

Clearinghouse Rule 09-021



State of Wisconsin \ Department of Commerce

# RULES IN FINAL DRAFT FORM

**Rule No.:** Comm 5.12

**Relating to:** Administrative Forfeitures for POWTS Governmental Unit Employees

**Clearinghouse Rule No.:** 09-021

The Wisconsin Department of Commerce proposes an order to amend Comm 5.12 (1), Comm 5.33 (6), and Comm 5 Appendix A5.12; and to create Comm 5.12 (2m), relating to the assessment of forfeitures for POWTS governmental unit employees.

\*\*\*\*\*

**ANALYSIS OF PROPOSED RULES**

**1. Statutes Interpreted.**

Sections 145.12 (5) (a) and 145.20 (6), Stats., as affected by 2007 Wisconsin Act 197

**2. Statutory Authority.**

Sections 145.12 (5) (a) and 145.20 (6), Stats., as affected by 2007 Wisconsin Act 197

**3. Related Statute or Rule.**

None

**4. Explanation of Agency Authority.**

Section 145.02, Stats., grants the Department of Commerce general authority for protecting the health, safety and welfare of the public by establishing reasonable and effective standards for Private Onsite Wastewater Treatment Systems (POWTS) including the licensing of individuals to inspect POWTS. Section 145.20, Stats., delineates the responsibilities and duties of governmental units administering and enforcing the laws and rules pertaining to POWTS. Section 145.12 (5) (a), Stats., as affected by 2007 Wisconsin Act 197, authorizes the Department to directly assess forfeitures to governmental unit employees who violate the limitations under s. 145.20, Stats., for POWTS employees that perform work outside of the scope of their governmental unit responsibilities.

**5. Summary of Proposed Rules.**

The proposed rules under chapter Comm 5 delineate the procedures for implementing the forfeiture assessments for POWTS governmental unit employees violating the outside employment limitations established under 2007 Wisconsin Act 197. The proposed rules establish a schedule for forfeitures based upon various situations and/or activities. Current rules delineate a process for appealing a forfeiture assessment.

**6. Summary of, and Comparison with Existing or Proposed Federal Regulations.**

There are no known federal regulations or proposed federal regulations that could be compared to the direct forfeiture provision.

**7. Comparison with Rules in Adjacent States.**

A search of the rules in adjacent states found that Minnesota, Iowa, Illinois, and Michigan do not have any regulations regarding conflict of interest related to their onsite sewage program governmental unit employees. The comparisons were completed via a web search.

**8. Summary of Factual Data and Analytical Methodologies.**

The proposed rules were developed by reviewing the provisions under ss. 145.12 (5) (a) and 145.20 (6), Stats., as created by 2007 Wisconsin Act 197, as well as existing administrative rules for administrative forfeitures administered by the Department of Commerce.

**9. Analysis and Supporting Documents Used to Determine Effect on Small Business or in Preparation of Economic Impact Report.**

The 2007 Wisconsin Act 197 affects governmental unit employees who administer and enforce regulations pertaining to design, installation and maintenance of POWTS by limiting the activities that such employees may undertake outside of their governmental employment. The proposed rules implement administrative forfeitures authorized under 2007 Wisconsin Act 197 for violations of these limitations.

The department does not believe that the proposed rules will increase the effect on small businesses over that imposed by the Act.

An economic impact report has not been required pursuant to s. 227.137, Stats.

**10. Agency Contact.**

James Quast, Program Manager, jim.quast@wisconsin.gov, (608) 266-9292

**11. Public Hearing Comments.**

The hearing record on this proposed rulemaking will remain open until 4:30 pm, Thursday, April 23, 2009. Written comments on the proposed may be submitted to James Quast, at the Department of Commerce, P.O. Box 8689, Madison, WI 53701-2689 or Email at jim.quast@wisconsin.gov.

\*\*\*\*\*

SECTION 1. Comm 5.12 (1) is amended to read:

**Comm 5.12 (1) GENERAL.** In addition to the forfeitures provided for in ~~sub-~~ subs. (2) and (2m), penalties for violations of the provisions of this chapter may be assessed in accordance with the respective penalty provisions in the statutes, depending upon the license, certification or registration category or activity involved.

SECTION 2. Comm 5.12 (2m) is created to read:

**Comm 5.12 (2m) POWTS FORFEITURES.** (a) Pursuant to s. 145.12 (5) (a), Stats., the department may assess a forfeiture in the amount listed in par. (b) to a violator of the restriction requirements under s. 145.20 (6) (a), Stats.

**Note:** See the appendix for a reprint of 145.20 (6) (a), Stats.

(b) The amount of forfeiture assessed against an individual who violates the restriction requirements under s. 145.20 (6) (a), Stats., shall be one of the following:

1. First offense - \$1,000.
2. Second offense - \$1,500.
3. Third and subsequent offense - \$2,000.

SECTION 3. Comm 5.33 (6) is amended to read:

**Comm 5.33 (6) RESPONSIBILITIES.** A certified soil tester who, as ~~either~~ an employee of a local governmental unit ~~or under contract to a local governmental unit~~, is responsible for administering regulations governing ~~privately owned private onsite~~ wastewater treatment systems may not provide soil evaluations relative to the design, installation or maintenance of private sewage onsite wastewater treatment systems within the boundaries of the local governmental unit and adjacent local governmental units.

SECTION 4. Comm 5 Appendix, Section A5.12 is amended to read:

A5.12 Penalties. Section 101.02 (12), Stats., states that *every day during which any person fails to observe and comply with any order of the department or to perform any duty enjoined by ss. 101.01 to 101.25, shall constitute a separate and distinct violation of the order or the statute.*

Section 101.02 (13) (a), Stats., states that *if any person violates ss. 101.01 to 101.25, or fails or refuses to perform any duty lawfully enjoined, within the time prescribed by the department, for which no penalty has been specifically provided, or fails, neglects or refuses to obey any lawful order given or made by the department, for each such violation, such person shall forfeit and pay into the state treasury a sum not less than \$10 nor more than \$100 for each such offense.*

Section 145.12, Stats., states:

**(1)** *Any person who engages in or follows the business or occupation of, or advertises or holds himself or herself out as or acts temporarily or otherwise as a master plumber, as an automatic fire sprinkler contractor or as a business establishment holding an automatic fire sprinkler—maintenance only registration certificate without first having secured the required license or certificate, or who otherwise violates any provisions of this chapter, shall be fined not less than \$100 nor more than \$500 or imprisoned for 30 days or both. Each day such violation continues shall be a separate offense.*

(2) Any person violating this chapter or failing to obey a lawful order of the department, or a judgment or decree of a court in connection with this chapter, may be imprisoned for not more than 3 months or fined not more than \$500.

(3) Any master plumber who shall employ an apprentice on plumbing representing the apprentice to be a journeyman, or who shall charge for an apprentice a journeyman's wage, shall be punished by a fine of not more than \$25, or by imprisonment in the county jail for not more than 30 days. Each day of violation shall be a separate offense.

(4) Any person who violates any order under s. 145.02 (3) (f) or 145.20 (2) (f) or any rule or standard adopted under s. 145.13 shall forfeit not less than \$10 nor more than \$1,000 for each violation. Each violation of an order under s. 145.02 (3) (f) or 145.20 (2) (f) or a rule or standard under s. 145.13 constitutes a separate offense and each day of continued violation is a separate offense.

Section 145.20 (6), Stats., states:

(6) RESTRICTIONS ON REVIEWERS AND INSPECTORS. (a) Except as provided in par. (b), a governmental unit employee who has responsibilities related to any of the activities under sub. (2) (a) to (i) may not do any of the following in the county in which the employee is employed or in an adjacent county:

1. Conduct any activities for which certification is required under s. 145.045 (1), except that the employee may review and verify soil tester reports as provided in sub. (2) (a).

2. Install, design, maintain, repair, or sell a private sewage system, component of a private sewage system, drain field designed to serve a private sewage system, or pipe from a private sewage system to the immediate inside of the existing or proposed foundation wall of the building served by the private sewage system.

(b) Paragraph (a) does not apply to activities performed by an employee on property owned by the employee that is outside of the governmental unit for which the employee works.

**END**

\*\*\*\*\*

**EFFECTIVE DATE**

Pursuant to s. 227.22 (2) (intro.), Stats., these rules shall take effect on the first day of the month following publication in the Wisconsin Administrative Register.

\*\*\*\*\*