

SECTION 1. Comm 5.003 (32m) is amended to read:

Comm 5.003 (32m) "PECFA" means petroleum environmental cleanup fund ~~æt award~~, as established in s. 101.143, Stats.

SECTION 2. Comm 5.01 (1) Note is amended to read:

Comm 5.01 (1) Note: Applications and related forms for licenses, certifications or registrations covered under subchapters II to VII and IX of this chapter are available from the Division of Safety and Buildings, at P.O. Box 7082, Madison, ~~Wisconsin~~ WI 53707-7082, or at telephone 608/261-8500 and 608/264-8777 (TTY), or at the Safety and Buildings' ~~website~~ Web site at commerce.wi.gov/SB/. Applications for certifications or registrations covered under subchapter VIII of this chapter are available from the Division of Environmental and Regulatory Services at P.O. Box 7837, Madison, WI 53707-7837, or at telephone 608/266-7874 and 608/264-8777 (TTY), or at the Web sites for petroleum programs and PECFA at commerce.wi.gov.

SECTION 3. Comm 5.10 (1) (a) 12. is created to read:

Comm 5.10 (1) (a) 12. If registered or certified under ss. Comm 5.80 to 5.81, has performed any of the following:

- a. Intentionally shifted costs, for the purpose of making ineligible costs appear to be eligible.
- b. Intentionally billed for activities not undertaken at a specific cleanup site.
- c. Rebated the deductible or structured a claim to provide a responsible party with a rebate or reimbursement of the deductible.
- d. Intentionally submitted invoices or bills containing fraud, or submitted claims that were incomplete or contained fraud.
- e. Conducted unnecessary, ineffective or incomplete remedial activities or services.
- f. Attempted to defraud, including but not limited to false or double billing of clients for work conducted.
- g. Charged a fee that the department determined was excessive, after written notice from the department that the fee was excessive and should not have been charged.
- h. Failed to maintain required records.
- i. Denied the department access to requested records.

j. Failed to submit a required notice or report to the department, within a required time period.

k. Exhibited a pattern of attempting and failing to complete remediations of PECFA sites.

SECTION 4. Comm 5.80 (1) (a) Note, (b) 5., and (2) (c) and (d) are created to read:

Comm 5.80 (1) (a) **Note:** See chs. 443 and 470, Stats., for additional requirements relating to the practice of professional engineering; and the practices of professional geology, professional hydrology, and professional soil science, respectively.

(b) 5. Preparing and submitting bids in the competitive public bidding process prescribed in ch. Comm 47.

(2) (c) Proof of employing at least one Wisconsin-registered PECFA consultant.

(d) Proof of being registered by the department of regulation and licensing to engage in the practice of professional engineering, geology, hydrology, or soil science.

SECTION 5. Comm 5.80 (4) (intro.), (a), and (b) are renumbered Comm 5.80 (4) (a) (intro.), 1., and 3. and are amended to read:

Comm 5.80 (4) (a) (intro.) An entity that performs or provides professional level engineering, ~~or hydrogeological~~ geological, hydrological, or soil science services related to a claim submitted for reimbursement under the PECFA program, ch. Comm 47, as a registered PECFA consulting firm shall do all of the following:

~~1. Make records of PECFA claim services available for inspection and audit as requested by the department for field or financial audits under ch. Comm 47; and~~ Ensure that only Wisconsin-registered professional engineers, professional geologists, professional hydrologists, or professional soil scientists perform professional-level engineering, geological, hydrological, or soil science services related to the PECFA program, unless those services are under the supervision of those professionals.

3. Hold errors and omissions professional liability coverage, including pollution impairment liability, of no less than \$1,000,000 per claim, \$1,000,000 annual aggregate and with a deductible of no more than \$100,000 per claim, except as provided in par. (b).

SECTION 6. Comm 5.80 (4) (a) 2., (b), and (c) are created to read:

Comm 5.80 (4) (a) 2. Ensure that only PECFA consultants who are so registered under this chapter perform the services referenced in s. Comm 5.81.

(b) A consulting firm may request the department's approval of an alternate mechanism for meeting the requirement of the maximum deductible in par. (a) 4. The department shall review the request and determine whether it meets the requirement of the rule.

(c) The insurance coverage required under this subsection shall be obtained from a firm that has an A.M. Best rating of at least "A-."

SECTION 7. Comm 5.80 (5) (b) is repealed.

SECTION 8. Comm 5.80 (5) (a) 1. and 2. are renumbered Comm 5.80 (5) (a) and (b).

SECTION 9. Comm 5.80 (5) (c) is created to read:

Comm 5.80 (5) (c) The renewal of a registration as a PECFA consulting firm shall be contingent upon all of the following:

1. Employing at least one Wisconsin-registered PECFA consultant.
2. Being registered by the department of regulation and licensing to engage in the practice of professional engineering, geology, hydrology, or soil science.

SECTION 10. Comm 5.81 (1) (a) Note and (2) (c) are created to read:

Comm 5.81 (1) (a) **Note:** See chs. 443 and 470, Stats., for additional requirements relating to the practice of professional engineering; and the practices of professional geology, professional hydrology, and professional soil science, respectively.

(2) (c) Proof of being registered by the department of regulation and licensing as a professional engineer, professional geologist, professional hydrologist, or professional soil scientist, or proof of being supervised by a person who is so registered.

SECTION 11. Comm 5.81 (4) (b) is repealed.

SECTION 12. Comm 5.81 (4) (a) 1. and 2. are renumbered Comm 5.81 (4) (a) and (b).

SECTION 13. Comm 5.81 (4) (c) is created to read:

Comm 5.81 (4) (c) The renewal of a registration as a PECFA consultant shall be contingent upon being registered by the department of regulation and licensing as a professional engineer, professional geologist, professional hydrologist, or professional soil scientist, or proof of being supervised by a person who is so registered.

SECTION 14. Comm 47.015 (8) Note and (9) Note are created to read:

Comm 47.015 (8) Note: See ch. Comm 5 for departmental credential requirements for consultants; and for references to corresponding statutory requirements and requirements by the department of regulation and licensing, that address performance of professional-level engineering, hydrogeological, or soil science services.

(9) Note: See ch. Comm 5 for departmental credential requirements for consultants; and for references to corresponding statutory requirements and requirements by the department of regulation and licensing, that address performance of professional-level engineering, hydrogeological, or soil science services.

SECTION 15. Comm 47.015 (24) is amended to read:

Comm 47.015 (24) “Investigation awards” means awards that are made for investigative activities when no discharge is found, if the owner, operator or person owning a home heating oil tank system has written direction from the DNR or the department to conduct an investigation under s. Comm 47.025 (5).

SECTION 16. Comm 47.015 (27) Note is created to read:

Comm 47.015 (27) Note: In Mews vs. Wisconsin Department of Commerce, 2004 WI APP 24, 676 NW 2d 160 Wis APP. (2004), the Court concluded that this definition is “published and unambiguous.” In arriving at this conclusion, the Court agreed with the department that without an intervening, unimpacted area of no detects, all contamination at a site is contiguous and is therefore a single occurrence.

SECTION 17. Comm 47.015 (32) is amended to read:

Comm 47.015 (32) “PECFA” means ~~the~~ petroleum environmental cleanup fund award, as established in s. 101.143, Stats.

SECTION 18. Comm 47.02 (4) is created to read:

Comm 47.02 (4) ELIGIBLE SYSTEMS AND EXCLUDED SYSTEMS AT THE SAME SITE. (a) *Three possible conditions.* An owner or operator of a petroleum product storage system which is excluded by sub. (3) (g) to (j) from coverage is eligible for reimbursement from the fund for claims relating to other petroleum product storage systems at the same site, where one of the following conditions applies:

1. ‘Discharges are not commingled.’ A discharge that predates the deadlines in sub. (3) (g) to (j) is documented as not commingled with any discharge excluded by sub. (3) (g) to (j).

2. ‘Discharges are commingled.’ A discharge that predates the deadlines in sub. (3) (g) to (j) is commingled with a discharge excluded by sub. (3) (g) to (j).

3. ‘Replacement within the same tank bed.’ A storage system that predates the deadlines in sub. (3) (g) to (j) has been replaced within the same tank bed or has been upgraded, subsequent to the deadlines in sub. (3) (g) to (j), and documentation cannot confirm whether a discharge there occurred before or after the deadlines.

(b) *Reimbursement rates.* 1. Where par. (a) 1. applies, 100 percent of the eligible costs may be reimbursed.

2. Where par. (a) 2. applies, the department will consider the two discharges to be one occurrence, and will apply a methodology of cost separation based on total tank volume, or based on other factors acceptable to the department.

3. Where par. (a) 3. applies, 25 percent of the eligible costs may be reimbursed, after documentation is submitted to the department showing that all applicable tank closure and site assessment requirements in either ch. Comm 10 or in preceding federal regulations were complied with, including the corresponding deadlines for performing that closure and assessment.

SECTION 19. Comm 47.025 (1) (b) is amended to read:

Comm 47.025 (1) (b) The department may not issue an award before all eligible costs have been incurred unless the department determines that the delay in issuing the award would cause a financial hardship to the owner, operator or the person owning a home oil tank system. The department may issue progress payments when sufficient evidence of completion of various activities, as specified in ss. Comm 47.12,~~47.35~~ and 47.355 are is received.

SECTION 20. Comm 47.025 (2) is repealed and recreated to read:

Comm 47.025 (2) AWARDS, DEDUCTIBLES, AND DENIALS. All awards shall be issued in accordance with this chapter and the requirements in s. 101.143 (4) (d), (dg), and (dm) to (g), Stats.

Note: The applicable portions of sections 101.143 (4) (d), (dg), and (dm) to (g), Stats., read as follows:

“(d) *Awards for claims; underground systems.* 1. The department shall issue an award under this paragraph for a claim filed after July 31, 1987, for eligible costs, under par. (b), incurred on or after August 1, 1987, and before December 22, 2001, by the owner or operator of an underground petroleum product storage tank system and for eligible costs, under par. (b), incurred on or after December 22, 2001, by the owner or operator of an underground petroleum product storage tank system if the petroleum product discharge on which the claim is based is confirmed and activities under sub.(3) (c) or (g) are begun before December 22, 2001.

2. The department shall issue the award under this paragraph without regard to fault in an amount equal to the amount of the eligible costs that exceeds the deductible amount under par. (dg). An award issued under this paragraph may not exceed the following for each occurrence:

- a. For an owner or operator of an underground petroleum product storage tank system that is located at a facility at which petroleum is stored for resale or an owner or operator of an underground petroleum product storage tank system that handles an annual average of more than 10,000 gallons of petroleum per month, \$1,000,000.
- b. For an owner or operator other than an owner or operator under subd. 2. a., c. or d., \$500,000.
- c. For an owner or operator of a petroleum product storage system described in par. (ei), \$100,000.
- d. For a school district or a technical college district with respect to a discharge from a petroleum product storage system that is used for storing heating oil for consumptive use on the premises where stored, \$190,000.

3. The department may not issue awards under this paragraph to an owner or operator for eligible costs incurred in one program year that total more than the following:

- a. For an owner or operator of 100 or fewer underground petroleum product storage tank systems, \$1,000,000.
- b. For an owner or operator of more than 100 underground petroleum product storage tank systems, \$2,000,000.

(dg) *Deductible; underground systems.* The amount of the deductible for an award under par. (d) is as follows for each occurrence:

2. For a school district or a technical college district with respect to a discharge from an underground petroleum product storage tank system that is used for storing heating oil for consumptive use on the premises, 25% of eligible costs.

4. For an owner or operator other than an owner or operator described in subd. 2., \$2,500, plus 5% of eligible costs.

(dm) *Awards for aboveground systems for a specified period.* 1. The department shall issue an award under this paragraph for a claim for eligible costs, under par. (b), incurred on or after August 1, 1987, and before December 22, 2001, by the owner or operator of a petroleum product storage system that is not an underground petroleum product storage tank system and for eligible costs, under par. (b), incurred on or after December 22, 2001, by the owner or operator of a petroleum product storage system that is not an underground petroleum product storage tank system if the petroleum product discharge on which the claim is based is confirmed and activities under sub. (3) (c) or (g) are begun before December 22, 2001.

2. The department shall issue the award under this paragraph without regard to fault in an amount equal to the amount of the eligible costs that exceeds the following deductible:

- a. For the owner or operator of a terminal, \$15,000 plus 10% of the amount by which eligible costs exceed \$200,000.
- b. For a school district or a technical college district with respect to a discharge from a petroleum product storage system that is used for storing heating oil for consumptive use on the premises where stored, 25% of eligible costs.
- c. For the owner or operator of a petroleum product storage system that is described in par. (ei), \$2,500 plus 5% of eligible costs per occurrence.
- d. For an owner or operator other than an owner or operator under subd. 2. a., b. or c., \$15,000 plus 2% of the amount by which eligible costs exceed \$200,000.

3. An award issued under this paragraph may not exceed the following for each occurrence:

- a. For an owner or operator of a petroleum product storage system that is located at a facility at which petroleum is stored for resale or an owner or operator of a petroleum product storage system that handles an annual average of more than 10,000 gallons of petroleum per month, \$1,000,000.
- b. For a school district or a technical college district with respect to a discharge from a petroleum product storage system that is used for storing heating oil for consumptive use on the premises where stored, \$190,000.
- c. For an owner or operator of a petroleum product storage system described in par. (ei), \$100,000.
- d. For an owner or operator other than an owner or operator under subd. 3. a., b. or c., \$500,000.

4. The department may not issue awards under this paragraph to an owner or operator for eligible costs incurred in one program year that total more than the following:

- a. For an owner or operator of 100 or fewer petroleum product storage systems that are not underground petroleum product storage tank systems, \$1,000,000.
- b. For an owner or operator of more than 100 petroleum product storage systems that are not underground petroleum product storage tank systems, \$2,000,000.

(dr) *Deductible in certain cases.* If a person is the owner or operator of an underground petroleum product storage tank system and a petroleum product storage system that is not an underground petroleum product storage tank system, both of which have discharged resulting in one occurrence, and if the person is eligible for an award under pars. (d) and (dm), the department shall calculate the award using the deductible determined under par. (d) 2. if the predominant method of petroleum product storage at the site, measured in gallons, is underground petroleum product storage tank systems or using the deductible determined under par. (dm) 2. if the predominant method of petroleum product storage at the site is not underground petroleum product storage tank systems.

(e) *Awards for certain owners or operators.* 1. The department shall issue an award under this paragraph for a claim for any of the following:

b. Eligible costs, under par. (b), incurred on or after December 22, 2001, by the owner or operator of a petroleum product storage system that is not an underground petroleum product storage system if those costs are not reimbursable under par. (dm) 1.

c. Eligible costs, under par. (b), incurred on or after December 22, 2001, by the owner or operator of an underground petroleum product storage tank system if those costs are not reimbursable under par. (d) 1.

2. The department shall issue the award under this paragraph without regard to fault in an amount equal to the amount of the eligible costs that exceeds a deductible amount of \$10,000, except that the deductible amount for a petroleum product storage system that is owned by a school district or a technical college district and that is used for storing heating oil for consumptive use on the premises where stored is 25% of eligible costs and except that the deductible for a petroleum product storage system that is described in par. (ei) is \$2,500 plus 5% of the eligible costs, but not more than \$7,500 per occurrence without regard to when the eligible costs are incurred.

2m. An award issued under this paragraph may not exceed \$190,000 for each occurrence, except that an award under this paragraph to the owner or operator of a petroleum product storage system described in par. (ei) may not exceed \$100,000 per occurrence.

3. The department may not issue awards under this paragraph to an owner or operator for eligible costs incurred in one program year that total more than \$190,000.

(ee) *Waiver of deductible.* Notwithstanding par. (d) 2., (dm) 2. or (e) 2., the department may waive the requirement that an owner or operator pay the deductible amount if the department determines that the owner or operator is unable to pay. If the department waives the requirement that an owner or operator pay the deductible, the department shall record a statement of lien with the register of deeds of the county in which the petroleum product storage system is located. If the department records the statement of lien, the department has a lien on the property on which the petroleum product storage system is located in the amount of the deductible that was waived. The property remains subject to the lien until that amount is paid in full.

(ei) *Awards for certain farm tanks.* A farm tank of 1,100 gallons or less capacity storing petroleum products that are not for resale, together with any on-site integral piping or dispensing system, is a petroleum product storage system for the purposes of this section, if all of the following apply:

1m. One of the following conditions is satisfied:

a. The owner or operator of the farm tank owns a parcel of 35 or more acres of contiguous land, on which the farm tank is located, which is devoted primarily to agricultural use, as defined in s. 91.01(1), including land designated by the department of natural resources as part of the ice age trail under s. 23.17, which during the year preceding submission of a first claim under sub. (3) produced gross farm profits, as defined in s. 71.58 (4), of not less than \$6,000 or which, during the 3 years preceding that submission produced gross farm profits, as defined in s. 71.58 (4), of not less than \$18,000, or a parcel of 35 or more acres, on which the farm tank is located, of which at least 35 acres, during part or all of the year preceding that submission, were enrolled in the conservation reserve program under 16 USC 3831 to 3836.

b. The claim is submitted by a person who, at the time that the notification was made under sub. (3) (a) 3., was the owner of the farm tank and owned a parcel of 35 or more acres of contiguous land, on which the farm tank is or was located, which was devoted primarily to agricultural use, as defined in s. 91.01(1), including land designated by the department of natural resources as part of the ice age trail under s. 23.17, which during the year preceding that notification produced gross farm profits, as defined in s. 71.58 (4), of not less than \$6,000 or which, during the 3 years preceding that notification, produced gross farm profits, as defined in s. 71.58 (4), of not less than \$18,000, or a parcel of 35 or more acres, on which the farm tank is located, of which at least 35 acres, during part or all of the year preceding that notification, were enrolled in the conservation reserve program under 16 USC 3831 to 3836.

2m. The owner or operator of the farm tank has received a letter or notice from the department of commerce or department of natural resources indicating that the owner or operator must conduct a site investigation

or remedial action because of a discharge from the farm tank or an order to conduct such an investigation or remedial action.

(em) *Awards for claims for home oil tank system discharges.* 1. The department shall issue an award for a claim filed after May 17, 1988, for eligible costs, under par. (b), incurred on or after August 1, 1987, by a person who owns a home oil tank system.

2. The department shall issue the award under this paragraph without regard to fault for each home oil tank system in an amount equal to 75% of the amount of the eligible costs, except that if the home oil tank system is owned by a nonprofit organization that provides housing assistance to families with incomes below 80% of the median income, as defined in s. 234.49(1) (g), of the county in which the home oil tank system is located, then the award shall equal 100% of the amount of the eligible costs.

3. An award issued under this paragraph may not exceed \$7,500.

(es) *Awards for claims for investigations.* 1. The department shall issue an award for a claim filed after August 9, 1989, for eligible costs, under par. (b), incurred on or after August 1, 1987, by an owner or operator or a person owning a home oil tank system in investigating the existence of a discharge or investigating the presence of petroleum products in soil or groundwater if the investigation is undertaken at the written direction of the department of commerce or the department of natural resources and no discharge or contamination is found.

2. The department shall issue the award under this paragraph without regard to fault for each petroleum product storage system or home oil tank system in an amount equal to the eligible costs incurred.

3. If an award has been made under this paragraph and a discharge or contamination is found in a subsequent investigation, the department shall reduce the award under par. (d) or (e) by the amount paid under this paragraph.

(f) *Contributory negligence.* Contributory negligence shall not be a bar to submitting a claim under this section and no award under this section may be diminished as a result of negligence attributable to the claimant or any person who is entitled to submit a claim.

(g) *Denial of claims, limits on awards.* The department shall deny a claim under par. (a) if any of the following applies:

1. The claim is not within the scope of this section.
2. The claimant submits a fraudulent claim.
3. The claimant has been grossly negligent in the maintenance of the petroleum product storage system or home oil tank system.
4. The claimant intentionally damaged the petroleum product storage system or home oil tank system.
5. The claimant falsified storage records.
6. The claimant willfully failed to comply with laws or rules of this state concerning the storage of petroleum products.
7. The petroleum product discharge was caused by a person who provided services or products to the claimant or to a prior owner or operator of the petroleum product storage system or home oil tank system.”

Note: Other sections of this chapter, such as s. Comm 47.30 (2) and (3), also address denial of claims, as established through other subsections of s. 101.143, Stats.

SECTION 21. Comm 47.025 (3) to (5) are repealed.

SECTION 22. Comm 47.025 (6) is renumbered Comm 47.025 (3).

SECTION 23. Comm 47.025 (3) Note is created to read:

Comm 47.025 (3) Note: See s. Comm 47.36 (3) for further requirements for third-party claims.

SECTION 24. Comm 47.10 (1) (a) (intro.) is amended to read:

Comm 47.10 (1) (a) (intro.) *Responsible parties*. Responsible parties may submit claims to the department pursuant to s. 101.143 (4), Stats., for reimbursement of eligible costs incurred because of a petroleum product discharge ~~or discharges from a petroleum product discharge or discharges~~ from a petroleum product storage system or home oil tank system.

SECTION 25. Comm 47.10 (1) (b) 3. c. is created to read:

Comm 47.10 (1) (b) 3. c. Providing commodity services that have reimbursement maximums which are determined either by the usual and customary cost schedule established under s. Comm 47.325, or by the public bidding process in subch. VII.

SECTION 26. Comm 47.115 (3) is repealed.

SECTION 27. Comm 47.115 Note is created to read:

Comm 47.115 Note: As defined in s. Comm 47.015 (52) (g), either failure to register, or actions to de-register a tank system in order to avoid regulation by the department, constitute willful neglect, and will result in denial of a claim, as specified in s. Comm 47.20 (7).

SECTION 28. Comm 47.12 (1) (intro.) is amended to read:

Comm 47.12 (1) (intro.) APPLICATION. A claimant shall submit a claim ~~on~~ in a Remedial Action Fund Application form (ERS-8067) furnished format prescribed by the department, and shall include all of the following that are applicable:

SECTION 29. Comm 47.12 (1) (j) is created to read:

Comm 47.12 (1) (j) A certificate or certificates verifying the existence of the insurance coverage required in ch. Comm 5 for all the environmental consultants who performed work included in a claim.

SECTION 30. Comm 47.12 (2) (c) and (4) are amended to read:

Comm 47.12 (2) (c) PECFA claims for awards may not be processed without proper and complete documentation including, but not limited to, Underground Petroleum Product Tank Inventory forms (ERS-7437), Aboveground Petroleum Product Tank Inventory forms (ERS-8731), Remedial Action Fund Application form (ERS-8067), department letter indicating compliance with remedial action plan submittal requirements (investigation claim), report providing information detailed in s. NR 716.15 (investigation claim), evidence of the source of the petroleum product discharge and the degree and extent of the soil or water contamination resulting from the discharge, proof of payment of costs incurred in remediation, approval of

closed remedial action, responsible party's social security number or federal tax identification number, and other forms available from the department necessary for claim processing.

~~(4) COSTS INCURRED IN REMEDIATION. (a) Forms shall be made available by the department which shall be completed by the owner, operator or person owning a home oil tank system, or agent prior to award payment. All invoices for costs incurred in a remediation shall be submitted with proof of payment verified.~~

~~(b) Only eligible costs, as specified in s. Comm 47.30, that have been paid, shall be submitted for an award. The department may use its published cost guidelines to determine if the level of reimbursement requested is excessive and may disallow costs if they are determined to be excessive.~~

SECTION 30m. Comm 47.12 (4) Note is created to read:

Comm 47.12 (4) Note: Section 101.143 (3) (d), Stats., addresses final review of remedial action activities, and reads as follows: "The department of natural resources or, if the discharge is covered under s. 101.144 (2) (b), the department of commerce shall complete a final review of the remedial action activities within 60 days after the claimant notifies the appropriate department that the remedial action activities are completed."

SECTION 31. Comm 47.13 Note is repealed and recreated to read:

Comm 47.13 Note: Section 101.143 (7) (a) and (am) read as follows "(a) No common law liability, and no statutory liability which is provided in a statute other than this section, for damages resulting from a petroleum product storage system or home oil tank system is affected by this section. Except as provided in par. (am), the authority, power and remedies provided in this section are in addition to any authority, power or remedy provided in any statute other than this section or provided at common law.

(am) An award under this section is the exclusive method for the recovery of the amount of eligible costs equal to the amount of the award that may be issued under this section."

SECTION 31m. Comm 47.20 is repealed.

SECTION 32. Comm 47.30 (1) (intro.) is renumbered Comm 47.30 (1) (a) and amended to read:

Comm 47.30 (1) (a) ~~Eligible costs for an award issued under this chapter may be determined by the department based upon cost guidelines published by the department.~~ Costs related to the following categories in pars. (b) to (g) may be reimbursed under the scope of this chapter:

SECTION 33. Comm 47.30 (1) (a) is renumbered Comm 47.10 (1) (a) 3. and amended to read:

Comm 47.10 (1) (a) 3. ~~Claims submitted for an award by owners~~ Owners or operators, or persons owning home oil tank systems, who were not owners or operators, or who were not persons owning home oil tank systems, when a petroleum product discharge occurred, and who meet all of the conditions of ~~s. Comm 47.10~~ this section, may submit a claim for an award under the scope of this chapter.

SECTION 34. Comm 47.30 (1) (b) 2. and 4. are amended to read:

Comm 47.30 (1) (b) 2. Costs of eligible work performed after confirmation of a ~~contamination~~ petroleum product discharge;

4. Laboratory services for testing specific to this chapter, including full VOC testing ~~during the investigation phase; and~~

SECTION 35. Comm 47.30 (1) (b) 5. is repealed.

SECTION 36. Comm 47.30 (1) (b) 6. is renumbered Comm 47.30 (1) (b) 5.

SECTION 37. Comm 47.30 (2) (a) 1., 3., 4., 8., and 11. to 13., (c) 3., (d) (intro.), 1., 2., 6., and 8., and (e) 3. are repealed.

SECTION 38. Comm 47.30 (2) (a) 2., 5. to 7., 9., 10., 14., and 15, (d) 3. to 5. and 7., and (e) 4. are renumbered Comm 47.30 (2) (a) 1. to 8., (d) 1. to 4., and (e) 3; and Comm 47.30 (2) (a) 7., as renumbered, is amended to read:

Comm 47.30 (2) (a) 7. Costs incurred after the DNR or the department determines that no further remedial action is required, except for abandonment of monitoring wells and finalization of site closure; ~~and~~

SECTION 39. Comm 47.30 (2) (b) 7. and 8. are amended to read:

Comm 47.30 (2) (b) 7. Additional interest costs accrued due to improper or incomplete filing of claims or non-response to department requests for additional information, exceptions being delays caused by the DNR or the department claim process; ~~and~~

8. Any late service charges; ~~or any~~

9. Any costs related to invoices or bills for which payment verification is unobtainable.

SECTION 40. Comm 47.30 (2) (h) to (k) are repealed and recreated to read:

Comm 47.30 (2) (h) Any costs, excluding for an emergency action, incurred before a confirmed discharge is reported to the DNR or the department.

(i) Interest costs associated with costs that are ineligible under this section or s. Comm 47.30 (3).

Note: See s. Comm 47.305 for further ineligible costs associated with loans.

(j) Interest costs excluded under s. Comm 47.60 (1) (b) 1., 47.625, or 47.69 (1) (b).

(k) Costs determined by the department to be excessive, as defined by the usual and customary cost schedule periodically established by the department under s. Comm 47.325.

SECTION 41. Comm 47.30 (2) (L) to (x) are created to read:

(L) Costs for any work performed where a contract is not in place as required in s. Comm 47.33 (2) (a) 1.

(m) Costs incurred for services exempted under s. Comm 47.33 (6) (b) 1., if the costs are incurred prior to the department approval required under s. Comm 47.33 (6) (b) 2., and the approval requirement is not subsequently waived by the department.

(n) Costs which exceed the \$20,000 limit in s. Comm 47.337 (2) (a) for a site investigation and remedial action plan, and which are incurred prior to either providing the notices that are required in s. Comm 47.337 (2) (c), or obtaining the approval which is required in s. Comm 47.337 (2) (b).

(o) Costs for any work performed after submittal of the notice of completion of an investigation under s. Comm 47.62 (4) and prior to the department's issuance of a response to the responsible party and the consulting firm under s. Comm 47.62 (5).

(p) Costs for any work performed more than 5 business days after the department issues a decision under s. Comm 47.62 (5) that an occurrence is subject to the public bidding process in s. Comm 47.68, if the work is conducted outside of that process.

(q) Costs for any work that is performed after submittal of a written deferral notice under s. Comm 47.63 (5) (c) and prior to a departmental authorization to proceed with additional activities.

(r) Costs for any unauthorized work performed more than 5 business days after the department issues a directive or notice under s. Comm 47.64 (1) about using the public bidding process in s. Comm 47.68.

(s) Costs for any unauthorized services that are performed by any party other than a firm which submitted a bid under s. Comm 47.68 (2) and with which a contract is executed under s. Comm 47.69, if they are conducted after the qualified low bid is determined under s. Comm 47.68 (3).

Note: For the purposes of pars. (o) to (s), costs for preparing or submitting a claim are eligible for reimbursement, regardless of when those costs are incurred.

(t) Costs that exceed the maximum reimbursement established under s. Comm 47.68 (7) (d).

(u) Costs for unauthorized work performed more than 5 business days after the department issues a disqualification notice under s. Comm 47.70 (4) (d).

(v) Costs for any work performed between the due date of any submittal required under this subchapter and the date a past-due submittal is actually submitted.

(w) Costs for performance bonds.

(x) Costs incurred that exceed caps established by the department unless written department approval is received prior to performance of the corresponding work.

SECTION 42. Comm 47.30 (3) and (4) are renumbered Comm 47.30 (4) and (5).

SECTION 43. Comm 47.30 (3) is created to read:

Comm 47.30 (3) PENALIZED INELIGIBLES. (a) 1. The costs in par. (b) are considered to be grossly ineligible for reimbursement.

2. An award for a claim which includes any costs in par. (b) and which was prepared and submitted by an owner or operator or person owning a home oil tank system shall be reduced to exclude those costs, and shall then be further reduced by 50 percent of the total amount of those costs.

3. A consultant who prepares a submitted claim that includes any costs in par. (b) shall pay to the department an amount equal to 50 percent of the total amount of those costs, and the award for the claim shall be reduced to exclude those costs.

(b) 1. Costs incurred on or before August 1, 1987, for a remediation.

2. Costs for cleanup resulting from spills from petroleum transportation equipment.

3. Costs for investigations or remedial action activities conducted outside the state of Wisconsin.

4. Costs associated with emptying, cleaning, or disposing of storage tank systems, and other costs associated with closing or removing any petroleum product storage tank system or home oil tank system after November 1, 1991 – unless the claimant has a contract for those services that was signed before November 1, 1991; or has a loan agreement, note, or commitment letter for a loan for the purposes of conducting those services, that was executed before November 1, 1991.

5. Laboratory rush charges, unless related to an approved emergency action.

6. Air travel.

7. Costs associated with tank-system upgrades or retrofits, and any corresponding compliance with other state or federal rules or laws, and future business plans.

8. Costs for repairing, retrofitting, or replacing a petroleum product storage system or home oil tank system, such as for tank bedding materials or fill for setting tanks, lines, or canopies.

9. Costs associated with capital improvements, reinstallation of electrical power, dispensers, pumps, or other items for retrofits, upgrades, or new construction, unless written department approval is received prior to performance of the corresponding work.

10. Costs associated with concrete, blacktop replacement, on-site landscaping, or other improvements; except for depreciation costs for third-party actions, or for asphalt or concrete patching associated with well abandonment, or where written department approval is received prior to performance of the corresponding work.

11. Costs associated with razing of buildings, removal of roads, removal of footings and foundations, or other destruction of structures, or other redevelopment costs, unless written department approval is received prior to performance of the corresponding work.

12. The opportunity cost of money, or interest income or dividend income lost because of a decision to use internal funding for a remediation.

13. Subcontractor markups for work performed after January 31, 1993. This subdivision does not apply to work that is included in a public bidding contract executed under s. Comm 47.69 (1).

14. Costs associated with general program support and office operation which are expected to be included in the hourly staff rates, such as telephone charges, photocopying, faxes, paper, printing, postage, hand tools, personal protective equipment, computer equipment, computer-aided-design, and software charges.

Note: For the purposes of this section, photo ionization detectors, flame ionization detectors, electronic equipment, and sampling kits are not considered hand tools.

15. Costs reimbursed by insurance companies unless performing in an agent role.

16. Costs associated with fees required by any other state agency, such as fees authorized by s. 292.55, Stats., and fees listed in ch. NR 749, except DNR closure review fees incurred prior to October 29, 1999.

SECTION 44. Comm 47.30 (5) (title), (intro.) and (a) are amended to read:

Comm 47.30 (5) (title) (intro.) ~~CONTAMINATIONS~~ AREAS OF CONTAMINATION CONTAINING ELIGIBLE AND INELIGIBLE PRODUCTS. When a an area of contamination is identified which contains both eligible and ineligible products under the fund, the following shall apply:

(a) ~~Only the costs~~ Costs associated with the eligible products may be claimed. ~~Eligible costs of remediation, which are only associated with the eligible product, may be claimed in their entirety, as specified in this section. Any costs that are required only because of the presence of an ineligible product may not be claimed even if a remedial benefit may be derived by the remediation of the eligible product.~~

SECTION 45. Comm 47.305 (1) (b) 3. and 4. are amended to read:

Comm 47.305 (1) (b) 3. Interest costs or late charges on invoices or bills; ~~and~~.

4. Additional interest costs accrued ~~because of poor money management or~~ for the use of PECFA loan proceeds to earn money or for investment purposes.

SECTION 46. Comm 47.305 (1) (b) 5. and Note, and 6. and Notes are created to read:

Comm 47.305 (1) (b) 5. Interest costs which are specified in s. 101.143 (4) (c) 8., Stats.

Note: Section 101.143 (4) (c) 8., Stats., reads as follows: "Interest costs incurred by an applicant that exceed interest at the following rate:

a. If the applicant has gross revenues of not more than \$25,000,000 in the most recent tax year before the applicant submits a claim, 1% under the prime rate.

b. If the applicant has gross revenues of more than \$25,000,000 in the most recent tax year before the applicant submits a claim, 4%."

6. Interest costs which are ineligible under s. 101.143 (4) (cc), Stats.

Note: Section 101.143 (4) (cc), Stats., reads as follows: "*Ineligibility for interest reimbursement.* 1. a. Except as provided in subd. 1m. or 2., if an applicant's final claim is submitted more than 120 days after receiving written notification that no further remedial action is necessary with respect to the discharge, interest costs incurred by the applicant after the 60th day after receiving that notification are not eligible costs.

c. Except as provided in subd. 2., if an applicant does not complete the investigation of the petroleum product discharge by the first day of the 61st month after the month in which the applicant notified the department under sub. (3) (a) 3. or October 1, 2003, whichever is later, interest costs incurred by the applicant after the later of those days are not eligible costs.

1m. If an applicant received written notification that no further remedial action is necessary with respect to a discharge before September 1, 2001, and the applicant's final claim is submitted more than 120 days after September 1, 2001, interest costs incurred by the applicant after the 120th day after September 1, 2001, are not eligible costs.

2. Subdivision 1. does not apply to any of the following:

a. An applicant that is a local unit of government, if federal or state financial assistance other than under this section, has been provided for that expansion or redevelopment.

b. An applicant that is engaged in the expansion or redevelopment of brownfields, as defined in s. 560.13 (1) (a), if federal or state financial assistance other than under this section, has been provided for that expansion or redevelopment.”

Note: Other sections of this code may also specify interest costs that are ineligible for reimbursement, such as ss. Comm 47.12 (3) (c) and 47.30 (2) (i) and (j).

SECTION 47. Comm 47.305 (1) (c) 1. b. and 2. b. and (g) 1. are amended to read:

Comm 47.305 (1) (c) 1. b. Loan origination fees from the same lender shall be reimbursable only once, and at no more than 2 points of the loan principal. Where a later, larger loan is obtained to pay off a preceding loan, the origination fee for the portion of the later loan that equals the preceding principal will not be reimbursed. A duplicative loan origination fee from a subsequent lender will not be reimbursed, unless the preceding loan was terminated by a different lender.

2. b. Loan origination fees from the same lender shall be reimbursable only once, and at no more than 2 points of the loan principal. Where a later, larger loan is obtained to pay off a preceding loan, the origination fee for the portion of the later loan that equals the preceding principal will not be reimbursed. A duplicative loan origination fee from a subsequent lender will not be reimbursed, unless the preceding loan was terminated by a different lender.

(g) 1. Annual loan service fees shall be charged no more frequently than once annually, and at a rate of no more than 1% on the outstanding balance.

SECTION 48. Comm 47.31 (2) is amended to read:

Comm 47.31 (2) INCENTIVES. For claimants who participate in the voluntary bundling of sites or for remediations that have approval as closed remedial actions and eligible costs not exceeding ~~\$80,000~~ \$60,000, excluding interest, the claim may receive priority review in the award process.

SECTION 49. Comm 47.32 is repealed.

SECTION 50. Comm 47.325 is created to read:

Comm 47.325 Usual and customary costs. (1) APPLICATION. This section applies to all work covered under this chapter, for all occurrences previously or newly reported to the

DNR, that is performed after [the effective date of this section . . . Revisor inserts date], except it does not apply to any of the following:

(a) Work for which a reimbursement cap has been determined through the competitive public bidding process established under s. 101.143 (3) (cp), Stats.

(b) Work performed as part of an emergency action, within the initial 72 hours after the onset of the need for the action.

(c) Work performed for home oil tank systems.

(2) **COST SCHEDULE.** Any cost for items that are commonly associated with claims under this chapter, which exceeds the amounts listed in the department's schedule of usual and customary costs, as published and in effect while the work was performed, may not be reimbursed, except as provided in sub. (3).

Note: The department's schedule of usual and customary costs is updated in January and June of each year to reflect changes in actual costs. The current schedule is included in the Appendix for this rule. The current schedule, and any preceding versions, are also posted at the Department of Commerce Web site at www.commerce.wi.gov, under petroleum programs and PECFA.

Note: The schedule of usual and customary costs limits the per-unit reimbursement for various, commonly associated tasks. For caps on reimbursement for items that are not commonly associated with claims, or for caps on the scope of work for a particular task or occurrence, other sections of this chapter may apply, such as s. Comm 47.337 (2), which addresses the maximum allowable cost for a site investigation and the development of a remedial action plan, and subch. VII, which addresses competitive public bidding.

(3) **EXCEEDING THE SCHEDULE.** The maximum reimbursement amounts established under sub. (2) may be exceeded only in accordance with all of the following:

(a) Higher costs must be incurred in order to comply with s. 101.143 (3) (c) 3., Stats., and with enforcement standards established under ch. 160, Stats.

(b) The higher costs, as needed under par. (a), are specifically approved in writing by the department prior to performance of the corresponding work.

Note: Under s. 101.143 (3) (c) 3., Stats., a responsible party is required to "conduct all remedial action activities at the site of the discharge from the petroleum product storage system or home oil tank system necessary to restore the environment to the extent practicable and minimize the harmful effects from the discharge as required under s. 292.11, Stats."

(4) **CLASSIFICATION OF OCCURRENCES.** (a) No later than 30 days after [the effective date of this section . . . Revisor inserts date], the responsible party or agent for each occurrence reported to the DNR by [the effective date of this section . . . Revisor inserts date] shall complete and submit to the department an occurrence-classification form prescribed by the department, except as provided in par. (c).

Note: The department's current occurrence-classification form is included in the Appendix for this rule. The form is also posted at the Department of Commerce Web site at www.commerce.wi.gov, under petroleum

programs and PECFA. The purpose of this form is to assist the department in prioritizing occurrences, in order to most effectively apply the actions specified in sub. (6).

(b) If an occurrence-classification form required under par. (a) is not submitted in accordance with par. (a), the department may not reimburse costs for any work performed between [the effective date of this section . . . Revisor inserts date] and the date the department receives the form.

(c) An occurrence-classification form is not required where the only remaining work consists of submitting a claim or completing the conditions in a conditional closure letter from the department or the DNR.

(5) REQUEST FOR ADDITIONAL INFORMATION. (a) If the department requests additional information after receipt of the occurrence-classification form required in sub. (4), the responsible party or agent shall provide the requested information no later than 45 days after the date of the department's request.

(b) If information requested under par. (a) is not submitted in accordance with par. (a), the department may only reimburse costs for the subject occurrence that are listed on the schedule established under sub. (2).

(6) RESPONSE TO THE OCCURRENCE-CLASSIFICATION FORM OR TO ADDITIONAL INFORMATION. After receipt of the occurrence-classification form required under sub. (4) or the additional information requested under sub. (5), the department may take one or more of the following actions:

(a) Limit reimbursement to the costs listed in the schedule established under sub. (2).

(b) Specify a reimbursement cap for costs that are not listed in the schedule established under sub. (2).

(c) Specify a scope of work and a corresponding reimbursement cap.

(d) Specify a period during which the public bidding process established under s. 101.143 (3) (cp), Stats., will be deferred.

(7) CLAIMS FOR PRIOR COSTS. For an occurrence that is the subject of a department directive under sub. (6) (b), (c) or (d), claims for reimbursement for costs incurred before the effective date of the directive shall be paid in accordance with s. Comm 47.025.

Note: As required in s. Comm 47.12 (1) (intro.), all claims for reimbursement for the costs included in the schedule established under sub. (2), or the costs included under sub. (7), must be submitted in a format prescribed by the department.

SECTION 51. Comm 47.33 (intro.) and (1) to (6) are renumbered Comm 47.33 (1) to (7), and Comm 47.33 (2) (a) 1., as renumbered, is amended to read:

Comm 47.33 (2) (a) 1. An owner or operator shall select a qualified PECFA consulting firm, as so registered under ch. Comm 5, to conduct the all site investigation and the development of a remedial action plan. ~~The owner or operator activities, and shall select and execute a written contract with a consulting that firm after making a comparison of qualified consulting firms by obtaining and reviewing a minimum of 3 proposals for services or utilizing another selection process approved by the department.~~

SECTION 52. Comm 47.33 (2) (a) 2., as renumbered, is repealed.

SECTION 53. Comm 47.33 (2) (a) 3., as renumbered, is renumbered Comm 47.33 (2) (a) 2. and amended to read:

Comm 47.33 (2) (a) 2. The services of the selected consulting firm shall be limited to providing the consulting services or scientific evaluations necessary to conduct an environmental response. ~~Neither the~~ The consulting firm nor and any company or consultant not independent of the consulting firm or project consultants may provide are prohibited from providing any of the commodity services required in the remediation.

SECTION 54. Comm 47.33 (6) (b), as renumbered, is amended to read:

Comm 47.33 (6) (b) 1. The department may exempt specific services from the competitive commodity bid process if the department determines that the conduct of the bid proposal process is unlikely to further the remediation process or the goals of the program.

2. Written department approval shall be received prior to incurring costs for services that are exempted under subd. 1., except where a subsequent department waiver of the approval requirement would further the goals or objectives of the program.

Note: As established in s. Comm 47.30 (2) (m) and (i), the department will not reimburse costs, including interest cost, for services exempted under subd. 1., if the costs are incurred prior to the department approval required under subd. 2., and the approval requirement is not subsequently waived.

SECTION 55. Comm 47.33 (6) (c) and (d) are created to read:

Comm 47.33 (6) (c) The competitive commodity bidding required under subs. (2) (b) and (4) is not required where reimbursement amounts are determined either by the usual and customary cost schedule established under s. Comm 47.325, or by the public bidding process in subch. VII.

(d) The prohibition in sub. (2) (a) 2. against consultants or their associates providing commodity services does not apply where reimbursement amounts are determined either by the usual and customary cost schedule established under s. Comm 47.325, or by the public bidding process in subch. VII.

SECTION 56. Comm 47.335 (3) (c) 1. is amended to read:

Comm 47.335 (3) (c) 1. The comparison of alternatives shall be a concise document written so that the responsible party and the department may easily compare alternatives. Only alternatives which are reasonably expected to be approved may be included in the comparison. The comparison of alternatives shall be submitted to the department if the proposed alternative is greater than ~~\$80,000~~ \$60,000. The comparison submitted to the department shall not include the full remedial action plan, unless requested by the department.

SECTION 57. Comm 47.336 is repealed.

SECTION 58. Comm 47.337 (2) (a) to (c) are amended to read:

Comm 47.337 (2) (a) The maximum allowable cost for a site investigation and the development of a remedial action plan shall be no more than ~~\$40,000~~ \$20,000, excluding interest, ~~feasibility testing~~, and interim action costs, unless approved under par. (b).

(b) If the investigation will exceed ~~\$40,000~~ \$20,000, either the claimant, or its their agent or the consultant shall contact the department in writing and provide an estimate of additional work and funding required, and obtain the department's approval.

(c) The consultant is responsible for monitoring the costs incurred in the investigation and remedial action plan development and ~~identifying that~~ notifying the department prior to exceeding the \$40,000 \$20,000 maximum may be exceeded. The consultant shall also notify the claimant, in writing, at the earliest point at which the consultant may know, or may have been reasonably expected to know, that the maximum allowable cost may be exceeded. ~~and that the~~ The written approval of the department shall be obtained before incurring any costs above \$40,000 \$20,000 will be reimbursed by the department. The notification to the owner shall be made before the owner has incurred liabilities above the ~~\$40,000~~ \$20,000 maximum

Note: As established in s. Comm 47.30 (2) (n) and (i), the department will not reimburse costs, including interest costs, above the \$20,000 limit in this subsection if they are incurred prior to either providing the notices that are required in par. (c), or obtaining the approval which is required in par. (b).

SECTION 59. Comm 47.337 (4) and (5) are repealed and Comm 47.337 (4) is recreated to read:

Comm 47.337 (4) COST CAPS FOR OCCURRENCES THAT ARE NOT SUBJECT TO PUBLIC BIDDING. For an occurrence that is not subject to the public bidding process in s. Comm 47.68 due to a waiver issued under s. Comm 47.63 (1), cost caps shall be established as prescribed in s. 101.143 (3) (cs), Stats.

Note: Section 101.143 (3) (cs), Stats., reads as follows: “1. The department of commerce shall review the remedial action plan for a site that is classified as low or medium risk under s. 101.144 and shall determine the least costly method of complying with par. (c) 3. and with enforcement standards. The department shall notify the owner or operator of its determination of the least costly method and shall notify the owner or operator that reimbursement for remedial action under this section is limited to the amount necessary to implement that method.

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

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

4. The department of commerce may review and modify an amount established under subd. 1. if the department determines that new circumstances, including newly discovered contamination at a site, warrant those actions. The department of commerce and the department of natural resources may review and modify an amount established under subd. 2. if the departments determine that new circumstances, including newly discovered contamination at a site, warrant those actions.”

SECTION 60. Comm 47.339 (1) (intro.) and (2) are amended to read:

Comm 47.339 (1) (intro.) FLEXIBILITY. If a claimant can achieve a closed remedial action, and the total costs incurred are equal to or less than ~~\$80,000~~ \$60,000, excluding interest, the department will allow the claimant to complete their remedial efforts without the requirements to:

(2) NOTIFICATION AND REQUIREMENTS. If a claimant and his or her consultant ~~elects~~ elect to attempt to achieve a closed remedial action within the ~~\$80,000~~ \$60,000 limit, the department shall be notified in advance of implementation of the remediation process of the intended attempt. If the effort is not successful, the department shall be notified as soon as it is known or should have reasonably been expected to be known that the site will not be completed within the ~~\$80,000~~ \$60,000 limit. The ~~\$80,000~~ \$60,000 limit shall not be exceeded without prior notice to and approval from the department. After notification of the failure to accomplish a closed remedial action, the department will provide direction on whether additional action will be funded, ~~or whether a remedial action plan is to be prepared and submitted~~. If any expenses above the ~~\$80,000~~ \$60,000 limit are incurred, ~~excluding interest~~, without department approval, they ~~will be the sole responsibility of the consultant and cannot~~ may not be claimed for reimbursement under the PECFA fund.

SECTION 61. Comm 47.339 (4) is created to read:

Comm 47.339 (4) SUNSET OF THIS SECTION. The election under sub. (2) to utilize this section may not be made on or after [the effective date of this rule. . . Revisor inserts date].

SECTION 62. Comm 47.34 is repealed and recreated to read:

Comm 47.34 Reduction of deductible, based on financial hardship. (1) The deductible amount specified in s. 101.143 (4) (dg), Stats., for underground petroleum product storage systems may be reduced by the department to \$2500, where proof of financial hardship is established in accordance with sub. (2).

Note: See the Note under s. Comm 47.025 (2) for a reprint of s. 101.143 (4) (dg), Stats.

(2) Financial hardship shall be demonstrated on a form provided by the department, in sufficient detail to enable the department to determine whether the hardship either exists, or will occur if the deductible is not reduced under this section.

Note: The department forms required in this chapter are available from the Division of Environmental and Regulatory Services at P.O. Box 7837, Madison, WI 53707-7837, or at telephone 608/266-7874 and 608/264-8777 (TTY), or at the Department of Commerce Web sites for petroleum programs and PECFA at commerce.wi.gov.

SECTION 63. Comm 47.35 is repealed.

SECTION 64. Comm 47.355 (2) (c) (intro.), 2., and 4. to 8. are amended to read:

Comm 47.355 (2) (c) (intro.) Progress payments. ~~Progress payments may not be made to entities who have met or have the ability to meet the test of self insurance in s. Comm 10.82.~~ All requests for progress payments shall be accompanied by a completed Remedial Action Fund Application form (ERS-8067). The department may conduct field or financial audits or inspections to verify completion of each phase of remediation prior to payment. Progress payments may be made only at the following times:

2. After completion of an investigation, ~~submittal of the remedial action plan~~ and receipt of written approval by the department to submit the investigation claim.

4. Approval of natural attenuation as a final remedial response or at the end of each ~~two~~ one-year cycle of the monitoring necessary to show that remediation by natural attenuation will occur.

5. At the end of each ~~two~~ one-year cycle of monitoring required for off-site contamination.

6. After implementation and ~~2-years~~ 1 year of actual operation, or monitoring, or combination thereof, and every ~~2-years~~ 1 year thereafter.

7. ~~For financial hardship claimants: after completion of the site investigation, submittal of the remedial action plan and receipt of written approval by the department to submit the~~

~~investigation claim; after implementation of an approved remedial action; or annually after completion of each year of operation and maintenance or monitoring.~~

~~8. For sites selected by the department for progress payments based upon extreme life safety and environmental risk and where the claimant has demonstrated to the department's satisfaction that he or she does not have the financial means to conduct a remediation without progress payments; after completion of the site investigation, submittal of the remedial action plan and receipt of written approval by the department to submit the investigation claim; after implementation of an approved remedial action; or annually after completion of each year of operation and maintenance or monitoring. The department shall be the sole determiner of whether progress payments are to be allowed, and an appeal of the decision to the department is not allowed.~~

~~**Note:** Claimants, who have met or have the ability to meet the test of self insurance, may also file for a payment after implementation and two years of actual operation, sampling, and monitoring of an active treatment system and every two years thereafter.~~

SECTION 65. Comm 47.355 (2) (d) 3. and Note, 4. to 7., and (e) are created to read:

Comm 47.355 (2) (d) 3. When the conditions prescribed in s. 101.143 (4) (a) 2. b., Stats., occur.

Note: Section 101.143 (4) (a) 2. b., Stats., reads as follows: "The department shall issue an award if the owner or operator or the person has incurred at least \$50,000 in unreimbursed eligible costs and has not submitted a claim during the preceding 12 months."

4. When there is a change in responsible party, if the previous responsible party files a claim.

5. When there is a change in consulting firms working on the project.

6. When there is a change in lenders for the project.

7. When the department directs filing a claim, in an effort to reduce interest costs to the program.

(e) *Penalty for not submitting a required claim.* If a claim submittal that is directed under par. (d) 7. is not submitted within 120 days of receiving written notification of that directive, any interest expense beginning on the 121st day and extending until the department receives the claim, is not eligible.

SECTION 66. Comm 47.355 (3) (b) is renumbered Comm 47.355 (3) (b) 1. and amended to read:

Comm 47.355 (3) (b) Cost-effective remediations, tanks for schools and farms, and home oil tanks. If a claimant can achieve a closed remedial action, and the total costs incurred are equal to or less than \$80,000, excluding interest, the claim may receive priority processing. 1. Claims received under this paragraph subds. 2. and 3. may be processed and awards may be made thereto, before processing other complete claims, except for emergency claims under par. (a), and except for claims for either home oil tanks or farm tanks, as prescribed in s. 101.143 (4) (a) 5. and 5m., Stats., respectively.

SECTION 67. Comm 47.355 (3) (b) 1. Note, 2., and 3. are created to read:

Comm 47.355 (3) (b) 1. **Note:** Sections 101.143 (4) (a) 5. and 5m., Stats., read as follows:

“5. The department shall review claims related to home oil tank discharges as soon as the claims are received. The department shall issue an award for an eligible home oil tank discharge as soon as it completes the review of the claim.

5m. The department shall review claims related to discharges from farm tanks described in par. (ei) as soon as the claims are received. The department shall issue an award for an eligible discharge from a farm tank described in par. (ei) as soon as it completes the review of the claim.”

2. Priority processing may be assigned to a claim for a closed remedial action that is achieved at a total cost of \$60,000 or less, excluding interest.

3. Priority processing may be assigned to a claim for a petroleum product storage system which is owned by a school district and which is used for storing heating oil for consumptive use on the premises where stored.

SECTION 68. Comm 47.36 (1) is amended to read:

Comm 47.36 (1) GENERAL. A responsible party may file a claim with the department for the reimbursement of an amount paid to third parties for personal injury to another individual or off-site property damage associated with a petroleum product discharge from an underground petroleum product storage tank system within the scope of this chapter. The existence of these claims shall be made known to the department, by the responsible party ~~shall notify the department of these claims,~~ no later than 30 calendar days from the date that ~~they~~ the responsible party knew or could have reasonably ~~have~~ been expected to have known of the occurrence of the injury or personal property loss. Rules established by the office of the commissioner of insurance, as specified in s. Ins 6.35, concerning ineligible costs for third-party claims, shall apply.

SECTION 69. Comm 47.37 is repealed and recreated to read:

Comm 47.37 Recovery of awards. Sale of remedial equipment or supplies shall comply with s. 101.143 (5) (a), Stats.

Note: Section 101.143 (5) (a), Stats., reads as follows: “If a person who received an award under this section sells equipment or supplies that were eligible costs for which the award was issued, the person shall pay the proceeds of the sale to the department. The proceeds shall be paid into the petroleum inspection fund.”

SECTION 70. Chapter Comm 47, subchapter V (title) is amended to read:

Chapter Comm 47, Subchapter V – (title) ~~Consultants, Consulting Firms~~ Credentials, Laboratories and, Drilling Firms and Audits

SECTION 71. Comm 47.40 is repealed and recreated to read:

Comm 47.40 Reimbursement and credentials. Remedial consulting services and activities performed by individuals and firms who do not have the applicable credentials under ch. Comm 5 to participate in the PECFA program may not be reimbursed under the scope of this chapter unless the department determines that denying the reimbursement would conflict with achieving the goals of the PECFA program.

SECTION 72. Comm 47.405 to Comm 47.41 are repealed.

SECTION 73. Comm 47.415 is renumbered Comm 47.41.

SECTION 74. Comm 47.42 (2) (g) is amended to read:

Comm 47.42 (2) (g) Sites having ~~intermingled~~ commingled plumes.

SECTION 75. Comm 47.42 (2) Note is created to read:

Comm 47.42 (2) Note: Defrauding the PECFA program may result in revocation or suspension of credentials issued under ch. Comm 5, and criminal prosecutions under chs. 939 and 943, Stats.

SECTION 76. Comm 47.42 (3) (a) is amended to read:

Comm 47.42 (3) (a) *General.* All consultants and consulting firms registered to participate, all organizations and individuals, including but not limited to service providers and others who perform remedial action services, all owners, operators, and persons owning home oil tank systems who file or attempt to file a claim under the PECFA program shall maintain records relevant to a claim for 6 years after claim submittal and make available ~~for inspection~~, upon request of the department, all financial and work records deemed by the department as necessary to support or investigate a claim or attempted claim.

SECTION 77. Comm 47.42 (3) (b) is repealed.

SECTION 78. Comm 47.42 (3) (c) to (e) are renumbered Comm 47.42 (3) (b) to (d), and Comm 47.42 (3) (b), as renumbered, is amended to read:

Comm 47.42 (3) (b) *Penalties*. Penalties ~~shall be established~~ for violations ~~to of~~ this section, as per shall be established in accordance with s. 101.143 (10), Stats.

~~1~~ Note: Section 101.143 (10), Stats., reads as follows: “PENALTIES. (a) Any owner or operator, person owning a home oil tank system or service provider who fails to maintain a record as required by rules promulgated under sub. (9) (a) may be required to forfeit not more than \$2000. Each day of continued violation constitutes a separate offense.

~~2~~ “(b) Any owner or operator, ~~or~~ person owning a home oil tank system or service provider who intentionally destroys a document that is relevant to a claim for reimbursement under the fund, ~~may be fined not more than \$1,000 or imprisoned for not more than 10 years or both~~ this section is guilty of a Class G felony.”

SECTION 79. Comm 47.50 (title) and 47.50 are amended to read:

Comm 47.50 (title) ~~Noticing~~ Notifying the department of actions—real estate transactions. (1) PROPERTY TRANSFER OR LEASE. The owner or operator or person owning a home oil tank system shall ~~have the responsibility of notifying~~ notify the department of ~~a property transfer which occurs during a remediation~~ any real estate transaction affecting the ownership or operation of a remediation site.

(2) SALE REAL ESTATE SALES AGREEMENT OR LEASE AFFECTING RESPONSIBILITY FOR THE REMEDIATION. The ~~sale~~ sales agreement or lease for a property being transferred ~~during a remediation or~~ or leased prior to the completion of a remediation shall ~~contain language defining~~ identify the party or parties responsible for the completion of the remediation, responsible for the payment of costs ~~incurred~~ and ~~the recipient of the PECFA award~~ eligible to receive PECFA proceeds. The party or parties eligible to receive the PECFA award shall submit a signed copy of the sales agreement or lease, a form W-9, and a release from any previous assignment of award under s. Comm 47.15, with the next claim.

SECTION 79m. Comm 47.51 is repealed.

SECTION 79n. Comm 47.52 and 47.53 are amended to read:

Comm 47.52 Dispute resolution procedures. (1) ~~Individuals~~ Any person, including, but not limited to, owners, operators, persons owning home oil tank systems and their agents may submit a written complaint to the department regarding a consultant, ~~or consulting firm or other service provider~~ alleged to be involved in any violation of the law or this chapter.

(2) The department may investigate ~~alleged violations~~ consultants, consulting firms or other service providers on its own initiative or upon the receipt of a complaint. The department may conduct an investigation and make a determination regarding a complaint ~~within 30 business days of~~ as soon as practicable following the receipt of the complaint. The department shall take appropriate action based on its determination. If it is determined that no further action is warranted or authorized, the department shall notify the persons affected.

~~Note: Section 101.09 (5), Stats., states "(5) Penalties. Any person who violates this section or any rule or order adopted under this section shall forfeit not less than \$10 nor more than \$1,000 for each violation. Each violation of this section or any rule or order under this section constitutes a separate offense and each day of continued violation is a separate offense."~~

~~Note: Each remedial activity, cost item fraudulently claimed, or other activities conducted or information submitted in violation of any section of this chapter shall be considered a separate violation.~~

Comm 47.53 Appeals and hearings. (1) HEARINGS APPEALS. (a) *General.* A responsible party, agent, consultant or consulting firm may request a hearing with the department, as specified in s. 101.02 (6) (e), Stats., on any ~~provision or decision made within the scope of this chapter~~ affecting that person's legal rights except as specified in ss. Comm 47.03, 47.35 (3), 47.355 (2) (c) 8. and (3) (a) and par. (b) 2.

(b) *Appeal requirements.* 1. All appeals pursuant to this chapter shall be in writing and shall be filed received by the department no later than 30 calendar days from after the date of the decision being appealed. The department may make a determination not to proceed with a request for a hearing depending on the nature of or amount of the cost item being appealed. Appeals received more than 30 days after the date of the decision being appealed shall be dismissed. For purposes of this section, appeals received after 4:30 p.m. shall be considered received on the next business day.

Note: A claimant or an attorney representing the claimant may request an administrative hearing to review this action by delivering, mailing, or faxing a written request for a hearing to:

Delivery address:

Department of Commerce PECFA Appeals
201 West Washington Ave., 3rd Floor
Madison, Wisconsin

Mailing address:

Department of Commerce PECFA Appeals
P.O. Box 7838
Madison WI 53707-7838

Fax number:

(608) 267-1381

~~1. Costs of consultants or individuals preparing and participating in appeals shall not be eligible for reimbursement under the PECFA program.~~

2. An appeal shall be signed by the person whose legal rights are affected by the decision being appealed or an attorney representing such person. Any appeal filed by a person other than

the person whose legal rights are affected by the decision being appealed or an attorney representing that affected person shall be dismissed.

3. Appeals of items identified as ineligible, as listed in s. Comm 47.30 (2) or (3), shall ~~not be allowed~~ dismissed.

4. The written appeal shall list every reason the department's decision is incorrect and shall identify every issue to be considered in the hearing. Issues not raised in the written appeal under this subdivision are considered to be waived and shall be dismissed.

~~(c) Response. Upon receipt of notification of hearing from the department, the affected party may submit to the department a written response within 30 calendar days of the date of service. Failure to respond within the prescribed time limit, or failure to appear at the scheduled hearing, may result in the allegations specified in the complaint being accepted as true and accurate.~~

~~(d) (2) HEARINGS. (a) General. All hearings shall be conducted in accordance with these rules and chapter 227, Stats.~~

~~(b) Conciliation Settlement agreement prior to hearing. If the department and the affected party are able to reach agreement on disposition of a complaint an appeal prior to a hearing, such agreement shall~~ the following actions shall occur:

1. ~~Be~~ The settlement agreement shall be transmitted in writing to the administrative law judge designated by the secretary of the department;

2. ~~Not~~ The settlement agreement shall be binding upon any party until accepted by the secretary of the parties when signed by both parties and returned to the department; and

3. ~~Not be considered a waiver of any defense nor an admission of any fact until accepted by the secretary of the department~~ The settlement agreement shall be considered a joint motion by the parties to dismiss the appeal its entirety or to dismiss such portions of the appeal as may be encompassed by the terms of the settlement agreement.

~~(c) Prehearing discovery. There shall be no prehearing discovery except as provided in s.227.45(7), Stats.~~

~~(e)(d) Witness fees. Witness fees and mileage of witnesses subpoenaed on behalf of the department shall be paid at the rate prescribed for witnesses in circuit court.~~

~~(2) CONDUCT OF HEARINGS. All hearings will be conducted by persons selected by the department. Persons so designated may administer oaths or affirmations and may grant continuances and adjournments for cause shown. The affected party shall appear in person and may be represented by legal counsel. Witnesses may be examined by persons designated by the department.~~

~~(3) Determinations. The department may make determinations and enter its order on the basis of the facts revealed by its investigation. Any determinations as a result of petition or hearing shall be in writing and shall be binding unless appealed to the secretary of the department.~~

~~(4) Appeal arguments. Appeal arguments shall be submitted to the department in writing unless otherwise ordered.~~

~~(5) Reimbursements. An award or portions of an award under the scope of this chapter may be withheld until a decision or an appeal shall be finalized.~~

(e) Location of hearings. All hearings shall be held in Madison, Wisconsin at a location determined by the department. Telephone testimony of individual witnesses and telephone hearings may be held at the discretion of the person designated by the secretary as hearing officer.

(f) Hearing transcripts. All hearings shall be electronically recorded. Any party may request a copy of the electronic recording. A transcript of the recorded hearing shall be prepared upon request at the expense of the party requesting the transcript. Copies of transcripts prepared under this section shall be provided to the other party or parties upon payment of the actual cost of copying or obtaining a copy of the transcript. The department may require payment in advance. A transcript may be provided at the department's expense to a party who demonstrates impecuniousness or financial need if that party has filed a petition for judicial review. Where the department contracts with a court reporting firm for the preparation of transcripts, the fees charged for transcription and copying shall be equal to the fees charged to the department by the court reporting firm.

SECTION 80. Comm 47.54 is created to read:

Comm 47.54 Arbitration. (1) APPLICATION. (a) If a claimant who files an appeal under s. Comm 47.53 requests use of arbitration and if the amount at issue is \$100,000 or less, the appeal shall be processed under this section.

(b) 1. A request for arbitration shall be considered as a withdrawal of the appeal filed regarding the subject of that arbitration and precludes the claimant from going forward with an administrative appeal regarding the same issues under s. Comm 47.53.

2. Proceeding to an appeal hearing under s. Comm 47.53 precludes the claimant from filing an arbitration request regarding the same issues.

(c) A request for arbitration shall be in writing signed by the claimant or their attorney, shall include the names and addresses of all parties, and shall be made after denial of costs submitted for reimbursement, but prior to commencement of a hearing under ch. 227, Stats.

(2) SCOPE. Only the costs in the following categories may be the subject of arbitration under this section:

- (a) Investigating a petroleum product discharge.
- (b) Planning remedial action.
- (c) Conducting remedial action activities.

(3) DEFINITIONS. (a) *Deadlines*. All time deadlines in this section, except in sub. (10) (e) 1., are specified in calendar days.

(b) *Terms*. Except where otherwise specified, the following terms are defined as follows for the purposes of this section:

1. “Administrator” means the administrator of the environmental and regulatory services division of the department, or his or her designee.

2. “Arbitrator” means a person appointed in accordance with s. 101.143 (6s), Stats., and governed by the provisions of this section.

Note: Section 101.143 (6s) Stats., reads as follows: “Upon the request of a person who files an appeal of a decision of the department under this section, if the amount at issue is \$100,000 or less, the appeal shall be heard by one or more individuals designated by the department to serve as arbitrator under rules promulgated for this purpose by the department. In such an arbitration, the arbitrator shall render a decision at the conclusion of the hearing, or within 5 business days after the conclusion of the hearing if the arbitrator determines that additional time is needed to review materials submitted during the hearing, affirming, modifying or rejecting the decision of the department. The arbitrator shall promptly file his or her decision with the department. The decision of the arbitrator is final and shall stand as the decision of the department. An arbitrator’s decision may not be cited as precedent in any other proceeding before the department or before any court. A decision under this subsection is subject to review under ss. 227.53 to 227.57 only on the ground that the decision was procured by corruption, fraud or undue means. The record of a proceeding under this subsection shall be transcribed as provided in s. 227.44 (8).”

3. “Claim” means the amount sought by a claimant as remediation costs actually incurred by the claimant at a remediation site.

4. “Ex parte communication” means any communication, written or oral, relating to the merits of an arbitration proceeding, between an arbitrator and any party or their agent, which was not originally filed or stated in the administrative record of the proceeding. Such communication is not ex parte communication if all parties to the proceeding have received prior written notice of the proposed communication and have been given the opportunity to be present and to participate therein.

5. “Party” means the department and any person who has agreed, pursuant to s. 101.143 (6s), Stats., to submit to an arbitrator one or more issues arising from a denial of incurred costs that have been claimed for reimbursement by a claimant.

(4) APPOINTMENT OF ARBITRATOR. (a) The department shall establish and maintain a panel of environmental arbitrators.

(b) Within 10 days of receiving a request for arbitration, the administrator shall identify and submit simultaneously to all parties an identical list of 6 individuals chosen from the panel of arbitrators, whom the administrator believes will not be subject to disqualification because of circumstances likely to affect impartiality. Each party shall have 10 days from the date of receipt of the list to identify any individuals objected to, to rank the remaining individuals in the order of preference, and to return the list to the administrator. If a party does not return the list within the time specified, all individuals on the list are deemed acceptable to that party. From among the individuals whom the parties have indicated as acceptable, and, in accordance with the designated order of mutual preference, if any, the administrator shall appoint an arbitrator to serve. If the parties fail to mutually agree upon any of the individuals named, or if the appointed arbitrator is unable to serve, or if for any other reason the appointment cannot be made from the submitted lists, the administrator shall make the appointment from among the other members of the panel. In no event shall appointment of the arbitrator by the administrator take longer than 30 days from the filing of the request for arbitration. The administrator's appointment notice to the arbitrator shall include the names and addresses of all of the parties, as provided in the request for arbitration.

(c) The arbitrator shall, within 5 days of receipt of his or her notice of appointment, file a signed acceptance of the case with the department and the claimant. The acceptance shall include a disclosure to the parties of any circumstances likely to affect impartiality, including any bias or any financial or personal interest in the result of the arbitration, or any past or present relationship with the parties or their counsel, or any past or present relationship with any known responsible party to which the claim may relate.

(d) If any appointed arbitrator should resign, die, withdraw, be disqualified, or otherwise be unable to perform the duties of the office, the administrator may fill the vacancy in accordance with the applicable provisions of this subsection, and the arbitration process shall be resumed.

(5) CHALLENGE PROCEDURES. (a) If any party wishes to request disqualification of an arbitrator, that party shall notify the other parties in writing of that request and the basis therefor within 5 days of receipt of the information on which the request is based.

(b) The administrator shall make a determination on any request for disqualification of an arbitrator within 7 days after the department receives the request, and shall notify the parties in writing of the determination. This determination shall be within the sole discretion of the administrator, and that decision shall be final.

(6) EX PARTE COMMUNICATION. (a) No party or agent of a party may make or knowingly cause to be made to the arbitrator an ex parte communication.

(b) The arbitrator may not make or knowingly cause to be made to any party or agent of a party an ex parte communication.

(c) The administrator may remove the arbitrator in any proceeding in which it is demonstrated to the administrator's satisfaction that the arbitrator has engaged in prohibited ex parte communication to the prejudice of any party. If the arbitrator is removed, the procedures in sub. (4) (d) shall apply.

(d) Whenever an ex parte communication in violation of this subsection is received by or made known to the arbitrator, the arbitrator shall immediately notify in writing all parties to the proceeding of the circumstances and substance of the communication and may require the party who made the communication or caused the communication to be made, or the party whose representative made the communication or caused the communication to be made, to show cause why that party's arguments or claim should not be denied, disregarded, or otherwise adversely affected on account of the violation.

(e) The prohibitions of this subsection apply upon appointment of the arbitrator and terminate on the date of the final decision.

(7) JOINT SUBMITTAL. (a) Within 10 days after receipt of the arbitrator's acceptance under sub. (4) (c), the claimant and the department shall jointly submit to the arbitrator a summary of one or more issues arising from the denial by the department of incurred costs claimed for reimbursement concerning the site. The joint submittal shall be signed by the claimant or their attorney, and a representative of the department, and shall include all of the following:

1. A description of the site and a brief summary of the actions taken at the site.
2. A statement of the issues arising from the costs denied by the department in the claim, that are being submitted for resolution by arbitration.
3. A statement that the parties consent to resolution of the issues jointly submitted to the arbitrator.
4. A statement that the parties agree to be bound by the final decision on all issues jointly submitted to the arbitrator, subject to the right to challenge the final decision solely on the grounds and in the manner prescribed in subs. (11) (b) and (c).
5. A statement that the parties agree that the final decision shall be binding only with respect to the costs at issue in the claim submitted for arbitration.
6. A statement that each signatory to the joint submittal is authorized to enter into the arbitration and to bind legally the party represented by him or her to the terms of the joint submittal.

(b) Any party may move to modify the joint submittal for arbitration to include one or more additional issues arising in the referred claim. To be effective, the modification must be signed by the arbitrator and all other parties.

(8) FILING OF PLEADINGS. (a) Discovery shall be in accordance with this subsection.

(b) Within 10 days after receipt of the arbitrator's acceptance under sub. (4) (c), the claimant shall submit to the arbitrator 2 copies of a written statement and shall serve a copy of the written statement upon all other parties. The written statement shall include all of the following:

1. A statement of facts, including a description of the costs incurred by the claimant in connection with the action taken at the site that have been denied by the department, and statements which state with particularity the basis for the claimant's assertion that the costs denied by the department are eligible.

2. A description of the evidence in support of both of the following:

a. The site at which the action was taken is an eligible site pursuant to s. Comm 47.02.

b. There was a discharge from a petroleum product storage system of an eligible petroleum product at the site at which the remedial response action was taken.

3. A complete list of the specific costs which were denied by the department which the claimant has requested be the subject of the arbitration proceeding.

4. To the extent such information is available, the names and addresses of all identified owners for the site, and the volume of the tanks and nature of the petroleum products that contributed to the contamination.

5. Any other statement or documentation that the claimant deems necessary to support its claim.

(c) If any issue concerning the adequacy of the claimant's remedial action has been submitted for resolution or may arise during the arbitrator's determination of the dollar amount of response costs recoverable by the claimant, the statement shall be accompanied with an index of any documents that formed the basis for the selection of the remedial action taken at the site, and a copy of all indexed documents.

(d) Within 14 days after receipt of the claimant's written statement, the department shall submit to the arbitrator 2 copies of an answer and shall serve a copy of the answer upon all other parties. The answer shall include all of the following:

1. A brief statement of the department's basis for denying the costs at issue that are the subject of the arbitration.

2. Any objections to the statement of facts in the claimant's written statement, and, if so, a counterstatement of facts.

3. A description of the evidence in support of the department's denial of the costs at issue and any supporting documentation thereof.

4. Any objections to the remedial action taken by the claimant at the site based upon any documents that formed the basis for the selection of the remedial action.

5. Any other documentation that the department deems relevant, including documentation that the department deems necessary to support its denial of costs submitted by the claimant for reimbursement.

(9) JURISDICTION OF ARBITRATOR. (a) In accordance with the procedures established by this section, the arbitrator is authorized to arbitrate one or more issues arising from the denial by the department of incurred costs in a claim for reimbursement.

(b) The arbitrator's authority is to render a decision regarding the denial of incurred costs claimed and is limited to only the issues submitted for resolution by the parties in the joint submittal for arbitration. Any issues arising from the denial of incurred costs claimed that are not submitted for resolution shall be deemed to be waived and shall not be raised in any action seeking enforcement of the decision for the purpose of overturning or otherwise challenging the final decision, except as provided in subs. (11) (b) and (c).

(c) If the issue of the dollar amount of incurred costs that were denied by the department has been submitted for resolution, the arbitrator shall determine, pursuant to par. (d), the dollar amount recoverable by the claimant and shall award the amount of such costs to the claimant.

(d) The arbitrator shall uphold the department's denial of costs in full or in part unless the claimant can establish that all or part of such costs were either of the following:

1. Eligible costs based upon the department's list of eligible costs in s. Comm 47.32, or the schedule of usual and customary costs established by the department under s. Comm 47.325 for the period in which the costs were incurred.

2. Clearly not excessive and clearly necessary, taking into account the circumstances of the remedial action and relative to the usual and customary cost schedule established by the department under s. Comm 47.325 for the time period in which the costs were actually incurred.

(e) If the arbitrator upholds the department's denial only in part, the arbitrator shall award to the claimant only those costs incurred in connection with the portions of the remedial action that were upheld along with any associated interest that was denied, less any remaining deductible and subject to occurrence maximums.

(f) The standard of review to be applied by the arbitrator to the department's reimbursement denial decision shall be whether the decision was arbitrary and capricious, or otherwise not in accordance with law.

(10) ARBITRATION DECISION. (a) Within 5 days after receipt of the statement and answer submitted under sub. (8), the arbitrator shall review the submittals and request any needed additional information from the claimant or the department.

(b) Any information requested under par. (a) shall be submitted to the arbitrator and served upon all other parties, within 5 days after receiving the request.

(c) Within 10 days after receipt of either the submittals under sub. (8) or the information requested under par. (a), whichever is applicable, the arbitrator shall render a proposed decision and shall mail the proposal to the parties, unless the parties have settled the dispute prior to the decision.

(d) Within 10 days after receipt of the proposed decision, a party may submit additional information to the arbitrator, and if done, shall serve a copy of the additional information to all other parties.

(e) 1. Within 5 business days after receipt of any additional information submitted under par. (d), the arbitrator shall render a final decision.

2. The final decision shall be in writing and shall be signed by the arbitrator. It shall be limited in accordance with the arbitrator's jurisdiction as established in sub. (9), and shall, if such issues have been jointly submitted by the parties for resolution, contain the arbitrator's determination of the dollar amount of costs denied by the department, if any, to be awarded to the claimant.

(c) The parties shall accept as legal delivery of the final decision the placing in the United States mail of a true copy of the final decision, sent by certified mail, return receipt requested, addressed to each party's last known address or each party's attorney's last known address, or by personal service.

(d) Notice of the final decision shall be published by the department on its Web site. The notice shall include the name and location of the site concerned, the names of the parties to the proceeding, and a brief summary of the final decision.

Note: Notices of arbitrator decisions are posted at the Department of Commerce Web site at www.commerce.state.wi.us, under petroleum programs and PECFA.

(11) EFFECT AND ENFORCEMENT OF FINAL DECISION. (a) The final decision shall be binding and conclusive upon the parties as to the issues that were jointly submitted by the parties for resolution and addressed in the decision.

Note: As established in s. Comm 47.54 (1) (b) 1., an arbitrator's decision may not be appealed under s. Comm 47.53.

(b) As established in s. 101.143 (6s), the final decision under this section is subject to review under ss. 227.53 to 227.57, Stats., only on the ground that the decision was procured by corruption, fraud, or undue means.

(c) Except as necessary to show fraud, misconduct, partiality, or excess of jurisdiction or authority, in any enforcement action, a party may not raise, for the purpose of overturning or otherwise challenging the final decision, issues arising in the claim that were not submitted for resolution by arbitration.

(d) Neither the initiation of an arbitration proceeding nor the rendering of a final decision shall preclude or otherwise affect the ability of the State of Wisconsin, including the department, to do any of the following:

1. Seek injunctive relief or enforcement against the claimant for further remedial action at the site concerned pursuant to s. 101.144, Stats., or any other applicable statute, regulation, or legal theory.

2. Seek any relief for any violation of criminal law from any claimant, consultant, commodity provider, contractor, or subcontractor.

3. Seek any relief, civil or criminal, from any person not a party to the arbitration proceeding under s. 101.143, Stats., or any other applicable statute, regulation, or legal theory.

(12) FEES AND EXPENSES. (a) In any arbitration conducted, all fees and expenses of the arbitrator shall be divided equally among all parties. All other expenses shall be borne by the party incurring them.

(b) The department shall establish the per diem fee for the arbitrator prior to the commencement of any activities by the arbitrator.

(13) MISCELLANEOUS PROVISIONS. (a) Any party who proceeds with arbitration knowing that any provision or requirement of this section has not been complied with, and who fails to object thereto either orally or in writing in a timely manner, shall be deemed to have waived the right to object.

(b) The original of any joint submittal for arbitration, modification to any joint submittal for arbitration, pleading, letter, or other document filed in the proceeding, except for exhibits and other documentary evidence, shall be signed by the filing party or by his or her attorney.

(c) All papers associated with the proceeding that are served by a party to an opposing party shall be served by personal service, or by United States first class mail, or by United States certified mail, return receipt requested, addressed to the party's attorney; or if the party is not represented by an attorney or the attorney cannot be located, to the last known address of the party. All papers associated with the proceeding that are served by the arbitrator or by the department shall be served by personal service or by United States certified mail, return receipt

requested, addressed to the party's attorney; or if the party is not represented by an attorney or the attorney cannot be located, to the last known address of the party.

(d) If any provision of this section, or the application of any provision of this section to any person or circumstance is held invalid, the application of that provision to other persons or circumstances and the remainder of this section shall not be affected thereby.

SECTION 81. Comm 47 subchapter VII is created to read:

Subchapter VII – Competitive Public Bidding

Comm 47.60 Selection of an investigation consulting firm and notification to the department. (1) INITIAL CONTRACT. (a) No later than 14 days after a PECFA-registered consulting firm executes or terminates a written contract with a responsible party for investigating a discharge from a petroleum product storage system, the consulting firm shall submit to the department a notification form prescribed by the department.

Note: See s. Comm 47.71 for special requirements for existing sites.

Note: As established in s. Comm 47.30 (2) (v) and (i), the department will not reimburse costs, including interest costs, for any work performed between the due date of any submittal required under this subchapter and the date a past-due submittal is actually submitted.

Note: The contracts referenced in this section are required by s. Comm 47.33 (2) (a) 1. As established in s. Comm 47.30 (2) (L) and (i), the department will not reimburse costs, including interest costs, for any site investigation work performed outside of these contracts.

(b) After receipt of a termination notice under par. (a), the department shall notify the responsible party of the requirements in sub. (2) for a subsequent contract and for ineligibility of interest costs.

(2) SUBSEQUENT CONTRACTS. (a) If a contract under this subsection is terminated before completion of the investigation, and the responsible party does not, within 60 days after the date of the notice in sub. (1) (b), perform either of the actions specified in pars. (b) and (c), any interest costs relating to the work under the terminated contract, which accrue between the termination date and the beginning of a new contract, may not be reimbursed by the department.

(b) Execute another written contract with a PECFA-registered consulting firm for completing the investigation.

(c) Obtain written approval from the department for additional time to comply with par. (b).

Comm 47.61 Management during a site investigation. (1) CONSULTING FIRM'S RESPONSIBILITIES FOR THE INVESTIGATION. The consulting firm selected to perform the investigation shall be responsible for planning and completing all investigation activities in

the most cost-effective manner possible, drawing professional engineering and geologic conclusions from data collected during the investigation, and submitting any consultant reports required by this subchapter or s. 101.143, Stats.

(2) DEPARTMENT'S RESPONSIBILITIES DURING THE INVESTIGATION. The department shall be responsible for tracking the expenditure of funds for investigation activities as reported by the investigation consulting firm, in accordance with s. Comm 47.62.

(3) REIMBURSEMENT AND COST CONTROLS DURING THE INVESTIGATION. For all investigation work that is not publicly bid under this subchapter, the usual and customary cost schedule referenced in s. Comm 47.325 and the maximum costs specified in s. Comm 47.337 (2) shall apply to reimbursement of all costs.

Note: Under s. Comm 47.33 (6) (c), the department will not require commodity bidding during the investigation, where reimbursement amounts are determined either by the usual and customary cost schedule established under s. Comm 47.325, or by the public bidding process in this subchapter.

Comm 47.62 Periodic progress reporting during a site investigation. (1)
FREQUENCY OF REPORTS. (a) To inform the department of the consulting firm's progress and the estimated cost of work remaining in the investigation for each occurrence, the consulting firm for a site investigation shall periodically submit reports to the department in a format prescribed by the department, no later than the recurring, earlier of the following dates:

1. The anniversary date of the contract between the firm and the responsible party, except as provided in par. (b).

2. The end of the calendar month that follows the month of completion of each investigative phase specified by the DNR or the department.

Note: See sub. (3) for information on directives from the department or the DNR to carry out specific investigation activities.

Note: See sub. (4) for filing a notice of completion of an investigation.

(b) After a report is filed under par. (a) 2., the anniversary shall be based on the date of that report.

(c) For occurrences that are not covered under s. 101.144 (2) (b), Stats., the department shall send the DNR a copy of the reports received under par. (a).

Note: Section 101.144 (2) (b), Stats., provides that the department has oversight responsibility for "a discharge of a petroleum product from a petroleum storage tank if all of the following apply:

1. The site of the discharge is classified, as provided under sub. (3m) (a) 3., as medium risk or low risk, based on the threat that the discharge poses to public health, safety and welfare and to the environment.

2. The site of the discharge is not contaminated by a hazardous substance other than the petroleum product, including any additive, that was discharged from the petroleum storage tank."

Note: Section 101.144 (1) (aq), Stats., establishes the definition of high-risk sites, as follows: “Except as provided under sub. (3g) ‘high-risk site’ means the site of a discharge of a petroleum product from a petroleum storage tank if at least one of the following applies:

1. Repeated tests show that the discharge has resulted in a concentration of contaminants in a well used to provide water for human consumption that exceeds a preventive action limit, as defined in s. 160.01 (6).
2. Petroleum product that is not in dissolved phase is present with a thickness of 0.01 feet or more, as shown by repeated measurements.
3. An enforcement standard is exceeded in groundwater within 1,000 feet of a well operated by a public utility, as defined in s. 196.01 (5), or within 100 feet of any other well used to provide water for human consumption.
4. An enforcement standard is exceeded in fractured bedrock.”

Note: See s. Comm 47.71 for special requirements for existing sites.

(2) DEPARTMENT RESPONSE TO INVESTIGATION PROGRESS REPORTS. After receiving a progress report under sub. (1), the department shall record the receipt and send a written response to the responsible party and the consulting firm, providing an assessment of the financial management of the investigation, an assessment of the estimate of the cost to complete the investigation for the occurrence, and a decision, if possible, of whether or not the occurrence is subject to the public bidding process in s. Comm 47.68.

(3) DIRECTIVES FROM THE DEPARTMENT OR THE DNR TO CARRY OUT SPECIFIC INVESTIGATION ACTIVITIES. At any time during the investigation, either the department, for an occurrence covered under s. 101.144 (2) (b), Stats., or the DNR, for any other occurrence, may direct the responsible party and the consulting firm to carry out specific activities necessary to achieve the most cost-effective collection of investigation data necessary to determine whether the occurrence is subject to competitive public bidding and to define a closure standard, remediation target, or scope of work for the remediation.

Note: See the Notes under sub. (1) (c) for a reprint of the relevant text in s. 101.144 (2) (b), Stats.

Note: Section Comm 46.11 addresses the classification and transfer of sites between the DNR and the department, and s. Comm 46.11 (1) (b) reads as follows: “Until a classification determination is made by the agency that receives a submittal under sub. (2) or (3), DNR has administrative authority for the site.”

(4) NOTICE OF COMPLETION OF INVESTIGATION. (a) By the end of the calendar month that follows the consulting firm’s development of all investigation data necessary to define either the remediation target or the scope of the remediation for an occurrence, the firm shall file with the department a notice of completion of an investigation, on a form prescribed by the department.

Note: As established in s. Comm 47.30 (2) (o) and (i), the department will not reimburse costs, including interest cost, for any work performed after submittal of the notice of completion under this subsection and prior to the department’s issuance of a response under sub. (5).

(b) For occurrences that are not covered under s. 101.144 (2) (b), Stats., the department shall send the DNR a copy of the notice received under par. (a).

(5) DEPARTMENT RESPONSE TO NOTICE OF COMPLETION. After receiving a notice of completion of an investigation of an occurrence, the department shall send a written

response to the responsible party and to the consulting firm, containing a decision by the department or the DNR on whether the occurrence is subject to public bidding, or whether the responsible party may proceed to remediate the occurrence or take other action directed by the department or the DNR.

Note: See s. Comm 47.623 for determining which occurrences are subject to public bidding.

Note: See s. Comm 47.325 and 47.337 for cost controls for work that is not subject to public bidding.

Note: As established in s. Comm 47.30 (2) (p) and (i), the department will not reimburse costs, including interest costs, for any work performed more than 5 business days after the department issues a decision under this section that an occurrence is subject to the public bidding process in s. Comm 47.68, if the work is conducted outside of that process.

(6) PROVIDING DEPARTMENT RESPONSES TO THE DNR. For occurrences that are not covered under s. 101.144 (2) (b), Stats., the department shall send the DNR a copy of all written departmental responses issued under this section.

Note: See the Notes under sub.(1) (c) for a reprint of the relevant text in s. 101.144 (2) (b), Stats.

Comm 47.623 Assignment to public bidding. (1) COST ESTIMATE EXCEEDS \$60,000. (a) *Occurrences under the department's jurisdiction.* Unless exempted under s. Comm 47.63, an occurrence covered under s. 101.144 (2) (b), Stats., shall be subject to the public bidding process in s. Comm 47.68 if the department estimates that the cost to complete a site investigation and remedial action will exceed \$60,000, including interest.

(b) *Occurrences under DNR jurisdiction.* Unless exempted under s. Comm 47.63, an occurrence that is not covered under s. 101.144 (2) (b), Stats., shall be subject to the public bidding process in s. Comm 47.68 if the DNR estimates that the cost to complete a site investigation and remedial action will exceed \$60,000, including interest.

(2) COST ESTIMATE DOES NOT EXCEED \$60,000, OR INCURRED COSTS EXCEED \$60,000, INCLUDING INTEREST. Occurrences not included in sub. (1) shall be subject to the public bidding process in s. Comm 47.68 if so directed by the department.

Comm 47.625 Claim submittal required. (1) ASSIGNMENT TO PUBLIC BIDDING. Whenever the department notifies a responsible party and the consulting firm that an occurrence is subject to the public bidding process in s. Comm 47.68, a claim for eligible costs incurred up to then shall be submitted to the department, no later than 120 days after the date of the department's notice.

(2) COMPLETION OF A SCOPE OF WORK. (a) Whenever a consulting firm completes a scope of work designated by the department, a claim for eligible costs incurred for that scope of work shall be submitted to the department, no later than 120 days after completing that work.

(b) The department may waive the requirement in par. (a) for small scopes of work that do not include a change to a different consulting firm.

(3) INELIGIBLE INTEREST COSTS. (a) Failure to file a claim prior to the deadline prescribed in sub. (1) shall result in ineligibility of any interest expenses incurred between the date of the department's notice and the date a claim is filed.

(b) Failure to file a claim prior to the deadline prescribed in sub. (2) shall result in ineligibility of any interest expenses incurred between the date of the completion of the scope of work and the date a claim is filed.

Comm 47.63 Exemptions from competitive public bidding. (1) GENERAL. Pursuant to s. 101.143 (3) (cp), Stats., the following exemptions may apply to an occurrence:

(a) The department or the DNR may waive the public bidding process in s. Comm 47.68 for the reasons set forth in s. 101.143 (3) (cp) 2., Stats.

Note: Section 101.143 (3) (cp) 2., Stats., provides that either the department or the DNR may waive the competitive public bidding requirement "if an enforcement standard is exceeded in groundwater within 1,000 feet of a well operated by a public utility, as defined in s. 196.01 (5), or within 100 feet of any other well used to provide water for human consumption."

(b) An occurrence is exempt from the public bidding process in s. Comm 47.68 where or while the circumstances in subs. (2) to (5) apply, or where the bidding process is otherwise waived by the department or the DNR.

(2) EMERGENCY ACTIONS. Work performed as part of an emergency action within the initial 72 hours after the onset of the need for the action, is not subject to the public bidding process in s. Comm 47.68.

(3) BIDDING IS NOT COST EFFECTIVE. The department may waive the public bidding process in s. Comm 47.68 after determining that either bidding would not be cost-effective, or the estimated additional cost to complete a scope of work is reasonable.

(4) ALTERNATIVE ACCEPTABLE BIDDING PROCESS. The department may waive the public bidding process in s. Comm 47.68 after determining that a responsible party has used an acceptable alternative competitive bidding process to choose the consulting firm and establish an estimated cost to define a closure standard, remediation target, or scope of work for the remediation.

(5) TEMPORARY DEFERRAL OF PUBLIC BIDDING. (a) The department may defer public bidding for an occurrence that is subject to the public bidding process in s. Comm 47.68 after determining that additional investigation activities will produce specific data and information which will contribute to the bidding process in s. Comm 47.68 for that occurrence.

(b) The department shall provide a written notice to the responsible party and the consulting firm specifying the conditions to be met during the deferral period.

(c) The consulting firm shall cease work on the occurrence after the conditions that justified the deferral have been met, and shall submit a written notice thereof to the department within the 14 days following. Work may recommence only after authorization to proceed is received from the department.

Note: As established in s. Comm 47.30 (2) (q) and (i), the department will not reimburse costs, including interest costs, for any work performed in violation of this paragraph.

Note: Under s. 101.143 (3) (cp) 5., Stats., the agency waiving competitive public bidding for an occurrence must provide notice to the other agency prior to issuing the waiver.

Note: Under s. 101.143 (4) (cm), Stats., the schedule of usual and customary costs referenced in s. Comm 47.325 must be used to determine the amount of eligible costs for an occurrence for which a competitive bidding process is not used, except in circumstances under which higher costs must be incurred to comply with s. 101.143 (3) (c) 3., Stats., and with enforcement standards.

Note: Section 101.143 (3) (c) 3., Stats., provides that the owner shall “conduct all remedial activities at the site of the discharge from the petroleum product storage system or home oil tank system necessary to restore the environment to the extent practicable and minimize the harmful effects from the discharge as required under s. 292.11.”

Comm 47.64 Bidding completion of an investigation. (1) INVESTIGATION ACTIVITIES MAY BE BID. During a site investigation, if either the department or the DNR determines that an occurrence is subject to the public bidding process in s. Comm 47.68, the department shall proceed under either of the following:

(a) For occurrences that are covered under s. 101.144 (2) (b), Stats., the department shall issue a written directive to the responsible party and the consulting firm to cease all work except as otherwise authorized by the department. The department shall then direct the occurrence through the public bidding process in s. Comm 47.68.

Note: As established in s. Comm 47.30 (2) (r) and (i), the department will not reimburse costs, including interest costs, for any work performed in violation of this subsection.

(b) For occurrences that are not covered under s. 101.144 (2) (b), Stats., the department shall notify the responsible party and the consulting firm that no further costs will be reimbursed except as established through the public bidding process in s. Comm 47.68 or as otherwise authorized by the department.

Note: See the Notes under s. Comm 47.62 (1) (c) for a reprint of the relevant text in s. 101.144 (2) (b), Stats.

(2) SCOPE OF WORK FOR BIDDING AN INVESTIGATION. The department may bid a scope of work to include the remainder of an investigation, where the investigation has stopped under sub. (1).

Comm 47.65 Department to determine scope of work to be bid. Prior to public bidding, the department shall determine whether the scope of work to be bid will be the work

necessary to achieve closure, work to a defined remediation target, or completion of a defined set of activities.

Comm 47.66 Bidder qualifications. (1) GENERAL. Bids may be submitted only by representatives of consulting firms which are registered under ch. Comm 5 and which meet all eligibility requirements in this section and in the bid specifications.

Note: The consulting firm retained by the responsible party to carry out the investigation is eligible to bid remedial activities if the consulting firm meets all eligibility requirements in this section and in the bid specifications.

(2) PERFORMANCE ASSURANCE. Every bidding firm shall submit a certified commitment to complete the work described in the bid specifications and in the submitted bid, for the price proposed in the bid.

(3) DISQUALIFIED INDIVIDUALS OR FIRMS. No individual or firm that has been disqualified under s. Comm 47.67 may submit a bid until the period of disqualification has ended and all corrective actions required by the department to reinstate the individual or firm have been met.

Comm 47.67 Disqualification from bidding. (1) GROUNDS FOR DISQUALIFICATION. (a) The department may disqualify from public bidding any individual or firm that has done any of the following:

1. Failed to complete a scope of work within a reimbursement cap established through public bidding.
2. Failed to complete the scope of work in a bid in a timely manner.
3. Failed to meet requirements in DNR rules on a bid project.
4. Received one or more notices from the department under s. Comm 47.62 (2) that assess the financial management of an investigation as unacceptable.
5. In any prior occurrence that has been publicly bid, failed to do either of the following:
 - a. Pay subcontractors after receiving payment for them.
 - b. Obtain lien waivers on or before the date of the final payment by the responsible party or the PECFA program, from all subcontractors paid under subd. 5. a.
6. Failed to execute a contract with a responsible party as required in s. Comm 47.69 (1).
7. Failed to commence work within 45 days after executing a contract, as required in s. Comm 47.69 (3).

(b) In making disqualification decisions under this section, the Department shall excuse failures that are shown to be due to factors which are beyond the control of a bidding individual or firm, such as a responsible party's inability to obtain financing.

(2) PERIOD OF DISQUALIFICATION. The period of disqualification shall be 2 rounds of public bidding for the first disqualification, 4 rounds for the second disqualification, and 6 rounds for any subsequent disqualification.

Note: The department may consider disqualification from public bidding as a contributing factor when applying other disciplinary actions to any individual or firm.

(3) WRITTEN NOTICE OF DISQUALIFICATION. The department shall provide written notification to any individual or firm disqualified from submitting bids. The notification shall specify the reasons for the disqualification, the period of the disqualification, the consequence under s. Comm 47.69 that post-bidding contracts at other sites may not be executed, and the right to protest or appeal the department's decision.

(4) CORRECTIVE ACTION BY DISQUALIFIED INDIVIDUAL OR FIRM. The department may require an individual or firm that has previously been disqualified to post a fidelity, surety, or performance bond or to take other corrective action specified by the department, to protect owners or operators and the PECFA fund from failure to carry out the work specified in the public bidding process in s. Comm 47.68.

(5) PROTESTS AND APPEALS BY DISQUALIFIED INDIVIDUALS OR FIRMS. An individual or firm that receives a notice of disqualification may protest the disqualification. The individual or firm shall file a written protest with the director of the bureau of PECFA no later than 5 business days after issuance of the notice in sub. (3). The filing shall include all of the reasons for the protest. Any reason not listed for the protest shall be deemed waived. The director or the director's designee may resolve the protest by either upholding the department's determination or by removing a disqualification, and shall issue a written decision no later than 5 business days after receiving the protest. A protestor may file a written appeal of the decision of the bureau director or designee, to the administrator of the environmental and regulatory services division, no later than 5 days after issuance of the decision, provided the protestor alleges a violation of s. 101.143, Stats., or of this chapter. The administrator or designee shall resolve the appeal without hearing and issue a written decision no later than 5 business days after receiving the appeal. The decision on the appeal shall be mailed or otherwise furnished to the protestor. In the event of the filing of a timely appeal under this subsection, the department may not proceed further with disqualifying an individual or firm from public bidding until a decision is issued on the appeal.

Comm 47.68 Competitive public bidding process. (1) PUBLISHING THE REQUEST FOR BIDS. The department shall post a request for bids on the department's Internet Web site.

Note: Requests for bids are posted at the Department of Commerce Web site at www.commerce.wi.gov, under petroleum programs and PECFA.

(2) SUBMITTING BIDS. Firms submitting public bids in response to the bid specifications shall comply with all of the following:

(a) Bidders shall submit bids in a format prescribed by the department.

(b) Bidders shall submit bids so that the bids are received by the department no later than 4:00 p.m. on the bid-end date listed in the bid specifications.

(3) EVALUATING BIDS. (a) The department may not consider any late bids. The department shall rank all remaining bids solely on the basis of cost, in ascending order from the least costly to the most costly. The department shall then evaluate only the bid containing the least costly proposal, to determine if all requirements of the bid specifications will be met, if the remedial strategy is appropriate to the geologic setting, and if the bid is likely to establish an amount to sufficiently fund the activities and outcome objective contained in the bid specifications. The department shall continue the evaluation process until the least costly qualified bid is identified.

Note: As established in s. 101.143 (3) (cp) 1., Stats., the purpose of the least costly qualified bid is to assist the department, or the department and the DNR, in making a determination of the least costly method of remedial action. See sub. (7) for further information about that determination.

(b) The department shall reserve the right to reject any or all bids.

(4) NOTICE OF DISQUALIFIED BID. The department shall provide written notification to any individual or firm that submitted a disqualified bid. The notification shall specify the reasons for the disqualification, and the right to protest or appeal the department's decision.

(5) NOTICE OF INTENT. The department shall announce its intent to select the least costly qualified bid to assist in determining the least costly method of remedial action or a cap for a defined scope of work. The department shall send the announcement in writing to the responsible party and shall post the announcement on its Internet Web site. The announcement shall identify the bid the department has determined to be the least costly qualified bid. The announcement shall identify all low bids that have been disqualified. The announcement shall be provided at least 11 business days prior to the determination of the least costly method or the determination of a cap.

(6) PROTESTS AND APPEALS. A responsible party or a bidder may protest the department's selection and use of the least costly qualified bid to assist in making the determination in sub. (7). The protestor shall file a written protest with the director of the bureau of PECFA no later than 10 business days after issuance of the notice in sub. (4) or (5), whichever is later. The filing shall include all of the reasons for the protest. Any reason not listed for the protest shall be deemed waived. The director or the director's designee may resolve the protest by upholding the department's determination, by removing a disqualification, or by correcting an error in determining the cost contained in a bid, and shall issue a written decision no later than 5 business days after receiving the protest. A protestor may file a written appeal of the decision of the bureau director or designee, to the administrator of the environmental and regulatory services

division, no later than 5 days after issuance of the decision, provided the protestor alleges a violation of s. 101.143, Stats., or of this chapter. The administrator or designee shall resolve the appeal without hearing and issue a written decision no later than 5 business days after receiving the appeal. The decision on the appeal shall be mailed or otherwise furnished to the protestor. In the event of the filing of a timely protest or appeal, the department may not proceed further with making the determination in sub. (7) until a decision is issued on the protest or appeal.

(7) DETERMINING THE LEAST COSTLY METHOD OF REMEDIAL ACTION, OR THE CAP FOR A DEFINED SCOPE OF WORK. (a) The least costly method of remedial action or the cap for a defined scope of work shall be determined according to pars. (b) or (c).

(b) For occurrences under the direction of the department, the department shall consider the least costly qualified bid identified under sub. (3) in determining the least costly method of remedial action or the cap for a defined scope of work. No later than 10 business days after making its decision, the department shall notify the responsible party of the department's determination of the least costly method of remedial action or the cap for a defined scope of work, and shall specify the maximum amount that will be reimbursed.

Note: See the Note under s. Comm 47.62 (1) (c) for a reprint of the text in s. 101.144 (2) (b), Stats., that establishes which occurrences are under the direction of the department. All other occurrences are under the direction of the DNR.

(c) For occurrences under the direction of the DNR, the department and the DNR shall jointly consider the least costly qualified bid identified under sub. (3) in determining the least costly method of remedial action or the cap for a defined scope of work. No later than 10 business days after making the decision, the department shall notify the responsible party of the departments' joint determination of the least costly method of remedial action or the cap for a defined scope of work, and shall specify the maximum amount that will be reimbursed.

(d) 1. The determination of the least costly method of remediation or the determination of the cap for a defined scope of work shall establish the maximum costs eligible for reimbursement by the PECFA program, except where that maximum is increased under s. Comm 47.70 (3).

Note: See s. Comm 47.71 (5) for special requirements for existing sites.

2. Any additional costs above the maximum established in subd. 1. or s. Comm 47.70 (3) shall be the responsibility of the responsible party.

Comm 47.69 Responsible party's contract with a bidder. (1) CONTRACT WITH REMEDIATION CONSULTING FIRM (a) Except as provided in pars. (c) or (d), no later than 60 days after the department issues the notification under s. Comm 47.68 (7) (b) or (c), the responsible party shall execute a written contract with one of the firms that submitted a bid under s. Comm 47.68 (2), to perform the work identified in the notification.

Note: A model contract is available from the Environmental and Regulatory Services Division at P.O. Box 7838, Madison, WI 53707-7838, or at telephone 608/267-3753 and 608/264-8777 (TTY), or at the Department of Commerce Web site at www.commerce.wi.gov, under petroleum programs and PECFA.

(b) Failure to execute the written contract as required in par. (a) shall result in ineligibility of any interest expenses incurred from the date of the notification under s. Comm 47.68 (7) (b) or (c), until a contract is executed and work commences on the occurrence.

(c) This subsection does not apply to a bidder who becomes disqualified under s. Comm 47.67, or where all subsequent work will not be submitted for reimbursement from the PECFA fund.

(d) The department may grant an extension of the 60-day period specified in par. (a) only after a claimant demonstrates that substantive efforts to obtain financing have been unsuccessful.

Note: As established in s. Comm 47.30 (2) (s) and (i), the department will not reimburse costs, including interest costs, for unauthorized services that are performed by any party other than a firm which submitted a bid under s. Comm 47.68 (2) and which is contracted with under this section, if they are conducted after the qualified low bid is determined under s. Comm 47.68 (3).

Note: See sub. (4) for criteria that apply to an affected site after a bidder who submits the least costly qualified bid becomes disqualified, and no other bidder agrees to perform the work within the corresponding reimbursement cap.

(2) NOTIFICATION OF CONSULTING FIRM SELECTION. No later than 14 days after any contract for remediation under sub. (1) is executed or terminated with the responsible party, the consulting firm shall submit to the department a notification form prescribed by the department.

(3) COMMENCING WORK. The consulting firm that executes a contract under sub. (1) shall commence the work specified therein no later than 45 days after the contract is executed.

(4) REBIDDING OR SELECTION OF NEXT-LOWEST, QUALIFIED BID. Where a bidder who submitted the least costly qualified bid becomes disqualified under s. Comm 47.67, and no other bidder agrees to perform the work identified in the notification under s. Comm 47.68 (7) (b) or (c), within the reimbursement cap established under s. Comm 47.68 (7), the department may either redirect the scope of work through the entire public bidding process in s. Comm 47.68, or reinstate that process at the bid evaluation stage in s. Comm 47.68 (3).

Comm 47.70 Monitoring the progress of the scope of work in the bid. (1) NOTIFICATION OF PROGRESS. (a) The consulting firm holding the contract required in s. Comm 47.69 (1) (a) shall report to the department, in a format prescribed by the department, the progress toward completing the scope of work defined in the bid specifications, at each of the following points:

1. Three months after entering into the contract.
2. Twelve months after beginning the work in the successful bid, except as provided in subd. 6.

3. Twelve months after submitting the previous report required under this subsection, except as provided in subd. 6.

4. No later than 10 days after encountering a change in circumstances, as specified in sub. (3).

5. At any other frequency directed by the department.

6. No later than 30 days after completing the work.

(b) For occurrences that are not covered under s. 101.144 (2) (b), Stats., the department shall send the DNR a copy of the reports received under par. (a).

Note: See the Notes under s. Comm 47.62 (1) (c) for a reprint of the relevant text in s. 101.144 (2) (b), Stats.

Note: See s. Comm 47.71 (5) for special requirements for existing sites.

(2) FAILURE TO MAKE PROGRESS. If the department determines that the consulting firm is failing to make adequate progress to complete the scope of work defined in the bid specifications for an amount not exceeding the reimbursement cap determined under s. Comm 47.68 (7), the department shall so notify the responsible party and may reduce the reimbursement to accurately reflect the work completed.

Note: See s. Comm 47.71 (5) for special requirements for existing sites.

(3) CHANGE OF CIRCUMSTANCES. (a) For occurrences under the direction of the department, the department may review and modify the reimbursement cap, and may reinitiate the public bidding process in s. Comm 47.68, based on a change in circumstances, if any of the following have occurred:

1. Substantial new contamination has been discovered on the site. Substantial contamination must increase remediation costs to either obtain closure or complete a defined scope of work. New contamination is contamination not previously identified, such as contamination in a broader area or deeper depth than previously identified.

2. Abnormal weather, previously unknown geologic conditions, or previously unknown subsurface structures have been encountered that directly affect the activities described in the least costly qualified bid identified under s. Comm 47.68 (3).

(b) For occurrences under the direction of the DNR, the department and the DNR may review and modify the reimbursement cap, and the department may reinitiate the public bidding process in s. Comm 47.68, based on a change of circumstances, if any of the events in par. (a) 1. and 2. have occurred.

Note: See the Note under s. Comm 47.62 (1) (c) for a reprint of the text in s. 101.144 (2) (b), Stats., that establishes which occurrences are under the direction of the department. All other occurrences are under the direction of the DNR.

Note: See s. Comm 47.71 (5) for special requirements for existing sites.

(4) DISQUALIFICATION FROM FURTHER WORK ON A PROJECT. (a) *Grounds for disqualification.* The department may disqualify any individual or firm from performing further work on a project, if the individual or firm has done any of the following:

1. Failed to complete a substantive portion of the defined scope of work within the corresponding portion of the reimbursement cap.
2. Failed to complete the scope of work in a bid in a timely manner.
3. Failed to meet requirements in DNR rules on the project.
4. Failed to do either of the following:
 - a. Pay subcontractors within a contracted timeline, after receiving payment for them.
 - b. Obtain lien waivers on or before the date of the final payment by the responsible party or the PECFA program, from all subcontractors paid under subd. 4. a.
5. Failed to execute a contract with a responsible party as required in s. Comm 47.69 (1).
6. Failed to commence work within 45 days after executing a contract, as required in s. Comm 47.69 (3).

Note: See s. Comm 47.71 (5) for special requirements for existing sites.

(b) In making disqualification decisions under this section, the department shall only excuse failures that are shown to be due to factors which are beyond the control of a bidding individual or firm, such as a responsible party's inability to obtain financing.

(c) *Period of disqualification.* The period of disqualification shall be 6 months for the first disqualification, 12 months for the second disqualification, and 24 months for any successive disqualification.

Note: The department may consider disqualification from further work as a contributing factor when applying other disciplinary actions to any individual or firm.

(d) *Written notice of disqualification.* The department shall provide written notification to any individual or firm disqualified from performing further work on a project. The notification shall specify the reasons for the disqualification, the period of the disqualification, and the right to appeal the department's decision. The notification shall inform the disqualified party that costs for any work on the occurrence during the disqualification, except as otherwise authorized by the department, will not be reimbursed.

(e) *Appeals by disqualified individuals or firms.* 1. An individual or firm that receives a notice of disqualification under this section may appeal as provided in s. Comm 47.53.

2. The department shall hold a hearing for an appeal filed under subd. 1. no later than 30 days after receipt of the appeal.

(f) *Rebidding or selection of next-lowest, qualified bid.* Where an individual or firm has been disqualified under this section, the department may either redirect the scope of work through the entire public bidding process in s. Comm 47.68, or reinstate that process at the bid evaluation stage in s. Comm 47.68 (3).

(g) *Corrective action by disqualified individual or firm.* The department may require an individual or firm that has previously been disqualified to take corrective action specified by the department, to protect owners or operators and the PECFA fund from failure to carry out the work specified in the public bidding process in s. Comm 47.68.

Comm 47.71 Special requirements for existing sites. (1) DEFINITION. For the purposes of this section, a site investigation in progress is any investigation that began but was not completed before [the effective date of this rule. . . Revisor inserts date].

(2) NOTIFICATIONS AND INITIAL INVESTIGATION PROGRESS REPORTS FOR INVESTIGATIONS IN PROGRESS. For site investigations in progress on [the effective date of this rule . . . Revisor inserts date], the notification form in s. Comm 47.60 (1) and the first investigation progress report under s. Comm 47.62 for each occurrence shall be submitted no later than 60 days after that date.

(3) SUBSEQUENT REQUIREMENTS. Upon submittal of the notification and report under sub. (2), all of the requirements in s. Comm 47.62 shall apply, except the requirement for submitting the initial investigation progress report.

Note: The department forms required in this chapter are available from the Environmental and Regulatory Services Division at P.O. Box 7838, Madison, WI 53707-7838, or at telephone 608/267-3753 and 608/264-8777 (TTY), or at the Department of Commerce Web site at www.commerce.wi.gov, under petroleum programs and PECFA.

[Note to Revisor: Substitute the above Note about department forms, for the current Note about department forms that is contained in each of the following Comm 47 sections: Comm 47.10 (1), 47.115 (1), 47.12 (2) (c), and 47.355 (2) (d).]

(4) OCCURRENCES WITH PREVIOUSLY COMPLETED SITE INVESTIGATIONS. An occurrence for which a site investigation was completed prior to [the effective date of this rule. . . Revisor inserts date] shall be subject to the public bidding process in s. Comm 47.68 when so determined by the department under s. Comm 47.325 or 47.623, or by the DNR.

(5) OCCURRENCES WITH REIMBURSEMENT CAPS DETERMINED THROUGH PREVIOUS PUBLIC BIDDING. For occurrences with reimbursements caps determined through the public bidding process under s. 101.43 (3) (cp), Stats., prior to [the effective date of

this rule . . . Revisor inserts date], all of the requirements in s. Comm 47.70 shall apply, except as follows:

(a) The consulting firm performing the work in the bid specifications shall submit the initial progress report required in s. Comm 47.70 (1) (a) 1. 3 months after [the effective date of this rule . . . Revisor inserts date].

(b) The consulting firm performing the work in the bid specifications shall submit the progress report required in s. Comm 47.70 (1) (a) 2. 12 months after [the effective date of this rule . . . Revisor inserts date].

(c) Reimbursement for the progress reports required in s. Comm 47.70 (1) (a) shall be in addition to the reimbursement that was previously established through the public bidding process, but may not exceed the reimbursement which is specified for these reports in the department's schedule of usual and customary costs, as established under s. Comm 47.325.

(d) The reimbursement cap used in s. Comm 47.70 (2) shall be the reimbursement cap determined through the public bidding that preceded [the effective date of this rule . . . Revisor inserts date].

(e) 1. For occurrences under the direction of the department, the department may review and modify the reimbursement cap prescribed in par. (c), and may reinstate competitive bidding through the public bidding process in s. Comm 47.68, if the modification is necessary to obtain compliance with s. 101.143 (3) (c) 3., Stats., and with enforcement standards.

2. For occurrences under the direction of the DNR, the department and the DNR may review and modify the reimbursement cap prescribed in par. (c), and the department may reinstate competitive bidding through the public bidding process in s. Comm 47.68, if the modification is necessary to obtain compliance with s. 101.143 (3) (c) 3., Stats., and with enforcement standards.

Note: Under s. 101.143 (3) (c) 3., Stats., a responsible party must "Conduct all remedial action activities at the site of the discharge from the petroleum product storage system or home oil tank system necessary to restore the environment to the extent practicable and minimize the harmful effects from the discharge as required under s. 292.11, Stats."

(f) Sections Comm 47.70 (4) (a) 5. and 6. do not apply.

SECTION 82. Comm 47 Appendix section A-47.325 is created to read:

A-47.325 The following pages contain the department's schedule of usual and customary costs, the corresponding occurrence-classification form, and a standardized invoice and summary form.

(END)

EFFECTIVE DATE

Pursuant to s. 227.22 (2) (intro.) and (e), Stats., these rules shall become effective on the first day of the third month commencing after the date of publication in the Wisconsin administrative register.

File reference: Comm 47/rules 2004c changes.LRev