

1999 ASSEMBLY BILL 347

May 17, 1999 – Introduced by Representative KELSO, cosponsored by Senator GEORGE. Referred to Joint committee on Audit.

1 **AN ACT** *to repeal* 101.143 (3) (g) 2.; *to renumber and amend* 101.143 (4) (cm);
2 *to consolidate, renumber and amend* 101.143 (3) (g) (intro.) and 1.; *to*
3 *amend* 101.143 (3) (c) 2., 101.143 (3) (cm), 101.143 (3) (d), 101.143 (4) (b) (intro.)
4 and 101.143 (4) (d) 2. (intro.); and *to create* 101.143 (1) (bm), 101.143 (1) (cq),
5 101.143 (2) (h), 101.143 (2) (i), 101.143 (2) (j), 101.143 (2e), 101.143 (3) (cg),
6 101.143 (3) (cp), 101.143 (3) (cs), 101.143 (3) (cw), 101.143 (4) (c) 10., 101.143
7 (4) (c) 11., 101.143 (4) (c) 12., 101.143 (4) (cm) 2. and 101.143 (11) of the statutes;
8 **relating to:** the petroleum storage remedial action program, providing an
9 exemption from emergency rule-making procedures and granting
10 rule-making authority.

Analysis by the Legislative Reference Bureau

Under current law, the department of commerce administers a program to reimburse owners of certain petroleum product storage tanks for a portion of the costs of cleaning up discharges from those tanks. This program is commonly known as PECFA. This bill makes numerous changes concerning PECFA.

This bill requires the department of commerce, in consultation with the department of natural resources (DNR), to promulgate rules specifying a method for

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determining the risk to public health, safety and welfare and to the environment posed by discharges of petroleum products. Under the bill, to be eligible for PECFA reimbursement, the owner of a petroleum product storage tank may not begin a cleanup without the approval of the department of commerce and DNR. The department of commerce and DNR will jointly determine the appropriate date to begin a cleanup based on the determination of the risk posed by a discharge and on the availability of funds to make PECFA reimbursements. The requirement for approval to begin a cleanup does not apply to emergency cleanups authorized by DNR or to cleanups of discharges from home heating oil tanks, small farm tanks and school district heating oil tanks.

Under current law, DNR generally may order a responsible person to conduct a cleanup of a hazardous substance that has been discharged into the environment and may oversee the cleanup. However, under current law, the department of commerce may order and oversee cleanups of certain discharges from petroleum product storage tanks. The department of commerce has authority over cleanups if the site of the discharge is classified as low or medium priority based on the threat that the discharge poses to public health, safety and welfare and to the environment and if the site is not contaminated by nonpetroleum hazardous substances. Current law requires DNR and the department of commerce to enter into a memorandum of understanding that establishes procedures and standards for determining whether a site is high, medium or low priority. Under this state's groundwater law, DNR and the department of health and family services set enforcement standards which represent a concentration of a pollutant in groundwater. If an activity or facility causes the concentration of a pollutant in groundwater to reach or exceed the enforcement standard, the state agency that regulates the activity or facility must, generally, prohibit the activity or practice that uses or produces the pollutant and implement remedial action.

This bill requires the department of commerce to determine the least costly method of conducting a cleanup and achieving compliance with enforcement standards for PECFA sites that are classified as low or medium priority. The bill requires the department of commerce and DNR jointly to determine the least costly method of conducting a cleanup and achieving compliance with enforcement standards for PECFA sites that are classified as high priority. The bill limits the amount of reimbursement under PECFA to the amount necessary to implement the least costly method of conducting the cleanup and achieving compliance with enforcement standards. The bill requires the departments to consider whether natural attenuation can be used for each cleanup. Natural attenuation is the naturally occurring reduction in the amount and concentration of a substance in the environment.

This bill generally requires the department of commerce to use a competitive public bidding process to help to determine the least costly method of conducting a cleanup if the estimated cost to complete an investigation, clean-up plan and cleanup exceeds \$60,000. The bill provides an exemption from the bidding requirement for certain sites with groundwater contamination near wells and allows DNR to waive the bidding requirement.

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This bill requires the department of commerce to conduct an annual review of ongoing PECFA cleanups at low and medium priority sites and the department of commerce and DNR to conduct an annual review of ongoing PECFA cleanups at high priority sites. As part of an annual review, the departments must determine the least costly method of completing the cleanup and achieving compliance with enforcement standards. The bill limits the amount of reimbursement under PECFA for costs incurred after the annual review to the amount necessary to complete the cleanup and achieve compliance with enforcement standards using the least costly method.

Current law authorizes the department of commerce to establish a schedule of usual and customary costs for items eligible for PECFA reimbursement. If the department of commerce establishes a usual and customary cost for an item, PECFA reimbursement for that item is limited to the usual and customary cost. This bill requires the department of commerce to establish a schedule of usual and customary costs for items that are commonly included in PECFA claims. The bill requires the department of commerce to use the schedule to determine eligible costs for cleanups for which a public bidding process is not used. This requirement applies until June 30, 2001.

Under PECFA, the owner of a petroleum product storage tank may receive an award for the amount by which the cost of the cleanup exceeds a deductible amount, up to a specified maximum. Currently, the PECFA deductible for underground tanks is generally \$2,500 plus 5% of eligible costs, but not more than \$7,500, except that the deductible for heating oil tanks owned by school districts and technical college districts is 25% of eligible costs.

This bill changes the PECFA deductible for certain underground petroleum storage tanks. Under the bill, the deductible for underground tanks, other than school district and technical college district heating oil tanks, is generally 100% of the amount by which eligible costs exceed \$18,750 but do not exceed \$21,250, plus 10% of the amount by which eligible costs exceed \$21,250 but do not exceed \$40,000, plus 5% of the amount by which eligible costs exceed \$40,000, but the maximum deductible remains \$7,500.

This bill requires the department of commerce, in consultation with DNR, to promulgate rules specifying the conditions under which the two departments must issue approvals of cleanups under PECFA. The bill also requires the department of commerce, in consultation with DNR, to promulgate rules specifying information that must be submitted under PECFA, review procedures that must be followed by employees of the department of commerce and DNR and training requirements for those employees.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

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1 101.143 (1) (bm) “Enforcement standard” has the meaning given in s. 160.01
2 (2).

3 **SECTION 2.** 101.143 (1) (cq) of the statutes is created to read:

4 101.143 (1) (cq) “Natural attenuation” means the reduction in the
5 concentration and mass of a substance, and the products into which the substance
6 breaks down, due to naturally occurring physical, chemical and biological processes.

7 **SECTION 3.** 101.143 (2) (h) of the statutes is created to read:

8 101.143 (2) (h) The department of commerce, in consultation with the
9 department of natural resources, shall promulgate rules designed to facilitate
10 effective and cost-efficient administration of the program under this section that
11 specify all of the following:

12 1. Information that must be submitted under this section, including quarterly
13 summaries of costs incurred with respect to a discharge for which a claim is intended
14 to be submitted under sub. (3) but for which a final claim has not been submitted.

15 2. Formats for submitting the information under subd. 1.

16 3. Review procedures that must be followed by employees of the department of
17 natural resources and the department of commerce in reviewing the information
18 under subd. 1.

19 **SECTION 4.** 101.143 (2) (i) of the statutes is created to read:

20 101.143 (2) (i) The department of commerce, in consultation with the
21 department of natural resources, shall promulgate rules specifying procedures for
22 evaluating remedial actions under sub. (3) (c) 3. to be used by employees of the
23 department of commerce and the department of natural resources while remedial
24 actions are being conducted. The department of commerce shall specify procedures
25 that include all of the following for ongoing remedial actions:

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1 1. Annual reviews that include application of the method under sub. (2e) (a) to
2 determine the risk posed by discharges that are the subject of the remedial actions.

3 2. Annual reports by consultants estimating the additional costs that must be
4 incurred to comply with sub. (3) (c) 3. and with enforcement standards.

5 **SECTION 5.** 101.143 (2) (j) of the statutes is created to read:

6 101.143 **(2)** (j) The department of commerce, in consultation with the
7 department of natural resources, shall promulgate rules specifying all of the
8 following:

9 1. The conditions under which employes of the department of commerce and
10 the department of natural resources must issue approvals under sub. (3) (c) 4.

11 2. Training and management procedures to ensure that employes comply with
12 the requirements under subd. 1.

13 **SECTION 6.** 101.143 (2e) of the statutes is created to read:

14 101.143 **(2e)** RISK-BASED ANALYSIS. (a) The department of commerce, in
15 consultation with the department of natural resources, shall promulgate rules
16 specifying a method, which shall include consideration of the routes for migration of
17 petroleum product contamination, for determining the risk to public health, safety
18 and welfare and to the environment posed by discharges for which the department
19 of commerce receives notification under sub. (3) (a) 3.

20 (b) The department of natural resources or, if the discharge is covered under
21 s. 101.144 (2) (b), the department of commerce shall apply the method under par. (a)
22 to determine the risk posed by a discharge for which the department of commerce
23 receives notification under sub. (3) (a) 3.

24 **SECTION 7.** 101.143 (3) (c) 2. of the statutes is amended to read:

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1 101.143 (3) (c) 2. Prepare a remedial action plan that identifies specific
2 remedial action activities proposed to be conducted under subd. 3. and submit the
3 remedial action plan to the department.

4 **SECTION 8.** 101.143 (3) (cg) of the statutes is created to read:

5 101.143 (3) (cg) *Approval to begin remedial action.* 1. Except as provided in
6 subds. 2. and 3., to be eligible for an award under sub. (4) an owner or operator may
7 not begin remedial action under par. (c) 3. with respect to a discharge without the
8 approval of the department of commerce and the department of natural resources.
9 The department of commerce and the department of natural resources shall jointly
10 determine when it is appropriate to begin remedial action with respect to a discharge
11 based on the determination of risk under sub. (2e) (b) for the discharge and the
12 availability of funds to pay awards under sub. (4).

13 2. Subdivision 1. does not apply if the discharge is from a home oil tank system,
14 a petroleum product storage system that is described in sub. (4) (ei) 1. or a petroleum
15 product storage system that is owned by a school district and that is used for storing
16 heating oil for consumptive use on the premises where stored.

17 3. Subdivision 1. does not apply to remedial action in response to an emergency
18 if par. (g) applies.

19 4. Notwithstanding s. 292.11 (3) and (7) (c), an owner or operator to whom subd.
20 1. applies is not required to begin remedial action under par. (c) 3. until the owner
21 or operator receives approval under subd. 1.

22 **SECTION 9.** 101.143 (3) (cm) of the statutes is amended to read:

23 101.143 (3) (cm) *Monitoring as remedial action.* An owner or operator or person
24 owning a home oil tank system may, with the approval of the department of natural
25 resources or, if the discharge is covered under s. 101.144 (2) (b), the department of

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1 commerce, satisfy the requirements of par. (c) 2. and 3. by proposing and
2 implementing monitoring to ensure the effectiveness of the natural process of
3 ~~degradation~~ attenuation of petroleum product contamination.

4 **SECTION 10.** 101.143 (3) (cp) of the statutes is created to read:

5 101.143 (3) (cp) *Bidding process.* 1. Except as provided in subds. 2. to 4., if the
6 department of natural resources or, if the site is covered under s. 101.144 (2) (b), the
7 department of commerce estimates that the cost to complete a site investigation,
8 remedial action plan and remedial action for an occurrence exceeds \$60,000, the
9 department of commerce shall implement a competitive public bidding process to
10 obtain information to assist in making the determination under par. (cs).

11 2. The department of commerce may not implement the process under subd.
12 1. if an enforcement standard is exceeded in groundwater within 1,000 feet of a well
13 operated by a public utility, as defined in s. 196.01 (5), or within 100 feet of any other
14 well used to provide water for human consumption.

15 3. The department of commerce may not implement the process under subd.
16 1. if the department of natural resources waives the requirement on the grounds that
17 waiver is necessary in an emergency to prevent or mitigate an imminent hazard to
18 public health, safety or welfare or to the environment.

19 4. The department of commerce may not implement the process under subd.
20 1. if the secretary of natural resources waives the requirement after providing notice
21 to the secretary of commerce.

22 **SECTION 11.** 101.143 (3) (cs) of the statutes is created to read:

23 101.143 (3) (cs) *Determination of least costly method of remedial action.* 1. The
24 department of commerce shall review the remedial action plan for a site that is
25 classified as low or medium priority under s. 101.144 (3m) and shall determine the

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1 least costly method of complying with par. (c) 3. and with enforcement standards.
2 The department shall notify the owner or operator of its determination of the least
3 costly method and shall notify the owner or operator that reimbursement for
4 remedial action under this section is limited to the amount necessary to implement
5 that method.

6 2. The department of natural resources and the department of commerce shall
7 review the remedial action plan for a site that is classified as high priority under s.
8 101.144 (3m) and shall jointly determine the least costly method of complying with
9 par. (c) 3. and with enforcement standards. The departments shall notify the owner
10 or operator of their determination of the least costly method and shall notify the
11 owner or operator that reimbursement for remedial action under this section is
12 limited to the amount necessary to implement that method.

13 3. In making determinations under subs. 1. and 2., the department of natural
14 resources and the department of commerce shall determine whether natural
15 attenuation will achieve compliance with par. (c) 3. and with enforcement standards.

16 **SECTION 12.** 101.143 (3) (cw) of the statutes is created to read:

17 101.143 (3) (cw) *Annual reviews.* 1. The department of commerce shall conduct
18 the annual review required under sub. (2) (i) 1. for a site that is classified as low or
19 medium priority under s. 101.144 (3m) and shall determine the least costly method
20 of completing remedial action at the site in order to comply with par. (c) 3. and with
21 enforcement standards. The department shall notify the owner or operator of its
22 determination of the least costly method and shall notify the owner or operator that
23 reimbursement under this section for any remedial action conducted after the date
24 of the notice is limited to the amount necessary to implement that method.

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1 2. The department of natural resources and the department of commerce shall
2 conduct the annual review required under sub. (2) (i) 1. for a site that is classified as
3 high priority under s. 101.144 (3m) and shall jointly determine the least costly
4 method of completing remedial action at the site in order to comply with par. (c) 3.
5 and with enforcement standards. The departments shall notify the owner or
6 operator of their determination of the least costly method and shall notify the owner
7 or operator that reimbursement under this section for remedial action conducted
8 after the date of the notice is limited to the amount necessary to implement that
9 method.

10 3. In making determinations under subds. 1. and 2., the department of natural
11 resources and the department of commerce shall determine whether natural
12 attenuation will achieve compliance with par. (c) 3. and with enforcement standards.

13 **SECTION 13.** 101.143 (3) (d) of the statutes is amended to read:

14 101.143 (3) (d) ~~*Review of site investigations, remedial action plans and Final*~~
15 ~~*review of remedial action activities.*~~ The department of natural resources or, if the
16 discharge is covered under s. 101.144 (2) (b), the department of commerce shall, at
17 the request of the claimant, review the site investigation and the remedial action
18 plan and advise the claimant on the adequacy of proposed remedial action activities
19 in meeting the requirements of s. 292.11. The advice is not an approval of the
20 remedial action activities. The department of natural resources or, if the discharge
21 is covered under s. 101.144 (2) (b), the department of commerce shall complete a final
22 review of the remedial action activities within 60 days after the claimant notifies the
23 appropriate department that the remedial action activities are completed.

24 **SECTION 14.** 101.143 (3) (g) (intro.) and 1. of the statutes are consolidated,
25 renumbered 101.143 (3) (g) and amended to read:

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1 101.143 (3) (g) *Emergency situations*. Notwithstanding pars. (a) 3. and (c) 1.
2 and 2., an owner or operator or the person may submit a claim for an award under
3 sub. (4) after notifying the department under par. (a) 3., without completing an
4 investigation under par. (c) 1. and without preparing a remedial action plan under
5 par. (c) 2. if any of the following apply: 1. ~~An~~ an emergency existed which made the
6 investigation under par. (c) 1. and the remedial action plan under par. (c) 2.
7 inappropriate and, before conducting remedial action, the owner or operator or
8 person notified the department of natural resources of the emergency and the
9 department of natural resources authorized emergency action.

10 **SECTION 15.** 101.143 (3) (g) 2. of the statutes is repealed.

11 **SECTION 16.** 101.143 (4) (b) (intro.) of the statutes is amended to read:

12 101.143 (4) (b) *Eligible costs*. (intro.) ~~Eligible~~ Except as provided in par. (c).
13 eligible costs for an award under par. (a) include actual costs or, if the department
14 establishes a schedule usual and customary cost under par. (cm) for an item, usual
15 and customary costs for the following items ~~only~~:

16 **SECTION 17.** 101.143 (4) (c) 10. of the statutes is created to read:

17 101.143 (4) (c) 10. Costs incurred with respect to a discharge if sub. (3) (cg) 1.
18 applies and remedial action is begun before approval is given under sub. (3) (cg) 1.

19 **SECTION 18.** 101.143 (4) (c) 11. of the statutes is created to read:

20 101.143 (4) (c) 11. Costs that exceed the amount necessary to comply with sub.
21 (3) (c) 3. and with enforcement standards using the least costly method.

22 **SECTION 19.** 101.143 (4) (c) 12. of the statutes is created to read:

23 101.143 (4) (c) 12. Costs that are incurred after the date of a notice under sub.
24 (3) (cw) 1. or 2. and that exceed the amount necessary to comply with sub. (3) (c) 3.
25 and with enforcement standards using the method specified in the notice.

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1 **SECTION 20.** 101.143 (4) (cm) of the statutes is renumbered 101.143 (4) (cm) 1.
2 and amended to read:

3 101.143 **(4)** (cm) 1. The department ~~may~~ shall establish a schedule of usual and
4 customary costs for ~~any~~ items under par. (b) ~~and may~~ that are commonly associated
5 with claims under this section. The department shall use that schedule to determine
6 the amount of a claimant's eligible costs for an occurrence for which a competitive
7 bidding process is not used, except in circumstances under which higher costs must
8 be incurred to comply with sub. (3) (c) 3. and with enforcement standards. For an
9 occurrence for which a competitive bidding process is used, the department may not
10 use the schedule. In the schedule, the department shall specify the maximum
11 number of reimbursable hours for particular tasks and the maximum reimbursable
12 hourly rates for those tasks. The department shall use methods of data collection and
13 analysis that enable the schedule to be revised to reflect changes in actual costs. This
14 subdivision does not apply after June 30, 2001.

15 **SECTION 21.** 101.143 (4) (cm) 2. of the statutes is created to read:

16 101.143 **(4)** (cm) 2. The department may establish a schedule of usual and
17 customary costs for any items under par. (b) and may use that schedule to determine
18 the amount of a claimant's eligible costs. This subdivision applies after June 30,
19 2001.

20 **SECTION 22.** 101.143 (4) (d) 2. (intro.) of the statutes is amended to read:

21 101.143 **(4)** (d) 2. (intro.) The department shall issue the award under this
22 paragraph without regard to fault in an amount equal to the amount of the eligible
23 costs that exceeds a deductible amount of \$2,500 ~~plus 5% of the eligible costs~~ 100%
24 of the amount by which eligible costs exceed \$18,750 but do not exceed \$21,250, plus
25 10% of the amount by which eligible costs exceed \$21,250 but do not exceed \$40,000.

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1 plus 5% of the amount by which eligible costs exceed \$40,000, but not more than
2 \$7,500 per occurrence, except that the deductible amount for a petroleum product
3 storage system that is owned by a school district or a technical college district and
4 that is used for storing heating oil for consumptive use on the premises is 25% of
5 eligible costs. An award issued under this paragraph may not exceed the following
6 for each occurrence:

7 **SECTION 23.** 101.143 (11) of the statutes is created to read:

8 101.143 **(11)** ANNUAL REPORT. No later than October 1 annually, the department
9 of commerce and the department of natural resources shall submit to the joint
10 legislative audit committee, to the joint committee on finance and to the appropriate
11 standing committees of the legislature, under s. 13.172 (3), a report on the program
12 under this section for the fiscal year ending on June 30 of the year in which the report
13 is submitted. The departments shall include all of the following information in the
14 report:

15 (a) The number of notices received under sub. (3) (a) 3. and the number of
16 approvals given under sub. (3) (c) 4.

17 (b) The percentage of sites classified as high priority under s. 101.144 (3m).

18 (c) The name of each person providing engineering consulting services to a
19 claimant under this section and the number of claimants to whom the person has
20 provided those services.

21 (d) The charges for engineering consulting services for sites for which
22 approvals are given under sub. (3) (c) 4. and for other sites.

23 (e) The charges by service providers other than engineering consultants for
24 services for which reimbursement is provided under this section, including
25 excavating, hauling, laboratory testing and landfill disposal.

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1 (f) Strategies for recording and monitoring complaints of fraud in the program
2 under this section and for the use of employes of the department of commerce who
3 conduct audits to identify questionable claims and investigate complaints.

SECTION 24. Nonstatutory provisions.

4
5 (1) FINANCIAL MANAGEMENT. No later than the first day of the 6th month
6 beginning after the effective date of this subsection, the department of commerce
7 shall do all of the following:

8 (a) Update its financial data base for the program under section 101.143 of the
9 statutes to ensure that complete cost information related to each occurrence and to
10 the annual payment to each owner or operator is readily available.

11 (b) Investigate any variances between the amount of total payments indicated
12 by the department's financial data base for the program under section 101.143 of the
13 statutes and the amount of total payments indicated by the accounts maintained by
14 the department of administration under section 16.52 of the statutes to identify
15 when the variances occurred and the reasons for the variances.

16 (c) Make any changes in the department's financial data base needed to ensure
17 that the data base is consistent with the accounts maintained by the department of
18 administration under section 16.52 of the statutes.

19 (2) RULE MAKING.

20 (a) The department of commerce shall submit in proposed form the rules
21 required under section 101.143 (2) (h), (i) and (j) and (2e) (a) of the statutes, as created
22 by this act, and the rules to implement section 101.143 (4) (cm) 1. of the statutes, as
23 affected by this act, to the legislative council staff under section 227.15 (1) of the
24 statutes no later than the first day of the 3rd month beginning after the effective date
25 of this paragraph.

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1 (b) Using the procedure under section 227.24 of the statutes, the department
2 of commerce shall promulgate the rules required under section 101.143 (2) (h), (i) and
3 (j) and (2e) (a) of the statutes, as created by this act, and shall promulgate rules to
4 implement section 101.143 (4) (cm) 1. of the statutes, as affected by this act, for the
5 period before the effective date of the rules submitted under paragraph (a), but not
6 to exceed the period authorized under section 227.24 (1) (c) and (2) of the statutes.
7 Notwithstanding section 227.24 (1) (a), (2) (b) and (3) of the statutes, the department
8 is not required to provide evidence that promulgating rules under this paragraph is
9 necessary for the preservation of the public peace, health, safety or welfare and is not
10 required to provide a finding of emergency for rules promulgated under this
11 paragraph. The department shall promulgate rules under this paragraph no later
12 than the 30th day after the effective date of this paragraph.

13 (c) The department of natural resources shall submit in proposed form any
14 changes in its rules necessary to implement this act to the legislative council staff
15 under section 227.15 (1) of the statutes no later than the first day of the 6th month
16 beginning after the effective date of this paragraph.

17 (3) EVALUATION OF USUAL AND CUSTOMARY COST SCHEDULE. The department of
18 commerce shall evaluate the operation of section 101.143 (4) (cm) 1. of the statutes,
19 as affected by this act, and shall report the results of the evaluation to the joint
20 legislative audit committee, to the joint committee on finance and to the appropriate
21 standing committees of the legislature, in the manner provided in s. 13.172 (3) of the
22 statutes, no later than the first day of the 14th month beginning after the effective
23 date of this subsection.

SECTION 25. Initial applicability.

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1 (1) The treatment of section 101.143 (2e) (b), (3) (cg), (cp), (cs) and (g) and (4)
2 (c) 10. and 11. of the statutes first applies to a discharge with respect to which
3 activities under section 101.143 (3) (c) 3. or (g) of the statutes are begun on the
4 effective date of this subsection.

5

(END)