup requirements. These factors, however, are not within the control of the PECFA program. Consequently, PECFA does not have the ability to implement the full range of cost controls that are needed.

				Boyd Possin (continued)	water from surface water sources. Until the groundwater law is changed appropriately, significant public funds that could produce substantial public health and other benefits in other, more important functions will continue to be wasted. Believes Commerce review staff should use the considerable authority created by this rule, and exercise utmost discretion, to achieve maximum use of natural attenuation. Reasonable, common sense decisions will produce better results than mindless, robotic insistence on compliance with every perceived code requirement.	The use of natural attenuation has the potential of reducing remediation cost and it is included as a major focus in the code changes.

File reference: h:/ILHR47/HEARCOMa

PUBLIC HEARING COMMENT AND AGENCY RESPONSE
DEPARTMENT OF COMMERCE

Rule Number: ILHR 47

Relating To: The Petroleum Environmental Cleanup Fund

DIVISION OF ENVIRONMENTAL AND REGULATORY SERVICES

Hearing Location: Mailed In

Hearing Date: May 29, 1998

Commenting In Sup.	Commenting In Opp.	For Info.	Exh. No.	Presenter, Group Represented, City, State	Comments/Recommendations	Agency Response
X			3	Kwik Trip, Inc. La Crosse, WI	Supports the rule change but is opposed to the limitation of making annual filings on sites with operating remediation systems.	In the past, excess focus has been placed on making progress payments based upon dollars spent and other non-results orientated criteria. The new progress payment schedule tries to focus on outcomes and remediation success. The new schedule encourages claimants to follow strategies that will bring their sites to closure.
X			4	Mary C. Christie Heuser En Chem, Inc. Mosinee, WI	States the reference to calendar-year bidding of laboratory services in s. ILHR 47.33 (1)(b)2 should be changed to bidding on an annual basis, to be consistent with a firm's fiscal year and to keep all of the PECFA laboratory contracts from coming due at the same time. States this section should also be changed to allow acceptance of a laboratory bid other than the low bid, with a provision that PECFA only reimburse to the low bid amount, to recognize there may be legitimate business reasons for not selecting the low bid.	The Department will further consider this possible wording. The rule allows the pre-qualification of bidders. The use of this provision should eliminate the need to select other than the low bidder.
X			5	Steven A. Meger Michaels Environmental Engineering La Crosse, WI	Indicates the code should be changed to respond to the human health threats from direct contact with highly contaminated soil and groundwater vapors in basements Believes estimates of contaminate mass should not be required until guidance is available that promotes consistency between sites and between consultants.	Appropriate responses to human health and vapor problems are consistent with the code and are not excluded by the emergency rule provisions. For example, vapors in a basement could likely indicate a moving contamination plume, one of the environmental factors indicated in the rule. Consulting firms have estimated contaminant mass for a number of years. The code change simply makes use of data already being estimated by many firms.

				Steven A. Meger (continued)	Indicates delays in progress payments should be shortened to lessen the diversion of site cleanup dollars to pay for accruing loan interest.	The change in progress payments will not reduce the number of dollars paid out by the program. The program will continue to pay out all available revenue dollars. Consequently, maximum interest reduction is accomplished regardless of the actual progress payment schedule.
					In applying the new Environmental Factors, questions whether a remedial action that is based on limited data, such as only two rounds of groundwater monitoring, will need reconsideration if the groundwater plume is later found to be expanding.	If the situation changes at a remediation site, changes may be necessary in the remedial strategy. This is true under both the original and emergency rules. The degree of investigation has not changed based upon the emergency rule.
					States further guidance is needed for determining whether a groundwater plume is expanding or shrinking, such as clarifying which methods are acceptable for demonstrating a trend, including averaging, statistical analysis, and inclusion or exclusion of outlying data points.	National studies verify that the majority of contamination plumes are not expanding. Of the subset of sites that do have expanding plumes, verification of this fact will probably occur through various means. The consulting industry is most capable of analyzing site data and making a determination of whether a plume has been proved to be expanding.
					Indicates guidance is also needed for discerning the difference between an expanding plume and a plume that is migrating while reaching equilibrium, such as the migration that may occur after a pump and treat system is shut off to allow natural attenuation. Questions how the Environmental Factors criteria will be applied to this migration.	Actions such as the shut down of a treatment system would create periods in which site data is not representative. The consultant must be aware of these changes and select data for conclusions appropriately.
	X		6	Jerome S. Chudzik, PE Graef, Anhalt, Schloemer and Associates, Inc. Milwaukee, WI	Believes the public bidding process on selected projects will result in unfair competition, confusion, future litigation, and higher costs. The investigative work by the original consultant will become available in this process to other bidders, which will allow them to unfairly underbid the original consultant.	The PECFA program is seriously oversubscribed and must implement additional cost controls. The use of bidding has been shown to reduce commodity program costs and similar results could be achieved with the bidding of remediations. Currently, there is limited competition and this has kept remediation costs high. It is unclear whether the firm that conducts the investigation has an advantage or a disadvantage in the bid process.
					Indicates confusion will arise from not having a detailed, uniform specification for all bidders to bid on, since neither the owner nor	The Department believes that criteria necessary to guide the bid process can be developed and

				Jerome S. Chudzik (continued)	the Department is likely to prepare one. Questions how bids would be evaluated that are based on an open specification, which allows bidders to bid whatever they think, will do the job. Costs would increase if the selected low bid does not achieve cleanup in the timeframe included in the bid.	implemented although the bid document will not provide a prescribed remediation strategy.
					Believes litigation will increase because more projects will be left incomplete due to contractors blaming faulty, deficient, or misleading investigation reports from owners.	Consultants are not required to bid on projects and, consequently, they may elect to not bid on sites where they have questions on the investigation report. A significant segment of remediations are left incomplete now. Completions may actually increase under the new rule because of the hard cap created on remedial actions. The cap may force more concentrated effort and better management of sites.
					Indicates bundling of projects will be very difficult for sites with different remediation actions, sites that are not all at the same stage in the investigation process, and for owners whose businesses will be affected differently. The owner is not helped if the remediation cleans up the site but closes the business.	Bundling is expected to be a difficult process, but it has the ability to significantly reduce capital investment and other costs. Selection of sites is important and, with careful use, can possibly save large amounts of money. In the absence of cost control efforts, the fund may fail and with it many businesses who would be required to pay for their remediation completely on their own.
					Believes the overall effects of the rule change will be to increase the time required by Department staff and to add costs to the owners, the Department, and the PECFA program.	The new rule will create more work demands on the program staff, but this additional effort is necessary to reduce program costs. Program costs should decrease, however, if market factors can be used to establish remediation costs.
X			7	Charles W. Elliott Wisconsin Petroleum Council Madison, WI	Indicates the definition of financial hardship in s. ILHR 47.015(16) should be based on financial condition or capability, not number of employees.	Financial condition or capability to pay is almost impossible to define or verify. Number of employees, however, can be determined. Providing additional payments to the smallest owners should have a high correlation to the owners who need the most assistance.
					Indicates the definition of natural remediation in s. ILHR 47.015(25) should include a reduction in the concentration or mass of a substance.	The definition is drawn from chapter NR 700, Wis. Admin. Code, and a modification of the definition may cause confusion with the NR 700 rule.

				Charles W. Elliott (continued)	Suggests the definition of remedial action plan in s. ILHR 47.015(40) refer to the results from considering various alternatives which are technically feasible and which include monitoring, where applicable.	The preparation of a remedial action plan assumes analysis of multiple approaches that certainly may include monitoring. The program does not want all of the different alternatives submitted, just the proposed one. The definition is worded so that claimants submit only their final alternative.
					Suggests the priority review incentive in s. ILHR 47.31(2) for sites with costs below $80,00 be limited to costs incurred after the effective date of the emergency rule.	The completion of a site for $80,000 or less is a success regardless of whether the work was fully completed before, during, or after the emergency rule. There would appear to be no benefit to restricting priority review to those sites that incurred their costs after the rule change. Individuals who practiced cost control and used flexible closure techniques in the absence of the emergency rule should also be awarded priority review.
					Believes that where cost guidelines are used, as referenced in s. ILHR 47.32(3), they must form the basis for disallowing excessive costs.	The general purpose of cost guidelines is to establish the reasonableness of costs. However, not all situations can be anticipated and there may be instances where a cost may be above a guideline and still be reasonable in the context of the site.
					Indicates all monitoring should be referenced in s. 47.335(3)(a), not just long-term monitoring.	The wording reflects an earlier effort to get claimants to consider natural remediation techniques. Original wording was retained because sites that fall under the section are continuing to work through the system. A new remedial alternative would not be submitted under this section.
					Indicates that only technically feasible alternatives should be included in the documentation prepared under s. ILHR 47.335(3)(c)1 for comparing alternatives.	This is consistent with the language in the rule. Only technically feasible alternatives would be "reasonably expected to be approved."
					Indicates that contrary to the prohibition in s. ILHR 47.337(5)(b), the Department must allow an appeal of a decision to not approve a higher cost alternative.	The statement in the code regarding an appeal is not necessary and can be eliminated.

				Charles W. Elliott (continued)	Believes priority processing should be mandatory under s. ILHR 47.35(3)(b) for successful remediations or approved passive bio-remediations, where the total cost is no more than $50,000; and under s. ILHR 47.355(3)(b) for the similar claims made after April 21, 1998, that are no more than $80,000.	These claims are receiving priority processing.
					States the two-year monitoring cycle in s. ILHR 47.355(2)(b)5 for off-site contamination should be changed to one year.	In the past, excess focus has been placed on making progress payments based upon dollars spent and other non-results orientated criteria. The new progress payment schedule tries to focus on outcomes and remediation success. The new schedule encourages claimants to follow strategies that will bring their sites to closure.
					States the two-year cycle for progress payments under s. ILHR 47.355(2)(b)6 should be changed to one year.	See previous answer.
					Believes the Department should clarify that alliances of consultants will continue to be allowed, under s. ILHR 47.33(1)(a).	The rule allows alternate consultant selection processes. If claimants demonstrate an understanding of purchase of service processes, modification of the consultant selection process has been approved. This does not change under the emergency rule.
X			8	Tim Clay Wisconsin Federation of Cooperatives Madison, WI	States the definition of financial hardship claimant should be based on a financial ratio of assets to cleanup debt, such as 5 to 1, rather than the number of non-family member employees.	Verifying financial ratios would be very labor intensive and not be necessarily reflective of true financial condition.
					Indicates s. ILHR 47.025(5)(a) should be changed to be consistent with the statutory requirement that the Department reimburse claimants for site investigations where no contamination is found, regardless of which state agency orders the investigation.	The 100% reimbursement provision of PECFA is a specific program element and should be administered by Commerce to prevent confusion on the part of owners regarding possible reimbursement.
					Believes additional incentives should be created, such as applying priority processing to responsible parties who voluntarily opt to bundle or publicly bid existing remediation sites under s. ILHR 47.335.	ILHR 47.335 relates to sites that had a remedial alternative approved before the emergency rule was effective. Bundling and bidding may not be as likely an option for these sites as those just reaching the alternative phase.
					States the progress payment milestones that were eliminated in the emergency rule were valuable for preventing legal confrontations	The PECFA fund is seriously oversubscribed. Lending institutions realize this fact and know that

				Tim Clay (continued)	and projecting a better image of the PECFA program to lending institutions, and should be reinstated.	the fund is paying out all available program dollars. The modification of the progress payment schedule is unlikely to change lender opinion of the fund. Action by the fund to balance claim demand and available funding is, however, likely to impact opinion.
					Believes the emergency rule will save significant revenue but may also create significant conflicts between responsible parties and the Department of Natural Resources. Potential conflicts with the DNR's cleanup agenda and the availability of PECFA funding may result in an active remedial approach that only receives financial assistance at a non-active level. The DNR and the Department of Commerce need to develop an agreeable understanding on this issue to preserve the original intent of the PECFA program.	PECFA is charged with providing reimbursement of program eligible expenses. From the start of the program, it has been acknowledged that some DNR required actions would not be reimbursed by the fund. The emergency rule sets new provisions for fund administration and cost control. If owners wish to minimize their non-eligible costs, they should concentrate on achieving compliance with the DNR's requirements while also working within the context of ILHR 47.
X			9	Dave Wantland Growmark Cooperative Bloomington, IL	States the definition of financial hardship claimant should be based on a financial ratio of assets to cleanup debt, such as 5 to 1, rather than the number of family-member employees.	Verifying financial ratios would be very labor intensive and still not be necessarily reflective of true financial condition.
					States the progress payment milestones that were eliminated in the emergency rule were valuable for establishing an owner's financial ability to continue a site cleanup and remain in business. These progress payments should be retained, particularly for the cleanup projects already in progress from the old program.	In the past, excess focus has been placed on making progress payments based upon dollars spent and other non-results orientated criteria. The new progress payment schedule tries to focus on outcomes and remediation success. The new schedule encourages claimants to follow strategies that will bring their sites to closure.
X			10	George E. Meyer Wisconsin Department of Natural Resources Madison, WI	States the rule needs to include a mechanism for sites where natural attenuation has been tried and is not viable so that such sites are able to re-enter the reimbursement process and be eligible for other remedies.	There is no statutory or rule provision defining what constitutes a failed natural attenuation strategy. If during the process of monitoring, a new environmental factor were identified, reconsideration of remedial strategy would probably take place.
					Indicates approvable remedies must have a clear purpose geared toward site remediation, rather than merely apply an institutional control to a property.	Many of the possible closures identified in NR 700 use a combination of remediation and institutional controls. The emergency rule is consistent with this process.

				George E. Meyer (continued)	Believes the rule can be improved by clarifying the distinction between its purpose and the purpose of DNR's rules governing site investigations and remediations.	The Department believes that the rule identifies that it is a rule that governs reimbursements for claimant remediation efforts.
					States the rule should identify at what level activities will be reimbursed, and specify that not all actions necessary for compliance with environmental rules will be reimbursed if that is the case.	From the start of the program in 1988, the fund has clearly communicated that not all DNR required activities are reimbursable.
					Indicates consideration should be given to the methods other states are using to minimize interest costs on bank loans.	A number of states significantly restrict or disallow charges for interest. An action of this nature is essentially an increase in the claimant's deductible because few owners cannot self-finance a remediation. Reduction in the interest provision may result in fewer voluntary cleanups being conducted.
					Believes the use of the "environmental factors" to set a standard of risk, thereby directing and limiting actions that may be taken at different types of sites, in at least two instances are not in compliance with the standards and acceptable responses contained in chs. NR 140 and 722, Wis. Adm. Code.	Information has not been provided on the specific violations that the DNR alleges. If the Department of Natural Resources would provide specific information, the Department's legal staff will review the issue. In the absence of specific information to the contrary, the Department believes that the rule, which establishes reimbursement provisions, is consistent with applicable statutes.
					Believes the rule should include notes in s. ILHR 47.01(2) referencing the governing rules for environmental cleanup, such as the responsible parties' liability for cleanup under s. 292.11, Stats., and ch. NR 140 and the NR 700 series. A reference to the requirements in s. 292.11, Stats., should be included in the test in s. ILHR 47.01(3)(a) that specifies the intent of PECFA.	The Department does not believe that these references are necessary to establish the statutory and program authority of the Department of Natural Resources.
					Indicates the definition of active treatment in s. ILHR 47.015(1) should be clarified to include ex-situ treatments, such as landspreading and biopiles, as reimbursable responses.	Including these technologies under the definition of active treatment might limit their use under other provisions of the code.
					States the definition of closed remedial action s. ILHR 47.015(7) should be revised to be consistent with the case closure rules in s. 726.05(2)(b).	NR 700 has no directly parallel definition of closure. We will review the definition, however, to see if any confusion can be eliminated.

				George E. Meyer (continued)	Believes consultants will have difficulty complying with the need under s. ILHR 47.337(2) to provide meaningful estimates for remediation by natural attenuation prior to collecting and analyzing natural attenuation monitoring data.	Monitoring is designed to demonstrate the progress of natural attenuation. The data to determine whether remediation by natural attenuation is appropriate should be developed earlier in the effort and be used in the selection/proposal of the remedial alternative.
					States s. ILHR 47.337(3)(b) and (c) should be expanded to reflect that evaluation of remedial alternatives for sites with environmental factors is to be done in accordance with rules promulgated by the DNR under s. 292.11, Stats.	The authority of the DNR is already conveyed clearly through state statutes and their administrative rules. ILHR 47 is a reimbursement code and not an avenue for detailing the Department of Natural Resources' authority.
					Believes the list of acceptable remediation alternatives in s. ILHR 47.337(3)(c) for sites without environmental factors should not include monitoring that is conducted without a purpose, and should not include institutional controls and site restrictions unless they are in conjunction with other remedial actions.	The list is a detailing of reimbursable alternatives. The alternatives can be used in combinations to achieve remediation success and are not mutually exclusive.
					Indicates further discussions are needed to establish interagency communication procedures for site specific remedial actions, such as coordinating the timing under s. ILHR 47.337(3)(d) for considering institutional controls.	Although the Department agrees that interagency communication is always beneficial, this provision attempts to elicit information from the claimant concerning controls that they anticipate using. The information would be used to explain and evaluate the remedial alternative proposed.
					States consultants should be required in s. ILHR 47.337(3)(e) to re-evaluate for the presence of environmental factors at least once a year.	This provision would increase program costs by encouraging consultants to prepare additional costly reports. Evaluation of the site status, remediation progress, soil and water contamination levels, and other data is already a requirement under current sampling and reporting provisions. Creating duplicate work does not add value to the remediation process.
					States s. ILHR 47.337(3)(f) should require an evaluation of remedial alternatives in accordance with DNR rules when a claimant cannot achieve case closure using natural attenuation as prescribed in DNR rules. PECFA could cap the cost of this evaluation.	If a remedial alternative fails, regardless of the alternative, it is likely that any modification or reconsideration will have to be accomplished within the original PECFA cap. Unless a previously undetected environmental factor is identified, a change in the site cap should not be expected.

					Indicates a note is needed in s. ILHR 47.339 to clarify that NR 700 requirements would still apply to the claimants with cost effective remediations that are not required to submit investigation and remedial action reports. Believes applying priority payments to the smaller, less environmentally significant sites that are below the $80,000 cap in s. ILHR 47.355(3)(b) is inconsistent with the need to address the most environmentally significant sites.	The authority of the DNR is already conveyed clearly through state statutes and their administrative rules. ILHR 47 is a reimbursement code and not an avenue for detailing the Department of Natural Resources' authority. By encouraging small remediations to be done quickly and effectively, funding and other program resources will be saved for major sites. Large quantities of funding can be saved on these sites that can then be used for more significant environmental problems.

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