Chapter NR 128

POINT SOURCE POLLUTION ABATEMENT GRANT PROGRAM

Subchapter I — Wisconsin Fund

NR 128.01 Purpose. The purpose of this subchapter is to establish rules under s. 281.57, Stats., for the implementation and administration of a financial assistance program for the planning, design, engineering, and construction of point source pollution abatement facilities.

History: Cr. Register, December, 1978, No. 276, eff. 1–1–79; am. Register, April, 1982, No. 316, eff. 5–1–82; correction made under s. 13.93 (2m) (b) 7., Stats., Register, May, 2000, No. 533.

NR 128.02 Applicability and cross referencing. This subchapter shall apply to all applications for funding for planning, design and construction of point source pollution abatement facilities made pursuant to s. 281.57, Stats. Compliance with this subchapter and all other applicable requirements identified herein is necessary for satisfying qualification requirements prior to grant assistance.

History: Cr. Register, December, 1978, No. 276, eff. 1–1–79; am. Register, April, 1982, No. 316, eff. 5–1–82; correction made under s. 13.93 (2m) (b) 7., Stats., Register, May, 2000, No. 533.

NR 128.03 Definitions. For the purposes of this subchapter:

(1) "Alternative wastewater treatment works" means a wastewater conveyance and/or treatment system other than a conventional system. This includes small diameter pressure and vacuum sewers and small diameter gravity sewers carrying partially or fully treated wastewater.

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

(3) "Approved areawide waste treatment management plan" means a plan or elements thereof developed pursuant to Section 208 of the Federal Water Pollution Control Act Amendments of 1972 as amended by the Clean Water Act Amendments of 1977 (33 USC 1251 et. seq.), and approved by the state of Wisconsin.

(4) "Combined sewer" means a sewer intended to serve as a sanitary sewer and a storm sewer, or as an industrial sewer and a storm sewer.

(5) "Construction" means any one or more of the following activities: Preliminary planning to determine the feasibility of treatment works; engineering, architectural, legal, fiscal, or economic investigations or studies; surveys, designs, plans, working drawings, specifications, procedures or other necessary actions; erection, building, acquisition, alteration, remodeling, improvement, or extension of treatment works; or the inspection or supervision of any of the foregoing items. The phrase"initiation of construction," means:

(a) The approval of the plan of study for step 1 activities;

(b) The award of a step 2 grant for step 2 activities;

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

(5m) "Construction contract claim" means a written demand or assertion by one of the contracting parties to a construction contract that has not been readily resolved by the contracting parties as evidenced by a record of unsuccessful negotiations. (Readily negotiated and agreed upon change orders or contract modifications are not part of this definition.)

(6) "Conventional system" means a collection and treatment system consisting of minimum size gravity collector sewers normally with manholes, force mains, pumping and lift stations, and interceptors leading to a central treatment plant.

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

(7m) "Enforceable requirements of the act" means those conditions or limitations of s. 283.31, Stats., permits which, if violated, could result in the initiation of a civil or criminal action under s. 283.89, Stats., or those provisions of s. 281.19 (5), Stats., which, if violated, could result in department orders under s.

281.19 (7), Stats. If a permit has not been issued, the term shall include any requirement which, in the department's judgment, would be included in the permit when issued. Where no permit applies, the term shall include any requirement which the department determines is necessary for the best practicable waste treatment technology to meet applicable criteria.

(8) "Excessive infiltration/inflow" means the quantities of infiltration/inflow which can be economically eliminated from a sewer system by rehabilitation, as determined in a cost−effectiveness analysis that compares the costs for correcting the infiltration/inflow conditions to the total costs for transportation and treatment of the infiltration/inflow, subject to the provisions in s. NR 128.20.

(8m) "Force account work" means the use of the grantee's own employees or equipment for construction, construction−related activities (including architectural or engineering services), or repair or improvement to a facility.

(9) "Individual systems" means privately owned alternative wastewater treatment works (including dual waterless/graywater systems) serving one or more principal residences or small commercial establishments which are neither connected into nor a part of any conventional treatment works. In general, these are on−site systems with localized treatment and disposal of wastewater with minimal or no conveyance of untreated wastewater. Limited conveyance of treated or partially treated effluents to further treatment or disposal sites can be a function of individual systems where cost−effective.

(10) "Industrial user" means:

(a) Any nongovernmental, nonresidential user of a publicly owned treatment works which discharges more than the equivalent of 25,000 gallons per day (gpd) of sanitary wastes and which is identified in the Standard Industrial Classification Manual, 1972, United States Office of Management and Budget, as amended and supplemented as of October 1, 1978 under one of the following divisions:

Division A. Agriculture, Forestry, and Fishing

Division B. Mining

Division D. Manufacturing

Division E. Transportation, Communications, Electric, Gas, and Sanitary Services

Division I. Services.

1. In determining the amount of a user's discharge, domestic wastes or discharges from sanitary conveniences may be excluded.

2. After applying the sanitary waste exclusion in subd. 1., dischargers in the above divisions that have a volume exceeding 25,000 gpd or the weight of biochemical oxygen demand (BOD) or suspended solids (SS) equivalent to that weight found in 25,000 gpd of sanitary waste are considered industrial users. Sanitary wastes, for purposes of this calculation of equivalency, are the wastes discharged from residential users. The grantee, with the department's approval, shall define the strength of the residential waste discharges in terms of parameters including biological oxygen demand (BOD) and suspended solids (SS) per volume of flow as a minimum. Dischargers with a volume exceeding 25,000 gpd or the weight of BOD or SS equivalent to that weight found in 25,000 gpd of sanitary waste are considered as industrial users.

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

(c) All commercial users of an individual system constructed with grant assistance under s. NR 128.08.

(11) "Infiltration" means the water other than wastewater that enters a sewerage system (including sewer service connections) from the ground through such sources as defective pipes, pipe joints, connections, or manholes.

(12) "Inflow" means water other than wastewater that enters a sewerage system (including sewer service connections) from sources such as, roof leaders, cellar drains, yard drains, and area drains, foundation drains, drains from springs and swampy areas, manhole covers, cross connections between storm sewers and sanitary sewers, catch basins, cooling towers, storm waters, surface runoff, street wash waters, or drainage.

(13) "Interceptor sewer" means a sewer whose primary purpose is to transport wastewaters from collector sewers to a treatment facility.

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

(15) "Principal residence" means the voting residence, the habitation of the family or household occupying the space for at least 51% of the time annually. Second homes, vacation or recreation residences are not included in this definition. Commercial establishments with wastewater flow equal to or smaller than one user equivalent (generally 300 gallons per day dry weather flows) are included.

(16) "Project" means step 1, step 2, or step 3 activities under this subchapter.

(16m) "Project performance standards" means the planned and designed performance and operations requirements applicable to a project including the enforceable requirements of the act, including the quantity of excessive infiltration and inflow proposed to be eliminated.

(17) "Reimbursement" means a commitment by the department, subject to legislative appropriation, to reimburse municipalities for project costs incurred at local expense consistent with the allocation procedures outlined in s. NR 128.09.

(18) "Replacement" means the expenditures for obtaining and installing equipment, accessories, or appurtenances which are necessary during the useful life of the treatment works to maintain the capacity and performance for which such works were designed and constructed. The term "operation and maintenance" includes replacement.

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

(20) "Sewage collection system" means the common sanitary sewers within a publicly−owned treatment system which are primarily installed to receive wastewaters directly from facilities which convey wastewater from individual structures or from private property, and which include service connection "Y" fittings designed for connection with those facilities. The facilities which convey wastewater from individual structures, from private property to the public sanitary sewer, or its equivalent, are specifically excluded from the definition of "sewage collection system"; except that pumping units and pressurized lines for individual structures or groups of structures may be included as part of a "sewage collection system" when such units are cost effective and are owned and maintained by the grantee.

(21) "Sewage treatment facilities" means treatment works defined in sub. (24) exclusive of interceptor sewers, and sewage collection systems.

(22) "Small commercial establishments" mean private establishments such as restaurant, hotels, stores, filling stations and recreational facilities, with dry weather wastewater flows less than 25,000 gallons per day. Private, non−profit entities such as

churches, schools, hospitals, charitable organizations, are considered small commercial establishments. Commercial establishments with wastewater flow equal to or smaller than one user equivalent (generally 300 gallons per day of dry weather flow) shall be treated as residences.

(23) "Storm sewer" means a sewer intended to carry only storm waters, surface runoff, street wash waters, and drainage.

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

(25) "User charge" means a charge levied on users of a treatment works for the user's proportional share of the cost of operation and maintenance (including replacement as defined in sub. (18)) of such works.

(26) "Advance commitment for reimbursement of engineering design costs" or "advance commitment" means a written prior approval to a municipality to initiate a specific step 2 project and incur engineering design costs to be reimbursed subject to the conditions of s. NR 128.09 (4).

History: Cr. Register, December, 1978, No. 276, eff. 1−1−79; emerg. cr. (26), eff. 9−29−81; cr. (26), Register, February, 1982, No. 314, eff. 3−1−82; am. (intro.) and (16), Register, April, 1982, No. 316, eff. 5−1−82; cr. (5m), (7m), (8m) and (16m), Register, March, 1986, No. 363, eff. 4−1−86; correction in (7m) made under s. 13.93 (2m) (b) 7., Stats., Register, May, 2000, No. 533.

NR 128.05 Eligibility for a state grant. (1) ELIGIBLE PARTICIPANTS. Municipalities, as defined by s. NR 128.03 (14) are eligible to participate in the financial assistance program for the construction of point source pollution abatement facilities established by this subchapter.

(2) ELIGIBLE PROJECTS. Projects for the construction of publicly owned treatment works and privately owned treatment works meeting the requirements of s. NR 128.08 are eligible for participation in the financial assistance program established by this subchapter if the project is necessary to correct noncompliance with the enforceable requirements of the act. Grant assistance may be awarded by the department for the following types of projects.

(a) *Step 1 projects.* Facilities planning and/or related elements required to apply for step 2 grant assistance are eligible provided that federal sources of funding for step 1 activities are not available.

(b) *Step 2 projects.* Preparation of construction plans and specifications are eligible provided that federal sources of funding for step 2 activities are not available.

(c) *Step 3 projects.* Building and erection of treatment works are eligible.

(3) INELIGIBLE PROJECTS. (a) Projects not in conformance with approved areawide waste treatment management plan are not eligible.

(b) Projects not satisfactorily completing all steps of planning and design are not eligible.

(4) ELIGIBLE COSTS. The grantee's allocable project costs which are reasonable and necessary, are eligible. These costs may include, but are not limited to:

(a) The cost of step 3 construction of treatment works designed to transport and/or treat the fundable capacity as determined in s. NR 128.06 (1) and (2). This cost shall be determined in accordance with s. NR 128.07;

(b) Costs of salaries, benefits, and expendable material the grantee incurs for the project except as provided in sub. (5) (g);

(c) Costs under construction contracts;

(d) Professional and consultant services;

(e) Facilities planning directly related to the treatment works;

(f) Sewer system evaluation and rehabilitation;

(g) Project feasibility and engineering reports;

(h) Costs of complying with the Wisconsin Environmental Policy Act, including costs of public notices and hearings;

(i) Preparation of construction drawings, specifications, estimates, and construction contract documents;

(j) Landscaping;

(k) Removal, relocation, replacement or temporary provision of utilities, for which the grantee is legally obligated to pay;

(L) Materials acquired, consumed, or expended specifically for the project;

(m) A reasonable inventory of laboratory chemicals and supplies necessary to initiate plant operation;

(n) Development and preparation of an operation and maintenance manual;

(o) Reasonable costs in the development of water conservation plans and user charge system plans;

(p) Project identification signs;

(q) Start−up services for new treatment works, including the training of operating personnel and the preparation of curriculum and training material for operating personnel on the new equipment and/or processes funded under this program. Funding of routine, entry level or update operator training to meet state certification requirements under ch. NR 114 is the responsibility of the grantee;

(r) A plan of operation; and

(s) Development of a municipal pretreatment program and purchase of monitoring equipment and construction of facilities to be used by the municipal treatment works in the pretreatment program.

(t) Notwithstanding the provisions of s. NR 128.11 (14), costs associated with determination of the fundable capacity and the cost of fundable capacity as required by ss. NR 128.06 and 128.07. These costs may be reimbursed to the grantee as part of a step 3 grant award. Approval must be obtained from the department before initiating such work in order for the costs to be grant eligible.

(u) Costs associated with step 2 projects which received an advance commitment for reimbursement. These costs shall be reimbursed to the grantee as part of a step 3 award, notwithstanding the provisions of s. NR 128.11 (14).

(v) Costs necessary to mitigate clearly demonstrated direct, adverse physical impacts resulting from building of the treatment works;

(w) The cost of necessary safety equipment, provided the equipment is required by applicable federal, state, local or industry safety standards.

(5) INELIGIBLE COSTS. Costs which are not necessary for the construction of a treatment works project are ineligible. Such costs include, but are not limited to:

(a) Basin or areawide planning not directly 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) Interest on bonds or any other form of indebtedness required to finance the project costs;

(g) Ordinary operating expenses of local government, such as salaries and expenses of a mayor, city council members, or city attorney;

(h) Site acquisition expenses (for example, sewer rights−of−way, sewage treatment plant sites, sanitary landfills and sludge disposal areas) except as otherwise provided in sub. (6) (a) through (c);

(i) Costs for which payment has been or will be received under another federal or state financial assistance program;

(j) Costs of studies to determine pollutant removals in existing treatment works or tolerance to pollutants which interfere with the treatment works' operation, sludge use, or disposal in development of a municipal pretreatment program;

(k) Costs of monitoring equipment used by industry for sampling and analysis of industrial discharges to municipal treatment works;

(L) Cost of sewage collection systems except as identified in s. NR 128.11 (10);

(m) Costs associated with transporting and/or treating sewage capacity in excess of the fundable capacity as determined in s. NR 128.06 (1) and (2);

(n) The cost for that portion of a project related to present and future capacity for industrial users as defined in s. NR 128.03 (10);

(o) The cost of revision of a facilities plan or construction plans and specifications to provide for the construction of the fundable capacity, if a longer design life was originally planned for in the facilities plan;

(p) Construction of privately−owned treatment works, including pretreatment facilities, except as authorized by ss. NR 128.08 and 128.30;

(q) Preparation of a grant application, including a plan of study.

(r) The cost of ordinary site and building maintenance equipment such as lawnmowers and snowblowers;

(s) The cost of additional insurance for a specific project beyond that normally carried by the contractor;

(t) The cost of office furnishings including draperies, furniture and office equipment;

(u) Items of routine maintenance, including vehicles except as authorized by sub. (6) (g).

(v) The costs associated with instream improvements and modifications including but not limited to instream aeration, controlling and creating access points for maintenance purposes, dredging, channelization and erosion control not located directly at the discharge point or a direct result of construction activities.

(w) Costs incurred in a contract which creates a real or apparent conflict of interest. An apparent conflict of interest arises when an official or employee of a grantee participates in the selection, awarding or administration of a contract supported by the Wisconsin fund and:

1. The official or employee, the official or employee's spouse or offspring, or the official or employee's partner has a financial interest in the firm selected for the contract; or

2. Any person identified in subd. 1. receives any benefit from the award of the contract, including but not limited to, gratuities, favors and award of any subcontract.

(6) COSTS ELIGIBLE IF APPROVED. Certain direct costs are sometimes necessary for the construction of a treatment works. The following costs are eligible if reasonable and if the department approves them in the grant agreement or a grant amendment:

(a) Land acquired after departmental approval, that will be an integral part of the treatment process or that will be used for ultimate disposal of residues resulting from such treatment (for example, land for spray irrigation of sewage effluent);

(b) Land acquired after departmental approval, that will be used for storage of treated wastewater in land treatment systems before land application;

(c) Land acquired after departmental approval, that will be used for composting or temporary storage of compost residues which result from wastewater treatment if the department has approved a program for use of the compost;

(d) Acquisition of an operable portion of a treatment works;

(e) Rate determination studies required under s. NR 128.11 (9); and

(f) A limited amount of end−of−pipe sampling and associated analysis of industrial discharges to municipal treatment works.

(g) Mobile equipment including portable stand−by generators; large portable emergency pumps to provide "pump around" capability in the event of pump station failure or pipeline breaks; and sludge or septic tanks, trailers, and other vehicles having as their sole purpose the transportation of liquid or dewatered wastes from the collector point, including individual or on−site system to the treatment works or disposal site.

(7) INDIRECT COSTS. The grantee's indirect costs shall be eligible in accordance with an indirect cost agreement negotiated and incorporated in the grant agreement. An indirect cost agreement must identify those cost elements eligible under sub. (4). Where the benefits derived from a grantee's indirect services cannot be readily determined, a lump sum for overhead may be negotiated if the department determines that this amount will be approximately the same as the actual indirect costs.

(8) CONSTRUCTION CONTRACT CLAIMS. Reasonable and necessary legal, technical and administrative costs associated with further assessing the merits of construction contract claims are eligible provided:

(a) The grantee issues a written notification to the department prior to incurring costs;

(b) The claim arises from work within the scope of the grant;

(c) The claim or assessment costs are not a result of mismanagement;

(d) The claim or assessment costs are not caused by the grantee's vicarious liability for the improper action of others;

(e) The grantee provides an acceptable record of negotiation;

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

(g) The grantee provides a written record of negotiations;

(h) The department determines that an overriding state interest exists in the issues involved in the claim; and

(i) The department subsequently formally amends the cost into the grant.

(9) DISPUTES CONCERNING ELIGIBLE COSTS. The grantee should seek to resolve any questions relating to cost eligibility or allocation at the earliest opportunity (if possible, before execution of the grant agreement). Disputes regarding eligible costs shall be resolved in accordance with s. NR 128.23.

History: Cr. Register, December, 1978, No. 276, eff. 1−1−79; emerg. cr. (4) (u), eff. 9−29−81; cr. (4) (u), Register, February, 1982, No. 314, eff. 3−1−82; am. (1) and (2) (intro.), Register, April, 1982, No. 316, eff. 5−1−82; am. (2) (intro.) and (4) (q), renum. (8) to be (9), cr. (4) (v) and (w), (5) (r) to (v), (6) (g) and (8) (a) to (i), Register, March, 1986, No. 363, eff. 4−1−86; cr. (5) (w), Register, September, 1988, No. 393, eff 10−1−88.

NR 128.06 Fundable capacity. The fundable capacity of treatment works shall be determined as follows.

(1) The fundable capacity of sewage treatment facilities and sewage collection systems exclusive of interceptor sewers shall be that capacity necessary to treat the projected flows 10 years from the estimated date that they will begin operation. The fundable capacity shall not include capacity for present and future flows from industrial users as defined in s. NR 128.03 (10).

(2) The fundable capacity for interceptor sewers shall be that capacity necessary to transport the projected flows expected to exist on the date the interceptor is estimated to become operational. The fundable capacity may not include capacity for transporting present and future flows from industrial users as defined in s. NR 128.03 (10).

History: Cr. Register, December, 1978, No. 276, eff. 1−1−79; am. (2), Register, March, 1986, No. 363, eff. 4−1−86.

NR 128.07 Cost of fundable capacity. The estimated cost of step 3 construction of treatment works to transport and/or treat the fundable capacity shall be determined as follows. The facilities plan shall provide parallel cost estimates for treatment works designed to treat the fundable capacity as well as for treatment works designed to treat the actual proposed design capacity. The actual design capacity shall be determined in accordance with ss. NR 110.09 (2) (j) and 110.10 (2). The ratio of these costs estimates shall be multiplied by the total step 3 eligible cost to obtain the cost of fundable capacity.

History: Cr. Register, December, 1978, No. 276, eff. 1−1−79.

NR 128.08 Individual systems. (1) ELIGIBLE PARTICIPANTS. A municipality eligible for a grant under this subchapter is eligible for a grant to construct privately or publicly owned treatment works serving one or more residences or small commercial establishments if the requirements of sub. (2) are met.

Note: These eligibilities are distinct and separate from septic system grants authorized by s. 145.245, Stats.

(2) ADDITIONAL LIMITATIONS ON AWARDS FOR INDIVIDUAL SYSTEMS. In addition to those limitations set forth in s. NR 128.11 the grant applicant shall:

(a) Certify that the residence or small commercial establishment was constructed before December 27, 1977, and inhabited or in use on or before that date. In the case of a privately owned system this shall be a principal residence;

(b) Demonstrate in the facility plan that the solution chosen is cost−effective;

(c) Apply on behalf of a number of individual units located in the facility planning area;

(d) Certify that if the treatment works is to be privately owned, public ownership of such works is not feasible and list the reasons in support of such certification;

(e) Certify that such treatment works will be properly installed, operated and maintained and that the public body will be responsible for such actions;

(f) Certify that the project will be constructed, and an operation and maintenance program established to meet local, state and federal requirements, including those protecting present or potential underground potable water sources;

(g) Establish a system of user charges in accordance with s. NR 128.13;

(h) Obtain assurances (such as an easement or another covenant running with the land) of unlimited access to each individual system at all reasonable times for such purposes as inspection, monitoring, construction, maintenance, operation, rehabilitation and replacement. An option will satisfy this requirement if it can be exercised no later than the initiation of construction;

(i) Establish a comprehensive program for regulation and inspection of individual systems before department approval of the plans and specifications. Planning for this comprehensive program shall be completed as part of the facility plan. The program shall include as a minimum, periodic testing of water from existing potable water wells in the area. Where a substantial number of on−site systems exist, appropriate additional monitoring of the aquifer(s) shall be provided; and

(j) Comply with all other applicable limitations and conditions which publicly−owned treatment works projects funded under this chapter must meet.

(3) ELIGIBLE AND INELIGIBLE COSTS. (a) Acquisition of land in which the individual system treatment works are located is not grant eligible.

(b) Only the treatment and treatment residue disposal portions of toilets with composting tanks, oilflush mechanisms or similar in−house systems are grant eligible.

(c) Commodes, sinks, tubs, drains and other wastewater generating fixtures and associated plumbing are not grant eligible. Modifications to homes or commercial establishments are also not grant eligible.

(d) Only reasonable costs of construction site restoration to preconstruction conditions are eligible. Costs of improvement or decoration created by the installation of individual systems are not eligible.

(e) Conveyance pipes from wastewater generating fixtures to the treatment unit connection flange or joint are not eligible where the conveyance pipes are located on private property.

(f) Any incremental cost increase in the sizing of treatment units and components due to flows from residences constructed or to be constructed after December 27, 1977 is not grant eligible.

History: Cr. Register, December, 1978, No. 276, eff. 1−1−79; am. (1), Register, April, 1982, No. 316, eff. 5−1−82; am. (1), (2) (a) and (d), cr. (3) (f), Register, March, 1986, No. 363, eff. 4−1−86.

NR 128.09 Distribution of grant funds. (1) GENERAL. Grant funds distributed under this program will be allocated to those projects placed on the funding list or the supplemental funding list. Project sequence on these lists shall be the same as that of the federal project priority list established under 33 USC 1251 et seq. The department shall not allocate funds to a municipality which can reasonably expect to receive an EPA grant within 12 months of the time that the department is ready to allocate funds.

(a) Between October 1 and December 31, each municipality intending to apply for a step 3 grant during the following year shall notify the department of its intent in writing. For those municipalities that notify the department by January 1, the department shall annually compile a funding list which ranks those municipalities in the same order as they appear on the federal project priority list. If there are not sufficient funds available under this section to fund all grant requests in that year, the department shall award available funds to projects in the order in which they appear on the funding list. The department may provide a notice entitled a "ready to allocate notice" to municipalities which appear on the funding list and which fulfill the requirements of sub. (2) (a). The department may presume that a municipality which has not submitted complete plans and specifications for review by June 30 and a step 3 state grant application by July 31 will not be able to receive a ready to allocate notice prior to December 31 and receive funding under this paragraph.

(b) For those municipalities that may notify the department after January 1, but before April 1 of each year of their intent to apply for a grant under this section, the department shall compile a supplemental funding list as of April 1 of each year.

(c) If funding remains from the allocations under par. (a), the department shall allocate available remaining funding to projects on the supplemental funding list in the order in which they appear on the funding list compiled under par. (b).

(d) As of January 1 of each year, both lists created under this section in the prior year expire. The department may allocate funds to a municipality on the lists after the expiration of the lists if a municipality received a ready to allocate notice before the expiration of the lists and the requirements of sub. (2) (b) are met.

(2) ALLOCATION PROCEDURE. (a) The department may give notice that it is ready to allocate funds to a municipality on lists complied under sub. (1) upon the submittal of the following:

1. Approved current detailed plans and specifications;

2. A statement assessing availability of the proposed site; and

3. An approvable step 3 grant application. An approvable step 3 grant application is an application meeting the requirements of s. NR 128.10 (2) (c) or an application which, in the opinion of the department, can be completed by submitting minor additional information.

(b) The department may allocate funds to a municipality on lists compiled under sub. (1) if the municipality has submitted a bid tabulation with a recommendation to the department for review and concurrence within 3 months of the department's notice given under par. (a).

(c) Upon departmental concurrence with bid tabulations and grantee compliance with all applicable grant conditions and other provisions of this chapter the department shall give notice to the grantee to proceed with construction.

(3) REIMBURSEMENT. (a) *General.* To accelerate construction under this program to meet statutory treatment standards and water quality goals, the legislature provided for a system of reimbursement to allow early construction of treatment works in anticipation of legislative appropriation of funds according to the following procedures.

(b) *Eligibility.* 1. The reimbursement process shall be implemented in any fiscal year only when there are more eligible step 3 construction projects on the lists under sub. (1) than are fundable with the legislatively appropriated funds under s. 20.370 (4) (dc), Stats., for that fiscal year.

Note: Section 20.370 (4) (dc) was renumbered 20.370 (4) (cb) by 1995 Wis. Act 29 and was subsequently repealed by 1989 Wis. Act 31.

2. To be eligible for reimbursement, a municipality must meet the same planning, design criteria and application requirements as are established in this subchapter for regular grant projects.

(c) *Reimbursement process.* 1. For those projects which are eligible for reimbursement funding, the department may enter into a reimbursement offer. All reimbursement offers shall be made on forms prepared by the department. The reimbursement offer shall be signed by the authorized administrator of the department and will set forth the terms and conditions of the offer. The terms and conditions shall specify that a reimbursement offer can be funded only upon the appropriation of funds by the legislature in a subsequent fiscal year. Only step 3 projects will be eligible for funding under reimbursement offers.

2. The reimbursement offer shall specify a grant share as a percentage of eligible costs.

3. The department shall convert a reimbursement offer to a grant contract within 45 days after the legislature appropriates funds sufficient to convert the reimbursement offer. Priority for conversion shall be in the same order as the sequence of community acceptance of reimbursement offers.

4. The state grant administration procedures for reimbursement shall follow the same processes as established in this subchapter for regular grants.

(4) ADVANCE COMMITMENTS FOR REIMBURSEMENT OF ENGINEERING DESIGN COSTS. (a) Advance commitments may be made for eligible step 2 projects subject to s. 281.57 (9m), Stats.

(b) Costs associated with step 2 advance commitments will be added to step 3 costs for the purpose of determining the fundable range on the intent to apply list.

(c) Step 2 grant application requirements included in s. NR 128.10 must be met to receive an advance commitment.

(d) Step 2 eligible costs approved in advance commitments will be awarded with the step 3 grant award. Only step 2 costs directly associated with the scope of work in the step 3 grant award are eligible for reimbursement.

History: Cr. Register, December, 1978, No. 276, eff. 1−1−79; emerg. am. (1) (a) and (d), eff. 4−20−81; am. (1) (a) and (d), Register, August, 1981, No. 308, eff. 9−1−81; emerg. cr. (4), eff. 9−29−81; cr. (4), Register, February, 1982, No. 314, eff. 3−1−82; am. (3) (b) 2. and (3) (c) 4., Register, April, 1982, No. 316, eff. 5−1−82; am. (2) (a) 2. and 3. and (b) and (3) (b) 1., Register, March, 1986, No. 363, eff. 4−1−86; correction in (4) (a) made under s. 13.93 (2m) (b) 7., Stats., Register, May, 2000, No. 533.

NR 128.10 Grant application. (1) PROCEDURE. An application must be submitted to the department for each proposed step 1, step 2, or step 3 project. Submissions required for subsequent related projects shall be provided in the form of amendments to the basic application. Each such submission must be complete (see sub. (2)). If any information required under sub. (2) has been furnished with an earlier application, the applicant need only incorporate by reference and, if necessary revise such information utilizing the previous application.

(2) CONTENTS OF APPLICATION. (a) *Step 1 projects.* (Facilities plan and related elements) An application for a grant for a step 1 project shall include the following:

1. A plan of study presenting:

a. The proposed planning area;

b. An identification of the entity or entities that will be conducting the planning;

c. The nature and scope of the proposed step 1 project, including a schedule for the completion of specific tasks; and

d. An itemized description of the estimated costs for the project.

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

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

(b) *Step 2 projects.* (Preparation of construction drawings and specifications) Before the award of a grant or grant amendment for a step 2 project, the applicant must furnish the following:

1. An approved facilities plan in accordance with s. NR 128.19. Where an EPA step 1 grant was awarded prior to September 30, 1978, the facilities planning requirements of s. NR 110.09 (1) (b) 11., (2) (L) and (m), need not be met by the applicant. For projects where an EPA step 1 grant was awarded prior to June 26, 1978 the facilities planning requirements of ss. NR 110.09 (2) (j) and 110.10 (2) need not be met by the applicant. Where and EPA step 1 grant was awarded prior to May 12, 1978 the planning requirements of s. NR 110.09 (2) (k) need not be met.

2. Satisfactory evidence of compliance with the user charge provisions of s. NR 128.11 (9);

3. A statement regarding availability of the proposed site;

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

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

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

7. A schedule for initiation and completion of the project work including milestones; and

8. Satisfactory evidence of compliance with s. NR 128.20 (5) regarding a sewer use ordinance.

(c) *Step 3 projects.* (Building and erection of a treatment works) Prior to the award of a grant or grant amendment for a step 3 project, the applicant must furnish the following:

1. Each of the items specified in par. (b) (in compliance with par. (b) 6., the final adopted intermunicipal agreements must be

furnished. This requirement may be waived by the board when an order under s. 281.43 (1), Stats., has been issued by the department);

2. Updated and departmentally approved construction drawings and specifications suitable for bidding purposes; and

3. A schedule for or evidence of compliance with ss. NR 128.11 (8) and 128.12 (9) concerning an operation and maintenance program, including a preliminary plan of operation.

4. Proof of acquisition of appropriate land and easements.

History: Cr. Register, December, 1978, No. 276, eff. 1−1−79; am. (2) (c) 3., cr. (2) (c) 4., Register, March, 1986, No. 363, eff. 4−1−86; correction in (2) (c) 1. made under s. 13.93 (2m) (b) 7., Stats., Register, May, 2000, No. 533.

NR 128.11 Limitations on award. Before awarding initial grant assistance for any project for a treatment works through a grant or grant amendment the department shall determine that all of the applicable requirements of s. NR 128.10 (2) have been met and shall also determine that sufficient documentation has been submitted to show that the municipality has complied or will comply with the following:

(1) FACILITIES PLANNING. That if the award is for a step 2 or step 3 grant the facilities planning requirements of s. NR 128.19 have been met except for those requirements exempted by s. NR 128.10 (2) (b) 1.

(2) AREAWIDE PLAN. That the project is consistent with any approved areawide waste treatment management plan, and that the applicant is wastewater management agency designated in any such approved plan.

(3) PRIORITY DETERMINATION. That such works are entitled to priority in accordance with chs. NR 128 and 160.

Note: Chapter NR 160 has been repealed.

(4) FUNDING AND OTHER CAPABILITIES. That the applicant has:

(a) Agreed to pay the non−state project costs, and

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

(5) PERMITS. That the applicant has, or has applied for, the permit or permits as required by the Wisconsin pollutant discharge elimination system.

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

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

Note: See ss. NR 110.09 (1) through (6) and 110.10 (2).

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

(c) The sewer system evaluation and rehabilitation requirements of s. NR 128.20 have been met.

(7) ENVIRONMENTAL REVIEW. That the Wisconsin Environmental Policy Act (WEPA) requirements applicable to the project have been met.

(8) OPERATION AND MAINTENANCE PROGRAM. If the award of grant assistance is for a step 3 project, that the applicant has made satisfactory provision to assure the efficient operation and maintenance of the treatment works, in accordance with s. NR 128.12 (9).

(9) USER CHARGES. That, for a step 3 project, an approvable plan and a schedule of implementation have been developed for a system of user charges to assure that each recipient of waste treatment services within the applicant's service area will pay its proportionate share of the costs of operation and maintenance of all waste treatment service provided by the applicant. The applicant must agree that such a system or systems will be adequately maintained for the design life of the funded treatment works.

Note: See s. NR 128.13.

(10) SEWAGE COLLECTION SYSTEM. That, if the project involves sewage collection system work, such work is for the replacement or major rehabilitation of an existing sewer system under s. NR 128.20 (4) and is necessary to maintain the total integrity and performance of the waste treatment works, serving the community, or is for a new sewer system in a community previously unsewered, but in existence on October 18, 1972, which is constructing a new wastewater treatment plant. Replacement or major rehabilitation of an existing sewer system may be approved only if cost−effective. The result must be a sewer system design capacity which is equivalent to that of the existing system including a reasonable amount for future growth. For purposes of this subsection, the term "community in existence on October 18, 1972" would include any area with substantial human habitation on October 18, 1972, as determined by an evaluation of each tract (city blocks or parcels of 5 acres or less where city blocks do not exist). No award may be made for a new sewer system in a community in existence on October 18, 1972, unless the department further determines that:

(a) The bulk (generally two−thirds) of the expected flow (flow from existing plus projected future habitations) from the collection system will be for wastewaters originating from the community (habitations) in existence on October 18, 1972;

(b) The collection system is cost−effective;

(c) The population density of the area to be served has been considered in determining the cost−effectiveness of the proposed project;

(d) The collection system conforms with approved areawide waste treatment management plans;

(e) The system would not provide capacity to new habitations or other establishments to be located on environmentally sensitive land such as wetlands, floodplains or prime agricultural lands. Appropriate and effective grant conditions (e.g., restricting sewer connections) must be used where necessary to protect these resources from new development; and

(f) A new wastewater treatment plant is also being constructed by the grantee.

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

(12) PROCUREMENT. That the applicant has complied or will comply with the applicable provisions of s. NR 128.14 with respect to procurement actions.

(13) FUNDABLE CAPACITY. That the eligible costs do not include costs allocable to the transportation and/or treatment of sewage in excess of the fundable capacity as determined in s. NR 128.06 (1) and (2).

(14) LIMITATIONS ON PROJECT COSTS PRIOR TO AWARD. That costs of project construction work performed prior to the approved date of initiation of construction established in the grant agreement shall not be eligible, provided, however, that costs of pre−award professional and consultant services and bid advertisement publication, as approved by the department, shall be eligible. The department may authorize payment, in conjunction with the first award of grant assistance for all pre−award allowable step 1 and step 2 project costs in the following cases, provided that such payment has not been previously made through other sources of funding:

(a) Step 1 or step 2 work begun after October 31, 1974, but before June 30, 1975, in accordance with an approved plan of study or an approved facilities plan, as appropriate, but only if a grant is awarded before April 1, 1981. If the first grant applied for is step 3, then the ready to allocate grant funds notice must be issued before April 1, 1981.

(b) Step 1 or step 2 work begun before November 1, 1974, but only if a grant is awarded before April 1, 1980. If the first grant

applied for is step 3, then the ready to allocate grant funds notice must be issued before April 1, 1980.

(c) In those cases where the first award of grant assistance has been made prior to April 1, 1980, the grantee may, by December 31, 1980, file a grant amendment requesting department approval under this subsection of prior step 1 or step 2 costs.

(15) WATER CONSERVATION PROGRAM. That for a step 3 grant, an approvable plan and schedule for implementing the flow reduction measures deemed to be cost−effective in accordance with s. NR 110.09 (2) (k) has been submitted by the applicant. This requirement only applies to projects for which state or federal step 1 grant was awarded after May 12, 1978.

History: Cr. Register, December, 1978, No. 276, eff. 1−1−79; r. and recr. (14), August, 1979, No. 284, eff. 9−1−79; am. (14), Register, July, 1980, No. 295, eff. 8−1−80; am. (intro.) and (9), Register, March, 1986, No. 363, eff. 4−1−86.

NR 128.12 Grant conditions. Each treatment works grant shall be subject to the following conditions:

(1) NON−STATE CONSTRUCTION COSTS. The grantee agrees to pay the non−state or federal costs of treatment works construction associated with the project and commits itself to complete the construction of the treatment works.

(2) SERVICE AREAS. The grantee agrees to provide timely sewerage service to all users within the delineated service area except in areas where annexation is refused, pursuant to s. 281.43 (1m), Stats.

(3) PROCUREMENT. The grantee and party to any subagreement shall comply with all applicable provisions of s. NR 128.14. The department may make appropriate review of grantee procurement methods from time to time.

(4) ACCESS. The grantee must insure that department representatives will have access to the project work whenever it is in preparation or progress. The grantee must provide proper facilities for such access and inspection. The grantee must allow the department or any authorized representative to have access to any books, documents, plans, reports, papers, and other records of the contractor which are pertinent to the project for the purpose of making audit, examination, excerpts, copies and transcriptions. The grantee must insure that a party to a subagreement will provide access to project work, sites, documents, and records.

(5) CONSTRUCTION INSPECTION. In the case of any project involving step 3, the grantee will provide and maintain adequate construction inspection of the project to insure that the construction conforms with the approved plans and specifications.

(6) PROJECT INITIATION AND COMPLETION. The grantee agrees to expeditiously initiate and complete the project or cause it to be constructed and completed in accordance with the grant agreement and application, including any project schedule approved by the department. Failure of the grantee to promptly initiate step 1, 2, or 3 project construction may result in termination of the grant.

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

(8) PROJECT CHANGES. (a) Changes in the project work that are consistent with the objectives of the project, within the scope of the grant agreement and which do not require review under ch. NR 110 will not require the execution of a formal grant amendment before the grantee's implementation of the change. However, the amount of the funding provided by the grant agreement may only be increased by a formal grant amendment and can be made only upon department review and acceptance of such cost increase as eligible, reasonable and necessary for the accomplishment of project objectives.

(b) The grantee shall receive prior approval or a formal grant amendment from the department before implementing changes which:

1. Alter the project performance standards;

2. Alter the type of wastewater treatment provided by the project;

3. Significantly delay or accelerate the project schedule; or

4. Substantially alter the facilities plan, design drawings and specifications, or the location, size, capacity, or quality of any major part of the project.

(c) No approval of a project change shall obligate the state of Wisconsin to increase the amount of the grant or payments made under a grant agreement unless a grant increase is also approved under s. NR 128.22. This does not preclude submission or consideration of a request for a grant amendment.

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

(b) As a minimum, such plan shall include provision for:

1. An operation and maintenance manual for each facility;

2. An emergency operating and response program;

3. Properly trained management, operation and maintenance personnel;

4. Adequate budget for operation and maintenance;

5. Operational reports;

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

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

(c) The department may not pay:

1. Any of the state share of any step 3 activities unless the grantee has obtained department approval of a final plan of operation.

2. More than 67% of the state share unless the grantee has furnished the department a draft systemwide operation and maintenance manual that indicates satisfactory progress is being made towards a final operation and maintenance manual.

3. More than 90% of the state share of any step 3 activities unless the grantee has obtained from the department approval of the final operation and maintenance manual.

(d) The department may seek recovery of some or all grant payments if the grantee does not continue to satisfactorily own, operate, and maintain the funded facilities for their anticipated design life. The criteria used to determine if the grantee is not satisfactorily operating and maintaining the facilities shall be the same as the criteria in s. NR 110.05 (3) (c). Recovery of funds shall be in accordance with s. NR 128.24 (1) (g).

(10) SUBMISSION AND APPROVAL OF USER CHARGE SYSTEMS. The grantee shall obtain the department's approval of its system of user charges.

(a) The department may not:

1. Pay more than 67% of the state share unless the user charge system has been approved by the department.

2. Make the final state grant payment until the user charge system approved by the department is adopted by the grantee pursuant to the requirements of s. NR 128.13 (2) (f).

(b) User charge systems shall comply with the requirements of s. NR 128.13.

(11) FINAL INSPECTIONS. The grantee must notify the department of the completion of step 3 project construction. The department shall cause final inspection to be made within 60 days of the receipt of the notice. When the final inspection is completed and the department determines that the treatment works have been satisfactorily constructed in accordance with the grant agreement, the grantee may make a request for final payment under s. NR 128.18 (5).

(12) SEWER USE ORDINANCE AND EVALUATION/REHABILITATION PROGRAM. The grantee must obtain the approval of the department of its sewer use ordinance, under s. NR 128.20 (5). The department shall not pay more than 67% of the state share of any step 3 project unless it has approved the grantee's sewer use ordinance, and the grantee is complying with the sewer system evaluation and rehabilitation schedule incorporated in the grant agreement under s. NR 128.20 (5).

(13) SEPTIC TANK HAULERS. The grantee shall not prohibit the hauling and discharge of septage from septic tanks or holding tanks within the grantee's service area to the treatment facility. The grantee may regulate the time, rate, location and quality of such discharges. The disposal of septage at the treatment facility shall be subject to equitable user charges.

(14) EROSION CONTROL DURING CONSTRUCTION. The grantee shall comply with all rules and policies promulgated or developed pursuant to s. 281.33 (1), Stats., and the conditions of s. NR 110.15 (5) (n).

History: Cr. Register, December, 1978, No. 276, eff. 1−1−79; emerg. am. (9) (c) and (10) (a) and (b), eff. 4−20−81; am. (9) (c) and (10) (a) and (b), Register, August, 1981, No. 308, eff. 9−1−81; am. (8) (c), (9) (d) and (11), r. and recr. (8) (a) and (b), cr. (14), Register, March, 1986, No. 363, eff. 4−1−86; corrections in (2) and (14) made under s. 13.93 (2m) (b) 7., Stats., Register, May, 2000, No. 533.

NR 128.13 Requirements for user charge systems.

Any user charge system adopted by a grantee to comply with s. 281.57 (8) (e), Stats., shall comply with the requirements of this section.

Note: 281.57 (8) (c) 1., Stats., states: *"Except as provided under subd. 2., each municipality receiving state assistance under this section for the construction of a point source pollution abatement facility shall develop and adopt a system of equitable user charges to ensure that each recipient of waste treatment services pays its proportionate share of the costs of the operation and maintenance of the point source pollution abatement facility. The user fee system shall be in compliance with title II of the federal act and the rules promulgated under the federal act."*

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

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

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

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

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

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

(c) *Replacement fund.* All user charges specifically collected for replacement shall be deposited in a separate and distinct fund which shall be used exclusively for replacement as defined in s. NR 128.03 (18).

(d) *Toxic pollutants.* The user charge system shall provide that each user which discharges any toxic pollutants which cause an increase in the cost of managing the effluent or the sludge of the grantee's treatment works shall pay for such increased costs.

(e) *Charges for operation and maintenance for extraneous flows.* The user charge system shall provide that the costs of operation and maintenance for all flow not directly attributable to users (i.e., infiltration/inflow) be distributed among all users of the grantee's treatment works system based upon either of the following:

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

2. Under a system which uses one or any combination of the following factors on a reasonable basis:

a. Actual or estimated wastewater discharge of the users;

b. Land area of the users;

c. Number of hookups or discharges to the users;

(f) *Adoption of system.* The user charge system shall be incorporated in one or more municipal legislative enactments or other appropriate authority. If the project is a regional treatment works or part of a regional system accepting wastewaters from other municipalities, the subscribers receiving waste treatment services from the grantee shall have adopted user charge systems in accordance with this section. Such user charge systems shall also be incorporated in the appropriate municipal legislative enactments or other appropriate authority of all municipalities contributing waste to the system. The municipality shall inform the public of the financial impact of the user charge system on them and shall consult with the public prior to adoption of the system. Prior to adoption of the system, the municipality shall notify the department in writing how the public was informed of the financial impact of the user charge system and how the public was consulted. Consultation shall include at least one, but may include several, of the following activities with affected individuals and groups:

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

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

(h) *Inconsistent agreements.* The grantee may have pre−existing agreements which address the reservation of capacity in the grantee's treatment works or the charges to be collected by the grantee in providing wastewater treatment services or reserving capacity. The user charge system shall take precedence over any terms or conditions of agreements or contracts between the grantee and users (including industrial users, special districts, other municipalities, or federal agencies or installations) which are inconsistent with the requirements of this section.

(3) IMPLEMENTATION OF THE USER CHARGE SYSTEM. (a) If a grantee's user charge system is approved, implementation of the approved system shall become a condition of the grant. The grantee shall be subject to the noncompliance provisions of s. NR 128.24.

(b) The grantee shall maintain such records as are necessary to document compliance with these regulations.

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

History: Cr. Register, December, 1978, No. 276, eff. 1−1−79; emerg. am. (2) (f), eff. 4−20−81; am. (2) (f), Register, August, 1981, No. 308, eff. 9−1−81; r. and recr. (2) (a) and (e) 2.a., am. (intro.), (2) (b) 1. and 2., (2) (f) and (g), r. (2) (b) 3., Register, March, 1986, No. 363, eff. 4−1−86; correction in (intro.) made under s. 13.93 (2m) (b) 7., Stats., Register, May, 2000, No. 533.

NR 128.14 Procurement. (1) APPLICABILITY. Procurement of professional services and construction contracts by grantees under all steps of grants for construction of treatment works shall be in accordance with state and local law and are subject to review for eligibility, allowability, allocability and reasonableness. The department, on request, in conducting such reviews will hold confidential in accordance with s. NR 2.195 (2) (b) 5.:

Note: Section NR 2.195 (2) (b) 5. was repealed effective 10−1−04.

(a) Professional services' indirect cost breakdowns.

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

Note: See ss. 61.54, 62.15 and 66.0901, Stats.

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

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

(4) UTILIZATION OF SMALL AND MINORITY OWNED BUSINESSES. (a) The department shall monitor the utilization of small and minority owned businesses by all grantees. Efforts shall be made by grantees to utilize small business and minority−owned business to allow these sources the maximum feasible opportunity to compete for subagreements and contracts to be performed utilizing state grant funds. Small and minority owned businesses should be utilized to the extent possible as sources of supplies and services. Inadequate performance by grantees may subject grantees to the provisions of s. NR 128.24.

(b) Grantees are responsible for implementation of the requirements of par. (a) and shall:

1. Inform potential construction contractors of the requirements of pars. (c) and (d).

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

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

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

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

(c) If at least 5% participation is not achieved by small businesses for any construction contract, the contractor shall contact a minimum of 5 small businesses to promote the utilization of small businesses. Documentation of these contacts shall be submitted to the department with the bid documents.

(d) 1. Municipalities having an established minority business goal as of January 1, 1985, shall achieve that goal through utilization of minority owned businesses which are certified under s. 560.036 (2), Stats., or be determined in compliance with the requirements of this paragraph. Those municipalities without a minority business goal as of January 1, 1985 shall achieve the level of participation specified in s. 16.75 (3m) (b), Stats., by minority owned business which meet the requirement of s. 16.75 (3m) (c) 5., Stats., for any construction contract or be determined in compliance with the requirements of this paragraph. The 5% bid preference stated in s. 16.75 (3m) (b), Stats., does not apply to any project funded under this subchapter. The grantee in awarding prime contracts, and the primary contractor, in awarding subcontracts, shall demonstrate good faith efforts as defined in subd. 1. a. to d. to promote the utilization of minority owned businesses. Documentation of the following good faith efforts shall be submitted to the department with the bid documents:

a. The grantee and contractor shall include minority owned businesses certified under s. 560.036 (2), Stats., on solicitation lists.

b. The grantee and contractor shall assure that certified minority owned businesses are solicited whenever they are potential sources. A minimum of 5 contacts is necessary.

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

d. If a subcontractor awards subcontracts, the conditions of this paragraph shall apply to the subcontractor.

2. Any change in the minority business percentage of participation by grantees as required in subd. 1. shall require written approval from the department prior to the start of construction on any portion of the project previously identified as being awarded to a certified minority owned business of any project funded under this subchapter.

(5) GENERAL REQUIREMENTS FOR SUBAGREEMENTS. Subagreements must:

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

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

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

(6) SPECIFICATIONS. (a) *Nonrestrictive specifications.* 1. No specifications for bids or statement of work in connection with such works shall be written in such a manner as to contain proprietary, exclusionary or discriminatory requirements other than those based upon performance, unless;

a. Such requirements are necessary to test or demonstrate a specific thing or to provide for necessary interchangeability of parts and equipment; or

b. At least one brand name or trade name is listed and is followed by the words "or equal".

2. The single base bid method of solicitation for equipment and parts for determination of a low responsive bidder may not be utilized.

3. With regards to materials, if a single material is specified, the grantee must be prepared to substantiate the basis for the selection of the material.

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

production techniques, methods, and processes, except to the extent that innovative technology may be utilized.

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

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

(7) FORCE ACCOUNT WORK. (a) A grantee must secure prior written approval from the department for utilization of the force account method in lieu of a subagreement for any step 1, step 2 or step 3 activities in excess of $5,000 unless the force account method is stipulated in the grant agreement.

(b) The department's approval shall be based on the grantee's certification and demonstration of the necessary competence required to accomplish such work and that the work can be accomplished more economically by the use of the force account method; or emergency circumstances so dictate.

(8) LIMITATION ON SUBAGREEMENT AWARD. No subagreement shall 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.

History: Cr. Register, December, 1978, No. 276, eff. 1−1−79; am. (1), (3), (6) (a) 1. b. and (7) (b), renum. (4) to be (4) (a) and am., cr. (4) (b) to (d), Register, March, 1986, No. 363, eff. 4−1−86.

NR 128.15 Subagreements for architectural or engineering services. (1) Step 1, step 2, or administration or management of step 3 project work may be performed by negotiated procurement of architectural or engineering services. Subagreements for such services shall be negotiated with candidates selected on the basis of demonstrated competence and qualifications for the type of professional services required and at fair and reasonable prices. To the maximum extent practicable all negotiated procurement shall be conducted in a manner to provide open and free competition. This section shall not be construed as requiring competitive bids or price competition in the procurement of architectural or engineering services.

(2) (a) The department shall review architectural or engineering service subagreements and amendments for the eligibility, allocability and reasonableness of costs.

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

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

History: Cr. Register, December, 1978, No. 276, eff. 1−1−79; renum. to be (1), cr. (2), Register, March, 1986, No. 363, eff. 4−1−86.

NR 128.16 Construction contracts (subagreements) of grantees. (1) APPLICABILITY. This section applies to construction contracts or subagreements awarded by grantees for any step 3 activity.

(2) TYPE OF CONTRACT. The project work shall be performed under one or more contracts awarded by the grantee to private firms except for force account work authorized by s. NR 128.14 (7). Each contract shall be a fixed price contract, unless the department gives advance written approval for the grantee to use some other acceptable type of contract. In any event the cost−plus−a−percentage−of−cost type contract shall not be used.

(3) NEGOTIATION OF CONTRACT AMENDMENTS (CHANGE ORDERS). (a) *Grantee responsibility.* Grantees are responsible for the negotiation of construction contract change orders. This function may be performed by the grantee directly or, if authorized, by an engineer. During negotiation with the contractor the grantee shall:

1. Make certain that the contractor has a clear understanding of the scope and extent of work and other essential requirements;

2. Assure that the contractor demonstrates that the contractor will make available or will obtain the necessary personnel, equipment and materials to accomplish the work within the required time;

3. Assure a fair and reasonable price for the required work.

(b) *Changes in contract price or time for performance.* The contract price or time for performance may be changed only by a change order. When negotiations are required, they shall be conducted in accordance with par. (c). The value of any work covered by a change order or by any claim for increase or decrease in the contract price shall be determined by the method which is most advantageous to the grantee and which is set forth below:

1. Unit prices.

a. Unit prices previously approved are acceptable for pricing changes of original bid items. However, when changes in quantities exceed 15% of the original bid quantity and the total dollar change of that bid item is significant, the grantee shall review the unit price to determine if a new unit price should be negotiated.

b. Unit prices of new items shall be negotiated.

2. A lump sum to be negotiated.

3. Cost reimbursement — the actual cost for labor, direct overhead, materials, supplies, equipment, and other services necessary to complete the work plus an amount to be agreed upon to cover the cost of general overhead and profit to be negotiated.

(c) *Cost and pricing data.* For each change order the contractor shall submit sufficient cost and pricing data to the grantee to enable the grantee to determine the necessity and reasonableness of costs and amounts proposed, and the allowability and eligibility of costs proposed.

(4) PROGRESS PAYMENTS TO CONTRACTORS. (a) Definition of progress payments. Progress payments are defined as follows:

1. Payments for work in place;

2. Payments for materials or equipment which have been delivered to the construction site or which are stockpiled in the vicinity of the construction site in accordance with the terms of the contract when conditional or final acceptance is made by or for the grantee. It is the grantee's responsibility to assure that the items for which progress payments have been made are adequately insured and are protected through appropriate security measures. Costs of such insurance and security are allowable costs.

3. Payment for undelivered specifically manufactured items or equipment (excluding off−the−shelf or catalog items), as work progresses. Such payments must be made if provisions therefor are included in the bid and contract documents. Such provisions may be included at the option of the grantee only when all of the following conditions exist:

a. The equipment is so designated in the project specifications;

b. The equipment to be specifically manufactured for the project could not be readily utilized on nor diverted to another job; and

c. A fabrication period of more than 6 months is anticipated.

(b) Protection of progress payments made for specifically manufactured equipment. The grantee will insure protection of the state's interest in progress payment made for items or equipment referred to in par. (a) 3. This protection must be in a manner or form acceptable to the grantee.

History: Cr. Register, December, 1978, No. 276, eff. 1−1−79.

NR 128.17 State share. (1) STATE SHARE ACTIVITIES. The state share of the project cost shall be no greater than 60% of the eligible cost of any step 3 activities. No project funded under this chapter may receive state assistance that, combined with other non−local government assistance exceeds 75% of the eligible cost of the project.

(2) STATE SHARE FOR STEP 1 AND STEP 2 ACTIVITIES. Except as provided in this subsection the state share of step 1 and step 2 activities shall not exceed 60% of the eligible project costs. In those cases in which federal financial assistance is not available for step 1 and step 2 activities, the state share may not exceed 75% of the eligible project costs.

(3) ANNUAL LIMITATION. In accordance with s. 281.57 (7), Stats., metropolitan sewerage districts that serve cities of the first class shall be limited to receiving 33% of the state funding appropriated annually.

History: Cr. Register, December, 1978, No. 276, eff. 1−1−79; correction in (3) made under s. 13.93 (2m) (b) 7., Stats., Register, May, 2000, No. 533.

NR 128.18 Grant payments. (1) GENERAL. The grantee shall be paid the state share of eligible project costs incurred within the scope of an approved project and which are currently due and payable by the grantee (but not including withheld or deferred amounts), subject to the limitations of ss. NR 128.11 (14) and 128.12 (9) (c), (10) (a), (11) and (12), up to the grant amount set forth in the grant agreement and any approved amendments thereto.

(2) INTERIM REQUESTS FOR PAYMENT. The grantee may submit requests for payments for eligible costs in accordance with the negotiated payment schedule included in the grant agreement. Upon receipt of a request for payment, subject to the limitations set forth in sub. (6), s. NR 128.12 (9), (10) and (12), the department shall cause to be disbursed from available funds such amounts as are necessary. The total amount of necessary state payments to the grantee for the project should be equal to the state share of the actual or estimated eligible project costs incurred to date, as the grantee certified in its most recent request for payment.

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

(4) REFUNDS, REBATES AND CREDITS. The state share of any refunds, rebates, credits, or other amounts (including any interest) that accrue to or are received by the grantee for the project, and that are properly allocable to costs for which the grantee has been paid under a grant, must be paid to the state of Wisconsin. Reasonable expenses incurred by the grantee while securing such refunds, rebates, credits, or other amounts shall be eligible under the grant when approved by the department.

(5) FINAL PAYMENT. After completion of final inspection under s. NR 128.12 (11), approval of the request for payment, which the grantee designates as the "final payment request", and the grantee's compliance with all applicable requirements of this subchapter and the grant agreement, the department shall pay to the grantee any balance of the state share of the eligible project cost which has not already been paid. The final payment request must be submitted by the grantee promptly after final inspection. Before final payment under the grant, the grantee must execute and deliver an assignment to the state of Wisconsin, of the state share of refunds, rebates, credits or other amounts (including any interest thereon) properly allocable to costs for which the grantee has been paid by the state under the grant. The grantee must also execute and deliver a release discharging the state of Wisconsin, its officers, agents, and employees from all liabilities, obligations, and claims arising out of the project work or under the grant, subject only to the exceptions specified in the release.

(6) WITHHOLDING OF FUNDS. (a) It is department policy that full and prompt payment be made to the grantee for eligible project costs. The department may only authorize the withholding of a grant payment where it determines in writing that a grantee has failed to comply with project objectives, grant award conditions, or reporting requirements. Such withholding shall be limited to only that amount necessary to assure compliance.

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

History: Cr. Register, December, 1978, No. 276, eff. 1−1−79; am. (5), Register, April, 1982, No. 316, eff. 5−1−82; am. (1), Register, March, 1986, No. 363, eff. 4−1−86.

NR 128.19 Facilities planning activities (step 1). (1) GENERAL. (a) Facilities planning consists of those necessary plans and studies which directly relate to the construction of treatment works. Facilities planning shall demonstrate the need for the proposed facilities. Through a systematic evaluation of feasible alternatives, it must also demonstrate that the selected alternative is the cost−effective means of meeting established effluent limitations and water quality related treatment requirements while also recognizing environmental and social considerations.

(b) Except as provided in par. (c), full compliance with the facilities planning provisions of this section will be required prior to award of step 2 or step 3 grant assistance.

(c) Grant assistance for step 2 or 3 may be awarded before approval of the facilities plan if:

1. The department determines that:

a. Applicable requirements of s. NR 128.11 (6) and (7) have been met;

b. The facilities planning related to the proposed step 2 or 3 project has been substantially completed; and

c. The step 2 or 3 project for which grant assistance is made will not be significantly affected by the completion of the facilities plan and will be a component part of the complete system; and

2. The applicant agrees to complete the facilities plan on a schedule that the department accepts. This schedule shall be included as a special condition in the grant agreement.

(d) Written approval of a plan of study must be obtained before initiation of facilities planning.

Note: See s. NR 128.10 (2) (a) 1. for requirements concerning the plan of study.

(e) If the information required as part of a facilities plan has been developed separately, the facility plan should incorporate it by reference. Planning which has been previously or collaterally accomplished under local, state or federal programs will be utilized without duplication.

(2) CONTENT OF A FACILITIES PLAN. Facilities planning work shall be done in accordance with the provisions of s. NR 110.09 (1) through (6).

(3) PUBLIC PARTICIPATION. (a) One or more public hearings or meetings should be held within the area to obtain public advice at the beginning of the planning process. All governmental agencies and other parties which are known to be concerned or may have an interest in the plan shall be invited to participate.

(b) Before the implementing governmental units adopt the facilities plan, a public hearing shall be held. The department may require the planning entity to hold additional public hearings, if

needed, to more fully discuss the plan and alternatives or to give concerned interests adequate opportunity to express their views.

(c) The time and place of the public hearing shall be conspicuously and adequately announced, generally at least 30 days in advance by publication of a class 1 notice in a newspaper having general circulation in the area affected by the plan. In addition, a description of the water quality problems and the principal alternatives considered in the planning process shall be displayed at a convenient local site sufficiently before the hearing (approximately 15 days).

(d) Appropriate local and state agencies, state and regional clearing houses, interested environmental groups, and appropriate local public officials shall receive a written notice of public hearings.

(4) ACCEPTANCE BY IMPLEMENTING GOVERNMENTAL UNITS. A facilities plan submitted for approval shall include adopted resolutions or, where applicable, executed agreements of the implementing governmental units or management agencies which provide for acceptance of the plan, or assurances that it will be carried out, and statements of legal authority necessary for plan implementation. The department may approve any variations from these requirements prior to plan submission.

(5) REVISION OR AMENDMENT OF FACILITIES PLAN. A facilities plan may include more than one step 3 project and provide the basis for several subsequent step 2, or step 3 projects. A facilities plan which has served as the basis for the award of a grant for a step 2 or step 3 project shall be reviewed before the award of any grant for a subsequent project involving step 2 or step 3 activities to determine if substantial changes have occurred. If the department determines that substantial changes have occurred which warrant revision or amendment, the plan shall be revised or amended and submitted for review.

History: Cr. Register, December, 1978, No. 276, eff. 1−1−79.

NR 128.20 Sewer system evaluation and rehabilitation. (1) GENERAL. (a) All applicants for grant assistance must demonstrate to the satisfaction of the department that each sewer system discharging into the treatment works project for which grant application is made is not or will not be subject to excessive infiltration/inflow. A determination of whether excessive infiltration/inflow exists, may take into account, in addition to flow and related data, other significant factors such as cost−effectiveness (including the cost of substantial treatment works construction delay), public health emergencies, the effects of plant bypassing or overloading, or relevant economic or environmental factors.

(b) The sewer system evaluation will generally determine whether or not excessive infiltration/inflow exists. It will consist of:

1. Certification by the department as to the existence or nonexistence of excessive infiltration/inflow based upon minimum information; or when necessary

2. An infiltration/inflow analysis; and, if appropriate

3. A sewer system evaluation survey and, if appropriate, a program, including an estimate of costs, for rehabilitation of the sewer system to eliminate excessive infiltration/inflow if identified in the sewer system evaluation.

(c) The department should receive the minimum amount of information necessary to enable it to make a judgment.

(2) INFILTRATION/INFLOW ANALYSIS. The infiltration/inflow analysis shall demonstrate the nonexistence or possible existence of excessive infiltration/inflow in the sewer system. This analysis shall be done in accordance with the requirements of s. NR 110.09 (5).

(3) SEWER SYSTEM EVALUATION SURVEY. Where appropriate, a sewer system evaluation survey shall be conducted in accordance with the requirements of s. NR 110.09 (6).

(4) REHABILITATION. (a) The scope of each treatment works project defined within the facilities plan as being required for implementation of the plan, and for which state assistance will be requested, shall define:

1. Any necessary new treatment works construction, and

2. Any rehabilitation work determined by the sewer system evaluation to be necessary for the elimination of excessive infiltration/inflow. However, rehabilitation which should be a part of the applicant's normal operation and maintenance responsibilities shall not be included within the scope of a step 3 treatment works project.

(b) Grant assistance for a step 3 project segment consisting of rehabilitation work may be awarded concurrently with step 2 work for the design of the new treatment works construction.

(5) SEWER USE ORDINANCE. Each applicant for grant assistance for a step 2 or step 3 project shall demonstrate to the satisfaction of the department that a sewer use ordinance or other legally binding requirement will be enacted and enforced in each jurisdiction served by the treatment works project before the completion of construction. The ordinance shall prohibit any new connections from inflow sources into the sanitary sewer system and shall ensure that new sewers and connections to the sewer system are properly designed and constructed. It shall require that wastewater introduced into the treatment works not contain toxics or other pollutants in amounts or concentrations that endanger public safety and physical integrity of the treatment works; cause violation of effluent or water quality limitations; or preclude the selection of the most cost−effective alternative for wastewater treatment and sludge disposal.

History: Cr. Register, December, 1978, No. 276, eff. 1−1−79; am. (5), Register, March, 1986, No. 363, eff. 4−1−86.

NR 128.21 Suspension or termination of grant. (1) SUSPENSION OF GRANTS — STOP−WORK ORDERS. (a) In accordance with the provisions of this subsection, the department may, for good cause, suspend state liability for work done under a step 1, step 2 or step 3 grant after notification is given to the grantee. Suspension of state liability under such a grant shall be termed for purposes of this subchapter as a "stop−work order."

(b) Good cause for issuance of a stop−work order includes, but is not limited to, default by the grantee, failure to comply with the terms and conditions of the grant, or lack of adequate funding. Generally, use of a stop−work order will be limited to those situations where it is advisable to suspend work on the project or a portion or phase of the project and a supplemental agreement providing for such suspension is not feasible. Although a stop−work order may be used by the department pending a decision to terminate the grant, it shall not be used in lieu of the issuance of a termination notice after a decision to terminate has been made.

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

1. A clear description of the work to be suspended;

2. Instructions as to the issuance of further orders by the grantee for materials or services;

3. Guidance as to action to be taken on subagreements, and

4. Other suggestions to the grantee for minimizing costs.

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

(e) Upon receipt of a stop−work order, the grantee shall forthwith comply with its terms and take all reasonable steps to mini-

mize the incurrence of costs allocable to the work covered by the order during the period of work stoppage. Within the suspension period or within any extension of that period to which the parties shall have agreed, the department shall either:

1. Cancel the stop−work order, in full or in part,

2. Terminate the work covered by such order as provided in s. NR 128.21 (2), or

3. Authorize resumption of work.

(f) If a stop−work order is canceled or the period of the order or any extension thereof expires, the grantee shall promptly resume the previously suspended work. An equitable adjustment shall be made in the grant period, the project period, or grant amount, or all of these, and the grant instrument shall be amended accordingly, if:

1. The stop−work order results in an increase in the time required for, or an increase in the grantee's cost properly allocable to the performance of any part of the project, and

2. The grantee asserts a written claim for such adjustment within 60 days after the end of the period of work stoppage.

(g) If a stop−work order is not canceled and the grant−related project work covered by such order is within the scope of a subsequently−issued termination order, the reasonable costs resulting from the stop−work order shall be allowed in arriving at the termination settlement.

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

(i) Failure to agree upon the amount of an equitable adjustment due under a stop−work order shall constitute a dispute under s. NR 128.23.

(2) TERMINATION OF GRANTS. A grant may be terminated in whole or in part by the department.

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

(b) A grantee may not unilaterally terminate the project work for which a grant has been awarded, except for good cause. The grantee must promptly give written notice to the department of any complete or partial termination of the project work by the grantee. If the department determines that there is good cause for the termination of all or any portion of a project for which the grant has been awarded, the department may enter into a termination agreement or unilaterally terminate the grant pursuant to par. (c), effective with the date of cessation of the project work by the grantee. If the department determines that a grantee has ceased work on the project without good cause, the department may either unilaterally terminate the grant pursuant to par. (c) or annul the grant pursuant to par. (e).

(c) Grants may be terminated by the department in accordance with the following procedure:

1. The department shall give not less than 10 days written notice to the grantee of its intent to terminate a grant in whole or in part. Notice shall be served on the grantee personally or by mail (certified mail — return receipt requested).

2. The grantee shall be afforded an opportunity for consultation with the department prior to any termination. After the department has received any views expressed by the grantee, the department may terminate the grant in whole or in part. Any such termination shall be in writing and shall state the reason(s) relied on by the department in terminating the grant. Notices of termination shall be served on the grantee personally or by mail (certified mail — return receipt requested).

3. A grant may be terminated by the department for good cause subject to negotiation and payment of appropriate termination settlement costs.

(d) Upon termination, the grantee must refund or credit to the state of Wisconsin that portion of grant funds paid or owed to the grantee and allocable to the terminated project work, except such portion thereof as may be required to meet commitments which had become legally enforceable prior to the effective date of termination and are otherwise eligible. The grantee shall not make any new commitments without department approval. The grantee shall reduce the amount of outstanding commitments insofar as possible and report to the department the uncommitted balance of funds awarded under the grant.

(e) The department may annul the grant if it determines that:

1. There has been substantial non−performance of the project work by the grantee without good cause;

2. There is substantial evidence the grant was obtained by fraud; or

3. There is substantial evidence of gross abuse or corrupt practices in the administration of the project.

(f) In addition to such remedies as may be available to the state of Wisconsin under law, after termination of a grant by the department, all state grant funds previously paid to the grantee shall be returned or credited to the state of Wisconsin, and no further payments shall be made to the grantee.

(g) The grantee may appeal a termination or annulment of a grant pursuant to s. NR 128.23.

History: Cr. Register, December, 1978, No. 276, eff. 1−1−79; am. (1) (a), Register, April, 1982, No. 316, eff. 5−1−82.

NR 128.22 Grant amendments. (1) Project changes which substantially alter the cost or time of performance of the project or any major phase thereof, which substantially alter the objective or scope of the project, or which substantially reduce the time or effort devoted to the project on the part of key personnel will require a formal grant amendment to increase or decrease the dollar amount, the term, or other principal provisions of a grant. This section does not apply to estimated payment schedules under grants for construction of treatment works.

(2) A formal grant amendment shall be effected only by a written amendment to the grant agreement. Such amendments shall be bilaterally executed by the department and the authorized representative of the grantee.

(3) Approval of grant amendment requests which increase the amount of state financial participation shall be subjected to the availability of funds.

History: Cr. Register, December, 1978, No. 276, eff. 1−1−79.

NR 128.23 Disputes. (1) GENERAL. Any disputes regarding the interpretation of this subchapter shall be decided by the department based upon precedents established by the United States environmental protection agency in its administration of the construction grants program established under Title II of the Federal Clean Water Act, as amended (33 USC 1251 et. seq.) if applicable.

(2) DECISION OF THE DEPARTMENT. Except as otherwise provided by law, any dispute arising under a grant shall be decided in writing by the department which will serve personally or by mail (certified mail, return receipt requested) a copy of the decision to the grantee.

(3) REVIEW OF THE DECISION. A decision of the department made pursuant to this section shall be final unless, within 30 days from the date of receipt of such decision, the grantee mails (certified mail, return receipt requested) or otherwise delivers to the department a written petition specifically stating the facts or law which warrant a modification or reversal of the decision. Any

review of a department decision filed pursuant to this subsection shall be treated as a class 2 contested case and shall be adjudicated in accordance with ch. 227, Stats., and ch. NR 2.

History: Cr. Register, December, 1978, No. 276, eff. 1−1−79;

NR 128.24 Enforcement. (1) Noncompliance with the provisions of ss. NR 128.01 through 128.25 or any grant or grant amendment made under those sections shall be cause for the imposition of one or more of the following sanctions at the discretion of the department.

(a) The grant may be terminated or annulled under s. NR 128.21;

(b) Project costs directly related to the noncompliance may be declared ineligible;

(c) Payment otherwise due to the grantee of up to 10% may be withheld under s. NR 128.18 (6);

(d) Project work may be suspended under s. NR 128.21;

(e) A court of appropriate jurisdiction may enter an injunction or afford other equitable relief;

(f) Such other administrative or judicial remedies may be instituted as may be legally available and appropriate.

(g) The department may seek recovery of some or all grant payments made pursuant to s. 281.57, Stats., unless the conditions set forth in the grant agreement have been fully satisfied.

(2) In cases where service is not provided in a delineated service area in compliance with the facility planning schedule, a course of action under this section may not be entered into by the department until an order pursuant to s. 281.43 (1), Stats., has been entered by the department relative to that service area and in no case can such an action be taken unless 5 years have elapsed from the time that service is scheduled to be provided. Further, in no case can recovery sought be more than the depreciated value of the grant for that segment of the treatment works designated for service to the unserved area.

History: Cr. Register, December, 1978, No. 276, eff. 1−1−79; am. (1) (intro.), Register, May, 1980, No. 293, eff. 6−1−80; corrections in (1) (g) and (2) made under s. 13.93 (2m) (b) 7., Stats., Register, May, 2000, No. 533.

NR 128.25 Grantee accountability. (1) FINANCIAL MANAGEMENT. The grantee is responsible for maintaining a financial management system which shall adequately provide for:

(a) Accurate, current and complete disclosure of the financial results of each grant program in accordance with department reporting requirements. Accounting for project funds shall be in accordance with generally accepted accounting principles and practices, consistently applied, regardless of the source of funds.

(b) Records which identify adequately the source and application of funds for grant−supported activities. These records shall contain information pertaining to grant awards and authorizations, obligations, unobligated balances, assets, liabilities, outlays, and income.

(c) Effective control over and accountability for all project funds, property, and other assets.

(d) Comparison of actual with budgeted amounts for each grant.

(e) Procedures for determining the eligibility and allocability of costs in accordance with the provisions of s. NR 128.05.

(f) Accounting records which are supported by source documentation.

(g) Audits to be made by the grantee or at his or her direction to determine, at a minimum, the fiscal integrity of financial transactions and reports, and the compliance with the terms of the grant agreement. The grantee shall schedule such audits with the reasonable frequency, usually annually, but not less frequently than once every 2 years, considering the nature, size and complexity of the activity.

(h) A systematic method to assure timely and appropriate resolution of audit findings and recommendations.

(2) RECORDS. The following record and audit policies are applicable to all department grants and to all subagreements.

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

1. The amount, receipt, and disposition by the grantee of all assistance received for the project, including both state assistance and any matching share or cost sharing; and

2. The total costs of the project, including all direct and indirect costs of whatever nature incurred for the performance of the project for which the state grant has been awarded. In addition, contractors of grantees, including contractors for professional services, shall also maintain books, documents, papers, and records which are pertinent to a specific state grant award. The foregoing constitute "records" for the purposes of this section.

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

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

1. Until expiration of 3 years from the date of final settlement, or

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

3. If a grant is terminated completely or partially, 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.

4. Records which relate to appeals, disputes, litigation on the settlement of claims arising out of the performance of the project for which a grant was awarded, or costs and expenses of the project to which exception has been taken by the department or any of its duly authorized representatives, shall be retained until any appeals, litigation, claims or exceptions have been finally resolved.

(3) AUDIT. (a) Preaward or interim audits may be performed on grant applications and awards.

(b) A final audit shall be conducted after the submission of the final payment request. The time of the final audit will be determined by the department and may be prior or subsequent to final settlement. Any settlement made prior to the final audit is subject to adjustment based on the audit. Grantees and subcontractors of grantees shall preserve and make their records available pursuant to sub. (2).

History: Cr. Register, December, 1978, No. 276, eff. 1−1−79; corrections made under s. 13.93 (2m) (b) 5., Stats., Register, September, 1995, No. 477.

NR 128.26 Variances. (1) GENERAL. The natural resources board may approve variances from requirements of this subchapter upon the recommendation of the department secretary when it is determined that such variances are essential to effect necessary grant actions or department objectives where special circumstances make such variances in the best interest of the state. Before granting variances, the board shall take into account such factors as good cause, circumstances beyond the control of the grantee, and financial hardship.

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

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

(a) The name of the applicant or the grantee, the grant number, and the dollar value;

(b) The section of this subchapter from which a variance is sought;

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

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

(4) APPROVAL OF VARIANCE. Variances may be approved only by the natural resources board. A copy of each such written approval shall be retained in the department grant file.

History: Emerg. cr. eff. 4−20−81; cr. Register, August, 1981, No. 308, eff. 9−1−81; am. (1), (2) and (3) (b), Register, April, 1982, No. 316, eff. 5−1−82; correction in (3) (intro.) made under s. 13.93 (2m) (b) 6., Stats., Register, May, 2000, No. 533.

NR 128.30 State grants for individual septic tank replacement or rehabilitation. (1) PURPOSE. The purpose of this section is to establish rules under s. 145.245, Stats., for the implementation and administration of a financial assistance program to replace or rehabilitate private sewage systems under enforcement orders.

Note: These eligibilities are separate and apart from those identified in s. NR 128.08 and constitute a separate process.

(2) DEFINITIONS. The following definitions apply to this section.

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

(b) A "failing private sewage system" is a private sewage system which causes or results in any of the following conditions:

1. The failure to accept sewage discharges which causes back up of sewage into the structure served by the private sewage system.

2. The discharge of sewage to the surface of the ground or to a drain tile.

3. The discharge of sewage to any waters of the state.

4. The introduction of sewage into zones of saturation which adversely affects the operation of a private sewage system.

(c) "Principal residence" means a residence which is occupied at least 51% of the year by an individual, family or household. Second homes, vacation or recreation residences are not considered "principal residences."

(d) "Private sewage system" means a sewage treatment and disposal system serving a principal residence or small commercial establishment with a septic tank and soil absorption field located on the same parcel of land as the structure. This term also means an alternative sewage system approved by the department of commerce including a substitute for the septic tank or soil absorption field, a holding tank, a system serving more than one structure or a system located on different parcel of land than the structure. A private sewage system may be owned by a property owner or by a special purpose district. In order to constitute a "private sewage system," a system cannot be connected to any conventional municipal treatment works, or have municipal treatment facilities available to the property.

(e) "Small commercial establishments" means a commercial establishment or business place which has average total sewage flows of less than 2,100 gallons per day. However, the private sewage system for a small commercial establishment shall be designed for the maximum daily flow.

(3) LIMITATIONS ON AWARD. Before awarding grant assistance for any project for a private sewage system, the department shall determine;

(b) That all requirements of sub. (6) have been met.

(4) ELIGIBLE SYSTEMS. Private sewage systems which replace or rehabilitate existing systems are eligible for grant assistance if they meet the eligibility criteria set forth in s. 145.245 (5), Stats.

(5) ELIGIBLE AND INELIGIBLE COSTS. The following cost eligibility criteria shall apply to applications for private sewage systems grants under s. 145.245, Stats.

(a) Costs allowable in determining grant funding under this section may not exceed the costs of rehabilitating or replacing a private sewage system which would be necessary to allow the rehabilitated or replaced system to meet the minimum requirements of the state plumbing code under s. 145.13, Stats.

(b) Costs allowable in determining grant funding under this section may not exceed the costs of rehabilitating or replacing a private sewage system by the least costly methods.

(c) Acquisition of land on which the private sewage system is located is not grant eligible.

(d) Toilets, sinks, tubs, drains and other wastewater generating fixtures, associated plumbing and modifications to a principal residence or small commercial establishment are not grant eligible.

(e) Only reasonable costs of construction site restoration to preconstruction conditions are eligible; however, costs of improvement or decoration occasioned by the installation of a private sewage system are not grant eligible.

(f) Conveyance pipes from wastewater generating fixtures to the treatment unit connection flange or joint are not eligible where the conveyance pipes are located on private property.

(g) Small sewage treatment plants with surface discharges are not grant eligible.

(h) Replacement or rehabilitation work done before the enforcement order which makes the system eligible under s. 145.245 (5), Stats., was issued is not eligible.

(6) GRANT APPLICATION. (a) A county shall apply for grants for the replacement or rehabilitation of private sewage systems aided under this program on forms to be supplied by the department.

Note: Application forms may be obtained, at no charge, from the Bureau of Community Financial Assistance, Department of Natural Resources, Box 7921, Madison, Wisconsin 53707.

(b) Counties may request preapplication assistance including technical assistance from the department.

(d) An application for a grant to replace or rehabilitate private sewage systems shall include:

1. Certification by the applicant that grants will be used to replace or rehabilitate private sewage systems which meet the eligibility requirements in s. 145.245 (5), Stats., that the funds will be used as provided in s. 145.245 (6), Stats., and that allowable costs will not exceed the amount under sub. (5) (a) or (b);

2. Certification by the applicant that grants provided to counties, shall be disbursed to the owners of eligible private sewage systems;

3. Certification by the applicant that the project will be completed as planned, and that the total share for each principal residence owner or small commercial establishment owner shall not be less than 25% of the total cost of the project.

4. Certification by the applicant that the grants will be used for private sewage systems that will be properly installed and maintained.

5. Documentation of an approvable regulatory program to insure proper installation and maintenance of all new or replacement private sewage systems constructed in that county. An approvable regulatory program must include the following:

a. County adoption of an ordinance which specifically requires compliance with the maintenance program set forth in subd. 5. d. and which specifically grants enforcement authority.

b. A system for providing written notice of the maintenance program requirements to each applicant for a sanitary permit at the time of application.

c. An inspection program, which includes at least one inspection during installation of a system.

d. A maintenance program, which requires inspection of all new or replacement private sewage systems at least once every 3 years. The owner of a system subject to the maintenance program must be required to submit to the county a certification form (to

be provided by the county) every 3 years, signed by the owner and signed by a master plumber, journeyman plumber or restricted plumber licensed under ch. 145, Stats., a person licensed under s. 281.48, Stats., or by a county or state employee designated by the department, who has inspected the system. The form shall require certification that the system is in proper operating condition, and that after inspection, and pumping if necessary, the septic or holding tank is less than 1/3 full of sludge and scum.

e. A central record keeping system.

f. Where considered appropriate, by the county, a system of user charges and cost recovery which assures that each recipient of service under this program will pay a proportionate share of the costs. User charges and cost recovery may include the cost of the grant application fee and the cost of supervising installation and maintenance.

6. Documentation that enforcement orders under s. 145.02 (3) (f), 145.20 (2) (f) or 281.19 (2), Stats., or enforcement orders from the county under s. 146.13, 1993 Stats., have been issued against the systems to be replaced or rehabilitated.

7. For a system serving more than one principal residence or small commercial establishment, an assurance (such as by deed restriction or other covenant running with the property) that the system is and will continue to be owned and controlled jointly by the owners of the properties served.

8. A statement assuring availability of the proposed site, if relevant.

9. A description of the nature and scope of the project and an itemized description of the estimated or actual costs for the project.

10. Subagreements or proposed subagreements, or an explanation of the intended method of awarding subagreements, for performance of any substantial portion of the project work.

11. A map showing the boundaries of all contiguous project areas established for the purposes of priority ranking under sub. (7), and showing the location of all property lines and all private sewage systems included in each contiguous project area.

(8) PAYMENTS. (a) Grant payments shall be made to the county applying for a grant. The county shall be responsible for disbursing all funds received from the department for the purposes for which the grant award was made.

(b) The grantee shall be paid the state grant share of eligible project costs, under s. 145.245 (7) (c), Stats.

(c) The grantee may submit requests for payments for eligible costs in accordance with a negotiated payment schedule included in the grant agreement. Upon receipt of a request for payment, the department shall cause to be disbursed from available funds such amounts as are necessary. The total amount of necessary state payments to the grantee for the project should be equal to the state share of the actual eligible project costs incurred to date, as the grantee certified in its most recent request for payment.

(d) At any time before final payment under the grant, the department may cause any request(s) for payment to be reviewed or audited. Based on such review or audit any payment may be reduced for prior overpayment or increased for prior underpayment.

(e) The state share of any refunds, rebates, credits, or other amounts (including any interest) that accrue to or are received by the grantee for the project, and that are properly allocable to costs for which the grantee has been paid under a grant, must be paid to the state of Wisconsin.

(f) After approval of the request for payment, which the grantee designates as the "final payment request", and the grantee's compliance with all applicable requirements of this subchapter and the grant agreement, the department shall pay to the grantee any unpaid balance of the state share of the eligible project cost. The final payment request must be submitted by the grantee promptly after project completion. Before final payment under the grant, the grantee must execute and deliver an assignment to the state of Wisconsin, of the state share of refunds, rebates, credits or other amounts (including any interest thereon) properly allocable to costs for which the grantee has been paid by the state under the grant.

(g) It is department policy that full and prompt payment be made to the grantee for eligible project costs. The department may only authorize the withholding of a grant payment where it determines in writing that a grantee has failed to comply with project objectives, grant award conditions, or reporting requirements. Such withholding shall be limited to only that amount necessary to assure compliance.

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

(9) ENFORCEMENT. If the department has reason to believe that a violation of the provisions of this section or of any grant or grant amendment made under this section has occurred, the department may take action as follows:

(a) Under s. 145.245 (14), Stats., the department may cause written notice to be served upon the alleged violator, and in conjunction with that notice:

1. Issue an order that corrective action be taken by the alleged violator within a reasonable time, or

2. Require that the alleged violator appear before the department for a hearing, to answer the charges that a violation has occurred.

(b) Under s. 299.95, Stats., the department may terminate or annul a grant made under this section and seek recovery of some or all grant funds previously paid to the grantee, if an order issued under s. 145.245 (14), Stats., is violated.

(c) Under s. 145.245 (14) (d), Stats., the department may suspend or terminate additional grants made under this section if the department finds that a private sewage system previously funded by the county with a grant awarded under this section is not being or has not been properly installed or maintained.

(d) The department may declare as ineligible project costs directly related to the violation.

(e) The department may withhold payment otherwise due to the grantee, under s. NR 128.18 (6).

(f) The department may seek an injunction or other appropriate relief, under s. 299.95, Stats.

(g) The department may seek the imposition of a forfeiture for each violation, pursuant to s. 299.97, Stats.

(10) GENERAL CONDITIONS. All grants and grantees for private sewage system projects under this section are governed, where applicable, by general administration requirements of this subchapter.

History: Cr. Register, February, 1979, No. 278, eff. 3−1−79; am. Register, May, 1980, No. 293, eff. 6−1−80; am. (8) (f) and (10), Register, April, 1982, No. 316, eff. 5−1−82; am. (1), (4), (5) (intro.) and (h), (6) (d) 1., (8) (b), (9) (a) (intro.), (b) and (c), r. (3) (a), (6) (c) and (7), Register, May, 1986, No. 365, eff. 6−1−86; corrections in (1), (2) (d), (4), (5) (intro.) and (h), (6) (d) 1., 5. d. and 6., (8) (b), (9) (a) (intro.), (b), (c), (f) and (g) made under s. 13.93 (2m) (b) 6. and 7., Stats., Register, May, 2000, No. 533.

Subchapter II — Combined Sewer Overflow Abatement

NR 128.35 Purpose. The purpose of this subchapter is to establish rules under s. 281.63, Stats., for the administration of a financial assistance program to implement the legislative finding that state financial assistance for the elimination of combined sewer overflow to the waters of the state is a public purpose and a proper function of state government.

History: Cr. Register, April, 1982, No. 316, eff. 5−1−82; correction made under s. 13.93 (2m) (b) 7., Stats., Register, May, 2000, No. 533.

NR 128.36 Applicability. This subchapter shall apply to all applications for funding under s. 281.63, Stats., for the abatement of combined sewer overflow to the waters of the state. Compliance with this subchapter and all other applicable requirements identified herein is necessary for satisfying qualification requirements prior to grant assistance.

History: Cr. Register, April, 1982, No. 316, eff. 5−1−82; correction made under s. 13.93 (2m) (b) 7., Stats., Register, May, 2000, No. 533.

NR 128.37 Definitions. In this subchapter the definitions in s. 281.63, Stats., and s. NR 128.03 shall apply except:

(1) "Construction" means any one or more of the following activities: erection, building, acquisition, alteration, remodeling, improvement, or extension of treatment works; or professional services necessary to accomplish any of the foregoing.

(2) "Initiation of construction" means the issuance of a notice to proceed under a construction contract or, if a notice to proceed is not required, execution of the construction contract.

(3) "Multi−purpose project" means any project which will result in combined sewer overflow abatement and one or more additional objectives being satisfied.

(4) "Project" means any discrete contract or subitem for the construction of a treatment works described in an approved facilities plan.

History: Cr. Register, April, 1982, No. 316, eff. 5−1−82; correction in (intro.) made under s. 13.93 (2m) (b) 7., Stats., Register, May, 2000, No. 533.

NR 128.39 Eligibility for a state grant. (1) ELIGIBLE MUNICIPALITIES. Only a municipality with a sewerage system which is violating ch. 283, Stats., or title III of the federal water pollution control act, as amended, 33 USC 1251 to 1376, because of combined sewer overflow is eligible to receive financial assistance under the combined sewer overflow abatement financial assistance program.

(2) ELIGIBLE PROJECTS. Projects for the abatement of combined sewer overflow are eligible for participation in the financial assistance program established by this subchapter. Grant assistance may be awarded by the department for those projects that:

(a) Are the most cost−effective means of abating combined sewer overflow and have completed facility planning and engineering design requirements under s. 281.63 (4), Stats.

(b) Are entitled to priority in accordance with s. NR 128.40 and ch. NR 160.

Note: Chapter NR 160 has been repealed.

(3) INELIGIBLE PROJECTS. Projects funded under this subchapter are not eligible for participation in the financial assistance program established under subch. I.

(4) ELIGIBLE COSTS. The grantee's allocable projects costs which are reasonable and necessary are eligible. These costs may include, but are not limited to:

(a) Costs of salaries, benefits, and expendable material the grantee incurs for the project except as provided in sub. (5);

(b) Those costs identified in s. NR 128.05 (4) (c), (d), (j), (k), (L), (n), (p), (q), (r), (v), (w) and (7).

(c) Pre−award professional services and bid advertisement publication as approved by the department.

(d) Costs associated with multi−purpose projects as determined by the department are eligible up to the amount necessary for the abatement of combined sewer overflows. Costs shall be determined by prorating the design capacity necessary to abate combined sewer overflows to the design capacity of the proposed project.

(5) INELIGIBLE COSTS. Costs which are not necessary for the construction of a combined sewer overflow abatement project are ineligible. Such costs include, but are not limited to:

(a) Those costs identified in s. NR 128.05 (5) (b) to (i) and (q), (r) to (w).

(b) Costs of project construction work performed prior to the approved date of initiation of construction established in the grant agreement except as allowed under sub. (4) (c).

(c) Costs associated with percentage−of−cost type contracts.

(6) COSTS ELIGIBLE IF APPROVED. Certain direct costs are sometimes necessary for the construction of a treatment works. Those costs identified in s. NR 128.05 (6) (g) are eligible if reasonable and if the department approves them in the grant agreement or a grant amendment.

(7) CONSTRUCTION CONTRACT CLAIMS. Reasonable and necessary legal, technical and administrative costs associated with further assessing the merits of construction contract claims are eligible provided:

(a) The grantee issues a written notification to the department prior to incurring costs;

(b) The claim arises from work within the scope of the grant;

(c) The claim or assessment costs are not a result of mismanagement;

(d) The claim or assessment costs are not caused by the grantee's vicarious liability for the improper action of others;

(e) The grantee provides an acceptable record of negotiation;

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

(g) The grantee provides a written record of negotiations;

(h) The department determines that an overriding state interest exists in the issues involved in the claim; and

(i) The department subsequently formally amends the cost into the grant.

(8) DISPUTES CONCERNING ELIGIBLE COSTS. The grantee should seek to resolve any questions relating to cost eligibility or allocation at the earliest opportunity before execution of the grant agreement. Disputes regarding determination of cost eligibility shall be resolved in accordance with s. NR 128.49.

History: Cr. Register, April, 1982, No. 316, eff. 5−1−82; am. (4) (b) and (5) (a), renum. (6) to be (8), cr. (6) and (7), Register, March, 1986, No. 363, eff. 4−1−86; corrections in (1) and (2) (a) made under s. 13.93 (2m) (b) 7., Stats., Register, May, 2000, No. 533.

NR 128.40 Distribution of grant funds. (1) GENERAL. Grant funds distributed under this program will be allocated to those projects placed on a funding list. Project sequence will be by priority value as identified on the project priority list established under ch. NR 160.

Note: Chapter NR 160 has been repealed.

(a) By December 31 of each year, each municipality intending to apply for a combined sewer overflow abatement project during the next calendar year shall notify the Department of Natural Resources, Bureau of Community Financial Assistance, Box 7921, Madison, Wisconsin 53707, of its intent in writing. For those municipalities that notify the department by December 31, the department shall annually compile a funding list which ranks those municipalities in the same order as they appear on the project priority list established under ch. NR 160. If there are not sufficient funds available under this section to fund all grant requests that year, the department shall award available funds to projects in the order in which they appear on the funding list. The department may provide a notice entitled a "ready to allocate notice" to municipalities which appear on the funding list and which fulfill the requirements of sub. (2). The department may presume that a municipality which has not submitted complete plans and specifications for review by June 30, 1982, and each March 31 thereafter and a state grant application by July 31, 1982, and each April 30 thereafter will not be able to receive a "ready to allocate notice" prior to December 31 and receive funding under this paragraph.

Note: Chapter NR 160 has been repealed.

(b) As of January 1 of each year, the list created under this section in the prior year expires. The department may allocate funds

to a municipality on the list after the expiration of the list if the municipality received a "ready to allocate notice" before the expiration of the list and the requirements of sub. (2) are met.

(2) ALLOCATION PROCEDURE. (a) The allocation procedure identified in s. NR 128.09 (2) applies here except for the references to the lists compiled under s. NR 128.09 (1). The lists used shall instead be taken from sub. (1).

(b) The distribution procedure identified in s. NR 128.09 (4) applies to advance commitments except for the reference to s. 281.57 (9m), Stats. The procedure identified in s. 281.63 (8), Stats., shall be used instead.

History: Cr. Register, April, 1982, No. 316, eff. 5−1−82; renum. (2) to be (2) (a) and cr. (2) (b), Register, December, 1982, No. 324, eff. 1−1−83; corrections in (1) (a) and (2) (b) made under s. 13.93 (2m) (b) 6. and 7., Stats., Register, May, 2000, No. 533.

NR 128.41 Grant application. (1) PROCEDURE. An application must be submitted to the Department of Natural Resources, Bureau of Community Financial Assistance, Box 7921, Madison, Wisconsin 53707, for each group of proposed projects. Submissions required for subsequent related projects may be provided in the form of amendments to the basic application. Each such submission shall be complete. If any information required under sub. (2) has been furnished with an earlier application, the applicant need only incorporate by reference and if necessary, revise the information utilizing the previous application.

(2) CONTENTS OF APPLICATION. Prior to the award of a grant or grant amendment for a project, the applicant shall furnish the following:

(a) The information and materials identified in s. NR 128.10 (2) (a) 1. d. and 2., (b) 7. and (c) 2. and 4.;

(b) An approved facilities plan as required under s. 281.63 (4) (b) and (c), Stats.;

(c) A schedule or evidence that the applicant has made satisfactory provision to assure the efficient operation and maintenance of the combined sewer overflow abatement project, including a preliminary plan of operation;

(d) Statements that the applicant has complied with the provisions of s. NR 128.11 (4) (a), (b) and (5); and

(e) Evidence that the project will meet applicable effluent limitations or such limitations as the department and municipality may stipulate in a state court of law.

(f) A sewer use ordinance or evidence that a sewer use ordinance or other legally binding requirement will be enacted and enforced in each jurisdiction served by the project before the completion of construction.

(3) GRANT CONDITIONS. (a) Each combined sewer overflow abatement project grant shall be subject to the provisions of s. NR 128.12 (1), (4), (5), (6), (7), (8) (a) and (b), (10), (12) and (14).

(b) No approval of a project change shall obligate the state of Wisconsin to increase the amount of the grant or payments made under a grant agreement unless a grant increase is also approved under s. NR 128.46. Failure to receive prior approval does not preclude submission or consideration of a request for a grant amendment.

History: Cr. Register, April, 1982, No. 316, eff. 5−1−82; am. (2) (a) and (3) (a), Register, March, 1986, No. 363, eff. 4−1−86; corrections in (1) and (2) (b) made under s. 13.93 (2m) (b) 6. and 7., Stats., Register, May, 2000, No. 533.

NR 128.42 Procurement. (1) APPLICABILITY. Procurement of professional services and construction contracts by grantees for construction of a combined sewer overflow abatement project shall be in accordance with state and local law, the provisions of s. NR 128.14 (2), (3), (4), (5), (6), (8) and are subject to review for eligibility, allowability, allocability and reasonableness. The department, on request, in conducting such reviews will hold confidential in accordance with s. NR 2.195 (2) (b) 5.:

Note: Section NR 2.195 (2) (b) 5. was repealed effective 10−1−04.

(a) Professional services' indirect cost breakdowns.

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

(2) FORCE ACCOUNT WORK. (a) A grantee shall secure prior written approval from the department for utilization of the force account method.

(b) The department's approval shall be based on the grantee's certification and demonstration of the necessary competence required to accomplish such work and that the work can be accomplished more economically by the use of the force account method, or emergency circumstances so dictate.

History: Cr. Register, April, 1982, No. 316, eff. 5−1−82; am. (1) and (2) (b), Register, March, 1986, No. 363, eff. 4−1−86; **correction in (1) (intro.) made under s. 13.92 (4) (b) 7., Stats., Register January 2011 No. 661.**

NR 128.43 Subagreements for architectural or engineering services. (1) Administration or management of the construction of a combined sewer overflow abatement project may be performed by negotiated procurement of architectural or engineering services. Subagreements for such services shall be negotiated with candidates selected on the basis of demonstrated competence and qualifications for the type of professional services required and at fair and reasonable prices. To the maximum extent practicable all negotiated procurement shall be conducted in a manner to provide open and free competition.

(2) The provisions of s. NR 128.15 (2) shall apply to the review of subagreements and amendments for architectural or engineering services.

History: Cr. Register, April, 1982, No. 316, eff. 5−1−82; renum. to be (1), cr. (2), Register, March, 1986, No. 363, eff. 4−1−86.

NR 128.44 Construction contracts (subagreement) of grantees. The provisions of s. NR 128.16 (1), (3) and (4) shall apply.

History: Cr. Register, April, 1982, No. 316, eff. 5−1−82.

NR 128.45 State share. The state share of the project cost shall be no greater than 50% of the eligible construction costs as provided in s. 281.63 (7), Stats.

History: Cr. Register, April, 1982, No. 316, eff. 5−1−82; correction made under s. 13.93 (2m) (b) 7., Stats., Register, May, 2000, No. 533.

NR 128.46 Grant payments. (1) The provisions of s. NR 128.18 (2), (3), (4) and (6) shall apply to this subchapter.

(2) The grantee shall be paid the state share of eligible project costs incurred within the scope of an approved project and which are currently due and payable by the grantee (but not including withheld or deferred amounts), subject to the limitations of s. NR 128.39 (4) (d), up to the grant amount set forth in the grant agreement and any approved amendments thereto.

(3) After completion of final inspection, approval of the request for payment which the grantee designates as the "final payment request", and the grantee's compliance with all applicable requirements of this subchapter and the grant agreement, the provisions of s. NR 128.18 (5) with the exception of the references to s. NR 128.12 (11), shall apply to this subchapter.

History: Cr. Register, April, 1982, No. 316, eff. 5−1−82.

NR 128.47 Suspension or termination of grant. (1) In accordance with the provisions of this section the department may, for good cause, suspend state liability for work done after notification is given to the grantee. Suspension of state liability under such a grant shall be termed for purposes of this subchapter as a "stop−work order".

(2) The provisions of s. NR 128.21 (1) (b), (c), (d), (e), (f), (g), (h), (2) (a), (b), (c), (d), (e) and (f) shall apply to this subchapter.

(3) Failure to agree upon the amount of an equitable adjustment due under a stop−work order shall constitute a dispute, and

the grantee may appeal a termination or annulment of a grant under s. NR 128.49.

History: Cr. Register, April, 1982, No. 316, eff. 5−1−82.

NR 128.48 Grant amendments. The provisions of s. NR 128.22 shall apply to this subchapter.

History: Cr. Register, April, 1982, No. 316, eff. 5−1−82.

NR 128.49 Disputes. The provisions of s. NR 128.23 (2) and (3) shall apply to this subchapter.

History: Cr. Register, April, 1982, No. 316, eff. 5−1−82.

NR 128.50 Enforcement. Noncompliance with the provisions of this subchapter or any grant or grant amendment made under this subchapter shall be cause for the imposition of one or more of the following sanctions at the discretion of the department:

(1) The grant may be terminated or annulled under s. NR 128.47.

(2) The sanctions in s. NR 128.24 (1) (b), (e) and (f).

(3) Payment otherwise due to the grantee of up to 10% may be withheld under s. NR 128.46 (1).

(4) Project work may be suspended under s. NR 128.47.

(5) The department may seek recovery of some or all grant payments made under s. 281.63, Stats., unless the conditions set forth in the grant agreement have been fully satisfied.

History: Cr. Register, April, 1982, No. 316, eff. 5−1−82; correction in (5) made under s. 13.93 (2m) (b) 7., Stats., Register, May, 2000, No. 533.

NR 128.51 Grantee accountability. (1) The provisions of s. NR 128.25 (1) (a), (b), (c), (d), (f), (g), (h), (2) and (3) shall apply to this subchapter.

(2) The grantee is responsible for maintaining a financial management system which shall adequately provide for procedures for determining the eligibility and allocability of costs in accordance with the provisions of s. NR 128.39.

History: Cr. Register, April, 1982, No. 316, eff. 5−1−82.

NR 128.52 Variances. The provisions of s. NR 128.26 shall apply to this subchapter.

History: Cr. Register, April, 1982, No. 316, eff. 5−1−82.

Subchapter III — Advance of Allowance

NR 128.60 Purpose. The purpose of this subchapter is to establish rules under the municipal wastewater treatment construction grant amendments of 1981 (33 USC 1251 et seq.) for the implementation and administration of a financial assistance program for facilities planning and engineering design of point source pollution abatement facilities.

History: Cr. Register, April, 1983, No. 328, eff. 5−1−83.

NR 128.61 Applicability. This subchapter shall apply to any advance of allowance for facilities planning and engineering design of point source pollution abatement facilities. Compliance with this subchapter and all other applicable requirements identified herein is necessary to receive and retain funding under the advance of allowance provision of the municipal wastewater treatment construction grant amendments of 1981.

History: Cr. Register, April, 1983, No. 328, eff. 5−1−83.

NR 128.62 Definitions. For the purposes of this subchapter the definitions in s. NR 128.03 (2), (3), (5), (7), (7m), (9) and (24) shall apply and in addition:

(1) "Allowance" means funding intended to assist communities in defraying costs incurred for facilities planning and engineering design.

(2) "Building cost" means the cost of erecting, building, acquiring, altering, remodeling, improving or extending of treatment works.

(a) For step 1 advance of allowance the amount indicated in the U.S. environmental protection agency needs survey as required by section 516 (b) of the federal water pollution control act, as amended (33 USC 1375 (b)) or an amount submitted by the small community with a breakdown of the cost estimate.

(b) For step 2 advance of allowance the amount indicated in the facilities plan or an up−to−date cost breakdown; or

(c) For step 3 the allowable cost of the initial award of all subagreements for building the project.

(3) "Municipality" means a city, town, county, district, association, or other public body (including an intermunicipal agency of 2 or more of the foregoing entities) created under state law, or an Indian tribe or an authorized Indian tribal organization, having jurisdiction over disposal of sewage, industrial wastes, or other waste, or a designated and approved management agency under section 208 of the federal water pollution control act (33 USC 1288).

(a) This definition includes a special district created under state law such as a water district, sewer district, sanitary district, utility district, drainage district or similar entity or an integrated waste management facility, as defined in section 201 (e) of the federal water pollution control act (33 USC 1281 (e)), which has as one of its principal responsibilities the treatment, transport, or disposal of domestic wastewater in a particular geographic area.

(b) This definition excludes the following:

1. Any revenue producing entity which has as its principal responsibility an activity other than providing wastewater treatment services to the general public, such as an airport, turnpike, port facility or other municipal utility.

2. Any special district (such as school district or a park district) which has the responsibility to provide wastewater treatment services in support of its principal activity at specific facilities, unless the special district has the responsibility under state law to provide wastewater treatment services to the community surrounding the special district's facility and no other municipality, with concurrent jurisdiction to serve the community, serves or intends to serve the special district's facility or the surrounding community.

(4) "Small community" means any municipality having a population of 3500 or less as determined by the most recent U.S. census.

History: Cr. Register, April, 1983, No. 328, eff. 5−1−83; am. (intro.) and (2) (a) and (b), r. (3), renum. (4) and (5) to be (3) and (4), Register, March, 1986, No. 363, eff. 4−1−86.

NR 128.64 Eligibility for advance of allowance. (1) ELIGIBLE PARTICIPANTS. (a) Small communities are eligible to participate in the financial assistance program established by this chapter.

(b) Only an applicant which is eligible to receive financial assistance for subsequent phases of construction (steps 2 and 3) and which has the legal authority to subsequently construct and manage the facility may apply for a step 1 advance of allowance.

(2) ELIGIBLE PROJECTS. Projects for the construction of publicly owned treatment works, and privately owned treatment works meeting the requirements of s. NR 128.08, are eligible for participation in the financial assistance program established by this subchapter. Advance of allowance may be awarded for the following types of projects.

(a) Step 1 projects for facilities planning required to apply for step 2 financial assistance.

(b) Step 2 projects for engineering design required to apply for step 3 financial assistance.

(3) INELIGIBLE PROJECTS. (a) Projects not in conformance with approved areawide waste treatment management plans are not eligible.

(b) Projects meeting the enforceable requirements of the act are not eligible.

(c) Projects with step 1 advance of allowance applications received after the department's facilities plan approval date are not eligible.

(d) Projects with step 2 advance of allowance applications received after the department's engineering design approval date are not eligible.

History: Cr. Register, April, 1983, No. 328, eff. 5−1−83.

NR 128.65 Distribution, adjustment and repayment of advance of allowance. (1) DISTRIBUTION. (a) An advance of allowance will be given after the department determines that the project is eligible. The advance of allowance will be paid to the small community after the department receives a copy of the advance of allowance agreement signed by the small community's authorized representative.

(b) The amount of the advance of allowance will be determined using the percentage of total allowable project costs as established in 40 CFR part 35, subpart I, appendix B, as amended, and may not exceed the federal share of the estimated allowance.

(2) ADJUSTMENT. Any adjustment to a step 1 or step 2 advance of allowance because of changes in the building cost shall be made at the time of the step 3 grant award.

(a) If the actual building costs are more than the estimated building costs used for the step 1 and step 2 advance of allowance, an additional allowance may be made.

(b) If the actual building costs are less than the estimated building costs used for the step 1 and step 2 advance of allowance, the small community shall repay the excess advance of allowance.

(3) REPAYMENT. (a) Repayment of a step 1 advance of allowance may be requested by the department if an acceptable facility plan is not completed within 3 years.

(b) Repayment of a step 2 advance of allowance may be requested by the department if engineering design work is not completed within 2 years.

(c) The department may require repayment of step 1 or step 2 advance of allowance if a project does not proceed to step 3, except in cases where a no−action alternative is approved by the department.

History: Cr. Register, April, 1983, No. 328, eff. 5−1−83; am. (1) (b), r. and recr. (2) (a) and (b), r. (3) (c), renum. (3) (d) to be (3) (c), Register, March, 1986, No. 363, eff. 4−1−86.

NR 128.66 Advance of allowance application. (1) PROCEDURE. An application must be submitted to the Department of Natural Resources, Bureau of Water Grants, Box 7921, Madison, Wisconsin 53707, for an advance of allowance for facilities planning or engineering design. If any information required under sub. (2) has been furnished with an earlier application, the applicant need only incorporate that information by reference.

(2) CONTENTS OF APPLICATION. (a) *Step 1.* An application for a step 1 advance of allowance shall include the following:

1. The information and materials identified in s. NR 128.10 (2) (a) 1. a., b., and c.;

2. A resolution from the governing body designating an authorized representative.

(b) *Step 2.* An application for as step 2 advance of allowance shall include the following:

1. An approved facilities plan in accordance with ss. NR 110.09 (1) to (6), 128.19 (3) and (4). Where a federal step 1 grant was awarded prior to September 30, 1978, the facilities planning requirements of s. NR 110.09 (1) (b) 11., (2) (L) and (m) need not be met by the applicant. For projects where a federal step 1 grant was awarded prior to June 26, 1978, the facilities planning requirements of ss. NR 110.09 (2) (j) and 110.10 (2) need not be met by the applicant. Where a federal step 1 grant was awarded prior to May 12, 1978 the planning requirements of s. NR 110.09 (2) (k) need not be met.

2. The nature and scope of the proposed step 2 project, including a schedule for the completion of specific tasks.

3. A resolution from the governing body designating an authorized representative.

History: Cr. Register, April, 1983, No. 328, eff. 5−1−83.

NR 128.67 Limitations and conditions. Before awarding an advance of allowance, the department shall determine that the requirements of s. NR 128.66 (2) (a) and (b) have been met and shall also determine that:

(1) The provisions of ss. NR 128.11 (2), (4) (a) and (b), (6) (b) and (c), (11) and 128.12 (1) apply to step 1.

(2) The provisions of ss. NR 128.11 (2), (4) (a) and (b), (6) (b) and (c), (7), (10) (a) through (f), (11) and 128.12 (1) apply to step 2.

(3) The small community agrees to complete the project in accordance with the advance of allowance agreement.

(4) The applicant is a small community.

History: Cr. Register, April, 1983, No. 328, eff. 5−1−83; am. (3), Register, March, 1986, No. 363, eff. 4−1−86.

NR 128.68 Suspension or termination of advance of allowance. (1) In accordance with the provisions of this section the department may, for good cause, suspend state liability for work done after notification is given to the small community. Suspension of state liability under an advance of allowance shall be identified as a "stop−work order" for the purposes of this subchapter.

(2) Good cause for issuance of a stop−work order includes, but is not limited to, default by the small community, failure to comply with the terms and conditions of the advance of allowance agreement, or lack of adequate funding.

(3) Failure to agree upon the amount of an equitable adjustment due under a stop−work order shall constitute a dispute, and the small community may appeal a suspension or termination of an advance of allowance under s. NR 128.69.

History: Cr. Register, April, 1983, No. 328, eff. 5−1−83.

NR 128.69 Disputes. The provisions of s. NR 128.23 shall apply to this subchapter.

History: Cr. Register, April, 1983, No. 328, eff. 5−1−83.

NR 128.70 Enforcement. Noncompliance with the provisions of this subchapter or any advance of allowance made under this subchapter shall be cause for the imposition of one or more of the following sanctions at the discretion of the department:

(1) The advance of allowance may be suspended or terminated under s. NR 128.68.

(2) The sanctions in s. NR 128.24 (1) (e) and (f) may be applied.

(3) State liability for project work may be suspended under s. NR 128.68.

(4) The department may seek repayment of all advance of allowance payments made under this subchapter unless the conditions set forth in the advance of allowance agreement have been fully satisfied.

History: Cr. Register, April, 1983, No. 328, eff. 5−1−83.

NR 128.71 Variances. The provisions of s. NR 128.26 shall apply to this subchapter except that the term "advance of allowance" shall be substituted for the word "grant" and the term "small community" shall be substituted for the word "grantee".

History: Cr. Register, April, 1983, No. 328, eff. 5−1−83.