

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\_pt24b
- Record of Comm. Proceedings ... RCP
-

— JCEAR - HZAR/MS 12/8/98 —



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## JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

### COMMITTEE HEARING

The Joint Committee for Review of Administrative Rules will hold a Public Hearing in Room 415 Northwest of the State Capitol, on the following at the time below:

**Tuesday, December 8, 1998 at 9:00 a.m.**

*The Joint Committee Will Hold a Public Hearing (and may hold an executive session) on the Following:*

**NR 749.04, Wis. Adm. Code** (Emergency Rule) *Relating to the assessment and collection of fees providing assistance on the remediation and redevelopment of contaminated lands. Suspension of the rule may be considered.*

**NR 300.06(2), Wis. Adm. Code.** *Relating to fees for activities related to water regulation. Suspension of the rule may be considered.*

**COMM 83.03, Wis. Adm. Code.** *Relating to the discontinuation of use of privately-owned wastewater treatment systems upon the installation of a public system approved by the DNR.*

**Department of Natural Resources** *Relating to "guidance documents" used by employes of the Department in issuing determinations of navigability of farm ditches pursuant to s. 30.10(4)(c), stats.*

*The Joint Committee Will Hold An Executive Session Only on the Following:*

**ATCP 75.015 (2m) and (2n), Wis. Adm. Code.** *Relating to license and re-inspection fees for retail food establishments. Suspension of the rule may be considered.*

**PECFA** *Pursuant to the motion adopted by the Joint Committee at its executive session on September 16, 1998, the Joint Committee requests the appearance of representatives of the Department of Commerce and the Department of Natural Resources to provide the members with an update on the progress of the Departments in drafting an emergency rule in accordance with the aforementioned motion.*

**Emergency Rule PI 35**

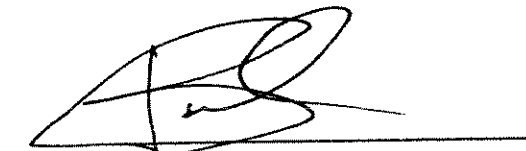
*Relating to the Milwaukee Parental School Choice Program. Extension of the effective period of this emergency rule by 60 days, at the request of the Department of Public Instruction. First Consideration.*

**Emergency Rule PI 38**

*Relating to the peer mentoring and review program. Extension of the effective period of this emergency rule by 60 days, at the request of the Department of Public Instruction. First Consideration.*

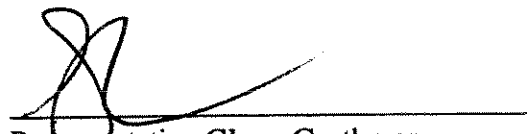
**Emergency Rule HFS 94**

*Relating to random searches of rooms and personal belongings at the Wisconsin Resource Center. Extension of the effective period of this emergency rule by 60 days, at the request of the Department of Health and Family Services.*



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Senator Robert T. Welch  
Senate Co-Chair



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Representative Glenn Grothman  
Assembly Co-Chair

**NR 300.06(2)**

**Water Regulation Fees**

(5) If the department's action on a requested permit or approval is delayed or prevented by an order or decision of a court of law, the time limit specified in s. NR 300.04 shall be adjusted to conform to the court's decision or order.

(6) If the department's action on a requested permit or approval is delayed or prevented by the action or failure to act of an agency or private party other than the department or the applicant, the time limit specified in s. NR 300.04 shall be adjusted accordingly.

History: Cr., Register, October, 1998, No. 514, eff. 11-1-98.

**NR 300.06 Fee processing. (1) FEE REQUIRED.** The department shall charge a fee for permits or approvals. The permit or approval fee shall accompany the permit application or request for approval. Projects funded in whole or in part by any federal agency or state agency or any permits issued under s. 30.12(3)(a)2., 2m. or 3., Stats., are exempt from fees. Except for federal or state agency dam projects, any construction, alteration, change in operation, transfer or abandonment of a dam requires a fee pursuant to s. 31.39(3), Stats.

(2) **BASIC FEES.** For fees charged for permits and approvals under ss. 30.10 to 30.205 and 30.21 to 30.27, 31.02 to 31.185, 31.33 to 31.38, and 281.22, Stats., the department shall classify the types of permits and approvals based on the estimated time spent by the department in reviewing, investigating and making determinations whether to grant the permits or approvals. The fees are established as follows:

(a) For a permit or approval with an estimated time of 3 hours or less, the fee shall be \$50.

(b) For a permit or approval with an estimated time of more than 3 hours but not more than 9 hours, the fee shall be \$300.

(c) For a permit or approval with an estimated time of more than 9 hours, the fee shall be \$500.

(3) **SUPPLEMENTAL FEES.** When the applicant requests in writing that the permit be issued in a shorter time interval than the total time interval allowed in s. NR 300.04, the department shall respond in writing within 20 business days to state whether it can comply with the request. If the request to expedite the permit review is accepted by the department, the applicant shall submit \$2000 in supplemental fees for each expedited permit request which is accepted by the department, in addition to the applicable fees in sub. (2). If the department fails to make a decision on the completed application within the time limits requested, the department shall refund the supplemental fee.

(4) **REFUNDS.** The department shall refund a permit or approval fee if the applicant withdraws the application before the department determines that the application for the permit or approval is complete. The department may not refund a permit or approval fee after the department determines that the application is complete.

(5) **LATE APPLICATION FEE.** If the applicant applies for a permit or requests an approval after the project is begun or after it is completed, the department shall charge an amount equal to twice the amount of the fee that it would have charged under this section.

(6) **MULTIPLE FEES.** If more than one fee is applicable to a project, the department shall charge only the highest fee of those that are applicable.

History: Cr., Register, October, 1998, No. 514, eff. 11-1-98.

# OLD FEES

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## NR 300.04 Fee processing procedures.

(1) Except as set forth herein every applicant for a permit or approval issued by the department shall include with the application the estimated project cost and a check for the amount of the fee required for that cost. An applicant receiving a permit pursuant to s. 31.05 or 31.07, Stats., shall be exempt from fee payment for approval of plans pursuant to s. 31.12, Stats.

(2) In determining estimated project cost, the applicant shall include both structural and nonstructural costs, such as, but not limited to the following costs. Municipalities shall estimate costs on the basis of total hourly rates and total hours when municipal equipment and labor are utilized.

- (a) Technical costs (i.e. surveying or architectural and engineering design),
- (b) Material costs (i.e. lumber, steel, concrete, riprap, pumps, pipes, sprinklers, etc.),
- (c) Labor costs,
- (d) Construction equipment rental or fees,
- (e) Monitoring costs required by permit or approval,
- (f) Landscaping costs required to prevent or minimize erosion,
- (g) Other costs necessary to complete the project.

(3) Certification of the estimated project cost shall be done on forms furnished by the department. An itemized list of estimated project costs need not be submitted if the applicant certified that the project cost will be in excess of \$10,000.

(4) The fee charged for permits and approvals includes a basic fee of \$10 per permit or approval plus a single supplemental fee based upon the estimated project cost according to the following schedule:

- (a) Five dollars for projects from \$1 to \$500.99 in value.
- (b) Ten dollars for projects from \$501 to \$2000.99 in value.
- (c) Twenty dollars for projects from \$2001 to \$5000.99 in value.
- (d) Fifty dollars for projects from \$5001 to \$10,000.99 in value.
- (e) Sixty-five dollars for projects in excess of \$10,000.99 in value.

(5) Upon receipt of the estimated project cost, the department shall evaluate the cost figure and supporting information. Processing of the permit or approval application shall not commence until an acceptable fee has been established and paid.

(6) If the applicant withdraws the application for any reason or should the permit or approval be denied, the department shall refund the fee submitted with the application.

(7) Payment of a fee to the department shall not be construed to imply department consent or approval of the proposed project or limit department regulatory or enforcement authority.

*History: Cr. Register, March, 1978, No. 267, eff. 4-1-78.*

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**NR 300.05 Severability. (Repealed)**

*History: Cr. Register, March, 1978, No. 267, eff. 4-1-78; r. under s. 13.93 (2m) (b) 16., Stats., Register, October, 1995, No. 478.*

**CHAPTER NR 301. RELATIONSHIP OF WATER  
REGULATION ENFORCEMENT AND PERMIT  
PROCEEDINGS**

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**NR 301.01 Purpose.**

The purpose of this chapter is to provide a uniform statewide procedure for the processing of enforcement actions for violations of chs. 30, 31 and 88, Stats., when after-the-fact permit applications have been filed by the alleged violator to legalize the activity. It is the natural resources board's policy to encourage timely permit applications so as to permit the department to properly review projects in order to discourage persons from engaging in activities affecting the waters of the state without obtaining prior approval when required by law.

*History: Cr. Register, April, 1977, No. 256, eff. 5-1-77.*



## **Comm 83.03**

# **Privately-Owned Wastewater Treatment Systems - At The Request of Rep. Gunderson**



# Scott Gunderson



Wisconsin State Legislature  
83rd Assembly District Representative

September 11, 1998

Senator Robert Welch  
Co-Chairman JCRAR  
1 East Main Street, Room 201

Representative Glenn Grothman  
Co-Chairman JCRAR  
125 West State Capitol

Re: Hearing request for Commerce Rule 83.03

Dear Senator Welch and Representative Grothman,

I would like to request a hearing by the Joint Committee for Review of Administrative Rules on Commerce Rule 83.03. Under the current rule, when public sewers approved by the Department of Natural Resources become available to a household, the use of a private sewage system must be discontinued.

Many homeowners have incurred great expenses installing their private septic systems, only to have a sanitary district annex the surrounding land. After public sewers become available, the homeowner has one year to disconnect his private sewage system, and connect to the public system. This rule is enforced upon the homeowner regardless of the age or operating condition of the private system. The private sewer systems can still in fine working condition never having experienced a malfunction, but the system still must be disconnected.

I feel it is in our best interest to address this issue because it will continue to gain in importance in the years to come. As rural subdivisions continue to be developed and our state's communities continue their outward growth, the current Commerce Rule will cause problems. I lookforward to hearing your response.

Sincerely,

Representative Scott Gunderson  
83<sup>rd</sup> District  
Wisconsin State Assembly

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**Comm 83.03 Approvals and limitations.**

(1) Allowable use. Septic tank and effluent absorption systems or other treatment tank and effluent disposal systems as may be approved by the department may be constructed when no public sewerage system is available to the property to be served. Unless specifically approved by the department, the private sewage system of each building shall be entirely separate from and independent of that of any other building. A private sewage system may be owned by the property owner or by a special purpose district. The use of a common system or a system on a different parcel than the structure will be subject to the same plan review procedures as for systems serving public buildings.

(2) Public sewer connection. When public sewers approved by the department of natural resources become available to the premises served, the use of the private sewage system shall be discontinued within that period of time required by order, but not to exceed one year. The building sewer shall be disconnected from the private sewage system and be connected to the public sewer. All abandoned treatment tanks and seepage pits shall have the contents pumped and disposed of in accordance with ch. NR 113, Wis. Adm. Code. The top or entire tank shall be removed and the remaining portion of the tank or excavation shall be immediately filled with suitable soil material.

(3) Failing system. When a failing or malfunctioning private sewage system is encountered, the sewage disposal system shall be corrected or its use discontinued within that period of time required by county or departmental order, with a maximum time limit of one year.

*History: Cr. Register, December, 1980, No. 300, eff. 1-1-81; renum. from H 63.03, Register, June, 1983, No. 330, eff. 7-1-83.*

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**Comm 83.035 Petitions for variance.**

The department shall consider a petition for a variance to a rule of this chapter in accordance with ch. ILHR 3. The department shall grant a variance provided an equivalency to the intent of the specific rule can be established.

Note: The department cannot grant a petition for an issue which is also specifically covered by the statutes; for example, a petition to waive the requirement to obtain a sanitary permit to install a new private sewage system.

Note: As a result of a court action, s. Comm 83.035 was prevented from taking effect on June 1, 1996. Prior to June 1, 1996, s. Comm 83.035 did not exist.

*History: Cr. Register, May, 1996, No. 485, eff. 6-1-96.*

SS.  
60.726

**ATCP 75.015(2m)**

**License and Reinspection Fees  
for Retail Food  
Establishments**



P.O. Box 7882  
MADISON, WI 53707-7882  
(608) 266-0751

P.O. Box 8952  
MADISON, WI 53708-8952  
(608) 264-8486

**JOINT COMMITTEE FOR  
REVIEW OF ADMINISTRATIVE RULES**

# Backgrounder

**To:** Joint Committee for Review of Administrative Rules  
**Date:** December 4, 1998  
**Re:** Food and Dairy License Fees

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**Description of the Rule**

The Department of Agriculture, Trade, and Consumer Protection is charged with the responsibility of inspecting food processing plants and retail establishments to assure that handling and other standards are being met. This is ostensibly done to protect the consumer from food-borne illness. The Department recently increased fees for the initial licensure and follow-up inspections of processing plants, retail food establishments, and food warehouses via Clearinghouse Rule 97-038. The rule package also continues the current practice of allowing local units of government to contract with the Department to provide the inspections and to set fees at any amount, with 20% of the amount of the state fee to be remitted by the local unit of government to the Department for each inspection completed.

Materials produced by the Department provide justification for the fee increases in two major ways:

- *The fees have not been increased since 1991:* The Department claims that inflationary pressures on staff salaries, transportation, and other expenses necessitate a revenue increase.
- *GPR support for these inspections has decreased:* The 1995-97 Budget decreased general fund support for the Department. The ratio of GPR support to program revenue support for the inspection programs also changed, such that GPR support of the total cost decreased from 60 percent to 50 percent. The Department claims, therefore, that its inspection program is running a deficit and needs additional revenue to remain solvent.

The Joint Committee for Review of Administrative Rules is hearing public testimony on the justification for these fee increases from the agency, as well as on the impact of the increases on the regulated industry. The notice for this hearing specifies that the Joint Committee will concentrate on the fee increases imposed upon the retail food industry.

125 - 107 = rest. fee  
 49.55 (increase)  
 rest.

Fee Increases

The fee increases which are the focus of this hearing are as follows:

Retail Food Establishment - Annual License Fees		
Sales of at least \$25,000 but less than \$1,000,000 and processes potentially hazardous food	\$90	\$175
Sales of at least \$1,000,000 and processes potentially hazardous food	\$210	\$450
Sales of at least \$25,000 and is engaged in the processing of food which is not potentially hazardous	\$80	\$125
Sales of less than \$25,000 and is engaged in processing of food which is not potentially hazardous	\$40	\$60
All retail food sellers not engaged in food processing of any kind	\$20	\$30
Retail Food Establishment - Annual Reinspection Fees		
Sales of at least \$25,000 but less than \$1,000,000 and processes potentially hazardous food	\$60	\$125
Sales of at least \$1,000,000 and processes potentially hazardous food	\$140	\$300
Sales of at least \$25,000 and is engaged in the processing of food which is not potentially hazardous	\$80	\$125
Sales of less than \$25,000 and is engaged in processing of food which is not potentially hazardous	\$40	\$60
All retail food sellers not engaged in food processing of any kind	\$50	\$60

9.65%

23.1%

28%

50%

518.6 - 715.5

56% inc.

### History of the Rule

- 1991-1993 Biennial Budget Act: The fee structure as it stood before 2/1/98 was put into effect (the "fee before increase" column in the grids above.)
- March 14, 1997: The initial draft of the rule package is transmitted to the Rules Clearinghouse for review.
- April 11, 1997: The package, now entitled Clearinghouse Rule 97-038, is sent back to the agency by the Clearinghouse.
- April 18, 1997: Department Public Hearing on the proposed rule held in Milwaukee.
- April 22, 1997: Department Public Hearing on the proposed rule held in Appleton.
- April 23, 1997: Department Public Hearing on the proposed rule held in Eau Claire.
- April 28, 1997: Department Public Hearing on the proposed rule held in Madison.
  - Over the course of four public hearings, the Department received comments from 25 persons and organizations, all opposed to the fee increases. Some called for a shift in the fee burden to others in the industry (some dairy processors called for grocers to pay higher fees, for instance.) The majority suggested cuts in the Department of Agriculture and the elimination of staff. One suggested that Department staff "spend less time per inspection, work longer, get paid less, less vacation, less sick days, and fewer holidays."
- August 25, 1997: The proposed final draft of the rules is approved by the Secretary of the Department.
- September 16, 1997: The proposed rule is sent to the presiding officer of each house.
- September 18, 1997: Senate President Risser refers the proposed rule to the Senate Committee on Agriculture and Environmental Resources. The chair is Sen. Alice Clausing.
  - **Senate Action**
    - October 20, 1997: No action taken. Rule returned to agency.
- September 23, 1997: Speaker Brancel refers the proposed rule to the Assembly Committee on Agriculture. The chair is Rep. Al Ott.
  - **Assembly Action**
    - October 22, 1997: Public Hearing Scheduled (30-day review period extended)
    - November 13, 1997: Public Hearing Held:
      - All members of the committee were present
      - Three persons appeared in support of the rule. These were Steve Steinhoff of DATCP, John Manske of the Federation of Cooperatives, and Brad Legreid of the Wisconsin Dairy Products Association.
      - Six person appeared in opposition to the bill, including representatives of the Roundy's corporation, the Midwest Food Processors, Copps, and the Wisconsin Grocers.

- One person, a representative of the Wisconsin Association of Convenience Stores, registered in opposition to the legislation.
- November 24, 1997: Rule is reported out of committee with no action taken. Returned to agency for promulgation.
- February 1, 1998: Rule becomes effective.



Units of Government Which Contract with DATCP To Perform Their Own Inspections of Food Retailers

**Appleton Health Department**  
100 N. Appleton  
Appleton, WI 54911  
414 832 6429  
414 832 5853 FAX  
Nancy Westphal  
Internet: Nancy Westphal  
(west102w@wonder.em.cdc.gov@inet@lmbgr)

**Beloit Health Department**  
100 State St.  
Beloit, WI 53511  
608 364-6635  
608 364-6609 FAX  
Jackie Phillips

**Brown County Health Dept.**  
6105 Broadway St  
PO Box 23600  
Green Bay, WI 54305-3600  
414 448 6400  
414 448 6449 FAX  
John Paul  
Judy Friederichs

**Dane County Health Department**  
1202 Northport Dr. Rm 154  
Madison, WI 53704 2088  
608 242-6515  
608 242-6256 FAX  
James Clark

**Fau Claire Health Department**  
720 Second Ave.  
Fau Claire, WI 54703  
715 839-4718  
715 839-4854 FAX  
Darryll Farmer

**Greenfield Health Department**  
7325 W. Forer Home Ave  
Greenfield, WI 53220  
414 543-5500 EXT 6  
414 543-8579 FAX  
Carol Skierka, RN  
Internet: Mary Kapelis  
(skiel00w@wonder.em.cdc.gov@inet@lmbgr)

**Kenosha County Health Dept.**  
714 52nd st.  
Kenosha, WI 53140  
414 605-6700  
414 605-6715 FAX  
Randy Wergin

**LaCrosse County Health Dept.**  
300 N. Fourth  
LaCrosse, WI 54601  
608 785-9771  
608 785-9846 FAX  
Ron Berg  
Internet: Ron Berg  
(berg105w@wonder.em.cdc.gov@inet@lmbgr)

08/01/97

**Madison Health Department**  
City County Bldg.  
215 Martin Luther King Jr.  
Madison, WI 53710  
608 266-4821  
608 266-5948 FAX  
Jim Steinhoff

**Marathon County Health Dept.**  
1200 Lakeview Dr.  
Wausau, WI 54401  
715 848-9060  
715 848-7160 FAX  
Tom Wittkopf  
Internet: Tom Wittkopf  
(mill109w@wonder.em.cdc.gov@inet@lmbgr)

**Menasha Health Department**  
140 Main st.  
Menasha, WI 54952 3190  
414 751-5119  
414 751-5273 FAX  
Sue Nett, RN

**Milwaukee Health Department**  
Municipal Bldg.  
841 N. Broadway  
Milwaukee, WI 53202  
414 286-3674  
414 286-5164 FAX  
Loyce Robinson  
Internet: Gregory Carmichael  
(gcarmich@omni.fest.uwm.edu@inet@lmbgr)

**Outagamie County Health Dept.**  
401 South Elm Street  
Appleton, WI 54911  
414 832-5100  
414 832-4924 FAX  
Don Day

**Waukesha County Department of Parks and Land Use**  
Division of Environmental Health  
1320 Pewaukee Rd., Rm 260  
Waukesha, WI 53188  
414 896-8300  
414 896-8298 FAX  
George Morris

**West Allis Health Department**  
7120 W. National Ave  
West Allis, WI 53214  
414 302-8657  
414 302-8628 FAX

CITY / CA  
LICENS  
AGENTS

Michelle  
244-00

ATCP 75.015 (2m)(a) - (e); 75.15 (2n) (a) and (b), 1-5 **Relating to fees charged to retail food establishments for annual licensing and re-inspection. Public hearing requested by the Wisconsin Grocers Association.**

March 31, 1998

**PUBLIC HEARING HELD**

Present: (9) Representatives Grothman, Gunderson, Seratti, R. Young, and Kreuser; Senators Grobschmidt, Potter, Welch, and Schultz.

Absent: (1) Senator George

Appearances for the Rule

- None

Appearances Against the Rule

- Rep. Tom Springer, 86<sup>th</sup> Assembly District
- Rep. Gregg Underheim, 54<sup>th</sup> Assembly District
- Rep. Dave Ward, 37<sup>th</sup> Assembly District
- John H. Damman, Stevens Point (Copps Corp.)
- Kent Burnstad, Tomah (Burnstad Supermarkets)
- Steve Diehlmann, Janesville (Palan Foods)
- Brian Conrad, Lake Mills (Wis. Grocers Assoc.)
- Penny Pederson, Sun Prairie (Wis. Grocers Assoc.)
- Michael Lannoy, Waterloo (Piggly Wiggly)

Registrations For the Rule

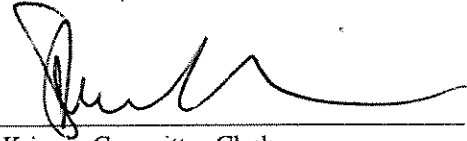
- None

Registrations Against the Rule

- Jeff Lasczewski, Milwaukee (Sentry - Lake Geneva)
- Michelle Kussow, Lobbyist, Wis. Grocers Assoc.
- Rep. Dave Brandemuehl, 49<sup>th</sup> Assembly District
- Mike Qualheim, Manitowoc (ABC Supermarket)
- David Ring, La Crosse (Reinhart Corp.)
- Mary Lou Baryenbruch, Spring Green (Hometown)
- Jerome Baryenbruch, Spring Green (Hometown)
- Dave Kotwitz, Edgerton (Piggly Wiggly)
- Tom Warta, Oak Creek (Aldi, Inc.)
- Jennifer Badeau, Lobbyist, WI Assoc. Of Convenience Stores.
- Mike Kniffin, Roundy's, Inc.

Appearances for Information Only

- Steve Steinhoff, DATCP



Steven Krieser, Committee Clerk

1981  
1982

*Terms Database*

**DNR**

**Guidance Documents Used By  
DNR Employees for  
Navigability Determinations**

*300-500*

# STATUTES

## **30.10 Declarations of navigability.**

**(1) Lakes.** All lakes wholly or partly within this state which are navigable in fact are declared to be navigable and public waters, and all persons have the same rights therein and thereto as they have in and to any other navigable or public waters.


**(2) Streams.** Except as provided under sub. (4) (c), all streams, sloughs, bayous and marsh outlets, which are navigable in fact for any purpose whatsoever, are declared navigable to the extent that no dam, bridge or other obstruction shall be made in or over the same without the permission of the state.

**(3) Enlargements or improvements in navigable waters.** All inner harbors, turning basins, waterways, slips and canals created by any municipality to be used by the public for purposes of navigation, and all outer harbors connecting interior navigation with lake navigation, are declared navigable waters and are subject to the same control and regulation that navigable streams are subjected to as regards improvement, use and bridging.

### **(4) Interpretation.**

(a) This section does not impair the powers granted by law under s. 30.123 or by other law to municipalities to construct highway bridges, arches or culverts over streams.

(b) The boundaries of lands adjoining waters and the rights of the state and of individuals with respect to all such lands and waters shall be determined in conformity to the common law so far as applicable, but in the case of a lake or stream erroneously meandered in the original U.S. government survey, the owner of title to lands adjoining the meandered lake or stream, as shown on such original survey, is conclusively presumed to own to the actual shorelines unless it is first established in a suit in equity, brought by the U.S. government for that purpose, that the government was in fact defrauded by such survey. If the proper claims of adjacent owners of riparian lots of lands between meander and actual shorelines conflict, each shall have his or her proportion of such shorelands.

 (c) Notwithstanding any other provision of law, farm drainage ditches are not navigable within the meaning of this section unless it is shown that the ditches were navigable streams before ditching. For purposes of this paragraph, "farm drainage ditch" means any artificial channel which drains water from lands which are used for agricultural purposes.

**History:** 1977 c. 190, 272, 418; 1981 c. 339; 1991 a. 316.

*Where there are 2 owners of land adjacent to a disputed parcel erroneously meandered under sub. (4) the judge is to divide the parcel proportionately on an equitable, but not necessarily equal, basis. Kind v. Vilas County, 56 W (2d) 269, 201 NW (2d) 881.*

*The DNR properly considered the existence of beaver dams and ponds and the periods of high water caused by spring runoffs in determining the navigability of the creek, since the dams and ponds were normal and natural to the stream, and the periods of high water were of a regularly recurring annual nature. DeGayner & Co. v. DNR, 70 W (2d) 936, 236 NW (2d) 217.*

*Where an error in survey results in a lot on a meandered lake being divided by lake, common law rule that an owner of land on a meandered lake takes only to the actual shoreline controls. Thus, an owner does not have a "proper claim" to the isolated parcel, making sub. (4) (b) inapplicable. Parcels separated by lake are not "adjacent" under sub. (4) (b). Bd. of Public Lands v. Thiel, 82 W (2d) 276, 262 NW (2d) 522.*

*A department declaration of navigability subjecting private property to sub. (1) was a taking. Zinn v. State, 112 W (2d) 417, 334 NW (2d) 67 (1983).*

*The DNR has the authority, as well as the obligation, to determine whether the waters of the state are navigable in fact and subject to regulation under ch. 30, another agency's prior ancillary finding to the contrary notwithstanding. Turkow v. DNR, 216 W (2d) 272, 576 NW (2d) 288 (Ct. App. 1998).*

*This chapter applies to navigable ditches that were originally navigable streams. If a navigable ditch was originally nonnavigable or had no previous stream history, the department's jurisdiction depends upon the facts of each situation. 63 Atty. Gen. 493.*

*Erroneously meandered lakeshore - the status of the law as it affects title and distribution. 61 MLR 515.*

*The Muench case: A better test of navigability. Edwards, 1957 WLR 486.*

**30.103 Identification of ordinary high-water mark by town sanitary district.** A town sanitary district may identify the ordinary high-water mark of a lake that lies wholly within unincorporated territory and wholly within the town sanitary district. The department may not identify an ordinary high-water mark of a lake that is different than the ordinary high-water mark identified by a town sanitary district under this section.

**History:** *1997 a. 237.*

**30.105 Determining footage of shoreline.** In determining footage of shoreline for purposes of s. 30.50 (4q), 30.77 (3) (ac), (ae) and (am) and 60.782 (2), towns, villages, cities, public inland lake protection and rehabilitation districts and town sanitary districts shall measure by use of a map wheel on the U.S. geological survey 7 1/2 minute series map.

**History:** *1995 a. 152 s. 9; 1995 a. 349 s. 11.*

Date: August 20, 1990

IN REPLY REFER TO: 3550

To: District Directors

PMMS Response  
Insertion: Chapter 30 Water  
Regulation Handbook

From: Robert Roden - WZ/6



Distribution: WRZ Program Staff

Subject: Navigability Determinations

We have been asked several questions regarding navigability determinations related to the following situation: In 1977 several Department employees determined a portion of a stream to be non-navigable. Since then the landowner channeled the stream and placed fill into adjoining wetlands and the floodplain. This action confined the flow to a channel estimated to average 3 feet deep and 3 feet wide, and observed (not proven) navigable during high water periods. This situation raises the following questions:

1). Q: May we now declare the stream navigable and assert Chapter 30 jurisdiction over future projects.

A: Two factors come into play in reaching an answer to this question. The first factor is the navigability standard in use at the time of the past determination of non-navigability. In this case the standard used is that of the most recent applicable Supreme Court Decision found in DeGayner & Company Inc., v. Department of Natural Resources, 70 Wis. 2d 936 (1975). Therefore, in this situation the question of navigability is based on the current standard and results in a proper determination that the stream was non-navigable. If, however, a past determination of non-navigability was based on pre-DeGayner standards it may be possible to prove, using DeGayner standards, that the stream is now navigable and subject to Chapter 30 jurisdiction for future projects.

The second factor to be considered is the applicability of the navigability standard based on s. 30.10, Wis. Stats. In 1981 s. 30.10, Wis. Stats. was amended to exclude "farm drainage ditches" from navigable waters unless it is shown the ditches were navigable streams before ditching occurred. Therefore, if the above situation involves an artificial channel which drains water from lands which are used for agricultural purposes and the past determination of non-navigability was based on the DeGayner standards the farm drainage ditch exclusion would apply and the stream would not be subject to our jurisdiction in the future even though it could be proven to now be navigable-in-fact. If, however, this situation does not involve a farm drainage ditch and a determination can be made using DeGayner standards that it is now navigable we could assert jurisdiction over future projects.

A: Normal permit and/or enforcement procedures should be used for future projects that are considered navigable using DeGayner standards and do not involve farm drainage ditches. For future projects involving farm drainage ditches we will have the additional burden of proving that there was a previous history of navigability based on DeGayner. In cases where we have advance notice of proposed projects that would be subject to our jurisdiction we should notify the project proponent in writing of our position and advise them to apply for the applicable permits.

3). Q: May we apply Chapter 30 jurisdiction to past projects?

A: Asserting jurisdiction over past projects may be possible if we can prove that the stream was navigable at the time the project was constructed using the navigability standards that were in place at that time. If the stream was considered non-navigable at the time of construction we would not have jurisdiction over past projects even though the stream is considered navigable now. However, we would have jurisdiction over future projects.

4). Q: May we assert any floodplain jurisdiction over past or future projects? The stream in this situation is not mapped.

A: Yes. Although the area in this situation is not mapped, if any future channel modifications affect other property owners appropriate legal arrangements are required. Further detailed guidance for areas that are mapped and/or studied is included in a previous program guidance listed below. For past projects in unmapped or unstudied areas where we have Chapter 30 jurisdiction as outlined above, we can also assert floodplain jurisdiction where appropriate.

Related Guidance: December 9, 1988 from Bob Roden, Chapter 80, Water Regulation Handbook and Chapter 3, Floodplain/Shoreland Guidebook

Requested by: Dale Lang- NCD

Drafted by: John Coke- WZ

Reviewed by: Scott Hausmann - WZ/6 *SH*  
Larry Larson - WZ/6 *LC*  
Mike Cain - LC/5 *mic*



Therefore, since 1911 it is no longer necessary in determining navigability of streams to establish a past history of floating of logs, or other use of commercial transportation, because any stream is "navigable in fact" which is capable of floating any boat, skiff, or canoe, of the shallowest draft used for recreational purposes.

The court apparently felt that the 1911 amendment's addition of the words "navigable in fact for any purpose whatsoever" provided the basis for its conclusion that the definition of navigability had been broadened.

The most recent "guidance" on how navigability is determined is found in DeGayner & Company Inc., v. Department of Natural Resources, 70 Wis. 2d 936 (1975). While the case basically restated Olson v. Spitt, supra, the following major principles of law were set forth or reaffirmed by the Court:

1. "A stream need not, however, be in its 'normal or natural condition' when navigability is determined." The Court states throughout its decision that navigability may be determined during recurring periods of high water such as spring floods. The Court approved the Department order's assessment that periods of high water of a regularly recurring annual nature were sufficient to declare Five Mile Creek navigable-in-fact.
2. The Court concurred with the Department order's conclusion that the existence of beaver and their dams on Five Mile Creek was a "normal and natural" condition of Five Mile Creek. The facts established the presence of beaver for at least thirty-seven years. Also while individual dams did not remain intact for more than a few years, the evidence established that the beaver constantly built and rebuilt dams in the stream. The Court concluded that the existence of beaver on the stream was not transitory.
3. Regardless of whether the beaver dams were a natural condition, the Court approved the lower court conclusion that it is irrelevant whether the circumstances creating navigability are natural or artificial. Citing several cases the Court stated: "(+)his court has frequently held that, where artificial conditions create navigability, the stream is navigable in fact where such conditions have existed for a period of time."

In recent years the legislature has taken several actions which attempt to limit our jurisdiction on certain waterways. The actions did not attempt to redefine navigability but only attempted to exclude certain waters which are navigable from our authority to regulate.

Because of farmers' concern over obtaining dredging permits, the 1977 Legislature amended Section 30.10(4), Wis. Stats., to limit Department jurisdiction over drainage ditches in organized drainage districts. The legislature declared all such ditches not navigable insofar as the application of Chapter 30, except where it could be shown that the ditches were navigable streams before ditching or had a previous stream history. However, in deciding State of Wisconsin v. Francis Oyer, 91 Wis. 2d (Ct. App.) 440 (1979), the court said that a dredging permit was needed in any stream - navigable or not.

Most recently, the legislature (1981) amended Section 30.10, Wis. Stats., to change the definition of navigability of farm drainage ditches. The 1977 subsection (30.10(4)(c)) applied only to drainage ditches in drainage districts established under Chapter 88, Wis. Stats. The present subsection applies to any farm drainage ditch regardless of whether or not it is in a drainage district. It also states that farm drainage ditches are not navigable unless they are shown to have been navigable streams "before ditching." The former version of the law allowed the Department to declare a drainage ditch navigable if it had a previous stream history (navigable or nonnavigable). Chapter 120 on dredging provides further details.

#### OWNERSHIP OF STREAM AND LAKE BEDS

Determination of ownership of a streambed or lakebed may have various consequences. In Wisconsin the beds of streams, whether navigable or nonnavigable, are owned to the middle or thread of the stream by the owners of the adjacent shorelands. Beds of natural navigable lakes are owned by the State (Bigsby v. Parish, 148 Wis. 421 (1912)). Private ownership of the bed of a navigable stream has always been subject to the overriding public right of navigation and to other public rights in navigable waters. (Munninghoff v. Wisconsin Conservation Commission, 255 Wis. 252 (1949)). The Wisconsin Supreme Court has repeatedly used strong language to underline its support of the public rights in navigable waters.

The ownership of the bed underlying a man-made lake or reservoir formed by damming a stream or otherwise impounding a natural flow of water remains in the hands of the abutting landowner unless it was purchased. Even though a lake now exists, bed ownership is determined as though the previous existing stream still remains. The public has the same rights in a flowage as it does in a navigable stream.

SENATOR ROBERT T. WELCH  
CO-CHAIRMAN



REPRESENTATIVE GLENN GROTHMAN  
CO-CHAIRMAN

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## JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

### *Attendance Form*

*Last Modified July 1998*

Date \_\_\_\_\_ Accounting for:  Public Hearing  Executive Session

Location \_\_\_\_\_

COMMITTEE MEMBER	PRESENT	ABSENT	EXCUSED
1. Senator WELCH	/		
2. Senator DARLING		/	
3. Senator HUELSMAN	/		
4. Senator GROBSCHMIDT	/		
5. Senator BRESKE		/	
6. Representative GROTHMAN	/		
7. Representative GUNDERSON	/		
8. Representative SERATTI	/		
9. Representative YOUNG	/		
10. Representative KREUSER	/		
Totals			

\_\_\_\_\_  
Steven Krieser, Committee Clerk

SENATOR ROBERT T. WELCH  
CO-CHAIRMAN



REPRESENTATIVE GLENN GROTHMAN  
CO-CHAIRMAN

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## JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

### *Attendance Form*

*Last Modified July 1998*

Date \_\_\_\_\_ Accounting for:  Public Hearing  Executive Session

Location \_\_\_\_\_

COMMITTEE MEMBER	PRESENT	ABSENT	EXCUSED
1. Senator WELCH			
2. Senator DARLING			
3. Senator HUELSMAN			
4. Senator GROBSCHMIDT			
5. Senator BRESKE			
6. Representative GROTHMAN			
7. Representative GUNDERSON			
8. Representative SERATTI			
9. Representative YOUNG			
10. Representative KREUSER			
Totals			

\_\_\_\_\_  
Steven Krieser, Committee Clerk



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## JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

### *Motion Form*

*Last Modified September 1998*

Date: December 8, 1998

Location: Room 415 Northwest, State Capitol

Moved by \_\_\_\_\_, Seconded by \_\_\_\_\_

THAT, pursuant to s. 227.26 (2)(d), stats., and for the reason set forth in s. 227.19 (4)(d)4 and 6, the Joint Committee for Review of Administrative Rules suspend emergency rule NR 749.04 in its entirety, including the table entitled "TABLE 1- FEE SCHEDULE." It is the judgment of the Joint Committee that this rule does not meet the test of "preservation of the public peace, health, safety or welfare" test necessary for the promulgation of emergency rules under s. 227.24 (1)(a), stats. The Joint Committee further finds that the imposition of the fees contained in the above-cited rule was arbitrary and capricious.

COMMITTEE MEMBER	Aye	No	Absent
1. Senator WELCH			
2. Senator DARLING			
3. Senator HUELSMAN			
4. Senator GROBSCHMIDT			
5. Senator BRESKE			
6. Representative GROTHMAN			
7. Representative GUNDERSON			
8. Representative SERATTI			
9. Representative YOUNG			
10. Representative KREUSER			
Totals			

Motion Carried

Motion Failed



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## JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

### *Motion Form*

*Last Modified September 1998*

Date: December 8, 1998

Location: Room 415 Northwest, State Capitol

Moved by \_\_\_\_\_, Seconded by \_\_\_\_\_

THAT, pursuant to s. 227.26 (2)(d), stats., and for the reason set forth in s. 227.19 (4)(d) 6, the Joint Committee for Review of Administrative Rules suspend the last "0" in NR 300.06(2)(a); the last "0" in NR 300.06(2)(b); and the last "0" in NR 300.06(2)(c).

COMMITTEE MEMBER	Aye	No	Absent
1. Senator WELCH			
2. Senator DARLING			
3. Senator HUELSMAN			
4. Senator GROBSCHMIDT			
5. Senator BRESKE			
6. Representative GROTHMAN			
7. Representative GUNDERSON			
8. Representative SERATTI			
9. Representative YOUNG			
10. Representative KREUSER			
Totals			

Motion Carried

Motion Failed



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## JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

### *Motion Form*

*Last Modified September 1998*

Date: December 8, 1998

Location: Room 415 Northwest, State Capitol

Moved by \_\_\_\_\_, Seconded by \_\_\_\_\_

THAT, pursuant to s. 227.26 (2)(d), stats., and for the reason set forth in s. 227.19 (4)(d) 6, the Joint Committee for Review of Administrative Rules suspend COMM 83.03(2). - 1ST 2 SEN.

COMMITTEE MEMBER	Aye	No	Absent
1. Senator WELCH	/		
2. Senator DARLING			
3. Senator HUELSMAN	/		
4. Senator GROBSCHMIDT			
5. Senator BRESKE			
6. Representative GROTHMAN	/		
7. Representative GUNDERSON	/		
8. Representative SERATTI	/		
9. Representative YOUNG	/		
10. Representative KREUSER	/		
Totals			

Motion Carried

Motion Failed



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## JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

### *Motion Form*

*Last Modified September 1998*

Date: December 8, 1998

Location: Room 415 Northwest, State Capitol

Moved by \_\_\_\_\_, Seconded by \_\_\_\_\_

THAT, pursuant to s. 227.26 (2)(b), stats., the Joint Committee for Review of Administrative Rules requires that the Department of Natural Resources promulgate as an emergency rule, within 30 days, all guidance documents published by the agency that provide direction to agency staff on the determination of navigability of farm drainage ditches.

COMMITTEE MEMBER	Aye	No	Absent
1. Senator WELCH			
2. Senator DARLING			
3. Senator HUELSMAN			
4. Senator GROBSCHMIDT			
5. Senator BRESKE			
6. Representative GROTHMAN			
7. Representative GUNDERSON			
8. Representative SERATTI			
9. Representative YOUNG			
10. Representative KREUSER			
Totals			

Motion Carried

Motion Failed



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## JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

### *Motion Form*

*Last Modified September 1998*

Date: December 8, 1998

Location: Room 415 Northwest, State Capitol

Moved by \_\_\_\_\_, Seconded by \_\_\_\_\_

THAT, pursuant to s. 227.26 (2)(b), stats., and for the reason set forth in s. 227.19 (4)(d) 6, the Joint Committee for Review of Administrative Rules suspend ATCP 75.015 (2m) in its entirety.

COMMITTEE MEMBER	Aye	No	Absent
1. Senator WELCH			
2. Senator DARLING			
3. Senator HUELSMAN			
4. Senator GROBSCHMIDT			
5. Senator BRESKE			
6. Representative GROTHMAN			
7. Representative GUNDERSON			
8. Representative SERATTI			
9. Representative YOUNG			
10. Representative KREUSER			
Totals			

Motion Carried

Motion Failed





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## JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

### *Emergency Rule Extension Motion Form*

*Last Modified September 1998*

Date: December 8, 1998

Location:

Room 415 Northwest

Moved by \_\_\_\_\_, Seconded by \_\_\_\_\_

THAT, pursuant to s. 227.24(2)(a), stats., the Joint Committee for Review of Administrative Rules extend the effective period of emergency rule PI 35 by 60 days, at the request of the Department of Public Instruction.

COMMITTEE MEMBER	Aye	No	Absent
1. Senator WELCH			
2. Senator DARLING			
3. Senator HUELSMAN			
4. Senator GROBSCHMIDT			
5. Senator BRESKE			
6. Representative GROTHMAN			
7. Representative GUNDERSON			
8. Representative SERATTI			
9. Representative YOUNG			
10. Representative KREUSER			
Totals			

Motion Carried

Motion Failed



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## JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

### *Emergency Rule Extension Motion Form*

*Last Modified September 1998*

Date: December 8, 1998

Location: Room 415 Northwest

Moved by \_\_\_\_\_, Seconded by \_\_\_\_\_

THAT, pursuant to s. 227.24(2)(a), stats., the Joint Committee for Review of Administrative Rules extend the effective period of emergency rule PI 38 by 60 days, at the request of the Department of Public Instruction.

COMMITTEE MEMBER	Aye	No	Absent
1. Senator WELCH			
2. Senator DARLING			
3. Senator HUELSMAN			
4. Senator GROBSCHMIDT			
5. Senator BRESKE			
6. Representative GROTHMAN			
7. Representative GUNDERSON			
8. Representative SERATTI			
9. Representative YOUNG			
10. Representative KREUSER			
Totals			

Motion Carried

Motion Failed



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## JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

### *Emergency Rule Extension Motion Form*

*Last Modified September 1998*

Date: December 8, 1998

Location: Room 415 Northwest

Moved by Welch, Seconded by Bundgen

THAT, pursuant to s. 227.24(2)(a), stats., the Joint Committee for Review of Administrative Rules extend the effective period of emergency rule HFS 94 by 60 days, at the request of the Health and Family Services.

COMMITTEE MEMBER	Aye	No	Absent
1. Senator WELCH	X		
2. Senator DARLING			
3. Senator HUELSMAN	X		
4. Senator GROBSCHMIDT	X		
5. Senator BRESKE			
6. Representative GROTHMAN	X		
7. Representative GUNDERSON	X		
8. Representative SERATTI	X		
9. Representative YOUNG			
10. Representative KREUSER	X		
Totals			

Motion Carried

Motion Failed



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## JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

### *Motion Form*

*Last Modified September 1998*

Date \_\_\_\_\_ Location \_\_\_\_\_

Moved by \_\_\_\_\_, Seconded by \_\_\_\_\_

**THAT,**

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\_\_\_\_\_  
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\_\_\_\_\_  
\_\_\_\_\_

COMMITTEE MEMBER	Aye	No	Absent
1. Senator WELCH			
2. Senator DARLING			
3. Senator HUELSMAN			
4. Senator GROBSCHMIDT			
5. Senator BRESKE			
6. Representative GROTHMAN			
7. Representative GUNDERSON			
8. Representative SERATTI			
9. Representative YOUNG			
10. Representative KREUSER			
Totals			

Motion Carried

Motion Failed



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## JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

### *Motion Form*

*Last Modified September 1998*

Date \_\_\_\_\_ Location \_\_\_\_\_

Moved by \_\_\_\_\_, Seconded by \_\_\_\_\_

**THAT,**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

COMMITTEE MEMBER	Aye	No	Absent
1. Senator WELCH			
2. Senator DARLING			
3. Senator HUELSMAN			
4. Senator GROBSCHMIDT			
5. Senator BRESKE			
6. Representative GROTHMAN			
7. Representative GUNDERSON			
8. Representative SERATTI			
9. Representative YOUNG			
10. Representative KREUSER			
Totals			

Motion Carried

Motion Failed



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## JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

### *Motion Form*

*Last Modified September 1998*

Date \_\_\_\_\_ Location \_\_\_\_\_

Moved by \_\_\_\_\_, Seconded by \_\_\_\_\_

**THAT,**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

COMMITTEE MEMBER	Aye	No	Absent
1. Senator WELCH			
2. Senator DARLING			
3. Senator HUELSMAN			
4. Senator GROBSCHMIDT			
5. Senator BRESKE			
6. Representative GROTHMAN			
7. Representative GUNDERSON			
8. Representative SERATTI			
9. Representative YOUNG			
10. Representative KREUSER			
Totals			

Motion Carried

Motion Failed



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## JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

### *Motion Form*

*Last Modified September 1998*

Date \_\_\_\_\_ Location \_\_\_\_\_

Moved by \_\_\_\_\_, Seconded by \_\_\_\_\_

**THAT,**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

COMMITTEE MEMBER	Aye	No	Absent
1. Senator WELCH			
2. Senator DARLING			
3. Senator HUELSMAN			
4. Senator GROBSCHMIDT			
5. Senator BRESKE			
6. Representative GROTHMAN			
7. Representative GUNDERSON			
8. Representative SERATTI			
9. Representative YOUNG			
10. Representative KREUSER			
Totals			

Motion Carried

Motion Failed



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## JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

### *Motion Form*

*Last Modified September 1998*

Date \_\_\_\_\_ Location \_\_\_\_\_

Moved by \_\_\_\_\_, Seconded by \_\_\_\_\_

**THAT,**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

COMMITTEE MEMBER	Aye	No	Absent
1. Senator WELCH			
2. Senator DARLING			
3. Senator HUELSMAN			
4. Senator GROBSCHMIDT			
5. Senator BRESKE			
6. Representative GROTHMAN			
7. Representative GUNDERSON			
8. Representative SERATTI			
9. Representative YOUNG			
10. Representative KREUSER			
Totals			

Motion Carried

Motion Failed