1997-98 SESSION COMMITTEE HEARING RECORDS

Committee Name:

Joint Committee for Review of Administrative Rules (JCR-AR)

Sample:

- Record of Comm. Proceedings
- 97hrAC-EdR_RCP_pt01a
- 97hrAC-EdR_RCP_pt01b
- 97hrAC-EdR_RCP_pt02

- *Appointments ... Appt*
-
- *Clearinghouse Rules ... CRule*
-
- *Committee Hearings ... CH*
-
- *Committee Reports ... CR*
-
- *Executive Sessions ... ES*
-
- *Hearing Records ... HR*
-
- *Miscellaneous ... Misc*
- *97hr_JCR-AR_Misc_pt22a*
- *Record of Comm. Proceedings ... RCP*
-

JCRAR HEARING NOTICE
BACKGROUND - ETC. 9/16/98

Wisconsin
Department of Commerce

JLHR 47 31

P. O. Box 7970
Madison, Wisconsin 53707
(608) 266-1018

Tommy G. Thompson, Governor
William J. McCoshen, Secretary

July 31, 1998

Senator Robert Welch
Co-Chairman
Joint Committee for Review of Administrative Rules
Room 201
1 East Main
Madison, WI 53707

Representative Glenn Grothman
Co-Chairman
Joint Committee for Review of Administrative Rules
Room 125 West, State Capitol
Madison, WI 53707

Bob! GLENN!

Dear Senator Welch and Representative Grothman:

As you may know, this Department adopted an emergency rule earlier this year relating to the Petroleum Environmental Cleanup Fund. The emergency rule took effect on April 21, and is currently in effect. The emergency rule will expire on September 18, 1998, unless an extension is granted by the Joint Committee for Review of Administrative Rules.

Since adoption of the emergency rule and pursuant to chapter 227, Stats., the Department has filed a proposed permanent rule with the Wisconsin Legislative Council (Clearinghouse Rule Number 98-065) to replace the emergency rule, held a hearing on that rule on May 29, 1998, and plans to file the final rule with the Legislature within the next two weeks.

The Joint Committee for Review of Administrative Rules (JCRAR) requests that agencies make a formal request for an extension prior to the expiration of an emergency rule. Under section 227.19 (4), Stats., the legislative standing committees have 30 days to review the final rule before the agency may adopt the rule. Due to the time factors associated with the rulemaking process in ch. 227, Stats., the permanent rule cannot be adopted and placed in effect prior to the expiration of the emergency rule.

In light of these facts, we respectfully request a 60-day extension of the emergency rule under s. 227.24 (2), Stats., in order to preserve the public safety and welfare and to provide a smooth and orderly transition from the emergency rule to the permanent rule.

If you have any questions regarding our progress to date or this request, please don't hesitate to contact us. Thank you in advance for your consideration of our request.

Sincerely,

William J. McCoshen,
Secretary

File ref: JCRAR extension request1

Department of Commerce

Emergency Rule Relating to the Petroleum Environmental Cleanup Fund

Finding of Emergency and Rule Analysis

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

The facts constituting the emergency are as follows. Under sections 101.143 and 101.144, Wisconsin Statutes, the Department protects public health, safety, and welfare by promulgating rules for and administering the Petroleum Environmental Cleanup Fund (PECFA fund). The purpose of the fund is to reimburse property owners for eligible costs incurred because of a petroleum product discharge from a storage system or home oil tank system. 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 must 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 factor 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 s. 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.

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

Dated at Madison, Wisconsin, this
17 day of April, A.D. 1998,
By the Department of Commerce

William J. McCoshen, Secretary

File ref.: finding & analysis 2

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 s. 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, the following definitions shall apply. The dictionary meaning shall apply for all other words.

(1) "Active Treatment" means a remedial activity that is not natural attenuation or monitoring but is conducted in situ. Active treatment includes bio and chemical augmentation.

(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 the scope of 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 department of natural resources has determined, based on information available at the time, that no further action is necessary to remediate a site. 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 may include one or more institutional restrictions or requirements that are conditions for approval.

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

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

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

(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 totally 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.

(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 home heating oil tank systems as underground home heating oil tank used for consumptive use on the premises together with any on-site integral piping or dispensing system.

(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) "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.

(23) "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 ILHR 47.025 (5).

(24) "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.

(25) "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.

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

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

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

Note: Section 101.143 (1) (e), 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).

(28) "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.

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

Note: Section 101.143 (1) (d), 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.; or in which the parties establishing the trust provide documentation that both the trustees and the beneficiary meet the definition of owner or operator.

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

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

(32) "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.

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

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

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

(35) "Pollution impairment" means bodily injury or property damage arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release, or escape of a petroleum product, as defined in sub. (33).

(36) "Prime rate" means the rate published in the "Wall Street Journal" under Money Rates – Prime Rate and is the base rate on corporate loans posted by at least 75% of the nation's 30 largest banks.

(37) "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.

(38) "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.

(39) "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 property value.

(40) "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.

(41) "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.

(42) "Site bundling" means the process of providing investigation or remedial action services, or both, across multiple occurrences while utilizing one consulting firm or common commodity services and providers, or both, to reduce total remediation cost.

(43) "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.

(44) "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.

(45) "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.

(46) "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.

(47) "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.

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

(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 the scope of ch. ILHR 10;

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

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

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

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

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

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

(c) Farm and 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 fuels, 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 additional statutory requirements regarding farm size and farm income, and are used to store products not for resale.

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

(g) Tank systems located on Trust Lands of an American Indian tribe if the owner or operator's tank system would be otherwise covered under (a) through (f) and the owner or operator complies with the rules promulgated in chs. ILHR 47 and ILHR 10 and obtains all applicable agency approvals.

(2) HEATING OIL TANK SYSTEMS. Persons owning home heating oil tank systems are eligible for reimbursement from the fund provided the claims are for heating oil tank systems that are underground home heating oil tank systems and the persons comply with rules promulgated in chs. ILHR 47 and ILHR 10.

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

(a) Pipeline facilities.

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

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

(d) Any tank systems that are Federal or state owned.

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

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

(g) 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. and Note are repealed.

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.

Note: Copies of forms referenced in this section are available on request from the Department of Commerce, Environmental and Regulatory Services Division, Bureau of PECFA, P.O. Box 7838, Madison, Wisconsin 53707-7838.

SECTION 17. ILHR 47.12 (2) (c) and (3) (c) 2. Note are 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.

(3) (c) 2. Note: Copies of forms referenced in this section are available on request from the Department of ~~Industry, Labor and Human Relations~~ Commerce, Environmental and Regulatory Services Division ~~of Safety and Buildings~~, Bureau of ~~Petroleum Inspection and Fire Protection~~ PECFA, P.O. Box ~~7969~~ 7838, Madison, Wisconsin 53707-~~7969~~7838.

SECTION 18. 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 19. 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 20. 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 or bidding of sites for remediation purposes.

(2) INCENTIVES. For claimants who participate in the voluntary bundling or bidding 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 21. ILHR 47.33 (intro.) Note, (1), and (2) are repealed and recreated to read:

ILHR 47.33 COMPARATIVE PROPOSALS AND BID PROCESSES FOR REMEDIATION ACTIVITIES AND SERVICES.

Note: The provisions of this section became effective as of February 1, 1993.

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

(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 must pay. In addition, there may be costs that are not covered by the PECFA fund or are above the maximums that will be reimbursed for by the fund. A remediation may cost you more than the deductible."

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

(b) Commodity purchases. 1. All commodity services which include, but are not limited to, soil borings, monitoring-well construction, laboratory analysis, excavation and trucking shall be obtained through a competitive bid process. A minimum of 3 bids are required to be obtained and the lowest cost service provider shall be selected. An 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. 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.

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

(b) The cost detail for the selected remediation alternative shall establish the total estimated cost for the remediation up to the point of 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. Unless specific written department approval of the additional cost is obtained, the additional expenses are not eligible for reimbursement.

(c) 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.

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

SECTION 22. ILHR 47.33 (3) and (4) are repealed.

SECTION 23. ILHR 47.33 (5) and (6) are renumbered ILHR 47.33 (3) and (4).

SECTION 24. 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 25. 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 26. ILHR 47.335 (3) (c) 1. is 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.

SECTION 27. ILHR 47.337 to 47.339 are created to read:

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. 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. (a).

(a) 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.

(b) 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.

(c) If interim actions are to be performed during the course of the investigation, the department must be informed prior to implementing the planned work. If the work is anticipated to result in costs, excluding interest, of $5,000 or more prior to approval by the department of a remedial action plan, approval must be obtained before implementation of any interim actions.

(d) 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 departmental approval. Additionally, feasibility testing costs may only be claimed when they are directly associated with a remedial action which 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 feasability testing.

(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 Chapter 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 must identify the lowest cost remedial strategy that will address the environmental factor(s) and the remediation of the site. Included within the action plan must be a cost detail providing separate dollar amounts for consulting and commodity activities. The cost detail must provide the total estimated cost, excluding interest, for the remediation up to the point of receiving approval as a closed remedial action. The remedial action plan, cost detail, information on any interim actions conducted during the site investigation, a report providing the information detailed in s. NR 716.15, and an estimate of total contaminant mass, must 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 must identify the lowest cost remedial strategy that will address the remediation of the site. Included within the analysis must be a cost detail providing separate dollar amounts for consulting and commodity activities. The cost detail must provide the total estimated cost, excluding interest, for the remediation up to the point of receiving approval as a closed remedial action. The remedial action plan, cost detail, a report providing the information detailed in s. NR 716.15, and an estimate of total contaminant mass, must 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 must 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(s) in order to reduce costs while still achieving a status of a closed remedial action.

4. Direct the site to a public bid process to establish a lower cost remedial strategy for achieving the status of 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 but not be limited to 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 market 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 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 must notify the department in writing of the intent to use a higher cost alternative. The notification must 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. The decision to not approve a higher cost alternative cannot be appealed.

ILHR 47.338 REVIEW OF EXISTING SITES. (1) GENERAL. The department may review the remedial performance and costs associated with sites for which a remedial alternative was received before April 21, 1998. 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 department of natural resources in its "PECFA Efficiency Project."

(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. The department may require a recosting of an existing remedial alternative to establish a total cost, excluding interest, 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; 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 must notify the department in writing of the intent to use a higher cost alternative. The notification must 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 site to complete its remedial efforts without the requirements to:

(a) Develop and submit investigation and other interim environmental reports.

(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 must 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. In no event is the $80,000 limit to be exceeded without prior notice to 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 28. 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 29. ILHR 47.35 (2) (a) 1. is repealed.

SECTION 30. 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 31. 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 32. ILHR 47.35 (3) (a) (title) is amended to read:

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

SECTION 33. 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. 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.

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

(b) Progress payments. Progress payments may not be made to entities who have met or have the ability to meet the test of self-insurance included 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, sampling, and monitoring of an active treatment system 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.

(c) 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).

(END)

Tommy G. Thompson
Governor

Joe Leean
Secretary

State of Wisconsin

Department of Health and Family Services

OFFICE OF LEGAL COUNSEL

1 WEST WILSON STREET
P.O. BOX 7850
MADISON WI 53707-7850

TELEPHONE: (608) 266-8428

August 7, 1998

The Honorable Brian Rude, President
Wisconsin State Senate
1 East Main, Suite 402
Madison, WI 53702

The Honorable Scott Jensen, Speaker
Wisconsin State Assembly
1 East Main, Suite 402
Madison, WI 53702

Re: Clearinghouse Rule 98-047
HFS 196.03 (22) (e), (f) and (g) and Note, relating to exemption of concession stands at locally sponsored sporting events from being regulated as restaurants.

Gentlemen:

In accordance with the provisions of s. 227.19(2), Stats., you are hereby notified that the above-mentioned rule is in final draft form. This notice and the report required by s. 227.19(3), Stats., are submitted herewith in triplicate.

The rule was submitted to the Legislative Council for review under s. 227.15, Stats. A copy of the Council's report is also enclosed.

If you have any questions about the rule, please contact Edward Rabotski at 266-8294.

Sincerely,

Paul E. Menge
Administrative Rules Manager

cc. Gary Poulson, Deputy Revisor of Statutes
Senator Robert Welch, JCRAR
Representative Glenn Grothman, JCRAR
Edward Rabotski, Division of Health
Thomas Sieger, Division of Health
Kevin Lewis, Secretary's Office

8-7-98

PROPOSED ADMINISTRATIVE RULES - HFS 196.03 (22) (e) to (g) ANALYSIS FOR LEGISLATIVE STANDING COMMITTEES PURSUANT TO S. 227.19 (3), STATS.

Need for Rules

The current Budget Act, 1997 Wisconsin Act 27, effective October 14, 1997, created s. 254.61 (5) (g), Stats., to exempt a concession stand at a "locally sponsored sporting event" from being regulated under ch. HFS 196 as a restaurant. Following enactment of the State Budget, the Department received several inquiries from its own region-based inspectors and local health departments serving as the Department's agents for enforcement of the Department's environmental sanitation rules, including rules for restaurants, about the meaning of "locally sponsored sporting event." What did the term cover? Did it cover food stands at facilities of locally-owned sports franchises? Were these now to be exempt from regulation under the restaurant rules?

This rulemaking order adds the new exemption to the Department's rules for restaurants and, in this connection, defines both "locally sponsored sporting event" and "concession stand." The order makes clear that the exemption refers only to concession stands at sporting events for youth. That interpretation is supported by the statutory phrase, "such as a little league game," that follows the term, "locally sponsored sporting event," in s. 254.61 (5) (g), Stats. The order further narrows the applicability of the exemption by building into the definitions the Department's understanding of who organizes or sponsors an exempt sporting event and on whose behalf a concession stand at the event is operated.

The rule change were made by emergency order effective March 14, 1998. This order makes the rule change permanent.

Responses to Clearinghouse Recommendations

No comments were received from the Legislative Council's Rules Clearinghouse following review of the proposed rules.

Public Hearing

The Department held one public hearing on the proposed rule change. The hearing was in Madison on May 11, 1998. No one presented testimony at the hearing. However, three written comments were received on the proposed change during the public review period that ended a few days after the hearing. The persons who commented on the proposed rule change are the following, with a summary of their comments and the Department's responses:

Commentor	Comment	Department Response
1. Michael Schwartz Port Edwards WI	Change HFS 196.03 (22) (g) from "specifically for youth" to "primarily for youth."	No change. The Department's understanding is that the intent of the statute is to exempt only events for youth.
2. Rep. Marlin D. Schneider Wisconsin Rapids/ Madison WI	Change HFS 196.03 (22) (g) from "specifically for youth" to "primarily for youth" or "predominantly for youth."	No change. The Department's understanding is that the intent of the statute is to exempt only events for youth.
3. Loyce C. Robinson President, Wis Environmental Health Assn(WEPA) Madison WI	Require these organizations to meet at least the same minimum standards as special organizations serving meals.	No change. The statute change clearly exempts these organizations from the restaurant permit requirement.

Following public review the Department modified the proposed rulemaking order by removing the phrase "under the age of 18." This change is in recognition that some youth sporting activities, including interscholastic sports competitions, involve some young people ages 18 and 19 and older. However, the Department remains concerned about the safety of food served to the public and therefore is taking care not to interpret the exemption too broadly. The Department will, to the extent possible, provide technical assistance and basic sanitation training to the newly exempt facilities. Moreover, although the new statute exempts these food service operations from being regulated as restaurants, the Department or a local health department will respond to complaints from the public of unsanitary conditions and inadequate food safety practices in any of these food service operations. If it has reason to believe that an exempt food service operation endangers the health of customers, the Department will take whatever action is necessary under s. 250.04 (1) and (2), Stats., to protect the public's health.

Final Regulatory Flexibility Analysis

This rule change will not affect small businesses as "small business" is defined in s. 227.114 (1) (a), Stats. The rule change implements a statutory change. Section 254.61 (5) (g), Stats., as created by 1997 Wisconsin Act 27, exempts concession stands at locally sponsored sporting events from being regulated as restaurants. The rulemaking order adds the exemption to a list of exempt food service operations in the Department's rules for restaurants, and in the process defines "concession stand" and "locally sponsored sporting event."

PROPOSED ORDER OF THE
DEPARTMENT OF HEALTH AND FAMILY SERVICES
AMENDING AND CREATING RULES

To amend HFS 196.03 (22) (e) and (f) and to create HFS 196.03 (22) (g) and Note, relating to exemption of concession stands at locally sponsored sporting events from being regulated as restaurants.

Analysis Prepared by the Department of Health and Family Services

The current Budget Act, 1997 Wisconsin Act 27, effective October 14, 1997, created s. 254.61 (5) (g), Stats., to exempt a concession stand at a "locally sponsored sporting event" from being regulated under ch. HFS 196 as a restaurant. Following enactment of the State Budget, the Department received several inquiries from its own region-based inspectors and local health departments serving as the Department's agents for enforcement of the Department's environmental sanitation rules, including rules for restaurants, about the meaning of "locally sponsored sporting event." What did the term cover? Did it cover food stands at facilities of locally-owned sports franchises? Were these now to be exempt from regulation under the restaurant rules?

This rulemaking order adds the new exemption to the Department's rules for restaurants and, in this connection, defines both "locally sponsored sporting event" and "concession stand." The order makes clear that the exemption refers only to concession stands at sporting events for youth. That interpretation is supported by the statutory phrase, "such as a little league game," that follows the term, "locally sponsored sporting event," in s. 254.61 (5) (g), Stats. The order further narrows the applicability of the exemption by building into the definitions the Department's understanding of who organizes or sponsors an exempt sporting event and on whose behalf a concession stand at the event is operated.

These rule changes were made by emergency order effective March 14, 1998. This order makes those changes permanent.

The Department's authority to amend and create these rules is found in s. 254.74 (1), Stats. The rules interpret s. 254.61 (5) (g), Stats., as created by 1997 Wisconsin Act 27, as follows:

SECTION 1. HFS 196.03 (22) (e) and (f) are amended to read:

HFS 196.03 (22) (e) Bed and breakfast establishments; ~~or~~

(f) A private individual selling food from a moveable or temporary stand at a public farm sale~~.~~ ; or

SECTION 2. HFS 196.03 (22) (g) is created to read:

HFS 196.03 (22) (g) A concession stand at a locally sponsored sporting event, such as a little league game. In this paragraph, "concession stand" means a food stand which serves meals and is operated exclusively for the benefit of a participating youth sports team or program or the governing youth sports organization, and "locally sponsored sporting event" means a competitive game, taking place inside or outside, specifically for youth, which is organized or sponsored by one or more local business, governmental or other civic organizations, or by parents of the youth, including a school-sponsored interscholastic sports competition.

Note: Examples of locally sponsored sporting events are peewee, midget and little league baseball games, youth soccer games, minicycle races and time trials for youth, youth basketball games, youth football games, track and field competitions for youth, youth hockey tournaments and youth swimming meets.

The rules contained in this order shall take effect on the first day of the month following publication in the Wisconsin Administrative Register, as provided in s. 227.22 (2), Stats.

Wisconsin Department of Health and Family Services

Date:

By: _____
Joseph Leean
Secretary

SEAL: