

# WISCONSIN LEGISLATIVE COUNCIL STAFF

## RULES CLEARINGHOUSE

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## CLEARINGHOUSE RULE 98-065

### Comments

**[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated October 1994.]**

### 2. Form, Style and Placement in Administrative Code

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- al. “PECFA eligible” should be hyphenated in s. ILHR 47.33 (1) (b) 2.
- am. Is there any reason for the difference between s. ILHR 47.33 (1) (b) 4. and (c) 2.?
- an. The comma after “services” in the first sentence of s. ILHR 47.33 (2) (intro.) should be deleted.
- ao. It is not clear in s. ILHR 47.33 (2) (a) who establishes the maximum reimbursable amount. Also, the comma after “consulting” should be deleted.
- ap. How does “non-active” in s. ILHR 47.337 (3) (c) (intro.) relate to the defined terms “natural attenuation” and “passive bio-remediation”?
- aq. “But not be limited to” should be deleted from s. ILHR 47.337 (4) (b) (intro.).
- ar. “Possibly” in s. ILHR 47.337 (4) (b) 2. is superfluous and should be deleted.
- as. It is not clear what is meant by “market” costs in s. ILHR 47.337 (4) (b) 3. Is “costs” sufficient? Also, is it appropriate for the measure to be in “dollars per pound”?
- at. Section ILHR 47.337 (5) (a) in part provides that when a claimant elects to implement a higher cost remedial strategy, the claimant agrees that additional costs will not be submitted to the fund. However, par. (b) provides that the department may elect to approve reimbursement for a higher cost. How can the department approve a higher cost if the additional costs will not be submitted? Further, par. (b) provides that a decision not to approve a higher cost alternative cannot be appealed. If this provision means, as other provisions in the rule state, that an appeal may not be taken to the department, the rule should so state. If this provision means that the decision cannot be appealed to a court, it probably is contrary to the provisions of ch. 227, Stats.
- au. Can some reference describing the PECFA Efficiency Project be included in a note after s. ILHR 47.338 (1) (a)?
- av. “Recosting” in s. ILHR 47.338 (2) does not appear to be a real word.
- aw. “Site” is not used properly in s. ILHR 47.339 (1) (intro.). The “site” does not complete the remedial efforts.
- ax. The beginning of the third sentence in s. ILHR 47.339 (2) should be rewritten to read: “The \$80,000 limit may not be exceeded . . . .”
- ay. “Included” should be deleted in s. ILHR 47.355 (2) (b) (intro.).