State of Wisconsin
Department of Natural Resources

NOTICE TO PRESIDING OFFICERS

OF PROPOSED RULEMAKING

Pursuant to s. 227.19, Stats., notice is hereby given that final draft rules are being submitted to the presiding officer of each house of the legislature. The rules being submitted are:

Natural Resources Board Order No. CF-57-98

Legislative Council Rules Clearinghouse Number 98-146

Subject of Rules Land recycling loan program

Date of Transmittal to Presiding Officers February 9, 1999

Send a copy of any correspondence or notices pertaining to this rule to:

Carol Turner, Rules Coordinator
DNR Bureau of Legal Services
LC/5, 101 South Webster

266-1959

REPORT TO LEGISLATURE

NR 167, Wis. Adm. Code
Land recycling loan program

Board Order No. CF-57-98
Clearinghouse Rule No. 98-146

Statement of Need

The Land Recycling Loan Program is a $20 million loan program within the Wisconsin Environmental Improvement Fund. The purpose of the loan program is to provide subsidized interest loans to cities, villages, towns and counties for remediating environmental contamination of landfills, sites or facilities at which environmental contamination has affected or threatens to affect groundwater or surface water.

These administrative rules establish the framework for participation in the loan program and include descriptions of eligible projects, priority criteria and scoring system for ranking projects, methods of providing financial assistance, application procedures and financial assistance commitments and agreements. The rule is patterned closely after the Clean Water Fund Program and Safe Drinking Water Program rules. Basic policies governing the land recycling loan program eligibility, terms and conditions of the loan, including the interest rate and requirement for a loan servicing fee, are established by statute.

Modifications as a Result of Public Comment

No modifications were made.

Appearances at the Public Hearings and Their Position

November 13, 1998 – West Allis – no appearances

November 16, 1998 – Stevens Point

In support – none

In opposition:

Mary Kiedrowski, 9251 Evergreen Avenue, Wis. Rapids, WI 54494

As interest may appear – none

November 19, 1998 – Superior – no appearances

Response to Legislative Council Rules Clearinghouse Report

The recommendations were accepted, except for:

1. The Clearinghouse Report commented that s. 281.60(7), Stats., requires a grant to be provided if the specific conditions in the statute are met, whereas several sections of the rule are written in permissive terms using the word may in sections NR 167.04, 167.05 and 167.09(3).

The Clearinghouse asks whether the permissive sections of the rule should be rewritten to conform with the statute. Upon review, the department elects to retain the existing language of the rule because s. 281.60(7), Stats., only requires that the department approve an application after specific conditions are met. Approval of an application is one of a number of statutory requirements in the financial assistance award process. Therefore, the existing language is appropriate.

The Clearinghouse Report asks whether the proposed rule's requirement for using minority and woman owned business "to the extent possible" in s. NR 167.18(4) means that a recipient of financial assistance must award a contract to these entities to the exclusion of others regardless of bid competitiveness. The Department's response is no, the language in the rule does not require a recipient to exclude all bids from nonminority and nonwoman owned businesses. The particular language was used in order to maintain consistence with similar language in the rules governing the Clean Water Fund program and Safe Drinking Water Loan program.

The Clearinghouse Report asks whether the proposed rule should indicate how the portion of project costs to be financed at market rate will be determined under s. NR 167.18(4)(e). The method of determining the market rate interest portion of a project is based on the level of minority and woman owned business project participation goals established by the U.S. Environmental Protection Agency. In the future, the Department may have to negotiate participation goals with EPA on an annual basis, thus if the participation goals vary annually, the market rate portion will also vary annually. Having to make frequent changes to the rule to reflect the current market interest rate portion would be difficult and confusing to the Department's customers. Therefore, the Department's response to the Clearinghouse comment is the existing language is appropriate and also identical to the language in the Safe Drinking Water Loan program rules. The Clean Water Fund program rules likely will be amended to incorporate this language.

Final Regulatory Flexibility Analysis

The proposed rule does not affect small businesses; therefore, a final regulatory flexibility analysis is not required.

ORDER OF THE STATE OF WISCONSIN
NATURAL RESOURCES BOARD
CREATING RULES

The Wisconsin Natural Resources Board proposes an order to create ch. NR 167 relating to the land recycling loan program.

CF-57-98

Analysis Prepared by Department of Natural Resources

Statutory authority: 281.60(5),(6) and (13)(b) and (c) and 227.11(2)(a), Stats.

Statutes interpreted: 281.60 and 281.59(3m), Stats.

The Land Recycling Loan Program (LRLP), created in the 1997-1999 Biennial Budget (Act 27), established a $20 million loan program within the Wisconsin Environmental Improvement Fund. The purpose of the LRLP is to provide subsidized interest loans to cities, villages, towns and counties for the remediating environmental contamination of landfills, sites or facilities at which environmental contamination has affected or threatens to affect groundwater or surface water.

Section 281.60 directs the Department of Natural Resources to promulgate rules for:

1. establishing eligibility criteria for applicants and projects,

2. determining project rankings based on the potential of projects to reduce environmental contamination and threats to human and, for sites and facilities that are not landfills, the extent to which projects will prevent the development of undeveloped land by making land available for redevelopment after cleanup is conducted,

3. executing its responsibilities under the LRLP with assistance from the Department of Administration (DOA).

These administrative rules establish the requirements for participation in the LRLP and include descriptions of eligible projects, priority criteria and scoring system for ranking projects, methods of providing financial assistance, application procedures, and financial assistance commitments and agreements. The rule is patterned closely after the Clean Water Fund Program and Safe Drinking Water Program Rules. Basic policies governing LRLP eligibility, terms and conditions of the loan (including the interest rate), and requirements for a loan servicing fee, are established by statute.

SECTION 1 NR 167 is created to read:

Chapter 167
LAND RECYCLING LOAN PROGRAM

NR 167.01 Purpose
NR 167.02 Applicability
NR 167.03 Definitions
NR 167.04 Types of financial assistance
NR 167.05 Eligible projects
NR 167.06 Project costs
NR 167.07 Priority criteria and scoring system
NR 167.08 Notice of intent to apply
NR 167.09 Loan application
NR 167.10 Funding list and allocation of funding
NR 167.11 Financial assistance commitments
NR 167.12 Financial assistance agreement
NR 167.13 Limitations on reimbursement and refinancing of interim financing costs
NR 167.14 Loan interest rate and term
NR 167.15 Loan servicing fee
NR 167.16 Prepayment of loan with grant awards or rebates
NR 167.17 Sale of site or facility
NR 167.18 Procurement
NR 167.19 Financial assistance disbursements
NR 167.20 Financial management
NR 167.21 Amendments to financial assistance agreements
NR 167.22 Disputes
NR 167.23 Records and record retention
NR 167.24 Breach of contract
NR 167.25 Noncompliance
NR 167.26 Variances

NR 167.01 PURPOSE. The purpose of this chapter is to establish rules under ss. 281.59 and 281.60, Stats., for the implementation and administration of the land recycling loan program.

NR 167.02 APPLICABILITY. This chapter applies to all land recycling loan program applicants and recipients. Compliance with the applicable requirements of this chapter is a prerequisite to receiving financial assistance under ss. 281.59 and 281.60, Stats.

NR 167.03 DEFINITIONS. In this chapter:

(1) "BEAP" means the brownfield environmental assessment program, as authorized in 40 CFR Section 300.420.

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

(3) "DOA" means the department of administration.

(4) "Environmental justice" means the fair treatment and meaningful involvement of all people, regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.

(5) "Facility" means "approved facility" as defined in s. 289.01(3), Stats., "approved mining facility" as defined in s. 289.01(4), Stats., "nonapproved facility" as defined in s. 289.02(24), Stats., and "solid waste facility" as defined in s. 289.01(35), Stats.

Note: Under s. 289.01(3), Stats., "approved facility" means a "solid or hazardous waste disposal facility with an approved plan of operation under s. 289.30, Stats., or a solid waste disposal facility initially licensed within 3 years prior to May 21, 1978 for a determination by the department that the facility's design and plan of operation comply substantially with the requirements necessary for plan approval under s. 289.30, Stats." " Approved mining facility" means an approved facility which is part of a mining site, as defined under s. 289.30(8), used for the disposal of solid waste resulting from mining, as defined under s. 293.01(5), Stats., or prospecting as defined under s. 293.01(12), Stats." "Nonapproved facility" means "a licensed solid or hazardous waste disposal facility which is not an approved facility." "Solid waste facility" means a "facility for solid waste treatment, solid waste storage or solid waste disposal, and includes commercial, industrial, municipal, state and federal establishments or operations such as, without limitation because of enumeration, sanitary landfills, dumps, land disposal sites, incinerators, transfer stations, storage facilities, collection and transportation services and processing, treatment and recovery facilities."

(6) "Financial assistance" means loans, debt guarantees and purchase of insurance provided to political subdivisions under ss. 281.59 and 281.60, Stats.

(7) "Financial assistance agreement" means an agreement between a political subdivision, the department, and DOA which provides for financial assistance to the political subdivision and contains the terms and conditions of the financial assistance.

(8) "Fiscal year" means the fiscal year that begins July 1 of one calendar year and ends June 30 of the next calendar year.

(9) "Force account work" means the work a municipality performs using its own employees or equipment for construction, construction-related activities, repairs or improvements to a site or facility.

(10) "Landfill" has the meaning specified under s. 281.60(1)(am), Stats., disposal a solid waste facility for solid waste disposal.

Note: Sec. 281.60(1)(am), Stats., refers to the definition in s. 289.01(20), Stats., which defines "landfill" as a solid waste facility for solid waste disposal.

(11) "Land recycling loan program" has the meaning specified in s. 281.60, Stats.,

Note: Sec. 281.60(1)(b), Stats., defines "land recycling loan program" as the program administered under s. 281.60, Stats., with financial management provided by the department of administration under s. 281.59, Stats.

(12) "LRLP" means the land recycling loan program.

(13) "Market interest rate" has the meaning specified in s. 281.60(1)(b), Stats.

Note: Sec. 281.60(1)(c), Stats., defines "market interest rate" as the interest at the effective rate of a revenue obligation issued by this state to fund a loan or a portion of a loan for a clean water fund program project under 281.58, Stats.

(14) "Minority owned business enterprise" means a sole proprietorship, partnership, joint venture or corporation that is at least 51% owned, controlled and actively managed by a minority group member or members who are U.S. citizens or persons lawfully admitted to the United States for permanent residence, as defined under 8 USC 1101(a)(20), and is performing a useful business function at the time an application is submitted.

(15) "Political subdivision" means a city, village, town or county.

(16) "PV subsidy" means the present value subsidy amount provided by the LRLP for projects receiving financial assistance under ss. 281.59 and 281.60, Stats., to reduce the interest rate of a loan made by the LRLP from the market interest rate to a lesser rate.

(17) "Remedial action" has the meaning specified in s. NR 700.03(48).

Note: Sec. NR 700.03(48) defines "remedial action" as those response actions, other than immediate or interim actions, taken to control, minimize, restore or eliminate the discharge of hazardous substances or environmental pollution so that the hazardous substance or environmental pollution do not present an actual or potential threat to public health, safety or welfare of the environment. The term includes actions designed to prevent, minimize, stabilize or eliminate the threat of discharged hazardous substances, and actions to restore the environment to the extent practicable and meet all applicable environmental standards. Examples include storage, disposal, containment, treatment, recycling or reuse, and any monitoring required to assure that such actions protect public health, safety and welfare and the environment.

(18) "Remedial action options report" has the meaning specified in s. NR 700.03(49).

Note: Sec. NR 700.03(49) defines "remedial action options report" as a report which identifies and evaluates various remedial action options with the goal of selecting an option in compliance with the requirements of s. NR 722.11.

(19) "Site" has the meaning specified in s. 281.60(1)(e), Stats.

Note: Sec. 281.60(1)(e), Stats., defines "site or facility" as an approved facility, an approved mining facility, a nonapproved facility, a waste site or a spill site.

(20) "Woman owned business" means an independent business concern which is at least 51% owned by a woman or women who also control and operate it.

NR 167.04 TYPES OF FINANCIAL ASSISTANCE. The department and DOA may provide the following types of financial assistance:

Note: The types financial assistance authorized under s. 281.60(2r), Stats., include:

(1) Loans with below market interest rates to finance project costs.

(2) Purchase or refinance debt obligations of a political subdivision if the obligation was incurred to finance the cost of an eligible project and the obligation was initially incurred after May 17, 1988, pursuant to internal revenue service reimbursement regulations covering the use of tax exempt bond or note proceeds.

(3) A financial guarantee or insurance to provide credit market access or to reduce the interest cost on commercial market debt issues used to finance an eligible project.

NR 167.05 ELIGIBLE PROJECT. A political subdivision may be eligible to receive financial assistance for eligible costs of a project under this chapter if all of the criteria in s. 281.60(2), Stats., are met and the project qualifies as a remedial action and is part of a remedial action options report that has been reviewed and approved by the department.

Note: The criteria for eligibility for financial assistance in s. 281.60(2), Stats., are as follows:

(1) The project is to remedy environmental contamination of landfills, sites or facilities.

(2) The landfill, site or facility has environmental contamination which has affected groundwater or surface water or threatens to affect groundwater or surface water.

(3) The political subdivision owns the landfill, site or facility.

(4) The environmental contamination to be remedied was not caused by the political subdivision. This criterion does not apply where the site is a landfill.

NR 167.06 PROJECT COSTS. **(1)** ELIGIBLE COSTS. The following project costs or portions of project costs are eligible for financial assistance under this chapter:

(a) Reasonable and necessary project costs associated with environmental assessments and preparing a site investigation report in accordance with s. NR 716.15, when such a report has been followed by submittal of a remedial action options report prepared in accordance with s. NR 722.13.

(b) Reasonable and necessary project costs associated with constructing the selected remedial action in accordance with ch. NR 724.

(2) INELIGIBLE COSTS. The following project costs or portions of project costs are not eligible for financial assistance under this chapter:

(a) Land acquisition.

(b) Fines and penalties for violations.

(c) Costs outside the scope of the project.

(d) Ordinary operating expenses of local government.

(e) Ordinary site maintenance.

(f) Personal injury compensation or damages arising out of the project.

(g) Remedial investigation costs when a remedial options report has not been approved.

(h) Private well replacement.

NR 167.07 PRIORITY CRITERIA AND SCORING SYSTEM. **(1)** PURPOSE. The priority criteria and scoring system establishes a means to numerically rank all LRLP project applications. If funds are insufficient to fund all approved projects in a year, funding will be awarded on the basis of the assigned numerical rank of each project.

Note: Sec. 281.60(8)(a) specifies that no more than 40% of the available funds in each fiscal year may be allocated to landfill remediation projects, and in any biennium no eligible applicant may receive more than 25% of the available PV subsidy established for that biennium.

Note: Rankings are based on a project's potential to reduce environmental pollution and threats to human health, and, for sites that are not landfills, the extent to which the project will prevent the development of undeveloped land by making land available for redevelopment after cleanup.

(2) PRIORITY & SCORING SYSTEM CRITERIA. An LRLP project application shall be assigned a priority score determined as follows:

(a) A site which has impacted one or more public water supply wells or private drinking water supply wells above maximum contaminant levels as specified in ch. NR 809, shall be assigned 31 points.

(b) A site which has impacted groundwater above preventive action limits of the public health groundwater quality standards as specified in ch. NR 140, shall be assigned 5 points; an additional 5 points shall be assigned to a site which has impacted groundwater above enforcement standards of public health groundwater quality standards as specified in ch. NR 140.

(c) A site which has soil or sediment contamination based upon any investigation done pursuant to s. NR 720.05(1), shall be assigned 5 points.

(d) A site where an agreement has been executed between the municipality and a private developer shall be assigned 5 points.

(e) A site shall be assigned the following points based on the size of the site:

1. Less than one acre = 1 point

2. Greater than 1 acre, but not greater than 3 acres = 2 points

3. Greater than 3 acres, but not greater than 4 acres = 3 points

4. Greater than 4 acres, but not greater than 5 acres = 4 points

5. Greater than 5 acres = 5 points

(f) A site that is consistent with a municipally adopted plan for renewal or redevelopment shall be assigned 5 points.

(g) A site that is within an area specially designated for tax incentives or targeted public funding, including BEAP site, tax increment financing district, enterprise zone, business improvement district, or community development block grant target area, shall be assigned 5 points.

(h) A site that where a portion of the remediation is being funded by the Wisconsin environmental fund pursuant to ss. 292.31(1) to (8) and 292.11(3), Stats., shall be assigned 1 point.

(i) A site that is designated a U. S. Environmental Protection Agency removal site shall be assigned 1 point.

(j) A site where remediation of environmental contamination will improve environmental justice shall be assigned 1 point.

(k) A site that has impacted a surface water or wetland that is designated an outstanding resource water under s. NR 102.10, an exceptional resource water under s. NR 102.11, a state or federal wildlife refuge, a state natural area or a special designated environmentally sensitive area shall be assigned 2 points.

Note: Examples of environmentally sensitive areas include environmentally sensitive areas and environmental corridors identified in area-wide water quality management plans, special area management plans (SAMP), special wetland inventory studies (SWIS), advanced delineation and identification studies (ADID), areas identified in a comprehensive outdoor recreation plan (CORP), riverway plan, and areas designated as environmentally sensitive by the United States Environmental Protection Agency.

(L) A site shall be assigned a population score based on the total population of the municipality as follows:

$$\text{The Population Score (PS)} = 1 - \frac{[\log 10 \text{ municipal population}]}{10}$$

(3) PRIORITY LIST. Each year the department shall establish a priority list that ranks each project application based on the scoring system contained in sub. (2).

NR 167.08 NOTICE OF INTENT TO APPLY. (1) A political subdivision shall submit to the department a notice of its intent to apply for financial assistance as specified in s. 281.60(3)(a), Stats. The notice shall be filed with the department by December 31, if funding will be requested within the following fiscal year beginning July 1. The notice shall be in a form prescribed by the department and the DOA.

(2) The department may waive the requirements under sub. (1) as specified in s. 281.60(3)(a), Stats.

NR 167.09 LOAN APPLICATION. (1) After submitting a notice of intent to apply, or obtaining a department waiver of that requirement, a political subdivision may submit an application for LRLP financial

assistance to the department as specified in s. 281.60(5), Stats. The application shall be in the form and include the information required by the department and DOA. An applicant may not submit more than one application per project per year.

(2) The political subdivision shall submit the application on or before the date established by the department.

Note: For the 1997-1999 biennium the application date shall be after the rule is in effect, but thereafter the department may establish a different application date following sufficient public notice.

(3) The department may approve an application only after all of the criteria in s. 281.50(7), Stats., are met.

Note: The criteria in s. 281.60(7), Stats., are as follows:

(a) The project is ranked on the department's priority scoring list.

(b) The department determines that the project meets the eligibility requirements under this chapter.

(c) DOA determines that the political subdivision has demonstrated that it has the financial capacity to undertake the project and pay the debt service on the obligations it issues for the project, giving consideration to the factors contained in ch. Adm. 35.

(d) DOA determines that the applicant will meet any requirements of s. 281.59(9)(b), Stats.

(e) The legislature has approved an amount under s. 281.59(3m)(b), Stats., for the biennium.

NR 167.10 FUNDING LIST AND ALLOCATION OF FUNDING. **(1)** The department shall establish one funding list for each fiscal year that ranks projects of political subdivisions that submit approved applications to the department. All projects shall be ranked according to the priority criteria and scoring system contained in s. NR 167.07, Stats. If sufficient funds are not available to fund all approved loan applications, funding will be offered in the order established by the funding list, except as provided in s. 281.60(8), Stats.

Note: Sec. 281.60(8), Stats., provides as follows:

(a) Not more than 40% of the available funds in each fiscal year may be allocated to projects to remedy contamination at landfills.

(b) In any biennium, no political subdivision may receive more than 25% of the PV subsidy amount established under s. 281.59(3m)(b), Stats., for that biennium.

(2) If funding is allocated for a project loan, but the loan is not closed within 12 months of the date that funding is allocated, DOA shall release the funding allocated to the project, pursuant to s. 281.60(10), Stats. The municipality may apply for funding for the same project the following year. The funding released under this section may be made available for other eligible projects.

NR 167.11 FINANCIAL ASSISTANCE COMMITMENTS. **(1)** The department and DOA may, at the request of a political subdivision, issue a notice of financial assistance commitment pursuant to s. 281.60(9), Stats.

(2) A notice of financial assistance commitment may only be issued after:

(a) The political subdivision's application for financial assistance has been approved by the department.

(b) The project has been determined to be in the fundable range of the department's priority based funding list.

(c) Sufficient PV subsidy to fund the project has been allocated.

(3) The notice of financial assistance commitment shall specify the terms and conditions that the political subdivision must meet in order to receive financial assistance and shall include an estimated loan repayment schedule.

NR 167.12 FINANCIAL ASSISTANCE AGREEMENTS. The department and DOA may enter into a financial assistance agreement with a political subdivision to fund a project if all of the following conditions are met:

(1) The political subdivision's application for financial assistance has been approved by the department.

(2) The project has been determined to be in the fundable range of the department's funding list.

(3) Sufficient PV subsidy to fund the project has been allocated.

(4) DOA is satisfied that the political subdivision has the financial capacity to undertake the project and pay the debt service on the obligations it issues for the project, giving consideration to the factors contained in ch. Adm. 35.

(5) The department has approved applicable items under ch. NR 724.

(6) The political subdivision agrees to comply with any provisions specified in s. 281.60(8m)(b), Stats.

(7) The political subdivision agrees to allow access to the project site by representatives of the department for the purpose of making inspections.

(8) The political subdivision has submitted any written materials required by the department for preparation of the financial assistance agreement including evidence of bid tabulations with recommendations for award.

(9) The political subdivision agrees to comply with the federal single audit act and U.S. Office of Management and Budget Circulars A-128 and A-133 for funding it receives from the LRLP that originated from federal funds.

NR 167.13 LIMITATIONS ON REIMBURSEMENT AND REFINANCING OF INTERIM FINANCING COSTS. (1) The department may reimburse eligible project costs previously paid by the political subdivision from moneys other than proceeds from a borrowing, if the reimbursement is in compliance with applicable federal internal revenue service reimbursement regulations covering the use of tax-exempt bond or note proceeds specified in 26 CFR Section 1150-2.

(2) The department may refinance the eligible portion of a political subdivision's Interim financing subject to the following limitations:

(a) Interim financing costs shall be offset with any interest earnings, during the eligible time period, from the investment of the proceeds from the interim financing.

(b) The period of time for which interest on interim financing is eligible for funding shall run from no earlier than 6 months prior to the start of remediation through the earliest of the following

1. The closing date of the LRLP loan; or

2. One year following completion of remediation

(c) If the interim financing is not exclusively for the land recycling loan program project, costs shall be prorated accordingly

(d) Any interest or principal payments the political subdivision makes on the interim debt from municipal funds may not be reimbursed or refinanced by the LRLP. Interest capitalized to the interim debt balance may be eligible subject to the limitations of this section.

NR 167.04 LOAN INTEREST RATE AND TERM. The interest rate on LRLP loans shall be the rate specified in s. 281.60(11), Stats. The interest rate is 55% of the market interest rate. The maximum term of the loan may not exceed 20 years from the date of the financial assistance agreement.

NR 167.15 LOAN SERVICING FEE. The department and DOA shall charge a loan servicing fee for each loan outstanding in a given year, as specified in s. 281.60(11m), Stats. The loan servicing fee for each year the loan is outstanding shall be based on the loan servicing fee in effect at the time when the loan was closed. The loan servicing fee shall be calculated annually by multiplying the loan balance on March 31st of each year that the loan is outstanding by the loan servicing fee applicable to the loan. The loan servicing fee shall be payable annually on May 1st of each year that the loan is outstanding. The fee shall be in addition to the interest charged on the loan. For loans originated during the 1997-99 fiscal biennium, the annual loan servicing fee may not exceed 0.5% of the loan balance. For bienniums thereafter, the amount of the loan servicing fee shall be established in the biennial finance plan.

NR 167.16 PREPAYMENT OF LOAN WITH GRANT AWARDS OR REBATES. If subsequent to the disbursement of the LRLP loan, the political subdivision receives a grant award or rebate for project costs already paid by the LRLP loan, the political subdivision shall apply the grant proceeds or rebate as a prepayment to the LRLP loan. The DOA shall accept the prepayment and apply the prepayment proportionally over the remaining term of the loan.

NR 167.17 SALE OF SITE OR FACILITY. (1) A political subdivision may not sell a site or facility, or portion of a site or facility, for which the political subdivision has received a loan under this chapter, while the loan is outstanding, for less than fair market value, as specified in s. 281.60(12)(b), Stats.

(2) If a political subdivision sells a site or facility, or portion of a site or facility, for which the political subdivision has received a loan under this chapter, the political subdivision shall pay to the land recycling loan program the amount specified in s. 281.60(12)(b), Stats.

(3) The political subdivision shall provide to the land recycling loan program an accounting of the project costs used to calculate the payment required under s. 281.60(12)(b), Stats., including a copy of the sale contract for the site or facility.

NR 167.18 PROCUREMENT. (1) APPLICABILITY. Procurement of professional services and construction contracts by recipients under this chapter shall be in accordance with state and local laws. No contract 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.

(2) PROFITS. Only fair and reasonable profits may be paid to contractors by political subdivisions under financial assistance agreements. Profits included in a formally advertised, competitively bid, fixed price or unit price construction contract are presumed to be reasonable.

(3) FINANCIAL ASSISTANCE RECIPIENT RESPONSIBILITY. The recipient is responsible for the administration and successful completion of the project as well as acceptance of the terms of the financial assistance agreement.

(4) MINORITY-OWNED AND WOMEN-OWNED BUSINESSES. This subsection applies to each recipient of financial assistance and those employed by the recipient to plan, design, construct or modify the project. This subsection applies to contracts for services, equipment, raw materials and supplies. In order to provide minority and women owned businesses the maximum feasible opportunity to compete for work related to the project, all of the following conditions shall be met:

(a) Recipients of the financial assistance, contractors and subcontractors shall use minority and women owned businesses to the extent possible.

(b) Recipients, contractors and subcontractors shall make good faith efforts to provide minority and women owned businesses the maximum feasible opportunity to compete for contracts and subcontracts. Good faith efforts include the following:

1. Soliciting bids from qualified, minority owned businesses certified by the department of commerce and qualified woman owned businesses whenever contracts and subcontracts are awarded.

2. Providing to minority and women owned businesses, upon request, a list of individuals and firms in possession of plans, specifications and other information relevant to the project.

3. Breaking down work into smaller projects to maximize the opportunity of minority and women owned businesses to compete for contracts and subcontracts.

4. Establishing work schedules which will allow minority and women owned businesses to compete for contracts and subcontracts.

5. Using the assistance of the department as appropriate.

(c) The recipient shall document the efforts made to provide minority and women owned businesses with the opportunity to compete for contracts and subcontracts.

(d) If requested, a recipient shall explain to a minority or woman owned business which bid but did not receive a contract, why the contract was not awarded to it.

(e) Failure to comply with pars. (b) to (d) shall result in a portion of the project cost eligible for subsidy being financed at the market interest rate.

Note. The utilization goals for minority and women owned businesses is negotiated annually between the department and the U.S. Environmental Protection Agency.

(5) FORCE ACCOUNT WORK. The department may approve financial assistance for force account work based on the recipient's certification that one of the following conditions exist:

(a) The recipient has the necessary competence required to accomplish the work and the work can be accomplished more economically by the use of force account work.

(b) Emergency circumstances dictate the use of force account work.

(6) CONTRACTS FOR ARCHITECTURAL OR ENGINEERING SERVICES. (a) The department may review architectural or engineering service contracts and amendments for the eligibility and reasonableness of costs. The department may not provide financial assistance for costs which are not eligible or reasonable.

(b) Reasonableness reviews conducted on architectural and engineering service contracts shall consider the scope of work, the recipient's procurement and negotiation process associated with costs, conditions unique to the project and any other factors impacting costs.

(c) Architectural or engineering service contracts shall indicate a maximum estimated cost for a defined scope of work which cannot be exceeded without a negotiated contract amendment prior to incurring additional costs.

(7) CONSTRUCTION CONTRACTS AND SUBCONTRACTS. (a) 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. (5). 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. The cost-plus-a-percentage-of-cost contract may not be used.

(b) Contract change orders. 1. The recipient shall secure a fair and reasonable price for the required work required by contract change orders.

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

NR 167.19 FINANCIAL ASSISTANCE DISBURSEMENTS. The loan recipient shall submit to the department requests for loan disbursements for eligible project costs on the forms provided by the department.

NR 167.20 FINANCIAL MANAGEMENT. The political subdivision that receives a LRLP loan shall:

(1) Maintain its project accounting in accordance with generally accepted governmental accounting standards.

(2) Maintain a financial management system that conforms to the requirements, terms and conditions contained in any financial assistance agreement entered into under s. 281.59(11), Stats.

(3) Comply with 26 CFR Section 1.103 for maintaining the tax-exempt status of the bonds or notes sold to the land recycling loan program.

NR 167.21 AMENDMENTS TO FINANCIAL ASSISTANCE AGREEMENTS. (1) The amount of financial assistance in the financial assistance agreement may only be increased by an amendment and may only be made upon department review and acceptance of any cost increases as eligible, reasonable, and necessary for the accomplishment of project objectives.

(2) Financial assistance agreement amendments which increase the amount of financial assistance shall be subject to the availability of funds and PV subsidy in accordance with s. 281.59, Stats.

(3) The interest rate for loan funds advanced in accordance with an amended financial assistance agreement shall be the same as the interest rate of the original financial assistance agreement unless there is no PV subsidy available, in which case the interest rate shall be the market interest rate. The final loan maturity shall remain the same established in the financial assistance agreement.

(4) A financial assistance agreement amendment shall be effective on the date it is executed by the department and DOA.

NR 167.22 DISPUTES. Except as otherwise provided by law, any dispute arising under this chapter, prior to the execution of a financial assistance agreement, shall be decided in writing by the department. The department shall serve a copy of the decision on the recipient personally or by mail. A decision of the department may be reviewed pursuant to ch. 227, Stats., and ch. NR 2..

NR 167.23 RECORDS AND RECORD RETENTION. (1) REQUIREMENTS. The recipient shall maintain books, documents, papers and records and accounting procedures in accordance with generally accepted government accounting standards, the financial assistance agreement and ch. Adm. 35 and shall retain them in accordance with s. 19.21, Stats. The recipient shall require contractors, including contractors for professional services, to maintain books documents, papers and records to the project which are necessary for the recipients' compliance with this chapter.

(2) INSPECTION. The department or its agents may during normal business hours inspect and copy LRLP- related records of the recipient and its contractors, including contracts for professional services.

(3) RECORD RETENTION. The recipient and contractors of recipients shall preserve and make their records available to the department until expiration of 3 years from the date of project completion. 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. Records which relate to appeals, disputes or litigation arising out of the performance of the project, shall be

retained until any appeals, disputes or litigation have been finally resolved or for a period of 3 years from the date of project completion, whichever is later.

NR 167.24 BREACH OF CONTRACT. (1) Upon breach of contract by the recipient, the department and DOA may do any of the following:

(a) Declare the unpaid loan balance mature and immediately payable.

(b) Increase the interest rate on the unpaid balance of the loan to the market interest rate in effect on the date the financial assistance agreement was executed.

(c) Immediately terminate the agreement and disburse no additional loan funds, if the loan has not been fully disbursed.

(d) Seek an injunction or any other equitable or judicial relief from a court of appropriate jurisdiction.

(e) Seek any other appropriate administrative remedy.

(2) DOA's receipt of any payment after the occurrence of a breach of contract does not constitute the department's waiver of any rights and remedies under this section.

NR 167.25 NONCOMPLIANCE. Upon failure of the recipient to comply with ss. 281.59 and 281.60, Stats., or with provisions of this chapter, the department may do any of the following:

(1) Refuse to enter into a financial assistance agreement.

(2) Seek penalties as provided in s. 281.59 or 281.60, Stats.

(3) Seek any other appropriate remedy, relief or penalty.

NR 167.26 VARIANCES. (1) GENERAL. The department may approve a variance from a requirement of this chapter when it determines that 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 factors such as good cause, circumstances beyond the control of the recipient and financial hardship.

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

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

(a) The section of this chapter from which a variance is sought, an adequate description of the variance desired, and the facts which the recipient believes warrant the department's approving the variance.

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

The foregoing rule was approved and adopted by the State of Wisconsin Natural Resources Board on January 27, 1999.

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

Dated at Madison, Wisconsin _____

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By _____
George E. Meyer, Secretary

(SEAL)