

Chapter NR 162

CLEAN WATER FUND

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NR 162.01 Purpose. The purpose of this chapter is to establish rules under s. 144.241, Stats., for the implementation and administration of a financial assistance program for the planning, engineering design and construction of point source pollution abatement facilities.

History: Cr. Register, October, 1989, No. 406, eff. 11-1-89.

NR 162.02 Applicability and cross referencing. This chapter applies to all applicants and recipients of funding for planning, design and construction of point source pollution abatement facilities made pursuant to s. 144.241, Stats. Compliance with the applicable requirements of this chapter is a prerequisite to receiving financial assistance under s. 144.241, Stats. This chapter does not apply to applications for financial assistance for nonpoint source pollution abatement facilities under s. 144.241, Stats.

History: Cr. Register, October, 1989, No. 406, eff. 11-1-89.

NR 162.03 Definitions. In this chapter:

(1) "Advance commitment" means a commitment by the department, subject to legislative appropriation, to reimburse or refinance municipalities for project costs which a municipality previously incurred using the allocation procedures outlined in s. 144.241 (17) (b), Stats.

(2) "Allocable costs" means costs of items that can be assigned to at least one of the objectives within the scope of a project.

(3) "Annual finance plan" means the proposed plan described in s. 144.241 (4), Stats.

(4) "Approval" means the written approval of the department.

(5) "Approved areawide waste treatment management plan" means a plan or elements thereof developed pursuant to section 208 of the federal water pollution control act amendments of 1972, as amended by the clean water act amendments of 1977, (33 USC 1251 et seq.), and approved by the state of Wisconsin.

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(6) "Assistance agreement end date" means the first day of the seventh month after physical completion of the project.

(7) "Change order" means an action that specifies and justifies a change to a construction contract which alters the time of completion, the total price or both.

(8) "Clean water fund" means the program established under s. 25.43, Stats., for the purpose of providing financial assistance to municipalities for the construction of wastewater treatment works, nonpoint source projects and estuary projects.

(9) "Compliance maintenance" means the program established and regulated under ch. NR 208, to prevent a permittee under ch. 147, Stats., from significantly exceeding effluent limitations contained in a permit issued under ch. 147, Stats.

(10) "Connection lateral" means a service sewer line which connects a residence, small commercial establishment or industrial user to a sewage collection system or individual wastewater system.

Note: This definition includes house service pipes and public lateral sewers regardless of ownership or whether located in the public right-of-way or on private property and which connect to the "Y" fitting of a public sanitary sewer main.

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

(a) Performing preliminary planning to determine the need for or the feasibility of building or modifying a treatment works;

(b) Performing engineering, architectural, legal, fiscal or economic investigations or studies;

(c) Preparing surveys, designs, plans, working drawings or specifications;

(d) Erecting, building, altering, remodeling, improving, extending or purchasing a wastewater treatment works;

(e) Inspecting or supervising any of the activities under pars. (a) to (d).

(12) "Construction contract claim" means a demand or request to change one or more terms of a construction contract that has not been resolved by compromise or negotiations. The term does not include bilateral change orders or contract modifications.

(13) "Coverage" means the ratio of net revenue available for debt service to the average annual debt service requirements of an issue of revenue bonds.

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

(15) "Enforceable requirements of the act" means those conditions or limitations included in permits issued under s. 147.02, Stats., which if violated, could result in the initiation of legal action under s. 147.29, Stats., or those provisions of s. 144.025 (2) (r), Stats., which, if violated, could result in the issuance of department orders under s. 144.025 (2) (s), Stats. If a permit under ch. 147, Stats., has not been issued, the term shall include any requirement which, in the department's judgment, would be included in the permit when issued. Where no permit under ch. 147, Stats., applies, the term shall include any requirement which the

department determines is necessary to comply with the provisions of ch. 147, Stats., and the federal water pollution control act, as amended.

(16) "Financial assistance" means loans, refinancing, guarantees, purchase of insurance, credit enhancement or grant funds provided to a municipality under s. 144.241, Stats.

(17) "Financial hardship assistance" means financial assistance, as authorized under s. 144.241 (13), Stats., which is available to municipalities that meet the financial hardship criteria under ch. NR 163. Such assistance may take the form of further interest rate reductions, grants or other forms as determined by the department.

(18) "Force account work" means the work a municipality performs using its own employes or equipment for construction, construction-related activities, repairs or improvements to a treatment works. The term includes any activity listed in sub. (11), if the work is performed by a municipality with its own employes or equipment.

(19) "Fundable range" means that range of projects on the funding list compiled under s. NR 162.06 which are projected to consume all available clean water fund financial assistance funds appropriated by the legislature for the fiscal year.

(20) "Individual system" means a privately or publicly owned wastewater treatment works which is operated and maintained by a municipality and serves one or more residences or small commercial establishments.

(21) "Industrial user" means:

(a) Any nongovernmental, nonresidential user of a publicly owned treatment works which discharges more than the equivalent of 25,000 gallons per day (gpd) of sanitary wastes and which is identified in the standard industrial classification manual, 1972, United States office of management and budget, as amended and supplemented as of October 1, 1978, under one of the following divisions:

Division A. Agriculture, forestry, and fishing

Division B. Mining

Division D. Manufacturing

Division E. Transportation, communications, electric, gas, and sanitary services.

Division I. Services

(b) Any nongovernmental user of a publicly owned treatment works which discharges wastewater to the treatment works which contains toxic pollutants or poisonous solids, liquids or gases in sufficient quantity either singly or by interaction with other wastes, to contaminate the sludge of any municipal system, to injure or interfere with any sewage treatment process, to constitute a hazard to humans or animals, to create a public nuisance, or to create any hazard in or have an adverse effect on the waters receiving any discharge from the treatment works;

(c) All commercial users of an individual system constructed with grant assistance under s. 144.24, Stats.

(22) "Inflow" means water other than wastewater that enters a sewage system.

Note: This definition includes sewer service connections from sources such as roof leaders, cellar drains, yard drains, area drains, foundation drains, drains from springs and swampy areas, manhole covers, cross connections between storm sewers and sanitary sewers, catch basins, cooling towers, stormwaters, surface runoff, street wash waters or other drainage.

(23) "Initiation of construction" means:

(a) For step 1 activities, the approval of a plan of study;

(b) For step 2 activities, the approval of the facility plan and other wastewater management decision documents;

(c) For step 3 activities, issuance of a notice to proceed under a construction contract for any segment of the project or, if notice to proceed is not required, execution of the construction contract.

(24) "Interceptor sewer" means a sewer whose primary purpose is to transport wastewaters from collector sewers to a treatment facility, or which is designed for one or more of the following purposes:

(a) To intercept wastewater from a final point in a sewage collection system and convey such wastes to a sewage treatment facility or to another interceptor.

(b) To replace an existing wastewater treatment facility and transport the wastes to an adjoining sewage collection system or interceptor sewer for conveyance to a sewage treatment facility.

(c) To transport wastewater from one or more municipal sewage collection systems to another municipality or to a regional plant for treatment.

(d) To intercept an existing major discharge of raw or inadequately treated wastewater for transport to another interceptor or to a treatment plant.

(25) "Maintenance" means the preservation of the functional integrity and efficiency of a wastewater treatment facility, including its equipment and structures. The term includes preventive maintenance, correctional maintenance and replacement of equipment.

(26) "Market interest rate" means the average interest rate obtained by the state on its general obligation bond issuances during the preceding 6 month period.

(27) "Municipality" means any city, town, town utility district, village, county, utility district, town sanitary district, public inland lake protection and rehabilitation district, metropolitan sewerage district or any federally recognized tribal governing body.

(28) "Operation" means control of the unit processes and equipment which make up the treatment works. The term includes financial and personnel management, records, laboratory control, process control, safety and emergency operation planning.

(29) "Parallel cost estimate" means a cost estimate used to determine the cost of capacity for projects or portions of projects under s. NR 162.05 (3) (a), (c) and (d). The parallel cost estimate includes an estimate of all costs for treatment works units necessary to provide the de-

sign capacity of the treatment works exclusive of the cost necessary for providing capacity for the items under s. NR 162.05 (3) (a), (c) and (d) and an estimate of the cost of treatment works units necessary to provide the design capacity.

(30) "Physical completion" means that project construction has been completed and the treatment process operation has been initiated or is capable of being put into operation.

(31) "Priority value" means the score assigned to a project by the department pursuant to ch. NR 161.

(32) "Progress payments" means:

(a) Payments for work in place;

(b) Payments for materials or equipment which have been delivered to the construction site or which are stockpiled in the vicinity of the construction site in accordance with the terms of the contract when conditional or final acceptance is made by or for the recipient.

(c) Payments for undelivered specifically manufactured items or equipment, excluding off-the-shelf or catalog items, if provisions for such payments are included in the bid and contract documents, and

1. The equipment is so designated in the project specification;
2. The equipment to be specifically manufactured for the project could not be readily utilized on nor diverted to another job; and
3. A fabrication period of more than 6 months is anticipated.

(33) "Project" means any step 1, step 2 or step 3 activities under this chapter.

(34) "Project completion" means the point in time when physical completion has been achieved.

(35) "Recipient" means any municipality that has applied for or received financial assistance available under this chapter.

(36) "Replacement" means obtaining and installing any equipment, accessories or appurtenances which are necessary during the useful life of the treatment works to maintain the capacity and performance for which such works were designed and constructed.

(37) "Sanitary sewer" means a sewer intended to carry only sanitary or sanitary and industrial wastewaters from residences, commercial buildings, industrial plants and institutions.

(38) "Sewage collection system" means the public sanitary sewer mains, including service connection "Y" fittings, which are primarily installed to receive wastewater directly from connection laterals.

(39) "Sewage treatment facilities" means treatment works as defined in sub. (47), exclusive of interceptor sewers and sewage collection systems.

(40) "Sewer service area" means that area served or for which an agreement has been reached for future service to be served by a sewage collection system; or for which capacity is provided to allow disposal of septic tank or holding tank wastes.

(41) "Small commercial establishment" means a private establishment, such as a restaurant, hotel, store, auto service station or recreational facility, with dry weather wastewater flows between 300 and 25,000 gallons per day; and non-profit entities such as churches, schools, hospitals and charitable organizations, if their dry weather flow or equivalent is less than 25,000 gallons per day.

(42) "Step 1" means the preparation of plans, studies and related information for a determination of the wastewater management needs of a municipality, community or area in accordance with the requirements of ss. NR 110.08 and 110.09.

(43) "Step 2" means the preparation of engineering plans and specifications for the construction of a proposed treatment works project in accordance with the requirements of chs. NR 108 and 110.

(44) "Step 3" means any activity identified in sub. (11) (d), and any inspection or supervision of those activities when the activity being inspected or supervised is in accordance with an approved facility plan and engineering plans and specifications.

(45) "Stop-work order" means the suspension of state liability for work performed under a financial assistance agreement after notification is given to the recipient.

(46) "Transition project" means a treatment works project that is eligible for financial assistance under s. 144.241 (7) (b), Stats., and which meets the requirements of s. 144.241 (20), Stats.

(47) "Treatment works" means any devices and systems for the storage, treatment, recycling and reclamation of municipal sewage, domestic sewage or liquid industrial wastes used to meet applicable effluent limitations or necessary to recycle or reuse water at the most economical cost over the useful life of the works. These systems may include intercepting sewers, outfall sewers, sewage collection systems, individual systems, pumping equipment and stations, power and other equipment and their appurtenances; extensions, improvements, additions and alterations thereof; elements essential to provide a reliable recycled supply such as standby treatment units and clear well facilities; and any works, including site acquisition of the land that will be an integral part of the treatment process, or on which the components of the treatment process are located, except for sewers and individual systems, or is used for ultimate disposal of residues resulting from such treatment (including land for composting sludge, temporary storage of such compost and land used for the storage of treated wastewater in land treatment systems before land application); or any other method or system for preventing, abating, reducing, storing, treating, separating or disposing of municipal waste or industrial waste, including waste in combined stormwater and sanitary sewer systems.

(48) "Unsewered municipality" means a municipality which is wholly or partially unsewered.

(49) "User charge" means a charge levied on users of a treatment works for the user's proportional share of the cost of operation, maintenance and replacement of such works.

(50) "Violator" means a person or municipality which cannot receive approval of an application for sanitary sewers under s. NR 110.05 (3), or

is not in substantial compliance with the terms, conditions, requirements and schedules of compliance of an applicable ch. 147, Stats., discharge permit, for a reason that the department determines is or has been within the control of the person or municipality.

History: Cr. Register, October, 1989, No. 406, eff. 11-1-89.

NR 162.04 Types of financial assistance available. The department may provide the following types of financial assistance to eligible recipients:

(1) Purchase or refinance the debt obligation of a municipality if the debt was incurred to finance the cost of constructing an eligible treatment works project located in the state and the debt was initially incurred on or after May 17, 1988.

(2) Purchase or refinance the debt obligation of a municipality if the debt was incurred to finance the cost of constructing an eligible treatment works project located in the state when the debt was initially incurred after March 7, 1985 and before May 17, 1988. The use of this method shall be limited to circumstances where financial assistance commitments under s. 144.241 (15), Stats., are not sufficient to meet the requirements of 33 USC 1382 (b) (3).

(3) Guarantee, or purchase insurance for, municipal obligations for the construction of treatment works if the guarantee or insurance would improve credit market access or reduce interest rates.

(4) Make loans at or below the market rate.

(5) Provide financial hardship assistance to eligible recipients.

History: Cr. Register, October, 1989, No. 406, eff. 11-1-89.

NR 162.05 Eligibility for financial assistance. (1) **ELIGIBILITY-GENERAL.** Municipalities are eligible to participate in the financial assistance program established by this chapter for the construction of a point source pollution abatement facility. A project shall meet the cost effectiveness analysis criteria contained in ch. NR 110 to be eligible for financial assistance under this chapter.

(2) **ELIGIBLE PROJECTS - BELOW MARKET INTEREST RATE.** Projects for facility planning, preparation of construction plans and specifications, and the construction of publicly-owned treatment works and privately owned treatment works meeting the requirements of s. 144.241 (7), Stats., and this section are eligible for financial assistance in a form which is below the market interest rate if the project is one of the following types:

(a) Projects that the department determines, under the compliance maintenance program, are necessary to prevent a municipality from significantly exceeding an effluent limitation contained in a discharge permit issued under ch. 147, Stats.

(b) Projects necessary to achieve substantial compliance with an enforceable requirement which was changed or established after May 17, 1988, provided that the municipality remains in substantial compliance with the newly established or changed enforceable requirement or an associated compliance schedule.

(c) Projects necessary to eliminate actual or imminent pollution of groundwater or surface water or threat to human health in unsewered municipalities or portions thereof.

(d) Projects for the planning, design and construction of collection system, interceptor and individual system projects in an unsewered municipality if the department finds that at least two-thirds of the initial flow will be for wastewater originating from residences in existence on October 17, 1972. Such financial assistance may be provided only if the department determines that:

1. Population density of the area to be served has been considered in determining the cost-effectiveness of the proposed project;

2. The collection system is consistent with an approved areawide waste treatment management plan; and

3. The unsewered municipality has executed an agreement under s. 66.30, Stats., with another municipality to receive, treat and dispose of wastewater if the unsewered municipality will be disposing of wastewater in the treatment works of another municipality.

(3) ELIGIBLE PROJECTS - MARKET INTEREST RATE. The following projects or portions thereof are eligible to receive financial assistance in a form which is equal to the market interest rate only:

(a) Design and construction costs related to public sanitary sewer mains, interceptors and individual systems in unsewered municipalities which exclusively serve residences or small commercial establishments constructed after October 17, 1972.

(b) Planning, design and construction costs related to public sanitary sewer mains, interceptors and individual systems in unsewered municipalities where the department finds that less than two-thirds of the initial flow will be from wastewater originating from residences or small commercial establishments constructed prior to October 17, 1972.

(c) The amount of reserve capacity for projects, excluding sewage collection system, interceptor or individual system projects in unsewered municipalities, necessary to treat projected flows beyond 10 years from the project completion date.

(d) The amount of capacity for present and future flows from industrial users.

(e) A project to correct violations of effluent limitations contained in a permit issued under ch. 147, Stats. In making a determination that compliance is within the control of a person or municipality, the department shall consider whether the person or municipality has taken or failed to take all actions within its authority which could reasonably have been expected to prevent, correct or eliminate the noncompliance.

(f) The estimated cost of capacity for the portion of the project receiving the market interest rate shall be determined as follows:

1. The facility plan shall provide parallel cost estimates for treatment works necessary to provide capacity for items under pars. (a), (c) and (d).

2. The total design capacity shall be determined in accordance with ss. NR 110.09 (2) (j) and 110.10 (2).

3. The estimates provided under subds. 1. and 2. shall be revised, if necessary, at the time the financial assistance application is submitted, based on the final approved engineering design.

(4) **INELIGIBLE PROJECTS.** The following projects or portions thereof are not eligible to receive financial assistance under this chapter:

(a) Projects for a municipality that has failed to substantially comply with any of the following conditions, requirements or terms of a federal or state grant or loan program used to pay the costs of planning, design or construction associated with wastewater collection, transportation, treatment or disposal or used to pay the cost of studies, investigations, plans, designs or construction associated with implementing a nonpoint source control management program:

1. Federal construction grants program. Failure to substantially comply with conditions of a federal grant issued under 33 USC 1251 et seq. includes but is not limited to:

a. Actions resulting in debarment and suspension under 40 CFR Part 32 for the period of time such debarment or suspension is in effect.

b. Failure to repay any costs declared ineligible on audit.

2. Wisconsin fund construction grants program. Failure to substantially comply with conditions of a state grant issued under s. 144.24, Stats., includes but is not limited to:

a. Failure to repay any costs declared ineligible on audit.

b. Actions resulting in annulment under s. NR 128.21 (2) (e) until the department determines that the cause of the annulment has been corrected.

c. Actions resulting in enforcement action under s. NR 128.24 (1) until the department determines that the cause of the enforcement action has been corrected.

3. Clean water fund financial assistance. Failure to substantially comply with conditions of state financial assistance issued under s. 144.241, Stats., includes but is not limited to:

a. Failure to repay financial assistance in accordance with a financial assistance agreement.

b. Failure to repay any costs declared ineligible on audit.

c. Actions resulting in rescission of financial assistance under s. NR 162.20 (3) or in enforcement action under s. NR 162.21 until the department determines that the cause of the rescission or enforcement action has been corrected.

(b) Connection laterals that transport wastewater from structures to municipally owned or individually owned wastewater systems.

(c) Public sanitary sewer mains, individual systems and interceptors in unsewered communities which exclusively serve development not in existence as of the date of application.

(d) Commodes, sinks, tubs, drains and other wastewater generating fixtures and associated plumbing.

(e) Modifications to homes or commercial establishments.

(f) Costs of improvement or decoration beyond that needed to restore the construction site to preconstruction conditions created by the installation of individual systems.

(g) Projects that do not meet the cost-effective analysis criteria contained in ch. NR 110.

(5) SEWAGE COLLECTION SYSTEM REPLACEMENT OR REHABILITATION.

(a) A seweraged municipality may receive financial assistance for a sewage collection system project if the project is for the replacement or major rehabilitation of an existing sewer system and is necessary to maintain the total integrity and performance of the waste treatment works serving the community.

(6) INDIVIDUAL SYSTEMS. A municipality may receive financial assistance to construct privately or publicly owned individual systems serving one or more residences or small commercial establishments if the municipality meets the following requirements:

(a) If the individual system is to be privately owned, certify that public ownership of the system is not feasible and submit the rationale to support the certification;

(b) Certify that the municipality will be responsible for the proper installation, operation and maintenance of the individual system;

(c) Certify that the project will be constructed according to approved plans and specifications, and that an operation and maintenance program which meets local, state and federal requirements will be established;

(d) Establish a user charge system in accordance with s. NR 162.11;

(e) Obtain assurances, such as easements or covenants running with the land, of unlimited access to each individual system at all reasonable times for the purposes of inspection, monitoring, construction, maintenance, operation, rehabilitation and replacement;

(f) Establish a comprehensive program for the regulation and inspection of individual systems and for monitoring the impact of the systems on the groundwater, subject to approval by the department. The department may require that the program include periodic testing of water from existing potable water wells and monitoring of aquifers in the area;

(g) If the project is in an unsewered municipality that will be discharging wastewater to the treatment works of another municipality, execute an agreement under s. 66.30, Stats., with the municipality that will be receiving, treating and disposing of the wastewater;

(h) Meet the requirements of ch. 147, Stats., or equivalent with secondary or more stringent wastewater discharge limitations;

(i) Comply with all other applicable requirements, limitations and conditions for publicly-owned treatment works projects funded under this chapter.

(7) COST ELIGIBILITY. (a) *Eligible costs.* The recipient's allocable project costs which are reasonable and necessary are eligible for financial assistance. Eligible costs may include, but are not limited to:

1. Costs of salaries, benefits and expendable material the recipient incurs for the project;

2. Construction of the project;

3. Professional, consultant and engineering services;

4. Planning work directly related to the treatment works;

5. Sewer system evaluation and rehabilitation;

6. Project feasibility and engineering reports;

7. Costs of complying with the Wisconsin environmental policy act, including costs of public notices and hearings;

8. Preparation of construction drawings, specifications, estimates and construction contract documents;

9. Landscaping;

10. Removal, relocation, replacement or temporary provision of utilities, for which the recipient is legally obligated to pay;

11. Materials acquired, consumed or expended specifically for the project;

12. An inventory of laboratory chemicals and supplies;

13. Development and preparation of an operation and maintenance manual;

14. Costs for the development of water conservation plans and user charge system plans;

15. Project identification signs;

16. Start-up services for new treatment works, including the training of operating personnel and the preparation of curriculum and training material for operating personnel on the new equipment or processes funded under this chapter. The cost of routine and entry level training and training for operators to meet state certification requirements under ch. NR 114 is not an eligible cost;

17. A plan of operation;

18. Development of a municipal pretreatment or toxicity reduction program and construction of facilities to be used by the municipal treatment works in such programs, including monitoring equipment;

Note: This subdivision is intended to include any steps taken by a municipality to require the reduction or treatment of high strength, toxic or hazardous waste prior to discharge into the municipal wastewater treatment plant.

19. Costs necessary to mitigate demonstrated direct, adverse physical impacts resulting from construction of the treatment works;

20. The cost of safety equipment;

21. On-site inspection during construction;

22. Acquisition of land that will be used for storage of treated wastewater in land treatment systems before land application;

23. Acquisition of land that will be used for composting or temporary storage of compost residues which result from wastewater treatment if the department has approved a program for use of the compost;

24. Acquisition of land on which the treatment plant or lift stations will be located;

25. Acquisition of an operable portion of a treatment works;

26. The cost of equipment used for sampling and analysis of industrial discharges to municipal treatment works;

27. Costs for value engineering studies or analyses performed during step 2; and

28. Interest cost incurred by a municipality for the eligible portion of a project that proceeded before receipt of financial assistance.

(b) *Ineligible costs.* Costs not directly associated with or not necessary for the construction or operation of an eligible project are not eligible for financial assistance. Ineligible costs include, but are not limited to:

1. Basin or area-wide planning not related to the project;
2. Bonus payments not legally required for completion of construction before a contractual completion date;
3. Personal injury compensation or damages arising out of the project, whether determined by adjudication, arbitration, negotiation or otherwise;
4. Fines and penalties due to violations of, or failure to comply with, federal, state or local laws;
5. Costs outside the scope of the approved project;
6. Ordinary operating expenses of local government, such as salaries and expenses of a mayor, city council members or city attorney, that are not directly related to the project;
7. Site acquisition expenses, other than administrative and legal costs, for rights-of-way and easements;
8. Costs for which payment has been or will be received under another federal or state financial assistance program;
9. Costs of monitoring equipment used by industry for sampling and analysis of industrial discharges to municipal treatment works;
10. Preparation of a financial assistance application, including a plan of study;
11. Costs incurred in a contract which creates a real or apparent conflict of interest. An apparent conflict of interest arises when an official or employe of a recipient participates in the selection, awarding or administration of a contract supported by the clean water fund and:

a. The official or employe, the official or employe's spouse or the official or employe's partner has an ownership interest in the firm selected for the contract; or

b. Any person identified in subpar. a. who receives any contract, gratuity or favor from the award of the contract.

12. Project costs incurred after the assistance agreement end date.

(c) *Indirect costs.* The recipient's indirect costs shall be eligible in accordance with an indirect cost agreement negotiated and incorporated in the financial assistance agreement. An indirect cost agreement shall identify those cost elements eligible under sub. (7) (a). Where the benefits derived from a recipient's indirect services cannot be readily determined, a lump sum for overhead may be negotiated if the department determines that this amount approximates the actual indirect costs.

(d) *Construction contract claims.* Reasonable and necessary legal, technical and administrative costs associated with further assessing the merits of construction contract claims are eligible, provided:

1. The recipient issues a written notification to the department prior to incurring costs;

2. The claim arises from work within the scope of the financial assistance agreement;

3. The claim or assessment costs are not a result of mismanagement;

4. The claim or assessment costs are not caused by the recipient's vicarious liability for the improper action of others;

5. Any arbitration based settlement includes written findings of fact, allocation of award to each issue, conclusion of law, basis of award and rationale;

6. The recipient provides a written record of negotiations;

7. The department determines that an overriding state interest exists in the issues involved in the claim; and

8. The department amends the financial assistance agreement to include the cost.

(e) *Disputes concerning eligibility.* All questions relating to cost eligibility or allocation shall be resolved prior to the execution of the financial assistance agreement. Disputes regarding eligible costs shall be resolved in accordance with s. NR 162.19.

History: Cr. Register, October, 1989, No. 406, eff. 11-1-89.

NR 162.06 Distribution of funds. (1) **GENERAL.** Financial assistance shall be allocated to those projects placed on the funding list and in the sequence specified in ch. NR 161.

(a) Between October 1 and December 31 of each year, each municipality intending to apply for financial assistance during the following state fiscal year shall notify the department of its intent in writing. For those municipalities that notify the department by January 1, and submit complete approvable and biddable plans and specifications and a financial assistance application by June 30, the department shall annually

compile a funding list which ranks those municipalities in the same order as they appear on the federal project priority list and specified in ch. NR 161. The funding list shall be compiled no earlier than July 1 of the fiscal year for which it is effective. If sufficient funds are not available to fund all requests in the fiscal year, the department shall award available funds to projects in the order in which they appear on the funding list. The department shall provide a notice entitled a "notice of commitment" to municipalities which appear on the funding list and which fulfill the requirements of sub. (2) (a). The department shall presume that a municipality which has not submitted complete plans and specifications for review and a financial assistance application by June 30 will not be able to receive financial assistance for the following fiscal year.

(b) The list established under par. (a) is effective for the fiscal year beginning on July 1. The list expires on June 30 of the fiscal year. The department may allocate funds to a municipality on the list after the expiration of the list if a municipality received a notice of commitment before the expiration of the list and the requirements of sub. (2) (b) are met.

(2) ALLOCATION PROCEDURE. (a) The department shall issue a notice of commitment of funds to a municipality on the list complied under sub. (1) upon the submittal of the following and within 90 days of the department's approval of the financial assistance application:

1. Approved current detailed plans and specifications which are capable of being bid;

2. A statement assuring that the proposed site will be available for project use prior to the start of construction;

3. A financial assistance application which meets the requirements of s. NR 162.08 or an application which, in the opinion of the department, can be completed by the submission of minor additional information.

(b) The department may enter into a financial assistance agreement with a municipality on the funding list compiled under sub. (1) if the municipality has submitted a bid tabulation with a recommendation to the department for review and concurrence within 3 months of the department's notice given under par. (a).

(c) Upon departmental concurrence with bid tabulations and the recipient's compliance with all applicable financial assistance conditions and other provisions of this chapter, the department may give notice to the recipient to proceed with construction.

(d) The department shall specify the type of financial assistance to be provided for each application that it approves.

(e) The department may issue a provisional notice of commitment for financial assistance prior to the approval of the annual finance plan contingent on approval of the plan by the state building commission under s. 13.42 (26), Stats.

(f) The date the financial assistance agreement is signed by the department shall be deemed the date the financial assistance is awarded for purposes of s. NR 162.07 (4) (b).

NR 162.07 Loan interest rate. The determination of the specific interest rate for a particular cost item or set of items shall be the interest rate or composite interest rate assigned to the type of project which required the particular item. The interest rate on loans made under this chapter shall be determined based on the following:

(1) **INTEREST RATE CRITERIA.** Interest rates shall be set at a level sufficient to contribute to maintaining the purchasing power of the fund and to support the administration of the program. Interest rates which are below the market interest rate shall be set as a percentage of the market interest rate.

Note: It is the goal of the clean water fund to establish an interest rate subsidy that will result in a significant reduction from the market rate in order to help achieve the department's water quality goals and provide municipalities with enough financial incentive to construct before violating their discharge permits issued under ch. 147, Stats.

(2) **INTEREST RATE TIERS.** Interest rates for projects shall be based on the following 3 tiered approach:

- (a) Tier 1 projects shall be funded at the lowest available interest rate. Compliance maintenance projects and new/changed limits projects.
- (b) Tier 2 projects shall be funded at an interest rate below the market interest rate. Unsewered projects, urban storm water projects and nonpoint source projects.
- (c) Tier 3 projects shall be funded at the market interest rate. Violator projects, future growth and industrial capacity.

(3) **DETERMINING MARKET INTEREST RATE.** Each year the department shall establish a proposed market interest rate as part of an annual funding policy for the fiscal year. The proposed market interest rate shall be included in the annual finance plan.

(4) **PROJECT INTEREST RATE.** (a) The interest rate for projects shall be set at a percent of the market interest rate and shall be prioritized based on the order in sub. (2).

(b) The department shall determine the interest rate for a project at the time of the award of the financial assistance agreement. The interest rate shall be based on the market interest rate in effect at the time of the award of the financial assistance agreement. Step 1 and step 2 projects financed at the time of step 3 shall receive the same interest rate as the step 3 project.

(c) Recipients that have received an advanced commitment shall receive the interest rate in effect at the time it is converted to a financial assistance agreement.

(5) **MULTI-PART PROJECTS.** (a) If a project contains costs from 2 or more of the following categories, a further breakdown of costs for treatment works necessary to provide capacity exclusive of portions under s. NR 162.05 (3) (a), (c) and (d) shall be computed before an interest rate for the project can be determined:

1. Compliance maintenance or new or changed limits under s. NR 162.05 (2) (a) and (b).

2. Unsewered municipality under s. NR 162.05 (2) (c).

3. Violator under s. NR 162.05 (3) (e).

(b) The following methods, in the order listed, shall be used to estimate the costs associated with each category in par. (a). The resulting estimates shall be provided in the facility plan and revised, if necessary, at the time the financial assistance application is submitted, based on the final approved engineering design.

1. If the cost of each treatment works unit can be allocated, based on its purpose, to any one of the categories, the sum of the treatment units costs allocable to each category shall be used.

2. If the cost of a treatment works unit cannot be allocated to a particular category, the cost of that unit shall be divided between the appropriate categories based on the portion of the design flow of the unit attributable to each category.

(6) COMPOSITE INTEREST RATE. A project which contains costs associated with 2 or more interest tiers shall receive a composite interest rate. The composite interest rate shall be computed as follows:

$$RC = \frac{(RT_1)(CT_1) + (RT_2)(CT_2) + (RT_3)(CT_3)}{(CT_1 + CT_2 + CT_3)}$$

Where:

RC is the composite interest rate for the project.

RT₁ is the tier 1 interest rate.

RT₂ is the tier 2 interest rate.

RT₃ is the tier 3 interest rate.

CT₁ is the eligible construction cost for portions of the project under s. NR 162.05 (2) (a) and (b).

CT₂ is the eligible construction cost for portions of the project under s. NR 162.05 (2) (c).

CT₃ is the eligible construction cost for portions of the project under s. NR 162.05 (3).

History: Cr. Register, October, 1989, No. 406, eff. 11-1-89.

NR 162.08 Financial assistance application. (1) PROCEDURE. An application shall be submitted to the department for each step 3 project. For step 1 or step 2 projects, an application shall also be submitted if the municipality is applying for direct financial assistance and qualifies for financial hardship assistance under s. 144.241 (13), Stats. If the municipality does not qualify for financial hardship assistance, an application for a step 1 or step 2 project will not be accepted and processed until the application for the step 3 project is submitted. If any information required under sub. (2), (3) or (4) has been furnished with an earlier application, the applicant may incorporate the information by reference and, if necessary, revise such information utilizing the previous application.

(2) CONTENTS OF APPLICATION - FINANCIAL HARDSHIP. (a) *Step 1 projects.* An application for financial hardship assistance for a step 1 project shall include the following:

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1. A statement of the type of financial assistance being applied for and the reasons for each type being requested;

2. A plan of study showing the proposed planning area; an identification of the entity or entities who will be conducting the planning; the nature and scope of the proposed step 1 project, including a schedule for the completion of specific tasks; and an itemized description of the total estimated costs of the project and, if appropriate, the description and costs of each portion of the project for which a different interest rate may apply under s. NR 162.07;

3. Proposed subagreements or an explanation of the intended method of awarding subagreements for performance of any substantial portion of the project;

4. Required comments or approvals of appropriate state, local and federal agencies;

5. Certification that the municipality possesses the ability to repay the financial assistance. This certification shall be supported by documentation of the applicant's financial capability; and

6. Financial assistance payment projections and a proposed repayment schedule.

(b) *Step 2 projects.* An application for financial hardship assistance for a step 2 project shall include the following:

1. The information required under subd. 1;

2. A facilities plan approved in accordance with s. 144.04, Stats.;

3. Proof of the availability of the proposed site;

4. For any treatment works serving 2 or more municipalities, proposed intermunicipal agreements necessary for the construction and operation of the proposed treatment works;

5. Proposed subagreements or an explanation of the intended method of awarding subagreements for performance of any substantial portion of the project; and

6. A schedule showing the dates of initiation and completion of the project, including appropriate milestones.

(3) CONTENTS OF APPLICATION-NONFINANCIAL HARDSHIP. (a) *Step 1 projects.* For all nonfinancial hardship assistance, applicants shall apply for step 1 financial assistance at the time they apply for step 3 financial assistance. The applicant shall submit the following:

1. A department approved facility plan or other approved planning documents;

2. Copies of any executed subagreements for performance of any portion of the step 1 project;

3. Invoices documenting the costs incurred to complete the work reflected in the approved planning document; and

4. Certification that the municipality possesses the ability to repay the financial assistance. This certification shall be supported by documentation of the applicant's financial capability.

(b) *Step 2 projects.* For all nonfinancial hardship assistance, applicants shall apply for step 2 financial assistance at the time they apply for step 3 financial assistance. The municipality shall furnish the following:

1. A copy of construction drawings and specifications which are bid-dable and have been approved by the department;
2. Copies of any executed subagreements for performance of any portion of the step 2 project;
3. Invoices documenting the costs incurred to complete the construction drawings and specifications; and
4. Certification that the municipality possesses the ability to repay the financial assistance. This certification shall be supported by documentation of the applicant's financial capability.

(4) **STEP 3 PROJECTS.** (a) An applicant shall submit the following:

1. A statement of the types of financial assistance being applied for and the reasons for each type being requested;
2. An executed intermunicipal agreement, if wastewater generated by the applicant will be discharged to or through wastewater facilities of another municipality. The department may waive the requirement of an executed intermunicipal agreement if an order under s. 144.07 (1), Stats., has been issued;
3. The most current construction drawings and specifications for the project which are suitable for bidding purposes and which have been approved by the department;
4. A schedule for or evidence of compliance with ss. NR 162.09 (8) and 162.10 (8);
5. Proposed user charge system and sewer use ordinance;
6. Financial assistance payment projections and a proposed repayment schedule; and
7. Certification that the municipality possesses the ability to repay the financial assistance. This certification shall be supported by documentation of the applicant's financial capability.

(b) If a financial assistance application is submitted between June 1 and June 30 in any year, the municipality may revise the estimated project cost, but shall do so no later than July 15 of that year.

History: Cr. Register, October, 1989, No. 406, eff. 11-1-89.

NR 162.09 Financial assistance conditions. Before awarding financial assistance for any project, the department shall determine that all of the applicable requirements of s. NR 162.08 have been met and that sufficient documentation has been submitted to show that the municipality has complied or will comply with the following:

(1) **FACILITIES PLANNING.** If the award is for step 2 or step 3 assistance, the facilities planning requirements of chs. NR 110 and 208 have been met.

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(2) **AREAWIDE PLAN.** The project is consistent with an approved area-wide waste treatment management plan and the applicant is a waste-water management agency designated in the approved plan.

(3) **PRIORITY DETERMINATION.** The project is entitled to priority in accordance with chs. NR 160 and 161, as applicable.

(4) **FUNDING AND OTHER CAPABILITIES.** The applicant has:

(a) Agreed to pay any non-state or non-federal project costs, as well as to repay any financial assistance granted under this chapter.

(b) Has the legal, institutional, managerial and financial capability to insure adequate construction, operation and maintenance of the treatment works throughout the applicant's jurisdiction.

(c) Provide proof of the acquisition of appropriate land and easements.

(5) **PERMITS.** The applicant has, or has applied for, the permit or permits as required by ch. 147, Stats.

(6) **DESIGN.** The treatment works design is based upon the following:

(a) The design, size and capacity of such works are cost effective and related directly to the needs they serve, including adequate reserve capacity.

(b) Such works will meet applicable water quality related effluent limitations and will attain not less than secondary treatment as defined by ch. NR 210.

(c) The sewer system evaluation and rehabilitation requirements of s. NR 110.09 (6) have been met.

(7) **ENVIRONMENTAL REVIEW.** The Wisconsin environmental policy act (WEPA) requirements applicable to the project have been met.

(8) **OPERATION AND MAINTENANCE PROGRAM.** If the award of financial assistance is for a step 3 project, the applicant has made satisfactory provision to assure the efficient operation and maintenance of the treatment works, in accordance with s. NR 162.10 (8).

(9) **USER CHARGES AND SEWER USE ORDINANCES.** (a) For a step 3 project, an approvable plan and a schedule of implementation have been developed for a system of user charges in compliance with s. NR 162.11. The applicant shall agree that a system of user charges in accordance with s. NR 162.11 will be adequately maintained for the design life of the treatment works.

(b) The applicant shall comply with s. NR 162.11 (4).

(10) **COMPLIANCE WITH ENVIRONMENTAL LAWS.** The treatment works will comply with all pertinent requirements of federal, state and local environmental laws and regulations.

(11) **WATER CONSERVATION PROGRAM.** For step 3 financial assistance, an approvable plan and schedule for implementing the flow reduction measures deemed to be cost-effective in accordance with s. NR 110.09 (2) (k) have been submitted by the applicant.

(12) **FEDERAL REQUIREMENTS.** For financial assistance provided directly from the federal capitalization grant, the municipality shall agree

to comply with the requirements contained in 33 USC 1251 to 1266 and 33 USC 1381 to 1387.

History: Cr. Register, October, 1989, No. 406, eff. 11-1-89.

NR 162.10 Financial assistance requirements. Each financial assistance agreement shall bind the recipient to the following conditions:

(1) **NON-STATE CONSTRUCTION COSTS.** The recipient shall pay the costs of treatment works construction which are ineligible for financial assistance under this chapter.

(2) **SERVICE AREAS.** The recipient shall provide timely sewerage service to all users within the delineated service area except in areas where annexation is refused, pursuant to s. 144.07 (1m), Stats.

(3) **PROCUREMENT.** The recipient and parties to any subagreement shall comply with all applicable provisions of s. NR 162.12. The department may make appropriate review of the recipient's procurement methods from time to time.

(4) **ACCESS.** The recipient shall insure that department representatives will have access to the project, including construction activities, whenever it is in preparation or progress. The recipient shall provide proper facilities for such access and inspection. The recipient shall allow the department or any authorized representative to have access to any books, documents, plans, reports, papers and other records of the contractor which are pertinent to the project for the purpose of making audits, inspections, examinations, excerpts, copies and transcriptions. The recipient shall insure that all parties to subagreements will provide the department access to the project, including sites, documents and records.

(5) **PROJECT INITIATION AND COMPLETION.** The recipient shall agree to expeditiously initiate and complete the project or cause it to be constructed and completed in accordance with the assistance agreement and application, including any project schedule approved by the department. Failure of the recipient to promptly initiate step 1, 2 or 3 project work may result in termination of the assistance agreement.

(6) **COPIES OF CONTRACT DOCUMENTS.** In addition to notifying the department of any project changes, the recipient shall promptly submit to the department a copy of any prime contract or modification of it and of revisions to plans and specifications.

(7) **REPAYMENT.** (a) Repayment of financial assistance is to begin not later than 12 months after the date of physical completion of the project and the final payment shall be made not later than 20 years after the physical completion date.

(b) Financial assistance funded through general obligation bonds shall be repaid within 20 years of the first financial assistance payment.

(8) **OPERATION AND MAINTENANCE.** (a) The recipient shall make provisions satisfactory to the department for assuring economic and effective operation and maintenance of the treatment works. The recipient shall follow a plan of operation approved by the department.

(b) As a minimum, the plan of operation shall include provision for:

1. An operation and maintenance manual for each facility. For projects or facilities that have an approved operation and maintenance manual, this requirement may be met by the submission of an addendum to the original manuals;

2. An emergency operating and response program;

3. Properly trained management, operation and maintenance personnel;

4. An adequate budget for operation and maintenance;

5. Operational reports;

6. Provisions for laboratory testing and monitoring adequate to determine influent and effluent characteristics and removal efficiencies as specified in the terms and conditions of the ch. 147, Stats., permit for the facility; and

7. An operation and maintenance program for the sewer system.

(9) **EROSION CONTROL DURING CONSTRUCTION.** The recipient shall comply with all rules and policies promulgated or developed pursuant to s. 144.266 (1), Stats., and the conditions of s. NR 110.15 (5) (n).

(10) **CONSTRUCTION INSPECTION.** In the case of a step 3 project, the recipient shall provide and maintain adequate construction inspection of the project to insure that the construction conforms with the approved plans and specifications.

(11) **PROJECT CHANGES.** No approval of a project change shall obligate the state of Wisconsin to increase the amount of the financial assistance or payments made under a financial assistance agreement unless an increase is approved under s. NR 162.15.

(12) **SEPTIC TANK HAULERS.** The recipient may not prohibit the hauling and discharge of septage from septic tanks or holding tanks within the recipient's service area to the treatment facility, except as provided under s. 144.08, Stats. The recipient may regulate the time, rate, location and quantity of such discharges. The disposal of septage and leachate at the treatment facility shall be subject to equitable user charges.

(13) **FINAL INSPECTIONS.** The recipient shall notify the department of the physical completion of step 3 project construction. The department shall cause final inspection to be made within 60 days of the receipt of the notice. When the final inspection is completed and the department determines that the treatment works have been satisfactorily constructed in accordance with the financial assistance agreement, the recipient may make a request for final payment under s. NR 162.13 (5).

(14) **REVENUE BONDING CONDITIONS** If the source of the financial assistance is from the state's issuance of revenue bonds, the recipient shall comply with all applicable requirements of the bond issuance. Compliance with these requirements shall be a condition of the financial assistance agreement.

(15) **ENVIRONMENTAL REVIEW REAFFIRMATION.** The recipient of each project receiving financial assistance for which an environmental review was conducted with a determination of categorically excluded, no significant impact or an environmental impact statement shall agree to an en-

vironmental re-evaluation of the project by the department every 5 years.

History: Cr. Register, October, 1989, No. 406, eff. 11-1-89.

NR 162.11 Requirements for a user charge system and sewer use ordinance. Any user charge system and sewer use ordinance adopted by a recipient to comply with s. 144.241 (14) (b) 7, Stats., shall meet the requirements of this section.

(1) **USER CHARGE SYSTEM: GENERAL.** The department may approve a user charge system which is based on the actual use of wastewater treatment services. The user charge system shall require that each user or user class pays its proportionate share of the operation and maintenance costs, including replacement costs, of treatment works within the recipient's service area. The proportionate share is based on the user's or user classes' proportionate contribution to the total wastewater loading from all users or user classes. To insure a proportional distribution of operation and maintenance costs to each user or user class, factors such as strength, volume, delivery flow rate characteristics or equivalent use shall be utilized in determining the waste load contribution from each user or user class.

(2) **REQUIREMENTS FOR USER CHARGE SYSTEMS.** Any user charge system approvable under this section shall meet the following requirements:

(a) Each recipient shall establish a financial management system that accounts for revenues generated and expenditures for operation and maintenance, including replacement, of the treatment system.

(b) The recipient shall review, not less often than every 2 years, the wastewater contribution of users and user classes, the total costs of operation and maintenance of the treatment works and the user charge system. The recipient shall revise the charges for users or user classes, if necessary, to accomplish the following:

1. Maintain the proportional distribution of operation and maintenance costs among users and user classes as required in this section;

2. Generate sufficient revenue to pay the total operation and maintenance costs necessary for the proper operation and maintenance, including replacement, of the treatment works;

(c) Provide for the replacement of critical mechanical equipment.

Note: A recipient who received a federal or state wastewater treatment grant under s. 144.24, Stats., or under 33 USC 1251 to 1376 should have established and be implementing a replacement fund according to s. NR 128.13 (2) (c). The requirement for a replacement fund under s. NR 128.13 (2) (c) is not superseded by this chapter and remains in effect for the design life of the facility which was funded with federal or state grant assistance under 33 USC 1251 to 1376 or s. 144.24, Stats.

(d) Require that each user which discharges any toxic pollutants which cause an increase in the cost of managing the effluent or the sludge of the recipient's treatment works to pay for any associated increased costs.

(e) Provide that the costs of operation and maintenance for all flow not directly attributable to users be distributed among all users of the recipient's treatment works based upon either:

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1. In the same manner that the user charge system distributes the costs of operation and maintenance among users or user classes for their actual use; or

2. Under a system which uses the actual or estimated wastewater discharge of the users, the land area of the users, the number of hookups or discharges of the users or a combination of these factors.

(f) A user charge system may include an optional class of low income residential users, with incomes below a level established by the municipality, who are charged at a lower rate than other residential users, subject to the approval of the department.

(g) The user charge system shall be incorporated in one or more municipal legislative enactments or other appropriate authority. If the project is a regional treatment works or part of a regional system accepting wastewaters from other municipalities, the subscribers receiving waste treatment services from the recipient shall have adopted user charge systems in accordance with this section. Such user charge systems shall also be incorporated in the appropriate municipal legislative enactments or other appropriate authority of all municipalities contributing waste to the system.

(h) The municipality shall inform the public of the financial impact of the user charge system on them and shall consult with the public prior to adoption of the system. Prior to adoption of the system, the municipality shall notify the department in writing how the public was informed of the financial impact of the user charge system and how the public was consulted. Consultation shall include at least one of the following activities with affected individuals and groups:

1. Public meetings
2. Public hearings
3. Review groups
4. Advisory groups
5. Ad hoc committees
6. Task forces
7. Workshops
8. Seminars

Note: The recipient is encouraged to publicize the proposed user charge rates and their impact on all user classes at the earliest stage possible.

(i) Each user charge system shall provide that each user be notified, at least annually, in conjunction with a regular bill, of the rate and charge attributable to wastewater treatment services.

(j) If the recipient has any pre-existing agreement which addresses the reservation of capacity in the recipient's treatment works or the charges to be collected by the recipient in providing wastewater treatment services or reserving capacity, the recipient shall agree to abandon any terms or conditions of agreements or contracts between the recipient and users including industrial users, special districts, other municipalities, or

federal agencies or installations, which are inconsistent with the requirements of this section.

(3) **IMPLEMENTATION OF THE USER CHARGE SYSTEM.** (a) The recipient shall maintain such records as are necessary to document compliance with this section.

(b) The department may review, no more often than annually, a recipient's user charge system to assure that it continues to meet the requirements of this section.

(4) **SEWER USE ORDINANCE.** Each applicant for financial assistance for a step 2 or step 3 project shall demonstrate to the satisfaction of the department that a sewer use ordinance or other legally binding requirements will be enacted and enforced in each jurisdiction served by the treatment works project. The ordinance shall:

(a) Prohibit any new connections from sources which include substantial inflow into the sanitary sewer system.

(b) Require that new sewers and connections to the sewer system are properly designed and constructed.

(c) Require that wastewater introduced into the treatment works:

1. Contains no toxics or other pollutants in amounts or concentrations that endanger public safety, jeopardize the physical integrity of the treatment works or cause substantial upset to the treatment process;

2. Not cause violation of effluent or water quality limitations;

3. Not preclude the selection of the most cost-effective alternative for wastewater treatment and sludge disposal.

(d) Define violations and penalties for violators.

(e) Define normal domestic strength of the wastewater.

(f) Control and monitor industrial discharges by requiring control manholes, pretreatment and grease, oil and sand interceptors.

(g) Provide methodology for establishing sewer use rates that will generate sufficient revenues to cover the costs of operation, maintenance, replacement and capital costs. The costs of operation, maintenance and replacement shall be distributed proportionately among user classes (residential, commercial, public and industrial).

History: Cr. Register, October, 1989, No. 406, eff. 11-1-89.

NR 162.12 Procurement. (1) **APPLICABILITY.** Procurement of professional services and construction contracts by recipients under this chapter shall be in accordance with state and local law and are subject to review for eligibility, allowability, allocability and reasonableness. The department in conducting such reviews will, on request, hold confidential in accordance with s. NR 2.195 (2) (b) 5.:

(a) Professional services' indirect costs breakdowns.

(b) Professional services' audit reports and associated work papers and audit resolution correspondence.

Note: See ss. 60.47, 60.77 (6) (a), 61.54, 61.55, 62.15 and 66.29, Stats.

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(2) **PROFITS.** Only fair and reasonable profits may be earned by contractors in subagreements under financial assistance agreements. Profit included in a formally advertised, competitively bid, fixed price or unit price construction contract is presumed to be reasonable.

(3) **FINANCIAL ASSISTANCE RECIPIENT RESPONSIBILITY.** The recipient is responsible for the administration and successful completion of the project for which financial assistance is awarded in accordance with sound business judgment and good administrative practice under state and local laws. Review or approval of facilities plans or other planning documents, design drawings and specifications or other documents by or for the department is for administrative purposes only and does not relieve the recipient of its responsibility to properly plan, design, build and effectively operate and maintain the treatment works described in the financial assistance agreement as required by law, regulations, permits and good management practices. The department is not responsible for added costs resulting from defects in the approved plans, design drawings and specifications or other subagreement documents.

(4) **UTILIZATION OF SMALL AND MINORITY OWNED BUSINESSES.** (a) The department shall monitor the utilization of small and minority owned businesses by all recipients. Efforts shall be made by recipients to utilize small businesses and minority owned businesses to allow these sources the maximum feasible opportunity to compete for subagreements and contracts to be performed utilizing assistance from the clean water fund. Small and minority owned businesses should be utilized to the extent possible as sources of supplies and services. Inadequate performance by recipients may subject recipients to the provisions of s. NR 162.21.

(b) Recipients shall:

1. Make reasonable efforts under pars. (c) and (d) to award prime contracts to small and minority owned businesses.

2. Inform potential construction contractors of the requirements of pars. (c) and (d) that shall be complied with if prime contractors award subcontracts.

3. Make information on small and minority owned businesses available to potential contractors.

4. Review bid documents submitted by potential contractors to verify small and minority owned business participation in accordance with pars. (c) and (d).

5. Monitor small and minority owned business participation throughout the length of the construction and take such steps as are necessary to insure contractor compliance with small business and minority owned business utilization commitments.

6. Make reports available, upon request of the department, on small and minority owned business utilization commitments, as well as actual small business and minority owned business utilization.

(c) Municipalities which have an existing established minority business goal of at least 5% shall achieve that goal through utilization of minority owned businesses which are certified by the department of development under s. 560.036 (2), Stats. Municipalities which do not have a minority business goal or which have a goal of less than 5% shall:

1. Achieve a minimum of 5% participation by minority owned businesses which are certified by the department of development under s. 560.036 (2), Stats., pursuant to ss. 16.75 (3m) (b) and 16.855 (10m), Stats., or

2. Negotiate a goal for minority owned business utilization with the department and achieve the negotiated goal through utilization of minority owned businesses which are certified by the department of development under s. 560.036 (2), Stats.

(d) The recipient, in awarding prime contracts, and the primary contractor, in awarding subcontracts, shall demonstrate good faith efforts as described in subds. 1 to 5 to promote the utilization of minority owned businesses. If the minimum required participation by minority owned businesses as defined in par. (c) is not achieved, the recipient and contractors shall provide substantiation of their good faith efforts which shall be submitted to the department with the bid documents. Good faith efforts include, but are not limited to the following:

1. The recipient and contractor shall include minority owned businesses certified by the department of development under s. 560.036 (2), Stats., on solicitation lists.

2. The recipient and contractor shall assure that certified minority owned businesses are solicited whenever they are potential contractors. Local minority owned businesses may not be excluded from this solicitation based solely on their proximity to the site. A minimum of 5 contacts is necessary, unless that quantity of contacts is demonstrated as unnecessary or unreasonable under the circumstances.

3. The recipient and contractor shall use the assistance of the department of development's office of minority business enterprise as appropriate.

4. Minority owned businesses that respond to a solicitation but are not successful in receiving the contract or subcontract shall be given follow-up documentation explaining why their bids or quotations were rejected.

5. If a subcontractor awards subcontracts, the requirements of this paragraph shall apply to the subcontractor.

(e) Any decrease in the minority business percentage of participation by recipients as required in par. (c) shall require written approval from the department prior to the start of construction on any portion of the project funded under this chapter previously identified as being awarded to a certified minority owned business.

(f) If at least 5% participation is not achieved by small businesses, the contractor shall provide to the recipient documentation substantiating their good faith efforts by taking the measures described in par. (d) as applicable to small businesses, to promote small business utilization. Upon acceptance of this substantiation, the recipient shall submit this documentation of good faith efforts to the department with the bid documents.

(5) GENERAL REQUIREMENTS FOR SUBAGREEMENTS. Subagreements shall:

(a) Be necessary for and directly related to the project;

(b) Be in the form of a bilaterally executed written agreement, except for purchases smaller than the amounts specified in applicable state statutes; and

(c) Be for monetary or in-kind consideration.

(6) SPECIFICATIONS. (a) *Nonrestrictive specifications.* 1. No specifications for bids or statement of work in connection with a project may be written in such a manner as to contain proprietary, exclusionary or discriminatory requirements other than those based upon performance, unless such requirements are necessary to test or demonstrate a specific thing or to provide for necessary interchangeability of parts and equipment.

2. If a single material is specified, the recipient shall demonstrate to the department the basis for the selection of the material.

3. Project specifications shall, to the extent practical, provide for maximum use of structures, machines, products, materials, construction methods and equipment which are readily available through competitive procurement or through standard or proven production techniques, methods and processes.

(b) *Sole source restriction.* A specification may not require the use of structures, materials, equipment or processes which are known to be available only from a sole source unless such use has been adequately justified in writing by the recipient's engineer as meeting the minimum needs of the project.

(c) *Experience clause restriction.* The general use of experience clauses requiring equipment manufacturers to have a record of satisfactory operation for a specified period of time or of bonds or deposits to guarantee replacement in the event of failure is restricted to special cases where the recipient's engineer adequately justifies the requirement in writing. When such justification has been made, submission of a bond or deposit shall be permitted in lieu of a specified experience period. The period of time for which the bond or deposit is required may not exceed the satisfactory operation period described in any such clause.

(7) FORCE ACCOUNT WORK. (a) Financial assistance may be provided for force account work, subject to approval by the department.

(b) The department's approval shall be based on the applicant's certification that:

1. The applicant has the necessary competence required to accomplish the work and that the work can be accomplished more economically by the use of the force account method; or

2. Emergency circumstances dictate the use of the force account method.

(8) LIMITATION ON SUBAGREEMENT AWARD. No subagreement may be awarded to any person or organization which does not operate in conformance with state and federal civil rights, equal opportunity and affirmative action laws.

(9) SUBAGREEMENTS FOR ARCHITECTURAL OR ENGINEERING SERVICES. (a) Step 1, step 2 or administration and management of step 3 project work may be performed by procured architectural or engineering ser-

vices contractors. Subagreements for such services shall be negotiated with candidates selected on the basis of demonstrated competence and qualifications for the type of professional services required and at fair and reasonable prices. To the maximum extent practicable all negotiated procurement shall be conducted in a manner to provide open and free competition. This section may not be construed as requiring competitive bids or price competition in the procurement of architectural or engineering services.

(b) 1. The department shall review architectural or engineering service subagreements and amendments for the eligibility and reasonableness of costs.

2. For step 2 and step 3 projects, reasonableness reviews shall, at a minimum, consist of a comparison of architectural or engineering fees for the project to the range of architectural or engineering fees for other similar projects undertaken within the state. Consideration shall be given to completeness of scope of work, the recipient's procurement and negotiation process associated with the costs, any conditions unique to the project and all other factors impacting costs.

3. The department is not precluded from performing other reviews of architectural or engineering costs for eligibility, allocability and reasonableness, or from disallowing architectural or engineering costs based on such reviews.

(10) CONSTRUCTION CONTRACTS (SUBAGREEMENTS) OF RECIPIENTS. (a) *Applicability.* This subsection applies to construction contracts or subagreements awarded by recipients for any step 3 activity.

(b) *Type of contract.* The project work shall be performed under one or more contracts awarded by the recipient to private firms except for force account work authorized by sub. (7). Each contract shall be a fixed or unit price contract, unless the department gives advance written approval for the recipient to use some other acceptable type of contract. In any event, the cost-plus-a-percentage-of-cost type contract may not be used.

(c) *Negotiation of contract change orders.* 1. Recipients are responsible for the negotiation of construction contract change orders. During negotiation with the contractor the recipient shall secure a fair and reasonable price for the required work.

2. The department may require that change orders for portions of the project funded under this chapter be approved by the department.

(d) *Progress payments to contractors.* A recipient may not claim payments from the department for contractor's invoices which do not meet the definition of progress payments provided in s. NR 162.03 (32).

History: Cr. Register, October, 1989, No. 406, eff. 11-1-89.

NR 162.13 Financial assistance disbursements and loan repayment. (1) **GENERAL.** The recipient shall be paid all project costs incurred within the scope of an approved project that are due and payable by the recipient, excluding withheld or deferred amounts, subject to the limitations of sub. (6), up to the amount in the financial assistance agreement and any approved amendments.

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(2) **INTERIM REQUESTS FOR DISBURSEMENT.** The recipient may submit requests for disbursements for eligible costs in accordance with the disbursement schedule included in the financial assistance agreement. Upon receipt of a request for disbursement, subject to the limitations in sub. (6), the department shall cause to be disbursed from available funds such amounts as are necessary. The total amount of disbursements shall be equal to the actual or estimated eligible project costs incurred to date, as the recipient certified in its most recent request for disbursement.

(3) **ADJUSTMENT.** At any time before final disbursement under the financial assistance agreement, the department may cause any request for disbursement to be reviewed or audited. Based on such review or audit, any disbursement may be reduced for prior overpayment or increased for prior underpayment.

(4) **REFUNDS, REBATES AND CREDITS.** Any refunds, rebates, credits or other amounts, including any interest, that accrue to or are received by the recipient for the project, and that are properly allocable to costs for which the recipient has been paid under the financial assistance agreement, shall be used to reduce the amount of the financial assistance received. Reasonable expenses incurred by the recipient while securing such refunds, rebates, credits or other amounts shall be eligible costs under the financial assistance agreement.

(5) **FINAL DISBURSEMENT.** After completion of final inspection under s. NR 162.10 (13), approval of a final request for disbursement, and the recipient's compliance with all applicable requirements of this chapter and the financial assistance agreement, the department shall pay to the recipient any balance of the eligible project cost which has not already been paid. The final request for disbursement shall be submitted by the recipient promptly after completion of the project and final inspection. Before the department makes a final disbursement under the financial assistance agreement, the recipient shall:

(a) Submit an executed assignment to the state of Wisconsin, of the refunds, rebates, credits or other amounts, including any interest, properly allocable to costs for which the recipient has been paid under the financial assistance agreement.

(b) Submit an executed release discharging the state of Wisconsin, its officers, agents and employees from any liabilities, obligations and claims arising out of the project work or under the financial assistance agreement, subject only to the exceptions specified in the release.

(c) Have received final approval of its operation and maintenance manual.

(d) Have received final approval of and adopted its user charge system and sewer use ordinance.

(e) Have certified to the department its acceptance of the project from its contractors.

(6) **WITHHOLDING OF FUNDS.** (a) It is department policy that full and prompt disbursement be made to the recipient for eligible project costs. The department may authorize the withholding of financial assistance disbursements only where it determines in writing that a recipient has failed to comply with project objectives, financial assistance agreement award conditions or reporting requirements. The withholding of finan-

cial assistance disbursements shall be limited to that amount necessary to assure compliance.

(b) The department shall withhold disbursement to the extent of any indebtedness to the state of Wisconsin, unless it determines that collection of the indebtedness will impair accomplishment of the project objectives and that continuation of the project is in the best interests of the state.

(7) **LOAN REPAYMENT** (a) The recipient shall repay the department in accordance with the repayment schedule included in the financial assistance agreement.

(b) Loans issued under this chapter shall accrue interest beginning on the day the funds are released to a recipient.

(c) If a recipient fails to make a payment within 180 days after the due date, the department may take collection actions pursuant to s. 144.241 (16) (b), Stats.

(d) The recipient has the option to prepay any or all the financial assistance without penalty upon a minimum of 30 days notice to the department. Prepayment shall be made on the regularly scheduled payment date.

History: Cr. Register, October, 1989, No. 406, eff. 11-1-89.

NR 162.14 Recipient accountability. (1) **FINANCIAL CAPABILITY.** The department shall evaluate a municipality's financial capability to repay its loan based on generally accepted financial indicators used by lending institutions and bonding companies.

(2) **DEDICATED SOURCES OF REVENUE.** (a) Each recipient that receives a loan shall establish one or more dedicated sources of revenue sufficient to generate 100% of the annual principal and interest payments on the loan, including, but not limited to, special assessments, general taxes and user charges. If the recipient pledges user charge revenues to repay the loan, an additional 10%, or 110% coverage, shall be required. The additional 10% of dedicated revenues, if unused and retained, may be carried over into the following year to satisfy that year's requirement. If the additional 10% is used, the municipality shall replace these funds within a 12 month time period.

(b) If the dedicated sources of revenue in par. (a) are inadequate to secure the loan, the department may require one or more additional pledges or securities, including, but not limited to, a debt reserve fund, a surety bond and loan insurance.

(3) **FINANCIAL MANAGEMENT.** The recipient is responsible for maintaining a financial management system which shall adequately provide for:

(a) The maintenance of project accounts in accordance with generally accepted government accounting standards.

(b) Accurate, current and complete disclosure of the financial results of the project. This includes: total project costs; sources and uses of funds on the project; identification of costs as eligible or ineligible for participation by the funding sources; and refunds, rebates, credits or other sources

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of income received for the project. All reports of the financial management system are to be supported by documentation.

(c) Adequate recipient control of project finances, including a comparison of actual versus budgeted costs for the project; a comparison of the amounts authorized by each funding source with the amounts already spent or obligated; and sufficient safeguards to protect the project's funds, property and other assets.

(d) Compliance with any federal requirements for cash management and arbitrage.

(4) RECORDS AND RECORD RETENTION. The following recordkeeping policies are applicable to all financial assistance agreements and to all subagreements.

(a) The recipient shall maintain books, records, documents and other evidence and accounting procedures and practices sufficient to accurately reflect:

1. The amount, receipt and disposition by the recipient of all assistance received for the project, including assistance from the clean water fund and any other assistance program; and

2. The total costs of the project, including all direct and indirect costs of whatever nature incurred for the performance of the project. In addition, the recipient shall require contractors, including contractors for professional services, to maintain books, documents, papers and records which are pertinent to a specific financial assistance agreement.

(b) The recipient's records and the records of its contractors, including professional services contracts, shall be subject at all reasonable times to inspection, copying and audit by the department.

(c) The recipient and contractors of recipients shall preserve and make their records available to the department:

1. Until expiration of 3 years from the date of project completion; or

2. For longer periods, if required by applicable statute or requirement;
or

3. If a financial assistance agreement is partially or completely terminated, the records relating to the work terminated shall be preserved and made available for a period of 3 years from the date of any resulting final termination settlement; or

4. Records which relate to appeals, disputes, litigation on the settlement of claims arising out of the performance of the project, or costs and expenses of the project to which exception has been taken by the department or any of its duly authorized representatives, shall be retained until any appeals, litigation, claims or exceptions have been finally resolved or for a period of 3 years from the date of project completion, whichever is later.

(5) AUDIT. (a) Preaward, interim and final project closeout audits may be performed by the department on financial assistance applications and awards. Recipients and subcontractors of recipients shall preserve and make their records available pursuant to sub. (4). Disbursements made

under the financial assistance agreement may be adjusted because of underpayment or overpayment identified by audit.

(b) Recipients of financial assistance provided directly from the federal capitalization grant are required to comply with the federal single audit act and OMB circular A-128. Recipients of assistance from other sources may, at their option, commission a single audit in accordance with the single audit act, OMB circular A-128, and state of Wisconsin single audit guidelines. All reasonable, allocable costs of single audits are eligible costs under the project.

(c) The department shall rely on commissioned audits to the extent feasible once it satisfies itself of the quality of the audit by appropriate tests or other acceptable methods as described in government auditing standards issued by the comptroller general of the United States. The department shall rely on and not duplicate single audits performed in accordance with the federal and state auditing standards. The department may perform additional audits to supplement work done in single audits to the extent it deems necessary to carry out its responsibilities under the program.

History: Cr. Register, October, 1989, No. 406, eff. 11-1-89.

NR 162.15 Financial assistance agreement amendments. (1) Changes in the project that are consistent with the objectives of the project, within the scope of the financial assistance agreement and which do not require review under ch. NR 110 will not require the execution of an amendment before the recipient implements the change. However, the amount of financial assistance in the financial assistance agreement may be increased by an amendment only and can be made only upon department review and acceptance of such cost increase as eligible, reasonable and necessary for the accomplishment of project objectives. The recipient shall receive prior approval or a formal amendment from the department before implementing changes which:

1. Alter the project performance standards;
2. Alter the type of wastewater treatment provided by the project;
3. Substantially alter the facilities plan, design drawings and specifications or the location, size, capacity or quality of any major part of the project. This section does not apply to estimated payment schedules under agreements for construction of treatment works.

(2) An assistance agreement amendment shall become effective after it has been executed by the department and the authorized representative of the recipient.

(3) Approval of assistance agreement amendment requests which increase the amount of financial assistance shall be subject to the availability of funds.

(4) The interest rate on additional financial assistance provided under an approved assistance agreement amendment may, based on the determination of the department, vary between the market interest rate and the overall project composite interest rate approved under the original assistance agreement or, if amended, the most recent approved amendment. The determination of the appropriate interest rate shall be based on the following criteria:

(a) If the factors or circumstances which led to the requested increase could reasonably have been predicted by the recipient in the original design or most recent amended design approved by the department, the market interest rate shall apply.

(b) If the factors or circumstances which led to the requested increase were caused by the department or could not have reasonably been predicted by the recipient, the interest rate for the increased financial assistance shall be the most recent approved composite rate for the project.

(c) If the factors or circumstances which led to the requested increase contain elements of pars. (a) and (b), the department may establish an interest rate between the market interest rate and the most recent project composite interest rate.

(d) The recipient may appeal an amendment interest rate determination pursuant to s. NR 162.19.

History: Cr. Register, October, 1989, No. 406, eff. 11-1-89.

NR 162.16 Advance commitments and refinancing (1) ADVANCE COMMITMENTS. (a) *General.* Advance commitments may be made for eligible step 1, 2 or 3 projects.

(b) *Eligibility.* 1. The advance commitment process may be implemented in any fiscal year when there are more eligible step 3 projects on lists prepared under s. NR 162.06 (1) than are fundable with funds appropriated under the annual finance plan for that fiscal year. Projects for treatment works that violate effluent limitations in a permit issued under ch. 147, Stats., are not eligible for advance commitments.

2. To be eligible for an advance commitment, a municipality shall meet the planning and design criteria and application requirements as established in this chapter.

(c) *Advance commitment process.* 1. Advance commitment offers shall be made on forms prepared by the department. The advance commitment offer shall be signed by the authorized official of the department and shall set forth the terms and conditions of the offer. The terms and conditions shall specify that the commitment can be funded only upon the appropriation of funds by the legislature in a subsequent fiscal year and the approval of the department's annual finance plan. Commitments shall be accepted by the recipient before the start of construction.

2. The department shall convert an advance commitment to a financial assistance agreement within 45 days after the legislature appropriates sufficient funds and the annual finance plan is approved. Priority for conversion shall be based on the date the department receives the recipient's acceptance of the advance commitment.

3. Disbursements shall be in accordance with s. NR 162.13.

(2) **ADVANCE COMMITMENTS FOR REIMBURSEMENT OF PLANNING AND ENGINEERING DESIGN COSTS.** (a) Costs associated with step 1 and step 2 advance commitments shall be added to step 3 costs for the purpose of determining the fundable range on the annual funding list.

(b) Step 1 and step 2 application requirements included in s. NR 162.08 shall be met to receive an advance commitment.

(c) Step 1 and step 2 eligible costs approved in advance commitments shall be awarded with the step 3 financial assistance agreement.

(d) All step 1 and step 2 projects shall be financed at the time of the step 3 financial assistance agreement except for those municipalities which can demonstrate financial hardship under ch. NR 163. Such municipalities may receive step 1 and step 2 financial assistance agreements prior to initiating step 1 or step 2 work.

(3) REFINANCING. (a) *General.* Refinancing may be provided for step 1, 2 or 3 projects if sufficient funds are not available in any fiscal year.

(b) *Eligibility.* 1. A municipality which did not receive a financial assistance commitment prior to the start of the project shall be eligible for refinancing if a notice of financial assistance commitment under s. NR162.06 (2) is issued within 5 years of the date of the initiation of construction for the step 3 project. For step 3 projects where construction was initiated between May 17, 1988 and June 30, 1990, the 5 year period for refinancing shall begin on July 1, 1990.

2. A project funded under this chapter may not be refinanced unless it meets one of the following conditions:

a. Substantial alteration in project performance standards, type of wastewater treatment, facility plan or other planning documents, design drawings and specifications, or the location, size, capacity or quality of any major part of the project is needed to maintain compliance with a discharge permit or to meet new or changed permit limits.

b. The municipality is subject to a catastrophic natural or manmade event beyond its control and has or will incur significant financial hardship, as defined in ch. NR 163.

c. The municipality now qualifies as a financial hardship community under ch. NR 163.

(c) *Refinancing process.* 1. A municipality shall meet the planning and design criteria and application requirements as established in this chapter for other recipients.

2. The department's annual funding policy shall establish the funding priority for refinancing projects.

History: Cr. Register, October, 1989, No. 406, eff. 11-1-89.

NR 162.17 Annual funding policy. (1) **GENERAL.** Each year, prior to the department's submittal of the annual finance plan, the department shall prepare an annual funding policy for the fiscal year. The funding policy shall be subject to public hearing and shall be submitted to the natural resources board for approval. The department shall consider the following factors in developing the funding policy:

(a) How much funding is available.

(b) How much funding is needed for advance commitments from the prior fiscal year.

(c) The priority value of new projects.

(d) Whether all new projects can be funded.

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(e) The project priority value of projects projected to request funding in the applicable fiscal year.

(f) Other relevant factors.

(2) CONTENTS. The funding policy shall include:

(a) The amount of funding available for new projects.

(b) The amount of funding available for advance commitments.

(c) The amount of funding available for amendments.

(d) The amount of funding available for financial hardship assistance.

(e) The amount of funding available for refinancing projects.

History: Cr. Register, October, 1989, No. 406, eff. 11-1-89.

NR 162.18 Transition projects. (1) **APPLICABILITY.** This section applies to financial assistance agreements issued pursuant to s. 144.241 (20), Stats.

(2) **ELIGIBILITY.** (a) To become eligible for financial assistance under this section, a municipality shall comply with the submission date, approvability and other requirements contained in s. 144.241 (20) (a), Stats., and shall meet the requirements for submittal of an intent to apply notice, plans and specifications and a grant application in accordance with s. NR 128.09 (1) (a) and (b) during 1989.

(b) Funding shall be allocated to transition projects in accordance with s. 144.241 (20) (b), Stats., using the federal priority list as established under s. 144.24 (6) (a), Stats.

(c) Step 2 costs approved through an advance commitment for reimbursement may be awarded with the step 3 loan subject to s. 144.24 (9m) (a), Stats. These costs shall be added to the step 3 application costs for the purpose of determining the fundable range on the intent to apply list.

(d) The application requirements of s. NR 162.08 shall be met in order to receive a loan.

(e) Transition projects shall comply with all other applicable limitations and conditions as required under this chapter.

(f) Additional step 1 planning work necessary for step 3 projects is not eligible for financial assistance under this section.

(g) Eligible costs shall be determined in accordance with s. 144.24, Stats.

(3) **ADVANCE COMMITMENTS.** (a) Advance commitments for transition projects may be made in accordance with the requirements of s. NR 162.16 (1).

(b) Funding for advance commitments for transition projects shall be allocated in accordance with the requirements of s. 144.241 (20), Stats., and the federal priority list as established under s. 144.24 (6) (a), Stats.

(c) Eligible costs shall be determined in accordance with s. 144.24, Stats.

(4) **REFINANCING.** (a) Refinancing may be provided for step 3 projects and associated step 2 costs only if sufficient funds are not available in any fiscal year to give notices of commitment or advance commitments under sub. (3) to all recipients.

(b) Eligible costs shall be determined in accordance with s. 144.24, Stats.

(c) Refinancing may not be provided for the non-local project costs for projects which received financial assistance under 33 USC 1251 et seq., as amended, or s. 144.24, Stats.

(5) **LIMITATIONS.** (a) The eligibility of specific costs for projects funded under this section shall be subject to the requirements of s. 144.241 (8) (b) and (f), Stats.

(b) A municipality which rejects a ready to allocate notice or grant award for a project issued under s. 144.24, Stats., or 33 USC 1251 et seq. as amended, may not receive a loan for that project under the provisions of s. 144.241 (20), Stats.

History: Cr. Register, October, 1989, No. 406, eff. 11-1-89.

NR 162.19 Disputes. (1) **DECISION OF THE DEPARTMENT.** Except as otherwise provided by law, any dispute arising under a financial assistance agreement shall be decided in writing by the department which will serve personally or by mail (certified mail, return receipt requested) a copy of the decision on the 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 such decision, the recipient mails (certified mail, return receipt requested) or otherwise delivers to the department a written petition specifically stating the facts or law 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.

History: Cr. Register, October, 1989, No. 406, eff. 11-1-89.

NR 162.20 Suspension or termination of financial assistance. (1) **SUSPENSION OF ASSISTANCE - STOP-WORK ORDERS.** (a) In accordance with the provisions of this subsection, the department may, for good cause, suspend state liability for work done under a step 1, step 2 or step 3 financial assistance agreement and to stop construction on a project after notification is given to the recipient.

(b) Good cause for issuance of a stop-work order includes, but is not limited to, failure to comply with the terms and conditions of the financial assistance agreement such that the ability of the project to meet approved design specifications is jeopardized or if there is a high potential for environmental damage to occur if construction continues.

Note: Generally, use of a stop-work order will be limited to those situations where it is advisable to suspend work on the project or a portion or phase of the project and a supplemental agreement providing for such suspension is not feasible. Although a stop-work order may be used by the department pending a decision to terminate the financial assistance agreement, it may not be used in lieu of the issuance of a termination notice after a decision to terminate has been made.

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(c) Prior to the issuance of a stop-work order, the department shall discuss with the recipient the facts supporting the decision to issue the stop-work order. Stop-work orders shall include:

1. A clear description of the work to be suspended;
2. Instructions as to the issuance of further orders by the recipient for materials or services;
3. Guidance on actions to be taken on subagreements; and
4. Other suggestions to the recipient for minimizing costs.

(d) After discussion of the proposed action with the recipient, the department may by written order to the recipient (certified mail, return receipt requested), require the recipient to stop all or any part of the project work for a period of not more than 45 days after the order is delivered to the recipient, and for any further period to which the parties may agree. The order shall be specifically identified as a stop-work order issued pursuant to this section.

(e) Upon receipt of a stop-work order, the recipient shall immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage. Within the suspension period or within any extension of that period to which the parties shall have agreed, the department shall either:

1. Cancel the stop-work order, in full or in part, or
2. Terminate the work covered by such order as provided in sub. (2).

(f) If a stop-work order is canceled or the period of the order or any extension thereof expires, the recipient shall promptly resume the previously suspended work. An equitable adjustment shall be made in the financial assistance agreement period and project period, and the financial assistance agreement shall be amended accordingly.

(g) Costs incurred by the recipient or its contractors, subcontractors, or representatives, after a stop-work order is received by the recipient, or within any extension of such period to which the parties shall have agreed, with respect to the project work suspended by such order or agreement which are not authorized by this section or specifically authorized in writing by the department, are unallowable costs.

(h) Failure to agree upon the amount of an equitable adjustment due under a stop-work order shall constitute a dispute under s. NR 162.19.

(2) **TERMINATION OF FINANCIAL ASSISTANCE.** Financial assistance may be terminated in whole or in part by the department pursuant to one or more of the following procedures:

(a) The department and recipient may enter into an agreement to terminate the financial assistance agreement at any time pursuant to terms which are consistent with this subsection. The agreement shall establish the effective date of termination of the financial assistance agreement, the basis for settlement of termination costs, and the amount and date of payment of any sums due either party.

(b) If a recipient wishes to unilaterally terminate all or any part of the project work for which financial assistance has been awarded, the recipi-

ent shall promptly give written notice to the department. If the department determines that there is a reasonable basis for the requested termination, the department may enter into a termination agreement, including provision for assistance agreement termination costs, effective with the date of cessation of the project work by the recipient. If the department determines that a recipient has ceased work on a project without reasonable basis, the department may unilaterally terminate financial assistance pursuant to sub. (4) or rescind the financial assistance agreement pursuant to sub. (3).

(3) **RECISSION OF FINANCIAL ASSISTANCE.** The department may rescind the financial agreement if it determines that:

(a) There has been substantial non-performance of the project work by the recipient without acceptable justification under the circumstances;

(b) There is substantial evidence the financial assistance agreement was obtained by fraud; or

(c) There is substantial evidence of gross abuse or corrupt practices in the administration of the project.

(4) **PROCEDURES FOR TERMINATION AND RECISSION.** (a) Financial assistance may be terminated or rescinded by the department in accordance with the following procedure:

1. The department shall make a written finding that grounds for sanctions as specified in sub. (3) or in s. NR 162.21 (1) exist with respect to the specific project.

2. The department shall give not less than 30 days written notice to the recipient of its intent to terminate or rescind financial assistance in whole or in part. Notice shall be served on the recipient personally or by mail (certified mail - return receipt requested) and shall include the grounds for termination or rescission required under subd. 1.

3. The recipient shall be afforded an opportunity for consultation with the department within 20 days after service of notice if practicable, and in any event prior to any termination or rescission. After the department has received any views expressed by the recipient, the department may terminate or rescind the financial assistance agreement in whole or in part. Any termination or rescission shall be in writing and shall respond to the view expressed by the recipient and shall state the reasons relied on by the department in terminating or rescinding the financial assistance. A notice of termination or rescission shall be served on the recipient personally or by mail (certified mail - return receipt requested). Termination or rescission shall be effective on the date specified in the notice of termination or notice of rescission, which shall be no less than 10 days after the date of the notice.

4. Service on the recipient under subds. 2 and 3 shall be on the individual designated in the financial assistance agreement.

(b) Upon termination or rescission, the recipient shall refund or credit to the state of Wisconsin that portion of financial assistance funds paid or owed to the recipient and allocable to the project for which financial assistance has been terminated or rescinded, except such portion thereof as may be required to meet commitments which had become legally enforceable prior to the effective date of termination or rescission and are

otherwise eligible. The recipient may not make any commitments after the effective date of termination or rescision without department approval. The recipient shall reduce the amount of outstanding commitments insofar as possible and report to the department the uncommitted balance of funds awarded under the financial assistance agreement.

(c) In the event of a termination under par. (a) and to the extent project work has been completed, state funds that were applied to the costs of the project work may be repaid according to the payment schedule that would have applied under the financial assistance agreement. In the case of rescision under sub. (3), and as to any funds not applied to project costs in the event of termination under par. (a), the department may require that all state funds be repaid within 90 days of notice of termination or notice of rescision.

(d) The recipient may appeal a termination or rescision of a financial assistance agreement pursuant to s. NR 162.19 (2).

History: Cr. Register, October, 1989, No. 406, eff. 11-1-89.

NR 162.21 Enforcement. (1) Noncompliance with the provisions of this chapter or any financial assistance agreement or amendment made under this chapter which jeopardizes timely completion of the project or the interests of the state in administering the clean water fund shall be cause for the imposition of one or more of the following sanctions at the discretion of the department:

(a) Payment otherwise due to the recipient of up to 10% may be withheld under s. NR 162.13 (6).

(b) Project work may be suspended under s. NR 162.20.

(c) A court of appropriate jurisdiction may enter an injunction or afford other equitable or judicial relief as the court finds appropriate.

(d) Such other administrative remedies may be instituted as may be appropriate.

(2) If the recipient fails to make timely payments when due under a financial assistance agreement or amendment and fails to cure such nonpayment within 10 days of the department's written notice, or commits more than 3 events of substantial noncompliance with the provisions of this chapter or any financial assistance agreement or amendment and fails to cure such matters within 20 days of the department's written notice; the department shall have cause for the imposition of one or more of the following sanctions at the discretion of the department:

(a) The financial assistance agreement may be terminated under s. NR 162.20 (4), or, if applicable, rescinded under s. NR 162.20 (3).

(b) The interest rate on all loan assistance may be increased to the market rate.

(c) The department may seek recovery of some or all financial assistance payments made pursuant to s. 144.241, Stats., unless the conditions set forth in the financial assistance agreement have been fully satisfied.

(3) Notwithstanding subs. (1) and (2), in the event of any material noncompliance with the provisions of this chapter or any financial assis-

tance agreement or amendment made under this chapter, project costs directly related to the noncompliance may be declared ineligible for financial assistance.

History: Cr. Register, October, 1989, No. 406, eff. 11-1-89.

NR 162.22 Variances. (1) **GENERAL.** The department may approve a variance from requirements of this chapter when it is determined that such a variance is essential to effect necessary financial assistance actions or department objectives where special circumstances make a variance in the best interest of the state. Before granting a variance, the department shall take into account such factors as good cause, circumstances beyond the control of the recipient and financial hardship.

(2) **APPLICABILITY.** A recipient may request a variance from any non-statutory 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 or the financial assistance agreement number and the dollar value;

(b) The section of this chapter from which a variance is sought and a statement explaining why the variance is necessary;

(c) An adequate description of the variance and the circumstances in which it will be used, including any pertinent background information which is relevant to making a determination on the justification of granting the variance; and

(d) A statement as to whether the same or similar variance has been requested previously, and if so, circumstances of the previous request.

(4) **APPROVAL OF VARIANCE.** A copy of each approval of a variance request shall be retained in the department financial assistance file.

History: Cr. Register, October, 1989, No. 406, eff. 11-1-89.

NR 162.23 Administration fees. (1) An administration fee of 0.5% of the outstanding principal shall be collected at the execution of the financial assistance agreement and semi-annually for the duration of the loan. The fees shall accrue semi-annually and shall be paid at the beginning of each interest payment period. The administration fee shall be placed in a separate administrative account.

(2) Grants provided for financial hardship under s. NR 162.04 (5) are not subject to an administration fee.

History: Cr. Register, October, 1989, No. 406, eff. 11-1-89.