

Clearinghouse Rule 06-023

ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD REPEALING AND REPEALING AND RECREATING RULES

The Wisconsin Natural Resources Board proposes an order to repeal chs. NR 127, 128 and 160; and to repeal and recreate ch. NR 166 relating to the Safe Drinking Water Loan Program.

CF-13-06

Analysis Prepared by Department of Natural Resources

Statute interpreted: ss. 281.59 and 281.61, Stats.

Statutory authority: ss. 281.59 and 281.61, Stats.

Explanation of agency authority: Section 281.61(2), Stats., states in part “The department and the department of administration shall administer a program to provide financial assistance to local governmental units for projects for the planning, designing, construction or modification of public water systems . . .” Chapter NR 166 contains the rules that the Department of Natural Resources follow to implement and administer the directives of s. 281.61, Stats.

Related statute or rule: Section 281.58, Stats., and Chapter NR 162, Wis. Adm. Code, both relating to the Clean Water Fund Program.

Plain language analysis: Chapters NR 127, NR 128 and NR 160 were the rules for grant programs that have been obsolete for more than 10 years due to changes in federal regulations and state statutes. Repealing these codes should eliminate any confusion their existence may cause about available funding programs.

The department proposes to repeal and recreate ch. NR 166, Wis. Adm. Code. This is necessary to maintain consistency between the Clean Water Fund Program and the Safe Drinking Water Loan Program. These two State Revolving Funds (SRFs) receive annual capitalization grants from the U.S. Environmental Protection Agency which prepares the federal guidelines the states must follow to administer the funds. The two programs, therefore, have very similar federal requirements. In order to avoid inconsistencies between the two programs and to efficiently administer them, the department attempts to keep chs. NR 162 and NR 166 as similar as possible. The department revised ch. NR 162 in 2004. To maintain consistency between the programs, the department is revising the Cost eligibility, Notice of intent to apply, Application, Financial assistance requirements, Financial management, Financial assistance disbursements, and Amendments sections of NR 166.

To clarify and codify existing policies, the department is revising the following sections of ch. NR 166: Procurement, Financial assistance agreement conditions, Priority scoring criteria, Procedure for determining and updating project priority scores.

The department also proposes to add language to ch. NR 166, Wis. Adm. Code, to limit the refinancing of local governmental units’ existing debt on projects that are already constructed.

Summary of, and comparison with, existing or proposed federal regulations: The Drinking Water SRF (DWSRF) was designed to be very similar to the Clean Water SRF. Therefore, it makes sense for the department to try to maintain that consistency between the two programs at the state level. Also, the changes to the Procurement section and the addition of refinancing limitations in the code better align the department’s policies with the Drinking Water SRF guidelines.

Comparison with rules in adjacent states: More varied applicants are eligible to apply for DWSRF financial assistance in Minnesota than in Wisconsin. The following types of applicants that are not eligible for Wisconsin’s program are eligible in Minnesota: Privately owned condominium and manufactured home park systems, schools,

day care centers, churches and retreat centers. Ohio's promulgated rules appear to have significantly less detail in them. The DWSRF program in Illinois appears to be very similar to that in Wisconsin but no administrative rules were available to review. Michigan's rules also appear to be very similar to Wisconsin's, including the priority scoring system.

Effect on small business: No effect.

Agency contact person: Jeanne H. Cargill, 608-267-7587 or jeanne.cargill@dnr.state.wi.us.

Submit comments by _____ to: Wisconsin Department of Natural Resources, Bureau of Community Financial Assistance – CF/8, P. O. Box 7921, Madison, WI 53707-7921.

SECTION 1. Chapters NR 127, 128 and 160 are repealed.

SECTION 2. Chapter NR 166 is repealed and recreated to read:

Chapter NR 166
SAFE DRINKING WATER LOAN PROGRAM

Subchapter I – General

NR 166.01 Purpose.
NR 166.02 Applicability.
NR 166.03 Definitions.

Subchapter II – Financial assistance

NR 166.04 Types of financial assistance available.
NR 166.05 Annual funding policy, project priority list and funding list.
NR 166.06 Project eligibility.
NR 166.07 Cost eligibility.
NR 166.08 Notice of intent to apply.
NR 166.09 Engineering report.
NR 166.10 Application.
NR 166.11 Financial assistance requirements.
NR 166.12 Procurement.
NR 166.13 Loan interest rates.
NR 166.14 Financial assistance agreement conditions.
NR 166.15 Financial management.
NR 166.16 Financial assistance disbursements.
NR 166.17 Amendments to financial assistance agreement.
NR 166.18 Disputes.
NR 166.19 Records and records retention.
NR 166.20 Breach of contract.
NR 166.21 Noncompliance.
NR 166.22 Variances.

Subchapter III – Priority Scoring and Ranking System

NR 166.23 Priority scoring criteria.
NR 166.24 Procedure for determining and updating project priority scores.
NR 166.25 Project ranking system.

Subchapter I – General

NR 166.01 Purpose. The purposes of this chapter are all of the following:

(1) Establish rules under ss. 281.59 and 281.61, Stats., for the implementation and administration of a financial assistance program to plan, design, construct or modify public water systems.

(2) Establish a priority system for the distribution of safe drinking water loan program financial assistance as provided in s. 281.61, Stats.

Note: All forms necessary for financial assistance under this chapter may be acquired at no charge from the Department of Natural Resources, Bureau of Community Financial Assistance, 101 S. Webster St., P.O. Box 7921, Madison, Wisconsin 53707–7921. The forms are also available on the Department of Natural Resources website.

NR 166.02 Applicability. This chapter applies to all applicants for and recipients of financial assistance to plan, design, construct or modify public water systems made pursuant to ss. 281.59 and 281.61, Stats. Compliance with the applicable requirements of this chapter is a prerequisite to receiving financial assistance under ss. 281.59 and 281.61, Stats.

NR 166.03 Definitions. In this chapter:

(1) “Action level” or “AL” is the concentration of lead or copper in water which determines, in some cases, the treatment requirements that a public water system is required to complete.

(2) “Amendment” means a formal, written change to an existing financial assistance agreement, executed by all parties to the original agreement.

(3) “Applicant” means any local governmental unit that applies for financial assistance under ss. 281.59 and 281.61, Stats.

(4) “Approval” means the written approval of the department.

(5) “Biennial finance plan” means the proposed plan described in s. 281.59 (3), Stats.

Note: The biennial finance plan is an estimate of wastewater treatment, safe drinking water and land recycling project needs of the state and available financial assistance, and other information for the 4 state fiscal years of the next 2 biennia. The plan is jointly prepared by the department and DOA by October 1 of each even-numbered year.

(6) “Breach of contract” means the failure of the local governmental unit to comply with any of the following:

(a) The terms and conditions of the financial assistance agreement.

(b) The terms and conditions of the municipal or local governmental unit obligation resolution which is required by the financial assistance agreement and which authorizes the issuance and sale of bonds or notes to the safe drinking water loan program.

(7) “Census block” means the smallest entity for which the U.S. census bureau collects and tabulates decennial census information.

(8) “Census designated place” means a statistical entity defined for each decennial census according to U.S. census bureau guidelines for the purpose of presenting census data for a concentration of population, housing and commercial structures that is locally identifiable by name, but is not within an incorporated place.

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

(10) “Community water system” means a public water system which serves at least 15 service connections used by year-round residents or regularly serves at least 25 year-round residents. Any water system serving 7 or more homes, 10 or more mobile homes, 10 or more apartment units or 10 or more condominium units shall be considered a community water system unless information is provided by the owners indicating that 25 year-round residents will not be served.

(11) “Construction” means any of the following:

(a) Building or modifying a water system, or purchasing a package water system.

(b) Inspecting or supervising any of the activities under par. (a).

(12) “Contaminant” means any physical, chemical, biological or radiological substance or matter in water.

(13) “Debt” means a liability for a project, including general obligation bonds, revenue bonds, promissory notes and special assessment bonds.

(14) “Department” means the department of natural resources.

(15) “Distribution system” means all pipes or conduits by which water is delivered to consumers except piping inside buildings served and water service from a building to a distribution main or pipe.

(16) “DOA” means the department of administration.

(17) “Financial assistance” means loans, refinancing debts, debt guarantees, purchases of insurance or credit enhancements provided to a local governmental unit under ss. 281.59 and 281.61, Stats.

(18) “Financial assistance agreement” means a written agreement between a local governmental unit, the department and DOA that contains the terms and conditions of the financial assistance provided to the local governmental unit.

(19) “Force account work” means work that meets all of the following requirements:

(a) Qualifies under sub. (11) as costs of construction, construction-related activities, repairs or improvements to a water system or under sub. (32) as project planning and design costs.

(b) Is performed by the local governmental unit using its own employees or equipment.

(20) “Future growth” means distribution system expansion beyond the existing system and excess capacity built into facilities that exceeds normally accepted standard engineering practice.

(21) “Interim financing” means a debt necessary to finance a project temporarily until permanent financing is obtained.

(22) “Interim financing costs” means the net interest, fees and charges associated with issuing interim financing, such as underwriter discounts, financial advisor fees, printing costs, bond rating charges, attorney fees and trustee fees.

(23) “Local governmental unit” has the meaning given in s. 281.61 (1) (a), Stats.

Note: Under s. 281.61 (1) (a), Stats., “local governmental unit” means a city, village, town, county, town sanitary district, public inland lake protection and rehabilitation district or municipal water district.

(24) “Maintenance” means the preservation of the functional integrity and efficiency of a water system, such as its equipment and structures, including preventive maintenance, correctional maintenance and replacement of equipment.

(25) “Market interest rate” has the meaning given in s. 281.59 (1) (b), Stats.

Note: Under s. 281.59 (1) (b), Stats., “market interest rate” means the interest at the effective rate of a revenue obligation issued by the state to fund a loan or a portion of a loan for a project under the clean water fund program.

(26) “Maximum contaminant level” or “MCL” means the maximum permissible level of a contaminant in water which is delivered to any user of a public water system.

Note: The maximum permissible level and the sampling and analytical requirements vary depending on the specific contaminant. Chapter NR 809 should be consulted for specific information regarding any contaminant.

(27) “MCL exceedance” means, for microbiological, inorganic, synthetic organic, volatile organic, total trihalomethane and radionuclide contaminants, the analytical results, as determined by methodology outlined in ch. NR 809, exceed the MCL of the contaminant.

(28) “Median household income” means median household income determined by the U.S. bureau of the census as adjusted by the department to reflect changes in household income since the most recent federal census.

(29) “Minority business enterprise” or “MBE” means a business, 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).

(30) “Non–community water system” means a public water system that is not a community water system.

(31) “Operation” means control of the unit processes and equipment that make up a water system including financial and personnel management, records, laboratory control, process control, safety and emergency operation planning.

(32) “Planning and design” means any of the following:

(a) Preparing an engineering report containing the controlling assumptions made and the factors used in the functional design of the water system facility as a whole or of individual component units.

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

(c) Preparing surveys, designs, plans, bidding documentation, working drawings or specifications.

(33) “Population” means the most recent year’s final population estimate published by the DOA demographic services center for the city, town, or village that submitted an intent to apply form. For a public water system owned by other than a city, town or village, “population” means the most recent population count or estimate done for the system or local governmental unit and provided to the department by the local governmental unit.

(34) “Present value subsidy” or “PV” means the sum of periodic subsidies for loans made to or projected to be made to local governmental units during a fiscal year, discounted at a rate of 7% per year to the first day of the biennium during which the loans are made.

(35) “Priority score” means the numerical value, determined by the department, that is assigned to each project in accordance with s. NR 166.24.

(36) “Project” means a combination of activities listed under sub. (11) and sub. (32) and s. NR 166.06 (1) to construct a water system or a modification thereof that are reasonably necessary and appropriate to address a single public health or system concern and are addressed in the engineering report.

(37) “Project closeout” means the procedures described in s. NR 166.16 (4) (b).

(38) “Project completion date” means the earliest date on which all of the following apply:

(a) The project construction is complete.

(b) The department or its agents have certified that the project was constructed according to department-approved plans and specifications.

(c) The department or its agents have certified that the facilities are operating according to design.

(d) The project closeout is complete.

(e) The department has notified the recipient that the project is complete.

(39) “Public water system” means a system for the provision to the public of piped water for human consumption if the water system has at least 15 service connections or regularly serves an average of at least 25 individuals daily at least 60 days each year. A public water system is either a community water system or a non-community water system.

Note: The definition of public water system as regulated by this chapter is broader and includes more water systems than those governed by the Public Service Commission under its definition of a public utility in ch. 196, Stats.

(40) “Recipient” means any local governmental unit or group of local governmental units that has been awarded or has received financial assistance under ss. 281.59 and 281.61, Stats.

(41) “Safe drinking water act” means the federal safe drinking water act, 42 USC 300f to 300j–26.

(42) “Safe drinking water loan program” has the meaning given in s. 281.61 (1) (d), Stats.

Note: Under s. 281.61 (1) (d), Stats., “safe drinking water loan program” means the program established under ss. 281.59 and 281.61, Stats., for the purpose of providing financial assistance to local governmental units for the construction or modification of water system projects.

(43) “Significant noncomplier” means a public water system that the U. S. environmental protection agency has reported to the department to be in significant noncompliance with any requirement of a primary drinking water regulation or variance under 42 USC 300g-1.

(44) “Subsidy” means the amounts provided by the safe drinking water loan program for projects receiving financial assistance under ss. 281.59 and 281.61, Stats., to reduce the interest rate of a loan made under the safe drinking water loan program from the market interest rate to a lesser rate.

(45) “Substantial completion” means the point in time when the project is operational or capable of being operated.

(46) “Total or fecal coliform positive” means that a bacteriological water test from the public water system was determined to be positive from a state approved drinking water certified laboratory.

(47) “Treatment technique” means one or more methods of treatment that are known to remove or inactivate giardia and viruses as determined in ss. NR 809.76 and 809.77.

(48) “Utility” means a public utility as defined in s. 196.01 (5), Stats.

(49) “Water rates” means a charge or system of charges levied on users of a water system for the user’s proportional share of the revenue requirement of a water system which consists of operation and maintenance expenses, depreciation, taxes and return on investment.

(50) “Water service” means connection of a publicly owned or privately owned water system to a residence, commercial establishment, institutional or industrial user whether located in the public right-of-way or on private property.

(51) “Water system” means all structures, conduits and appurtenances by means of which water is delivered to consumers except piping and fixtures inside buildings served and service pipes from buildings to street mains.

(52) “Women business enterprise” or “WBE” means an independent business concern which is at least 51% owned by a woman or women who also control and operate it.

Subchapter II – Financial assistance

NR 166.04 Types of financial assistance available. The department and DOA may, subject to applicable requirements of ss. 281.59 and 281.61, Stats., and ch. Adm 35, provide any of the following types of financial assistance to eligible applicants:

(1) Subject to the limits established in s. NR 166.07 (3), purchase or refinance the debt obligation of a local governmental unit if all of the following are met:

(a) The debt was incurred to finance the cost of constructing an eligible project located within the state.

(b) The project has not been substantially complete for more than 3 years.

(c) The department and DOA determine that the local governmental unit’s existing debt obligation for a completed or substantially completed project is not in the form of an affordable, long-term financing package.

(2) Guarantee, or purchase insurance for, municipal obligations for the construction of public water systems, if the guarantee or purchase would improve credit market access or reduce interest rates applicable to the obligation.

(3) Make loans below the market interest rate.

NR 166.05 Annual funding policy, project priority list and funding list. (1) FUNDING POLICY AND PROJECT PRIORITY LIST. Each year, the department shall prepare an annual funding policy for the fiscal year in conjunction with the project priority list under s. NR 166.25. The department shall hold a public hearing regarding the funding policy prepared under this subsection.

(2) FUNDING LIST. The department shall prepare an annual funding list in accordance with s. 281.61 (8), Stats., and sub. (1).

NR 166.06 Project eligibility. (1) ELIGIBLE PROJECTS. A local governmental unit may receive financial assistance under this chapter for a project that has any of the following purposes:

(a) Address safe drinking water act health standards that have been exceeded or to prevent future violations of health standards and regulations contained in ch. NR 809. This includes projects to maintain compliance with existing regulations for contaminants with acute health effects and regulations for contaminants with chronic health effects.

(b) Replace infrastructure if necessary to maintain compliance with or further the public health protection goals of the safe drinking water act. This includes projects with any of the following purposes:

1. Rehabilitate or develop sources, excluding reservoirs, dams, dam rehabilitation and water rights, to replace contaminated sources.

2. Install or upgrade treatment facilities if, in the department's opinion, the project would improve the quality of drinking water to comply with primary or secondary drinking water standards.

3. Install or upgrade storage facilities, including finished water reservoirs, to prevent microbiological contaminants from entering the public water system.

4. Install or replace transmission and distribution pipes to prevent contamination caused by leaks or breaks in the pipe, or improve water pressure to safe levels.

(c) Consolidate existing community water systems that have technical, financial or managerial difficulties. Projects for consolidating existing systems shall be limited in scope to the service area of the systems being consolidated.

(d) Purchase a portion of another public water system's capacity if it is the most cost-effective solution.

(e) Restructure a public water system that is in noncompliance with the safe drinking water act requirements or lacks the technical, managerial and financial capability to maintain the system if the assistance will ensure that the system will return to and maintain compliance with the safe drinking water act requirements.

(f) Create a new community water system or expand an existing community water system that, upon completion, will address existing public health problems with serious risks caused by unsafe drinking water provided by individual wells or surface water sources. Projects to address existing public health problems associated with individual wells or surface water sources shall be limited in scope to the specific geographic area affected by contamination. These would include projects where the MCL for microbiological, nitrate/nitrite or chronic contaminant is exceeded by 50% or more of the individual wells or surface water sources within the affected area.

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

(a) Construction or rehabilitation of dams.

(b) Water rights, except if the water rights are owned by a public water system that is being purchased through consolidation as part of a capacity development strategy.

(c) Reservoirs, except for finished water reservoirs and those reservoirs that are part of the treatment process and are located on the property where the treatment facility is located.

(d) Projects needed primarily for fire protection.

(e) Projects for systems that lack the adequate technical, managerial and financial capability, unless assistance will ensure compliance.

(f) Projects for systems determined to be significant noncompliers unless funding will ensure compliance with safe drinking water act requirements.

(g) Projects primarily intended to serve future growth.

(h) Projects for systems owned by state or federal agencies.

(i) Projects or portions of projects that are not reasonably necessary and appropriate to address a public health concern.

(j) Projects of local governmental units that do not intend to request financial assistance for construction, including requests to solely fund planning and design.

(k) Any project to which one of the following applies, unless the local governmental units served by the project execute an intermunicipal agreement that meets the requirements described in s. NR 166.10 (2) (h):

1. The applicant local governmental unit will obtain water from another local governmental unit's water facilities.

2. The applicant local governmental unit is providing water to another local governmental unit.

NR 166.07 Cost eligibility. (1) ELIGIBLE COSTS. (a) Allocable project-specific costs that are reasonable and necessary are eligible for financial assistance. Eligible costs include, but are not limited to, any of the following items and activities:

1. Costs of salaries, benefits and expendable material, incurred by the recipient for the project.

2. Planning work directly related to the water system, including gathering and disseminating information, education and citizen participation.

3. Preparing environmental assessment reports and evaluations.

4. Preparing engineering reports.

5. Preparing construction drawings, specifications, estimates and construction contract documents.

6. Landscaping.

7. Removing, relocating or replacing utilities, providing temporary utilities necessary for the project, installing new utility equipment or upgrading utilities, if the recipient is legally obligated to pay these costs.

8. Materials acquired, consumed or expended specifically for the project.

9. Costs of acquiring land, including purchase cost and administrative and legal expenses if all of the following apply:

a. The land is integral to the project, including land necessary to locate a treatment facility, transmission line, storage tank, pump station or well.

b. The land is acquired from a willing seller.

10. Laboratory equipment, chemicals and supplies related to initial setup, upgrade or expansion of the laboratory.

11. Developing, preparing and revising an operation and maintenance manual.

12. Developing water conservation plans, water rates and water system ordinances.
13. Project and water system identification signs.
14. Safety equipment.
15. Inspection fees related to construction.
16. Professional, consulting and engineering services.
17. Costs associated with the federal single audit portion of the audit report until the project is complete.
18. Interim financing costs in accordance with sub. (3).
19. Preparing the financial assistance application, including costs to conduct studies or investigations necessary to complete the application.
20. Issuance costs related to eligible project debts.
21. Relocating sewer pipes if necessary for construction, and replacing sewers of the same size or required minimum size if breakage from construction occurs.
22. Costs of acquiring easements and rights-of-way, including purchase cost and administrative and legal expenses, if acquisition is from a willing seller.
23. Start-up expenses for a water system incurred solely because of the project, including costs for any of the following:
 - a. Preparing a start-up curriculum and training materials.
 - b. Initial training of operating personnel on new or modified equipment, laboratory procedures, records management, and treatment processes.
 - c. Obtaining expert operational assistance for adjustments to the treatment process.
 - d. Implementing a maintenance management system.
 - e. Obtaining necessary computers, upgrades and software.
 - f. Attending off-site formal training programs, if necessary for the initial operation of the constructed water system.
24. Value engineering studies or analyses performed during the design phase.
25. Fees for permits obtained solely for construction of the project, including pit/trench dewatering permits, hydrostatic test water permits, construction site storm water permits, railroad crossing permits, building, electrical and plumbing permits and permits required under ch. 30, Stats.
26. Abandonment of an entire water system or portions of a water system if approved in the plans and specifications of an eligible project or by department staff, including activities such as demolition, re-landscaping, and removal and disposal of debris.
27. Access roads when included in an eligible project.
28. Costs associated with meeting requirements of the Americans with Disabilities Act.
29. Costs identified or incurred during the project for historical, architectural, archaeological and cultural resources work.
30. Buildings, offices and office equipment and furnishings used for purposes of operating a water system, such as administration and storage buildings, if included in the approved plans and specifications or otherwise

approved by department staff. The department may prorate costs for buildings, offices and office equipment and furnishings that are partially used for purposes not related to a water system.

31. Loan closing costs, including financial advisor fees related to loan closing and bond counsel or other legal fees related to the issuance of bonds.

32. Demolishing existing structures if the demolition is part of an eligible project and at least one of the following applies:

a. The existing structure is part of the water system.

b. The demolition is necessary for site preparation.

c. The demolition is included in abandonment procedures as approved in the project plans and specifications or by department staff.

33. Groundwater monitoring facilities or equipment if part of an eligible project.

34. Construction site restoration to original condition or upgraded to meet state and local requirements.

35. Property, liability and builders risk insurance, construction insurance and other insurance necessary during construction of the project.

36. Reconnecting water service lines due to the rehabilitation of a publicly-owned water system.

37. Mobile equipment, such as portable stand-by generators, portable emergency pumps, and grounds and maintenance equipment for mowing and snow removal, for the water system. The department may prorate costs for equipment that is used partially for purposes not related to the water system.

38. Fees for services provided to a local governmental unit by a state agency if the service is necessary solely because of the project.

39. Legal fees of an attorney that is not an on-staff municipal attorney if the fees are project-specific, including costs of legal reviews of architectural, engineering or construction contracts, user charge systems and water system ordinances, management plans, and intermunicipal agreements, and costs for legal work necessary for securing eligible permits.

40. Replacing, repairing or rehabilitating a water system if identified in the plans and specifications as cost-effective and necessary.

41. Restoring streets and rights-of-way, and repairing damage to items such as pavement, sidewalks and sewers necessary as a result of construction of the project.

42. Site preparation costs.

43. Spare parts, if included in the plans and specifications or otherwise approved by the department.

44. Tools necessary for construction and maintenance of the water system, when purchased as part of a project, including specialized tools for specific purposes, site and building maintenance tools such as wheelbarrows, lawn sprinklers, weed trimmers, hoses, shovels and rakes, and other basic tools such as trash cans, brooms, flashlights and multiple-use hand tools.

45. Machinery for manufacturing or repairing necessary water system tools or equipment.

46. Communication devices, such as walkie talkies, cellular phones, and pagers needed for operation of the water system.

47. Costs related to punch list items.

48. Other capital costs incurred solely for the purpose of the project.

(b) Project costs attributable to state and federal facilities are eligible for financial assistance.

(2) INELIGIBLE COSTS. Costs not directly associated with or not necessary for the construction or start-up of an eligible project are not eligible for financial assistance. Ineligible costs include, but are not limited to any of the following:

(a) Basin or areawide planning not related to the project.

(b) Bonus payments not legally required for completion of construction before a contractual completion date.

(c) Personal injury compensation or damages arising out of the project, whether determined by adjudication, arbitration, negotiation or otherwise.

(d) Fines and penalties due to violations of, or failure to comply with, federal, state or local laws.

(e) Costs outside the scope of the approved project.

(f) Laboratory fees for monitoring.

(g) Operation and maintenance expenses.

(h) Ordinary operating expenses of local government such as salaries and expenses of elected officials and on-staff attorneys, postage, utility bills and annual financial audits.

(i) Site acquisition expenses other than those integral to the approved project.

(j) Costs for which payment has been or will be received under another federal or state program.

(k) Costs of claims resulting from mismanagement or caused by the recipient's vicarious liability for the improper action of others, and costs resulting from litigation of contract disputes, liquidated damages, appeals and other related disputes.

(L) Costs incurred under a contract that creates a real or apparent conflict of interest. An apparent conflict of interest arises when an official or employee of a recipient participates in the selection, award or administration of a contract supported by the safe drinking water loan program and any of the following conditions exist:

1. The official or employee, the official's or employee's spouse, or the official's or employee's partner has an ownership interest in the firm selected for the contract.

2. Any person identified in subd. 1. receives any contract, gratuity or favor from the award of the contract.

(m) Project costs incurred after the project completion date.

(n) Water service downstream of the curb stop.

(o) The applicable portion of costs of a project that is in non-compliance with requirements of s. NR 166.12 (4) (a) 2. to 3 regarding MBE and WBE solicitation and good faith efforts.

(p) Hookup charges imposed by one local governmental unit on another for hooking into a water system.

(q) Interest or principal payments on interim financing paid by the local governmental unit out of its internal funds rather than capitalized funds.

Note: The ineligibility of interest or principal payments in par. (q) is based on U.S. treasury reimbursement regulations 26 CFR 1.150-2.

(r) Interest or late fees charged a local governmental unit for delayed payments to engineers, construction contractors, financial advisors and others providing services to the local governmental unit.

(s) Fees for operator certification training.

(t) Costs related to leasing land or buildings.

(u) Costs of establishing special purpose districts or commissions, such as sanitary districts, utility districts, public inland lake protection and rehabilitation districts, municipal water districts and joint commissions.

(v) Costs incurred due to negligence or error of a party contracted by the local governmental unit.

(w) All costs of a project if the local governmental unit will not request financial assistance for at least some construction costs.

(x) Any contingency amounts built into a bid contract for nonspecific costs.

(y) Land acquisition or easement costs incurred for land used for source water protection.

(3) LIMITATION ON ELIGIBILITY OF INTERIM FINANCING COSTS. (a) *Net interest expense.*

Interim financing interest expenses shall be offset with any interest earnings from the investment of the proceeds from the interim financing to determine the amount eligible for safe drinking water loan program funding.

(b) *Interim financing issuance costs.* The amount of interim financing issuance costs eligible for funding is limited to \$7,500 plus 0.5% of the total eligible face amount of the interim financing. If interim financing is rolled over or renewed, the face amount may not be counted multiple times in calculating the eligible face amount of interim financing for purposes of this limit.

(c) *Interim interest costs.* 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 construction through the earliest of the following:

1. The loan closing date of the safe drinking water loan program loan.
2. One year following substantial completion of the project.

(d) *Cost proration.* If the term of the interim financing exceeds the limit in par. (c), the interim financing costs shall be prorated using the length of the eligible term divided by the total time that the interim financing is outstanding. If the debt used for interim financing is not exclusively for the safe drinking water loan program project, costs shall be prorated according to the proportion of the total debt that is for the department approved project.

(e) *Maximum principal.* The principal amount of interim financing that can be refinanced with financial assistance cannot exceed the total amount of the interim financing that was spent on eligible project costs.

(4) REIMBURSEMENT OF PREVIOUSLY PAID PROJECT COSTS. The department may reimburse eligible project costs previously paid by the local governmental unit from its internal funds, if the reimbursement is in compliance with applicable U.S. treasury reimbursement regulations in 26 CFR 1.150–2.

NR 166.08 Notice of intent to apply. (1) A local governmental unit shall submit a notice of intent to apply for financial assistance on a form provided by the department. The local governmental unit shall submit the notice by December 31 prior to the state fiscal year from which the local governmental unit is requesting to receive financial assistance. In order for the notice of intent to apply to be valid, at least one of the following shall apply:

(a) The notice of intent to apply is postmarked by December 31 or has a documented shipping or mailing date of December 31 or earlier.

(b) The department receives the notice of intent to apply by December 31. Hand-delivery and faxing are acceptable submittal methods as long as the department receives the notice by the December 31 deadline.

Note: A Notice of Intent to Apply form is available from the Bureau of Community Financial Assistance, Department of Natural Resources, Box 7921, Madison, Wisconsin 53707-7921.

(2) The department may waive the requirement in sub. (1) upon the written request of a local governmental unit pursuant to s. 281.61 (3) (c), Stats.

NR 166.09 Engineering report. (1) Prior to submitting an application for financial assistance under this section, a local governmental unit shall submit an engineering report to the department for approval.

(2) An engineering report shall comply with the requirements of s. NR 811.13 (3).

(3) The department shall determine what qualifies as a project under s. NR 166.03 (36).

NR 166.10 Application. (1) PROCEDURES. Local governmental units shall apply by April 30 to be considered for funding in the following fiscal year. The application shall be on a form provided by the department.

Note: An application form is available from the Bureau of Community Financial Assistance, Department of Natural Resources, 101 S. Webster St., P.O. Box 7921, Madison, Wisconsin 53707-7921.

(2) CONTENTS OF APPLICATION. The applicant shall submit a complete application. The department shall accept an application as complete when all of the following items, if applicable, are received by the department either in the application form or separately:

(a) Evidence of an approved engineering report in accordance with s. NR 166.09.

(b) A copy of biddable construction plans and specifications that are approvable by the department.

(c) A completed financial assistance application form.

(d) Estimated or actual construction costs.

Note: The safe drinking water loan program cannot provide any financial assistance for a project if construction costs are not included as part of the project costs to be funded by the safe drinking water loan program.

(e) Copies of executed engineering contracts for planning and design, and a proposed or executed engineering contract for construction, if funds are requested for the activity.

(f) A resolution declaring intent to reimburse municipal accounts with financial assistance proceeds if required by U.S. treasury reimbursement regulations 26 CFR 1.150-2.

(g) A resolution authorizing a municipal official or an individual employed by the local governmental unit to act as the applicant's representative in connection with the application and with any additional information required for financial assistance.

(h) A proposed or an executed intermunicipal agreement, if the project will serve more than one local governmental unit. The intermunicipal agreement shall do all of the following:

1. Identify ownership for each individual portion of the water system, such as distribution systems, storage, wells and water treatment facilities.

2. Establish a term of agreement that is at least for the life of the loan.

3. Demonstrate the basis for generating revenue for operation and maintenance costs based on actual use, and state the parties that are responsible for paying these charges.

4. Indicate the method for generating revenue for capital costs and indicate who is responsible for payment.

5. Indicate that the owner of the regional facility shall supply water to the identified users of the system.

6. Require each entity to either obtain a rate order from the public service commission or adopt a user charge system.

(i) Financial information required by DOA to be used in determining the affordability of the proposed project, the financial capability of the local governmental unit, and the adequacy of the pledge of revenues to repay the obligation securing the proposed financial assistance.

(j) Proposed water rates, if the public water system is not regulated by the public service commission.

(k) Any existing contracts with users of the water system.

(L) Documentation applicable to U.S. internal revenue service tax information as requested in the application form.

(m) A copy of the debt instrument of any debt to be refinanced with financial assistance.

Note: All forms necessary for financial assistance under this chapter may be acquired at no charge from the Bureau of Community Financial Assistance, Department of Natural Resources, 101 S. Webster St., P.O. Box 7921, Madison, Wisconsin 53707-7921.

NR 166.11 Financial assistance requirements. Before executing a financial assistance agreement for any project, the department shall determine that all of the applicable requirements of s. NR 166.10 have been met and that all of the following have been satisfied:

(1) All of the following documentation, if applicable to the project, is submitted to the department:

(a) Certification for force account as required by s. NR 166.12 (5).

(b) Legal opinion or statement on land ownership, and acquisition of easements and rights-of-way necessary for the project.

(c) Items related to bids including all of the following:

1. The proposal of the successful bidder.

2. An engineer's evaluation of the bids, including bid tabulation, and a recommendation.

3. If a contract is awarded to other than the low responsive bidder, a legal opinion or statement that the award complies with applicable state statutes and administrative codes.

4. Information regarding solicitation and utilization of MBEs, WBEs and small businesses in rural areas.

5. Any addenda to plans and specifications.

6. Evidence of bid advertisement.

7. A copy of the bid bond.

8. Evidence of a resolution awarding the construction contract.

9. A copy of the executed construction contract.

10. A construction start date and estimated substantial and final completion dates.

(d) Request for disbursement and supporting invoices.

(e) Draft legal documents related to the authorization and issuance of bonds, if the department or DOA requests these documents.

(f) A copy of the title or deed for land purchased for the project, if the applicant is requesting financial assistance for land purchase costs.

(g) An executed intermunicipal agreement, if the project will serve more than one local governmental unit.

(h) A copy of the executed construction management contract with an architectural or engineering firm, if the applicant requests reimbursement of costs for this activity.

(i) A statement of the payoff amount, if the applicant is refinancing a debt with financial assistance.

(2) The department has approved the plans and specifications for the project.

(3) The project is entitled to priority in accordance with ss. NR 166.24 and 166.25.

(4) The applicant has the legal, institutional, managerial, technical and financial capability to ensure adequate construction, operation and maintenance of the water system throughout the applicant's jurisdiction.

(5) DOA is satisfied that the local governmental unit has the financial capacity as described in ch. Adm 35 to assure sufficient revenues to operate and maintain the project for its useful life and to pay the debt service on the obligations it issues for the project.

(6) The applicant has received, or has applied for, permits required by the department, including those under ch. 283, Stats.

(7) If a public water system is regulated by the public service commission, the applicant has filed the appropriate applications to increase water rates with the public service commission, if necessary for the project, and the corresponding order authorizing the water rates and rules has been issued by the public service commission.

(8) If a public water system is not regulated by the public service commission, the applicant has, to the satisfaction of the department and DOA, developed and adopted water rates and operating rules.

NR 166.12 Procurement. (1) APPLICABILITY. Procurement of professional services and construction contracts by recipients under this chapter shall be in accordance with state and local law. No contract may be awarded to any person or organization which does not operate in conformance with state and federal civil rights and equal opportunity laws.

(2) **PROFITS.** Contractors may earn only fair and reasonable profits 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 as well as acceptance of the terms of the financial assistance agreement.

(4) SOLICITATION OF SMALL BUSINESSES IN RURAL AREAS, MINORITY BUSINESS

ENTERPRISES AND WOMEN BUSINESS ENTERPRISES. (a) In order to provide small businesses in rural areas, MBEs and WBEs an opportunity to compete for work related to the project, recipients and their contractors shall do all of the following:

1. Use small businesses in rural areas, MBEs and WBEs to the extent feasible.

2. Make good faith efforts to provide small businesses in rural areas, MBEs and WBEs the maximum feasible opportunity to compete for contracts and subcontracts. Good faith efforts include, but are not limited to, all of the following:

a. Soliciting proposals or bids from qualified small businesses in rural areas, MBEs and WBEs when preparing to award contracts and subcontracts. A qualified small business in a rural area is a small business, under 15 USC 632 and 13 CFR 121, that is located in a non-metropolitan county with a 6, 7, 8 or 9 code in the rural-urban continuum code published by the U.S. department of agriculture. A qualified MBE or WBE is a business that is certified by a state agency or other agency recognized by the department as able to certify disadvantaged businesses. The department may also recognize a business as an MBE or a WBE through self-certification. Solicited businesses shall be provided a reasonable amount of time to respond to requests for bids.

b. Providing to small businesses in rural areas, MBEs and WBEs, upon request, a list of individuals and firms in possession of plans, specifications and other information relevant to the project.

c. Breaking down work into smaller tasks to maximize the opportunity of small businesses in rural areas, MBEs and WBEs to compete for contracts and subcontracts.

d. Establishing work schedules that enable small businesses in rural areas, MBEs and WBEs to compete for contracts and subcontracts.

e. Using the assistance of the department as appropriate.

f. If requested, explain to a small business in a rural area, an MBE or a WBE that submitted a bid but did not receive a contract, why the contract was not awarded to it.

3. Document the efforts made to provide small businesses in rural areas, MBEs and WBEs with the opportunity to compete for contracts and subcontracts, and provide the documentation to the department.

(b) Failure to comply with par. (a) 2. to 3. shall result in a sanction of up to 8% of the construction costs otherwise eligible for financial assistance, being determined ineligible for financial assistance. This paragraph does not apply to procurement of small businesses in rural areas or any recipient that awards contracts to MBEs or WBEs or both in an amount equal to or greater than the applicable fair share objectives. Fair share objectives means the percentage of participation in project costs by MBEs and WBEs that can be reasonably procured. Fair share objectives are determined by the department as negotiated with and agreed to by the U.S. environmental protection agency under 40 CFR part 35, subpart K, given the availability of qualified MBEs and WBEs in the state.

(c) This subsection applies to contracts for construction work, raw materials and supplies. It also applies to equipment when state procurement laws require the local governmental unit to solicit bids for the equipment purchase.

(5) **FORCE ACCOUNT WORK.** The department may approve financial assistance for force account work based on the applicant's certification that at least one of the following applies:

(a) The applicant's staff has the necessary competence required to accomplish the work and they can accomplish the work more economically using the force account method.

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

(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 that are not eligible or reasonable.

(b) Reasonableness reviews may include 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. The department may consider the scope of work, conditions unique to the project and any other factors affecting costs.

(c) Architectural or engineering services contracts shall indicate a maximum estimated cost for a defined scope of work that the contractor may not exceed without a negotiated contract amendment for additional costs.

(7) **CONSTRUCTION CONTRACTS AND SUBCONTRACTS.** (a) *Applicability.* This subsection applies to construction contracts or subcontracts awarded by recipients for any construction 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. (5). Each contract shall be a fixed or unit price contract, or a time and expense contract, unless the department gives advance written approval for the recipient to use some other acceptable type of contract. In any event, a cost-plus-a-percentage-of-cost contract may not be used.

(c) *Contract change orders.* 1. The recipient shall secure a fair and reasonable price for any contract change orders and submit all change orders to the department.

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

NR 166.13 Loan interest rates. Interest rates for eligible projects as determined in s. NR 166.06 shall be set in accordance with s. 281.61 (11), Stats., and all of the following:

(1) The loan interest rate shall be 33% of market interest rate if the local governmental unit meets all of the following criteria:

(a) The population of the local governmental unit is less than 10,000.

(b) The median household income of the local governmental unit is 80% or less of the median household income in this state. The department shall determine median household income as follows:

1. If the local governmental unit is a city, town, village, county or census designated place, the department shall obtain a median household income figure for the local governmental unit from the most recent federal census as published by the U.S. bureau of the census.

2. If the local governmental unit is a town sanitary district, public inland lake protection and rehabilitation district or municipal water district, the local governmental unit shall submit to the department, with its intent to

apply form, a map showing the boundaries of the local governmental unit. The department shall compare this map to a census block map and determine which census blocks contain any portion of the local governmental unit. The department shall then obtain from the U.S. bureau of the census a median household income figure for the local governmental unit through special tabulation of census block data collected in the most recent federal census for the appropriate census blocks.

3. The department shall adjust median household income figures from the most recent federal census to reflect the estimated change in annual income. The department shall apply to the census data the percent increase in per capita income since the most recent federal census in the county in which the local governmental unit is located. The department shall determine the percent change in per capita income using figures published by the U.S. department of commerce.

4. If a local governmental unit is located in more than one county, the department shall weight, according to population or number of households located within each county's portion of the local governmental unit, the percent change in per capita income used to adjust the median household income.

(2) The loan interest rate shall be 55% of market interest rate if the local governmental unit does not meet all of the criteria established in sub. (1).

(3) The department shall determine the interest rate based on the market rate in effect at the time the financial assistance agreement is prepared, prior to mailing it to the local governmental unit.

NR 166.14 Financial assistance agreement conditions. (1) Each financial assistance agreement shall bind the recipient to all of the following conditions:

- (a) Maintain system water rates and operating rules in accordance with s. NR 166.11 (7) or (8).
- (b) Comply with all pertinent requirements of federal, state and local environmental laws and regulations.
- (c) Comply with the requirements contained in the safe drinking water act amendments of 1996, section 1452.
- (d) Pay the costs of water system construction that are ineligible for financial assistance under this chapter.
- (e) Comply with all state and local laws regarding procurement and public contracts.
- (f) Provide department representatives access to the project, including construction activities, whenever the project is in preparation or in progress, and for a final inspection when the project is complete. The recipient shall include a provision in each of its contracts for the project that requires the recipient and its contractors or subcontractors to allow the department access to records of the contractor and subcontractor that are pertinent to the project for the purpose of making inspections, examinations, excerpts, copies and transcriptions. The recipient shall also allow DOA or its agent access to records for audits.
- (g) Expediently initiate and complete the project in accordance with the financial assistance agreement and application, including any project schedule approved by the department. Failure of the recipient to promptly initiate project work may be deemed a breach of contract.
- (h) Promptly notify the department of changes to the project.

(i) Promptly submit to the department a copy of any prime contract or modification of it and of revisions to plans and specifications.

(j) Begin repayment of the principal balance of the loan no later than 12 months after the substantial completion date of the project as specified in the financial assistance agreement, and make the final principal payment no later than 20 years after the date of the financial assistance agreement.

(k) Provide construction site erosion control in accordance with the design criteria, standards and specifications outlined in the Wisconsin Construction Site Best Management Practice Handbook, WDNR Pub. WR-222, November 1993 Revision. WDNR publication WR-222 is incorporated by reference for this chapter.

Note: Copies of the WDNR publication WR-222, Wisconsin Construction Site Best Management Practice Handbook, November 1993 Revision, are available for inspection in the offices of the Department of Natural Resources, Secretary of State, 30 West Mifflin Street, Madison, Wisconsin 53702, and Revisor of Statutes, 131 West Wilson Street, Suite 800, Madison, Wisconsin 53702. Copies of these documents may be obtained from the Department of Natural Resources, Bureau of Community Financial Assistance, 101 South Webster Street, Madison, Wisconsin 53702.

(L) Provide and maintain adequate construction inspection to ensure conformance with the approved plans and specifications.

(m) Notify the department of the substantial completion of the project.

(2) The financial assistance agreement is not effective until it is executed by all parties to the agreement.

NR 166.15 Financial management. The recipient shall do all of the following:

(1) Maintain project accounts in accordance with generally accepted accounting principles or other methods of accounting accepted by the department.

(2) Maintain a financial management system that meets the requirements, terms and conditions of the financial assistance agreement and ch. Adm 35.

(3) Comply with any U.S. treasury requirements for maintaining the tax-exempt status of the bonds or notes sold to the safe drinking water loan program.

NR 166.16 Financial assistance disbursements. (1) REQUESTS FOR DISBURSEMENT. The recipient shall submit to the department requests for disbursement for eligible costs in the format specified by the department.

(2) **ADJUSTMENT.** Before the final disbursement under the financial assistance agreement, the department may recommend to DOA that any request for disbursement be reviewed or audited.

(3) **WITHHOLDING OF FUNDS.** The department may withhold funds on the basis of any of the following:

(a) The department may direct DOA to withhold financial assistance disbursements where the department determines in writing that a recipient has failed to comply with project objectives, or the terms, conditions or reporting requirements of the financial assistance agreement.

(b) The department may withhold 5% of the principal amount of the loan until the requirements of project closeout are complete.

(4) FINAL DISBURSEMENT AND PROJECT CLOSEOUT. (a) The recipient shall submit the final request for disbursement after completion of project construction. The recipient shall include written certification that it has accepted the project from its contractors in the final disbursement request.

(b) All of the following project closeout procedures shall occur prior to the final disbursement:

1. The department shall complete a final inspection and shall signoff on the project.
2. The recipient shall obtain department approval of all change orders and amendments for which disbursement is requested.

3. The recipient shall certify its acceptance of the project on a form provided by the department.

Note: A project acceptance certification form is available from the Bureau of Community Financial Assistance, Department of Natural Resources, Box 7921, Madison WI 53707.

4. The recipient shall document final utilization of MBEs and WBEs on a form provided by the department.

Note: An MBE/WBE/SBRA utilization form is available from the Bureau of Community Financial Assistance, Department of Natural Resources, Box 7921, Madison WI 53707.

5. The department shall certify in writing to DOA the recipient's compliance with all applicable requirements of this chapter and the financial assistance agreement.

NR 166.17 Amendments to financial assistance agreement. (1) ALTERING THE PROJECT. The recipient shall request an amendment to a financial assistance agreement if it is proposing one of the following:

(a) Altering the type of water treatment.

(b) Substantially altering the engineering report, plans and specifications, or any major part of the project.

(2) CHANGES CONSISTENT WITH OBJECTIVES. The department may determine that execution of an amendment is not required if the changes in the project are consistent with the objectives of the project, within the scope of the financial assistance agreement, and do not require review under ch. NR 809 or 811.

(3) ADDITIONAL FUNDING. (a) *General.* The department may provide additional funding in the form of a loan for eligible project costs incurred beyond the amount specified in the original financial assistance agreement. The department may not process a request to provide additional funding for a project until the time the total remaining costs to complete the project can be reasonably determined.

(b) *Applicability.* Additional funding for a project is subject to the availability of funds and present value subsidy as determined in s. 281.59, Stats., and in accordance with the following:

1. 'Sufficient PV, original biennium.' If there are sufficient funds and present value subsidy available from the biennium in which the original financial assistance agreement was funded, a local governmental unit may receive funding for the additional project costs from that biennium's present value subsidy. The loan interest rate and loan maturity date in the original financial assistance agreement shall be maintained in amending the original financial assistance agreement.

Note: Section 281.59 (3e) (c), Stats., allows present value subsidy to be allocated only until the December 30th following the end of the biennium.

2. 'Compete for PV, new biennium.' If a local governmental unit is not able to obtain safe drinking water loan program assistance for its additional project costs through the method described in subd. 1., the local governmental unit may compete through the application process in a new biennium to receive safe drinking water loan program funds and present value subsidy to finance the additional costs. If a local governmental unit is successful in obtaining funds and present value subsidy for the additional costs, and the interest rate and loan maturity date for the additional funding are the same as in the original financial assistance agreement, the funds may be provided by amending the original financial assistance agreement. If the loan interest rate or loan maturity date for the additional funding is different than those established in the original financial assistance agreement, the funds shall be provided in a new financial assistance agreement in the form of a loan for up to 20 years at the current interest rate. The interest rate shall be at the same percentage of market interest rate as was determined appropriate for the project in accordance with s. NR 166.14 for the original financial assistance agreement. The application for additional costs shall be ranked on the safe drinking water loan program funding list based on the priority score the project received in the fiscal year in which the original financial assistance agreement was funded.

(c) *Requesting funds.* A local governmental unit may request funding for additional project costs using one of the following options:

1. 'Request by letter.' If par. (b) 1. is applicable, the local governmental unit shall submit a letter to the department that justifies the need for the additional funding and details the additional eligible costs. A revised budget sheet shall be attached to the letter, indicating in one column the requested additional costs and in a second column the total project costs. All costs in the revised budget sheet shall be assigned to the appropriate budget line items from which disbursement will be requested.

2. 'Request by application.' If par. (b) 2. is applicable, the local governmental unit shall submit a safe drinking water loan program notice of intent to apply as described in s. NR 166.08, and a financial assistance application as described in s. NR 166.10, requesting a loan for additional project costs. The department may waive specific application requirements for the amendment request if submittals made with the initial application are still acceptable to the department. The application may be submitted through the second fiscal year of the biennium following the biennium that contains the substantial completion date of the project written in the original financial assistance agreement. The application shall be postmarked by the April 30 prior to the fiscal year from which the funds for the additional costs are requested.

(4) EFFECTIVE DATE. A financial assistance agreement amendment is not effective until executed by all parties to the agreement.

NR 166.18 Disputes. (1) DECISION OF THE DEPARTMENT. 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.

(2) REVIEW OF THE DECISION. A final decision of the department shall be reviewed pursuant to subch. III of ch. 227, Stats., and ch. NR 2.

NR 166.19 Records and records retention. (1) REQUIREMENTS. The recipient shall maintain books, documents, papers, records and accounting procedures in accordance with generally accepted government accounting standards, the financial assistance agreement and ch. Adm 35 and retain them in accordance with subch. II of ch. 19, Stats. The recipient shall require contractors, including contractors for professional services, to maintain books, documents, papers and records related to the project which are necessary for the recipients' compliance with this section.

(2) INSPECTION. The department or its agents may, during normal business hours, inspect and copy the recipient's records and the records of its contractors.

(3) RECORD RETENTION. The recipient and contractors of recipients shall preserve and make their records available to the department for a minimum of 3 years after the closeout date.

(a) 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 after the date of any resulting final termination settlement.

(b) 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 after the closeout date, whichever is later.

(4) FEDERAL SINGLE AUDIT. Recipients of financial assistance provided directly from the federal capitalization grant shall comply with the federal single audit act, 31 USC 7501 to 7507, OMB circular A-133 and ch. Adm 35.

NR 166.20 Breach of contract. (1) Upon breach of contract by the recipient, the department and DOA may initiate 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.

Note: DOA may, under s. 281.59 (11) (b), Stats., seek recovery of some or all financial assistance payments by deducting those amounts from any state payments due to a municipality, or by adding a special charge to the amount of taxes apportioned to and levied upon the county under s. 70.60, Stats.

NR 166.21 Noncompliance. Upon failure of the recipient to comply with ss. 281.59 and 281.61, 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 281.61, Stats.
- (3) Seek any other appropriate remedy, relief or penalty.

NR 166.22 Variances. (1) GENERAL. The department may, on its own initiative or pursuant to a written request from an applicant, approve a variance from a requirement of this chapter when it determines that special circumstances make a variance in the best interest of the state. Any variance approved shall be consistent with the objectives of ss. 281.59 and 281.61, Stats.

(2) **APPLICABILITY.** The department may only approve a variance from any non–statutory requirement of this chapter.

(3) **REQUEST FOR VARIANCE.** 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. A request for a variance shall be submitted in writing to the department, as soon as it is determined a variance is needed. Each request for a variance shall contain all of the following:

- (a) The name of the applicant and the project number.
- (b) The provision of this chapter from which a variance is sought and a statement explaining why the variance is necessary.
- (c) 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.
- (d) An adequate description of the variance desired, and the facts which the recipient believes warrant the department’s approving the variance.

Subchapter III – Priority Scoring and Ranking System

NR 166.23 Priority scoring criteria. The purpose of the priority scoring criteria is to establish a list of eligible projects to be funded in a manner that is in accordance with the federal requirements of the safe drinking water act, 42 USC 300j–12. Consistent with the act, all of the following criteria shall apply:

Note: The act requires, to the maximum extent practicable, that priority ranking be given to projects that: 1) address the most serious risk to human health; 2) are necessary to ensure compliance with the requirements of the safe drinking water act (including requirements for filtration); and 3) assist systems most in need on a per household basis according to state affordability criteria. The department will give first priority to acute public health risk, particularly those related to microbiological organisms and second priority given to situations that pose chronic and longer term health risks to consumers, such as organic chemical contamination. The scoring criteria also considers issues that are related to infrastructure upgrading or replacement to address those projects (or portions of a project) which are eligible for funding but not included in the first 2 sections.

(1) RISK TO HUMAN HEALTH. The following criteria are divided into acute and chronic risk categories. A project shall be assigned points based on criteria in a single category in par. (a) or a single category in par. (b), but not from both. If the severity of the problem is not reflected in any of the categories in par. (a) or (b), the department shall determine the number of points the project is assigned.

(a) Project addresses a maximum contaminant level violation, action level exceedance or treatment technique violation, or an acute or chronic health hazard.

1. Acute contaminants. The acute contaminants are divided into 3 groups. Points are awarded in the following manner for a project that eliminates a problem that poses an acute health hazard from one of these groups:

a. Five hundred points shall be awarded to a project that proposes to eliminate a microbiological MCL violation that has occurred or will address a confirmed waterborne disease outbreak as defined in s. NR 809.04 (79), or a demonstrated microbiological contamination problem for a newly created community water system or expanding an existing community water system in accordance with s. NR 166.06 (1) (f).

b. Four hundred points shall be awarded to a project that eliminates violations of filtration requirements in s. NR 809.76 and disinfection requirements in s. NR 809.77, or confirmed microbial, including giardia and cryptosporidium, contamination found in finished water.

c. Three hundred points shall be awarded to a project that eliminates a continuing nitrate or nitrite MCL exceedance or demonstrated nitrate or nitrite problem for a newly created community water system or expanding an existing community water system in accordance with s. NR 166.06 (1) (f).

2. Chronic contaminants. The chronic contaminants are divided into the 5 subgroups of: inorganics, volatile organic chemicals, synthetic organic chemicals, radionuclides and total trihalomethane compounds. For a newly created community water system or expanding an existing community water system in this subdivision, points shall be assigned by determining the 90th percentile sample for the project area. All individual wells or surface water sources in the project area shall be included in the determination. A single water sample from each individual well or surface water source shall be used for the determination. All water samples submitted shall be collected within the same 6-month period and shall be representative of current conditions. If there is no sample for an individual well or surface water source, a value of zero or no detect shall be used in the determination. The maximum point total that shall be awarded in this subdivision is 250 points. Points shall be awarded in the following manner for a project that eliminates a chronic health hazard from these groups of chemicals:

a. For each subgroup, other than the trihalomethane subgroup, only the MCL exceedance of greatest percentage magnitude is to be used for the point calculation, even though multiple contaminant MCL exceedances might be occurring. For exceedances in multiple subgroups, see subd. 2. c. The MCL exceedance shall be divided by the current MCL or AL and then multiplied by 50 to obtain a subgroup point total.

b. For the THM subgroup, the total sum THM exceedance as defined in s. NR 809.23 is used for the calculation similar to subd. 2. a.

c. For MCL exceedances in more than one subgroup, the highest point level of the subgroups shall be used as the primary number to be divided by the current MCL or AL and then multiplied by 50. The other subgroup exceedances will be divided by their respective MCL or AL and then multiplied by 10. The total point value shall be the sum of points in each subgroup.

(b) Project prevents an anticipated MCL, AL or treatment technique violation or critical health hazard. Points shall be awarded to a single group under either subd. 1. or 2. to a project that proposes to eliminate an anticipated acute or chronic health hazard.

1. Acute contaminants. The acute contaminants are divided into 3 groups. Points shall be awarded from one of the following groups for a project that eliminates an anticipated acute health hazard.

a. Three hundred points shall be awarded to a project that eliminates an anticipated microbiological MCL violation, where no actual violation has yet occurred.

b. Two hundred points shall be awarded to a project that proposes to eliminate anticipated violations of filtration requirements, or turbidity, in s. NR 809.76, or long term 2 enhanced surface water treatment rule requirements.

c. One hundred points shall be awarded to a project that proposes to eliminate an anticipated nitrate or nitrite violation.

2. Chronic contaminants. The chronic contaminants are divided into the 5 subgroups of: inorganics, volatile organic chemicals, synthetic organic chemicals, radionuclides and total trihalomethane compounds. Points shall be awarded in the following manner for a project that eliminates an anticipated chronic health hazard from these groups of chemicals:

a. Twenty points shall be awarded to a project that proposes to eliminate an anticipated exceedance of an inorganic, volatile organic chemical, synthetic organic chemical, radionuclide or total trihalomethane chemical contaminant.

b. Five points shall be awarded for each additional subgroup addressed by a project that eliminates an anticipated exceedance.

(2) FINANCIAL NEED. The department shall grant additional points to a project if the project is associated with a system considered most in need of financial assistance on a per household basis. The department shall determine the appropriate number of points by evaluating table A and table B for the public water system in question and totaling the points allocated in the point columns. A public water system shall have a population less than 10,000 and a median household income less than or equal to 80% of the state's median household income to acquire any points in this section.

TABLE A	
Population	Points
0–499	30
500–999	25
1000–1999	20
2000–2999	15
3000–4999	10
5000–9999	5

TABLE B	
Median Household Income	Points
75%–80%	5
70%–74%	10
65%–69%	15
60%–64%	20
<60%	25

(3) SECONDARY CONTAMINANT VIOLATION OR SYSTEM COMPLIANCE WITH CH. NR 811.

No points will be awarded for specific areas already receiving points under sub. (1). A project shall be assigned points from the following categories:

(a) Ten points shall be awarded if the project will reduce a secondary drinking water contaminant, as listed in s. NR 809.60 (2), to a level below the aesthetic standard.

(b) Ten points shall be awarded if the project addresses areas of inadequate distribution system pressure, as defined in s. NR 811.63 (1).

(c) Ten points shall be awarded if the project will address a documented storage deficiency, excluding fire demand, within an existing public water supply system.

(d) Ten points shall be awarded if the project addresses a source or capacity deficiency where there is a demonstrated need within the existing public water supply system.

(e) Four points shall be awarded if the project includes replacement of lead service lines.

(f) Four points shall be awarded if the project includes long-term zebra mussel control.

(g) Four points shall be awarded if the project includes installation of an auxiliary power source to a well, pump station or water treatment plant.

(h) Four points shall be awarded if the project includes replacement of asbestos-cement pipe material.

(i) Four points shall be awarded if the project includes upgrading of existing supervisory control and data acquisition system.

(j) Four points shall be awarded if the project includes installation or replacement of fluoridation equipment.

(k) Four points shall be awarded if the project includes the upgrading of existing facilities for capturing, holding or disposing of liquid or solid waste generated from the water system operation.

(L) Four points shall be awarded if the project includes the replacement of a water main or mains less than 6 inches in diameter.

(m) Four points shall be awarded if the project includes the looping of water mains or the elimination of dead end water mains.

(n) Four points shall be awarded if the project includes treatment that reduces the potential for formation of disinfection by-products, including trihalomethanes.

(o) Four points shall be awarded if the project as a secondary benefit will increase the fire protection of the community.

Note: If the primary purpose of the project is to improve the fire protection of the system, the project is not eligible for funding.

(p) Four points shall be awarded if the project will include the installation of a water booster station or pressure reducing station to improve the quality of service to the customers by supplying water at a more acceptable level.

(q) Four points shall be awarded if the project includes the installation of an additional river, railroad or highway crossing to a major system divide that results in better system reliability.

(r) Four points shall be awarded if the project includes the replacement of one or more pumps or pump motors that are no longer functional, or have reached the end of their useful life.

(s) Four points shall be awarded if the project improves the intake structure for a surface water plant.

(t) Four points shall be awarded if the public water system currently has a documented water loss in excess of 30% and the project reduces the water loss within the system.

(u) Four points shall be awarded if the project includes removal of water mains that pass through sanitary sewer manholes.

(4) SYSTEM CAPACITY POINTS. Points shall be awarded to a project based on the technical, financial and managerial capacity of the existing public water system or upon completion of construction of a newly created community water system in the following manner:

(a) Five points shall be awarded if the applicant has a written emergency action plan for the public water system.

(b) Five points shall be awarded if the applicant has implemented a private well abandonment ordinance for the public water system.

(c) Five points shall be awarded if the applicant has a wellhead protection plan and ordinance for all the wells in the public water system.

(d) Five points shall be awarded if the applicant has a certified operator and provisions for a certified back-up operator.

(e) Five points shall be awarded if the applicant has a cross connection control program for the public water system.

(f) Five points shall be awarded if the applicant has a dedicated replacement fund for the water system.

(4m) CONSOLIDATED SYSTEMS CAPACITY POINTS. For consolidating existing systems that are eligible in accordance with s. NR 166.06 (1) (c), 30 points shall be awarded for each existing water system that is consolidated which is having technical, financial or managerial difficulties. The maximum points that shall be awarded for this paragraph is 90 points.

(5) PROJECT PRIORITY SCORE. The total points from subs. (1) to (4m) shall be added together to determine the final project priority score.

NR 166.24 Procedure for determining and updating project priority scores. (1) An applicant intending to apply for safe drinking water loan program financial assistance under this chapter shall submit to the department a project priority evaluation and ranking form by December 31, if the funding will be requested the following April 30 or after.

Note: All forms necessary for financial assistance under this chapter may be acquired at no charge from the Department of Natural Resources, Bureau of Community Financial Assistance, 101 S. Webster St., P.O. Box 7921, Madison, Wisconsin 53707-7921.

(2) The department may not assign a priority score greater than 0 to a project until the applicant has submitted a completed priority evaluation and ranking form to the department for evaluation.

(3) The department shall determine a project priority score based on information provided to the department that is no more than 5 years old as of the date the applicant signed its most recent notice of intent to apply.

(4) Evaluation of the priority evaluation and ranking form may include identifying and scoring multiple projects to address multiple health or system concerns described in the scope by the local governmental unit on a single priority evaluation and ranking form.

(5) Upon completion of the evaluation and determination of the priority score, the department shall notify the applicant in writing of the determination.

(6) The department may review and, if necessary under the requirements of this chapter, recalculate priority scores to assure accuracy and age of the information provided, and the necessity of portions of the project to address a single public health or system concern. The department shall notify the applicant in writing if it revises the project priority score previously assigned to a project. The department shall also notify the applicant if during the review the department identifies and scores multiple projects within the scope described by the applicant on a single priority evaluation and ranking form.

(7) If the applicant objects to the department's determination of the priority score in sub. (5) or (6), the applicant shall notify the department in writing within 30 days of the date of the department's notification in sub. (5) or (6). The notice shall state the specifics of the objection. The applicant shall submit any information which

supports the objection and the priority score which the applicant believes should be assigned to the project based on this information.

(8) Upon receipt of a notice under sub. (5) or (6), the department shall reevaluate its determination of the priority score and shall notify the applicant. If the department denies the requested priority score, it shall state the reasons in writing.

(9) Notwithstanding sub. (5) or (6), an applicant may request a reevaluation of its priority score within 45 days after the application for financial assistance deadline. The department shall notify the applicant of the results of the reevaluation in the same manner as required in sub. (5) and (6).

Note: All forms necessary for financial assistance under this chapter may be acquired at no charge from the Department of Natural Resources, Bureau of Community Financial Assistance, 101 S. Webster St., P.O. Box 7921, Madison, Wisconsin 53707-7921.

NR 166.25 Project ranking system. (1) The department shall maintain a project priority list which shall be based on the intent to apply forms submitted and shall rank the projects for which priority scores have been determined. The projects shall be ranked in the order of descending priority score, with the project with the highest priority score ranked first. A funding list shall be developed consisting of all projects for which applications have been submitted under s. NR 166.05 (2).

(2) If 2 or more projects have the same priority score, the project serving the larger population shall have the higher priority.

(3) Projects shall be funded in the order they appear on the funding list, except that projects may be given priority or removed from the list, upon written notice by the department, if any of the following situations occur:

(a) Ranking the projects in descending order does not result in at least 15% of the funds allocated to small systems serving less than 10,000 persons. In this case, systems serving less than 10,000 persons shall be given priority until the 15% funding allocation requirement is met.

(b) Requirements of s. NR 166.10 are not met.

(c) A project is canceled or the funding request is withdrawn by an applicant.

(d) The department determines that the applicant is unable to proceed with construction of the project in the fiscal year in which funds are requested.

(e) The project fails to meet the engineering review requirements or does not have department approval of the project.

(f) The applicant has reached the 25% biennial present value subsidy cap, as established under ss. 281.61 (8) (a) 2. and 281.59 (3s) (b), Stats.

Note: In any biennium, no local governmental unit may receive more than 25% of the safe drinking water loan program present value subsidy amount approved by the legislature for that biennium.

(g) DOA is not satisfied that the local governmental unit has the financial capacity as described in ch. Adm 35 to assure sufficient revenues to operate and maintain the project for its useful life and to pay the debt service on the obligations it issues for the project.

(h) Federal or state refinancing or reimbursement restrictions prevent funding.

SECTION 3. EFFECTIVE DATE. The rule shall take effect the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22(2)(intro.), Stats.

SECTION 4. BOARD ADOPTION. The rule was approved and adopted by the State of Wisconsin Natural Resources Board on _____.

Dated at Madison, Wisconsin _____

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By _____
Scott Hassett, Secretary

(SEAL)