



CR 90-225

State of Wisconsin

DEPARTMENT OF NATURAL RESOURCES

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STATE OF WISCONSIN)
)
DEPARTMENT OF NATURAL RESOURCES) ss

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETINGS:

I, Bruce B. Braun, Deputy Secretary of the Department of Natural Resources and custodian of the official records of said Department, do hereby certify that the annexed copy of Natural Resources Board Order No. CA-71-90 was duly approved and adopted by this Department on January 24, 1991. I further certify that said copy has been compared by me with the original on file in this Department and that the same is a true copy thereof, and of the whole of such original.

IN TESTIMONY WHEREOF, I have here-
unto set my hand and affixed the
official seal of the Department at
the Natural Resources Building in
the City of Madison, this 1st
day of April, 1991.

Bruce B. Braun
Bruce B. Braun, Deputy Secretary

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ORDER OF THE WISCONSIN NATURAL RESOURCES BOARD
REPEALING AND RECREATION RULES

.....
IN THE MATTER OF repealing and recreating ch. NR 127 .
of the Wisconsin administrative code relating to the . CA-71-90
municipal clean drinking water grant program. .
.....

Analysis Prepared by the Department of Natural Resources

Statutory authority: section 53 of 1989 Wisconsin Act 366 and
s. 227.11(2), Stats.
Statute interpreted: section 53 of 1989 Wisconsin Act 366

Statute 53 of 1989 Wisconsin Act 366 created s. 144.0255, Stats., which established the Municipal Clean Drinking Water Grant Program. Funding of \$9.8 million is provided for the current biennium to provide grants of up to 90% of the eligible cost to correct existing violations of drinking water contaminant standards. Proposed ch. NR 127 would do the following:

1. Specify the methodology for rating and ranking project applications based on the health risk associated with the contaminants for which standards are established under ch. NR 109, Wis. Adm. Code.
2. Define criteria and the process for determining project and cost eligibility.
3. Establish procedures and requirements for the administration of the grant program.

SECTION 1. Chapter 127 is repealed and recreated to read:

CHAPTER 127 (title)

MUNICIPAL CLEAN DRINKING WATER GRANT PROGRAM

NR 127.01 PURPOSE. The purpose of this chapter is to establish rules under s. 144.0255 (4), Stats., as created by 1989 Wisconsin Act 366, for the implementation and administration of a municipal clean drinking water grant program to assist municipalities to comply with the drinking water standards established by rule under s. 144.025(2)(t), Stats.

NR 127.02 APPLICABILITY AND CROSS REFERENCE. This chapter applies to all applicants and recipients of grant funding for design and construction of facilities made pursuant to s. 144.0255, Stats. Compliance with the

applicable requirements of this chapter is a prerequisite to eligibility for grant assistance under s. 144.0255 (4), Stats., as created by the 1989 Wisconsin act 366.

NR 127.03 DEFINITIONS. In this chapter:

(1) "Capital cost" means the construction costs necessary for the correction of a violation of a drinking water standard established by the department under s. 144.025(2)(t), Stats. For purposes of this chapter, "capital costs" are further limited to the contractual costs of a project, unless an exception is specifically approved by the department.

(2) "Construction" means any of the following activities:

(a) Preparing engineering investigations, surveys, reports, designs, construction plans, working drawings or specifications;

(b) Erecting, building, altering, remodeling, improving municipal public water system facilities;

(c) Acquisition and installation of equipment for municipal public water system facilities;

(d) Supervising or inspecting any of the activities under pars. (a) to (c).

(3) "Contaminant" means any physical, chemical, biological or radiological substance or matter in water.

(4) "Cost per capita" means the total eligible capital cost to correct a municipal water system violation of a maximum contaminant level standard, divided by the population served by the water system.

(5) "Department" means the department of natural resources.

(6) "Funding list" means the list of projects, determined by the department to be eligible for grant assistance, arranged in funding sequence order based on their priority rank.

(7) "Maximum contaminant level" or "MCL" generally means the maximum permissible level of a contaminant in water which is delivered to the consumer service outlet of the ultimate user of a public water system, except in the case of turbidity where the maximum permissible level is measured at the point of entry to the distribution system. 'Maximum contaminant level' or 'MCL' does not include contaminants added to the water under circumstances controlled by the user, except those resulting from corrosion of piping and plumbing caused by water quality, which are excluded from this definition.

Note: The maximum permissible level and the sampling and analytical requirements vary depending on the specific contaminant. Chapter NR 109 should be consulted for specific information regarding any particular contaminant. Any conflict in the meaning of MCL between this chapter and ch. NR 109 shall be resolved in favor of ch. NR 109.

(8) "Municipality" means a city, county, town, town sanitary district or village.

(9) "Municipal water system" means a water system, owned and operated by a municipality, for the provision to the public of piped water for human consumption, if the system has at least 15 service connections or regularly serves an average of at least 25 year round residents daily at least 60 days out of the year. A municipal water system includes:

(a) Any collection, treatment, storage and distribution facilities under control of the operator of the system and used primarily in connection with the system, and

(b) Any collection or pretreatment storage facilities not under control of the operator of the system which are used primarily in connection with the system.

(10) "Parallel cost estimate" means the method for estimating the eligible project construction cost for a proposed project that, as determined by the department, includes more than is necessary to correct a violation of a maximum contaminant level. Two cost estimates are prepared. The first is a detailed cost estimate of the project as proposed. The second, parallel, cost estimate is for a project designed to only correct the MCL violation.

(11) "Parallel cost ratio" means the ratio that is calculated between the two parallel cost estimates in order to determine the costs of the proposed project that are eligible for a grant.

(12) "Population" means the most recent annual estimate of the residential population of the municipality from the Wisconsin department of administration.

(13) "Priority ranking list" means a list of project priority values, ranked in descending order, that is prepared by the department from information submitted by municipalities.

Note: The priority ranking list does not reflect the final project eligibility determination which is made by the department after the grant application is submitted.

(14) "Priority rank" means the numerical value, determined by the department, which is assigned to each project in accordance with s. NR 127.05.

(15) "Project" means the activities defined in sub. (2) that the department determines are necessary for and related to the correction of a violation of a maximum contaminant level.

(16) "Service area" means the geographical area served by the municipal water system at the time of grant application.

NR 127.04 ELIGIBILITY FOR GRANT ASSISTANCE. (1) ELIGIBLE APPLICANT. Any municipality which owns and operates a municipal water system is eligible to apply for grant assistance under this chapter.

(2) ELIGIBLE PROJECT. A project submitted by an eligible applicant is eligible for grant assistance if, based on the information provided, the department determines that each of the following conditions is met:

(a) The municipal water system is, on or after April 1, 1990, determined by the department, in accordance with ch. NR 109 to be in violation of a maximum contaminant level. In cases where the use of a water source has been discontinued or reduced to achieve compliance, the department may determine that a violation exists for purposes of this chapter if:

1. There is adequate evidence that had the action not been taken the municipality would be out of compliance on or after April 1, 1990, and

2. The water source that was removed from service or had its usage reduced in order to achieve compliance is a necessary part of the municipal water system, as documented by a current engineering report, and that the action taken to reduce the contaminant level in the water system cannot be maintained on a long term basis.

(b) The eligible capital cost per capita for the project exceeds \$150.

(c) The project has met all applicable submission requirements and received necessary approvals under chs. NR 108 and 111.

(d) The department concurs with the municipality that the proposed project is the appropriate and cost effective means of correcting the MCL violation.

(3) ELIGIBLE SCOPE AND CAPACITY. It is the intent of the department to limit grant assistance under this chapter to the capital costs of facilities

to correct violations of MCL standards. Costs beyond those necessary to correct the MCL violations are not eligible for grant participation. If the municipality proposes to construct facilities that, the department determines, include more than is directly necessary to correct the MCL violation, the following information is to be included with the plans and specifications, and the grant application:

(a) For those additional material, supply or construction cost items that are readily identifiable and separable from the construction costs, a separate itemized listing with estimated costs shall be provided. The cost of these additional items shall be deducted from the total project cost to arrive at the eligible capital cost.

(b) For those cases where the costs for the portion of the project beyond that work directly necessary to correct the MCL violation are not readily identifiable and separable, a parallel cost ratio will be used to estimate the eligible capital cost. The ratio is based on 2 separate cost estimates provided by the municipality. The first is a detailed estimate of the total cost of the project as proposed. The second shall be a parallel cost estimate of the cost of facilities designed to only correct the MCL violation. The parallel cost ratio calculated from these 2 cost estimates shall be applied to the total proposed cost to determine the eligible capital cost. The parallel cost ratio shall be applied to construction costs only and not applied to the engineering report or plans and specification portion of the proposed project costs;

(c) For those proposed projects that include additional costs of the types identified in both pars. (a) and (b), the par. (a) estimated costs shall be deducted from total proposed project cost before the parallel cost ratio is applied to determine eligible capital cost.

(4) ELIGIBLE COSTS. The applicant's reasonable and necessary capital costs, incurred after January 1, 1989, to correct a MCL violation, are eligible for grant assistance. Eligible capital costs, as determined by the department may include, but are not limited to the following:

(a) Contractual costs incurred for the preparation, submission and approval of an engineering report and the plans and specifications for an eligible project.

(b) Contractual costs incurred for construction of approved facilities to correct MCL violations. In cases where ineligible construction contract items are identified or a parallel cost ratio is used to determine the eligible portion of a project, the eligible construction costs shall be correspondingly limited. In order for contractual construction costs to be eligible, the municipality shall comply with the municipal procurement requirements of ch. 59, 60, 61 or 62, Stats., whichever is applicable.

(c) Construction costs incurred directly by the municipality, such as municipal staff providing construction supervision or doing some part of the actual construction, if approved in advance by the department.

(d) Land acquisition costs, if the land is necessary for the eligible project and the acquisition complies with department procedures and requirements.

(e) Financing costs, other than interest, incurred by a municipality to proceed with construction, with department concurrence, before grant funding is available. Eligible financing costs are fees for the professional services of financial advisors, bond counsel, underwriting and other related legal services associated with obtaining funds from an external source.

(5) INELIGIBLE COSTS. Ineligible costs, as determined by the department, include, but are not limited to the following:

(a) Costs incurred prior to January 2, 1989.

(b) The costs of easements or rights-of-way or similar interest in property, and any associated costs.

(c) Direct or indirect administrative costs, such as the provision of office space, telephone service and any additional or existing municipal personnel.

(d) Interest on any form of indebtedness.

(e) Damage awards arising out of the construction, equipping or operation of the project, regardless of how the damage awards are determined.

(f) Costs incident to normal operating costs of government, including the salaries and expenses of statutory officials such as the mayor, city manager or other official.

(g) Bonus payment made to a contractor for completing work in advance of a specified time.

(h) Costs determined by the department to be unreasonable in amount.

(i) All costs incurred for projects which commence without departmental approval of plans and specifications.

(j) Costs for which the municipality receives federal assistance or state assistance other than a loan.

(k) Costs associated with contract procurement not in compliance with the requirement of ch. 59, 60, 61 or 62, Stats., whichever is applicable.

NR 127.05 ALLOCATION OF GRANT ASSISTANCE. (1) The allocation of grant funding to eligible projects is a two step process. The product of the first step is a priority ranking list of all projects determined to have met the MCL violation criteria under s. NR 127.04 (2) (a). The methodology used to determine the priority rank, the information to be submitted by each applicant, and the preparation and distribution of the priority ranking list are contained in s. NR 127.06.

(2) The product of the second step of the allocation process is the funding list. The funding list is a priority ranking of those projects from the priority ranking list, established under s. NR 127.06 that have met the grant application requirements and have been determined to have met the remaining eligibility criteria under s. NR 127.04. The grant application requirements, including documentation of eligible capital costs, and the preparation and distribution of the funding list are contained in s. NR 127.07.

NR 127.06 PRIORITY RANKING SYSTEM. (1) GENERAL. The priority ranking system is a methodology for assigning a numerical value to a project that reflects the severity of the health risk associated with a violation of a drinking water maximum contaminant level (MCL). The purpose of the priority system is to establish the relative ranking of proposed projects for grant award. In the event that a particular project involves more than one MCL violation, the highest health risk MCL violation shall be used to determine the priority rank.

(2) PRIORITY RANKING FACTORS AND METHODOLOGY. The priority rank for a particular project is the product of 2 factors. The first, called the tier, is a 3 level categorization of projects based on whether the contaminant represents an acute or chronic health risk. The second factor, the within tier ranking, differs between tier 1 and tiers 2 and 3. For Tier 1 the ranking is based on the presence of fecal coliform and the cost per capita for correcting the MCL violation. Within tier 2 and 3 the ranking is based on a measure of the extent to which each MCL violation exceeds the standard or a negligible health risk level established for each contaminant. The 3 tiers and the specific method for ranking projects within each, are defined as follows:

(a) Tier 1 includes all microbiological contaminants. This type of contaminant presents an acute health risk to all persons who come in contact with it. All tier 1 contaminant projects shall be ranked higher than any tier 2 or 3 project. Ranking within this tier shall be based on the presence of fecal coliform and the cost per capita to correct the violation. All tier 1 projects where the presence of fecal coliform is confirmed will be ranked higher than tier 1 projects where fecal coliform is not documented. The overall ranking will be based on the estimated or final project cost per capita. The highest per capita cost project where the presence of fecal coliform is confirmed will be ranked first.

Note: For purposes of the Priority Ranking List the estimated project cost per capita will be used for Tier 1 projects. However, because these are estimates that are likely to change, there may be ranking changes reflected on the Funding List.

(b) Tier 2 is for nitrate contamination levels above the MCL. Nitrate contamination presents an acute health risk to a segment of the population, principally children under 6 months of age. All tier 2 projects shall be ranked higher than any tier 3 project. Ranking within this tier shall be based on the percentage by which the MCL is exceeded, with the project which exceeds the MCL by the greatest percentage given the highest rank.

(c) Tier 3 is established for all other organic, inorganic and radionuclide contaminants, which are considered to represent a chronic health risk. Ranking within this tier will utilize the lifetime adverse health impact probability measures used, together with other factors, by the U.S. Environmental Protection Agency in establishing the MCL for these substances. For each tier 3 contaminant, these data provide the concentration at which the probable adverse health impact is negligible or no greater than 1 in 1,000,000. This negligible impact concentration will be used as the

denominator in a ratio which reflects the extent to which a project's actual MCL violation concentration exceeds the negligible health risk level. These ratios then provide a common measure of the relative health risk for each project; the higher the ratio, the higher the probability of cancer or other adverse health impact. Ranking of projects will be in descending order with the project which has the highest health risk ratio ranked first.

(3) PRIORITY RANKING LIST. Based on the information submitted by eligible municipalities and the methodology described in sub. (2), the department shall prepare and distribute a priority ranking list containing the score and rank of each project that is in violation of a drinking water MCL on or after April 1, 1990.

Note: The priority ranking list does not reflect the final determination by the department (see NR 127.07) of whether the eligible capital cost of the project exceeds the \$150 per capita requirement established by statute, and may not reflect departmental approval of a proposed project's plans and specifications.

(4) PRIORITY RANK REQUESTS. (a) The completed priority rank request forms for the first funding cycle shall be submitted to the department by June 10, 1991. For subsequent funding cycles, the deadline for completed priority rank request forms shall be December 31 of each year. Late or incomplete priority rank request forms may be removed from consideration during that funding cycle, but may be resubmitted in subsequent cycles.

(b) Following the application due date, the department shall prepare a priority ranking list containing the priority rank and estimated construction cost, if provided by the municipality, for each potential project for which a priority rank request was received. For the first funding cycle, the department shall distribute the priority ranking by July 12, 1991. For subsequent funding cycles, the priority ranking list shall be distributed by

February 15 of each year. The priority ranking list shall be sent to each applicant and made available to other interested individuals or organizations.

NR 127.07 AWARD OF GRANT ASSISTANCE. (1) GENERAL. Grant funds shall be distributed to eligible projects in priority rank order as reflected in the funding list. In the event that grant funding available for a particular project is less than the amount the project is eligible to receive under this section, the department may offer a reduced grant or consider changes in the project as proposed by the applicant municipality.

(2) GRANT APPLICATION. At or prior to distribution of the priority ranking list, the department shall distribute grant application materials and instructions to municipalities that have submitted priority rank request forms. Municipalities shall obtain departmental approval for plans and specifications, if not already obtained, secure bid prices for the proposed construction, and submit completed grant application materials by the deadline established. For the first funding cycle, the application deadline is September 16, 1991. Thereafter, completed grant applications shall be submitted by April 15 of each year. Applications that are received late or do not contain the required information may be removed from consideration during that funding cycle, but may be resubmitted in subsequent funding cycles.

(3) AMOUNT OF GRANT. The state grant may not exceed 90% of the total eligible project cost minus an amount equal to \$25 times the population served by the public water system. In the event that a project has or will also receive state or federal financial assistance, other than a loan, the grant amount under this chapter may be reduced based on the other financial assistance provided. The net effect, in cases where other financial assistance is available, shall be that local funds shall pay at least 10% of the total eligible cost.

(4) FUNDING LIST. Following the grant application due date, the department shall review the information submitted, determine eligibility under the \$150 per capita capital cost and the other requirements in s. NR 127.04 and prepare a priority ranked funding list. The funding list shall also contain the total estimated eligible capital cost for each project. In the event that 2 or more projects have the same priority rank, the tie will be broken based on which project has the highest cost per capita.

(5) GRANT OFFER. All grant offers shall be made in accordance with the established funding list, and after the municipality has made tentative contract awards, conditioned upon receipt of a state grant under this chapter. In the event that the department determines that it is necessary to make a grant offer out of sequence with the funding list, it shall first insure that an amount, based on the estimated eligible as-bid costs contained in the application, is reserved for the higher ranking project before making a grant offer to a lower ranking project. The grant offer shall be signed by the authorized official of the department and shall set forth the terms and conditions of the offer.

(6) GRANT CONDITIONS. Each grant awarded under the chapter shall be subject to the following conditions:

(a) The municipality agrees to pay all of the non-state grant costs associated with the project and commits to completion of all project work on a timely basis.

(b) The municipality agrees to construct the facility in accordance with the engineering plans and specifications approved by the department.

(c) The municipality agrees that department representatives shall have access to the project whenever it is in preparation or progress. The municipality further agrees to allow department representatives access to any books, documents, plans, reports, papers and other records which are pertinent

to the project, whether these records are maintained by the municipality or its contractors.

(d) In the case of a project involving construction or installation of equipment, the municipality agrees to provide adequate management, supervision and inspection to ensure that the finished project meets generally accepted standards of workmanship and quality and conforms with the approved plans and specifications.

(e) For any project involving procurement of equipment or contract construction or services, the municipality agrees to comply with the procurement requirements of ch. 59, 60, 61 or 62, Stats., whichever is applicable.

(7) GRANT ACCEPTANCE. Acceptance of the grant offer shall be made by signature of the authorized representative of the municipality on documents provided by the department at the time of grant offer. If the grant offer is not formally accepted within 30 days from the date of the offer, the department may withdraw the offer, offer the funds to another eligible applicant and remove the original project from the funding list.

(8) GRANT PAYMENT. The municipality shall be paid the state grant share of the eligible project costs incurred within the scope of the approved project, up to the total grant amount reflected in the grant award or subsequent amendment approved by the department. In order to receive grant payment, the municipality shall submit an itemized payment request, with backup documentation of all eligible costs incurred, in accordance with the instructions provided by the department.

(a) The municipality may request interim grant payments, when documented in accordance with this subsection, and be paid up to a cumulative amount

totalling 95% of the total grant award. Interim grant payment requests may be submitted no more frequently than monthly.

(b) The final grant payment request shall be labeled as such by the municipality and submitted with all remaining cost documentation. Upon completion of a final inspection and acceptance of any outstanding project documents, the department shall make the final grant payment.

NR 127.08 RECORDS RETENTION AND AUDITING. The municipality shall retain all records pertaining to the project for up to 3 years after the date of the final grant payment and, upon request, make them available to the department.

NR 127.09 DISPUTES. (1) DECISION OF THE DEPARTMENT. Except as otherwise provided by law, any dispute arising under a grant agreement shall be decided in writing by the department and the department shall serve personally or by mail (certified mail, return receipt requested) a copy of the decision on the grant recipient.

(2) REVIEW OF THE DECISION. A decision of the department made pursuant to this section shall be final unless, within 30 days from the date of receipt of the decision, the recipient mails (certified mail, return receipt requested) or otherwise delivers to the department a written petition specifically stating the disputed facts which warrant a modification or reversal of the decision. Any review of a department decision filed pursuant to this subsection shall be treated as a class 2 contested case and shall be adjudicated in accordance with ch. 227, Stats., and ch. NR 2.

NR 127.11 VARIANCES. (1) GENERAL. The department may approve a variance from any nonstatutory requirement of this chapter. Before granting a variance, the department shall take into account factors such as good cause and circumstances beyond the control of the recipient.

(2) APPLICABILITY. A recipient may request a variance from any nonstatutory requirement of this chapter.

(3) REQUEST FOR VARIANCE. A request for a variance shall be submitted in writing to the department, as far in advance as the situation will permit. Each request for a variance shall contain the following:

(a) The name of the applicant and the name and telephone of a contact person familiar with the variance request situation.

(b) An explanation of why the variance is needed, including the factual basis for the variance, and the specific provision of this chapter from which a variance is being sought.

(4) APPROVAL OF VARIANCE. A copy of each approval of a variance request shall be retained by the department in the grant file established under this chapter.

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The foregoing rules were approved and adopted by the State of Wisconsin Natural Resources Board on January 24, 1991.

The rules contained herein shall take effect on the first day of the month following publication in the Wisconsin administrative register, as provided in s. 227.22(2)(intro), Stats.

Dated at Madison, Wisconsin April 1, 1991

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES

By Carroll D. Besadny
Carroll D. Besadny, Secretary

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