

Publication Date: August 28, 2009
Effective Dates: August 28, 2009 through January 24, 2010

**ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD
REPEALING, RENUMBERING, AMENDING AND CREATING RULES
WT-22-09(E)**

The Wisconsin Natural Resources Board proposes an order to **repeal** NR 335.08(2)(f), NR 336.02(1)(a) and (1)(b), 336.02(2)(a) and (2)(b), 336.03(12) and (14), and 336.08(1) and (2), to **renumber** NR 335.03(5) to (23), 335.08(2)(g) and 336.03(13), to **amend** NR 335 TITLE, 335.04, renumbered 335.03(14), renumbered 335.03(18), renumbered 335.03(21), 335.05, 335.06(1) to (4), 335.06(6) to (7), 335.07(1)(a) and (1)(b), 335.07(2)(a)3. and (2)(b)1., 335.07 – ANNOT., 335.08(1)(c) to (1)(d), 335.03(2)(e), 335.09-ANNOT., 335.14(1)(b)1., NR 336 TITLE, 336.02(1) and (2), 336.03(1) and (9), renumbered 336.03(12), 336.05(11), 336.06 – ANNOT., 336.08, and 336.10(1), and to **create** NR 335.03(5) and (6), 335.05(1) to (3), 335.06(8) and (9), 335.08(1)(e), 335.15, 335.16, 335.16(1) to (3), and NR 336.10(5) relating to grants for dam maintenance, repair, modification, or abandonment and removal.

Analysis Prepared by the Department of Natural Resources

Statutes interpreted: ss. 31.385 (1m) and (4)(b), Stats.

Statutory authority: ss. 31.385 (1m), 31.384(4), 227.11(2)(a) and 227.24(1)(a), Stats.

Explanation of agency authority: This order implements s. 31.385(1m), Stats., which directs the department to promulgate rules to administer a financial assistance program for dam safety projects and s. 31.385(4), Stats., which directs the department to promulgate rules to establish a dam grant inventory and notice and hearing procedure to place dams on the inventory. The rules must provide grants to municipalities and Lake Districts for maintenance, repair, reconstruction, and removal of dams, to private dam owners for the removal of their dams and any person for the removal of abandoned dams. Amendments under Act 28 of 2009 provide \$4 million in bonding for dam safety grants, the first substantial increase in bonding since 1999.

Related statute or rule: These rules assist the department in achieving the statutory goals of Chapter 31, Stats., which vests the Department with the responsibility to regulate dams and promote safety and protect life and property from unsafe dams. The grant programs provide funding to dam owners to address safety deficiencies at dams. There are no other similar rules that address these issues.

Plain language analysis: The objectives of the order for ch. NR 335 and ch. NR 336 are to implement enabling legislation. The changes can be divided into two broad categories:

- *Incorporate statutory changes into the existing grant codes:*
 - *increases the maximum level of state contribution allowed under the grant programs from \$200,000 to \$400,000*
 - *varies the state contribution percentage for dam repair and reconstruction projects, depending on the size of the projects*
 - *increases the percentage of state contribution to 100% up to the maximum grant award for dam removal projects*
 - *eliminates statutory definition of “small dam” for dam removal grants*
 - *provides for an inventory of dam safety projects with a notification for dam owners*
 - *changes the definition of large dam to match change in s. 31.19, Stats.*
 - *allows for cost effective, non construction activities that increase the safety of a dam*
- *Facilitate investing the \$4 million allocation of bonding for the program*
 - *grants greater flexibility for implementation of a grant application cycle for the fall of 2009*
 - *adjusts other code timelines and application requirements to address past implementation difficulties and assure more applications can be deemed complete*

- *allows for the addition of a variance clause which would facilitate the implementation and administration of NR 335*
- *makes it easier applicants to the Municipal Dam Grant program to pair the grant with other, outside funding sources.*
- *corrects incorrect definitions and statute citations*
- *clarifies that state agencies may use the grants to remove abandoned dams*
- *clarifies that an owner can only submit one application at a time per dam for funding under NR 335 and cannot get a grant for the same dam under NR 335 and NR 336 in the same year.*

These proposed changes will provide for an immediate process whereby Wisconsin dam owners can address dam safety deficiencies at municipally owned dams and allow the owner of any dam to obtain funding to remove the dam as a means to mitigate safety deficiencies. Without the emergency rule revisions, the ability for eligible entities to apply for and receive funding will be delayed 6 to 12 months and the general public that lives or recreates near an unsafe dam will remain at risk.

The emergency rule revisions are designed to be non-controversial. Any proposed rule changes that may be controversial were not included in the emergency rules and will be vetted through the public hearing process for permanent rule revisions. The permanent rule process is anticipated to start this fall with a request to go to public hearing at the October Natural Resources Board meeting.

Comparison to federal regulations: The U.S. Department of Agriculture, Natural Resource Conservation Service (NRCS) has a cost sharing program for the rehabilitation of dams built under Public Law 566. We anticipate that at least one County which owns PL566 dams will be trying to obtain funding from both the state and federal programs. Funding for the federal program is limited but if a dam owner is successful in obtaining funding from both programs the state grant would help the county pay their 35% local cost share requirement under the federal program. There are also a number of federal programs which fund dam removal and stream restoration, including programs from U.S. Fish and Wildlife Service, NRCS and the National Oceanic and Atmospheric Administration. These programs have been used in conjunction with grants awarded under NR 336 in the past. The programs are complimentary and pairing of the funding sources allows grant funds to go toward more projects.

Comparison with rules in adjacent states: No similar programs in adjacent states.

Summary of factual data and analytical methods: None.

Analysis to determine effect on small business: None.

Anticipated costs incurred by private sector: These rules affect the owners of dams in the state. The majority of the funds will be awarded to municipalities or Lake Districts. The effects are believed to be positive, by providing state cost-sharing to address dam safety deficiencies. While the grant program is voluntary, there will be some increased cost to and effort to dam owners associated with the material required for the application. However, cost sharing is available for these requirements as well. It is believed that these increased costs and effort will be offset by the financial assistance available through the grants.

Effect on small business: Small business is not directly affected unless they own a dam and want to remove the structure, in which case they can apply for funding to accomplish this objective. Therefore, under s. 227.114, Stats., an initial regulatory flexibility analysis is not required. Engineering consultants and companies involved in dam construction and removal should benefit from an increase in project activity resulting from an increase in the supply of money for these kinds of projects.

Emergency rule: The Department is interpreting the substantial increase in dam grant funding as a strong message from the Legislature that concern for public welfare from unsafe dams is growing, as well as the desire to help dam owners, including the owners of the many dams damaged during the flooding in 2007 and 2008. In order to protect the public and provide this financial assistance, these additional funds should be put to work as soon as possible. The timeline for permanent rule promulgation will impede the Department's ability to accept applications and commit funding to dam safety projects until at least June 2010, which would delay most projects until late 2010 or 2011. The emergency rules will allow immediate implementation of modifications that will allow a grant application cycle to be conducted yet this fall and allow most projects to be constructed during the 2010 construction season or before. Only the changes necessary

to implement statutory changes and quickly and effectively conduct a grant application cycle will be included in the emergency rule. The Bureau will be promulgating these changes and additional proposals as a permanent rule for public hearing at the October Board meeting.

Agency contact:

Meg Galloway

Phone: (608) 266-7014

Email: Meg.Galloway@Wisconsin.gov

Remainder is Dam Grant info:

SECTION 1. NR 335 Title is amended to read:

NR 335, MUNICIPAL DAM MAINTENANCE, REPAIR, MODIFICATION, ABANDONMENT AND REMOVAL AID GRANT PROGRAM

SECTION 2. NR 335.03(4) is amended to read:

NR 335.03(4) "Dam" means any artificial barrier in or across a ~~waterway~~ watercourse which has the primary purpose of impounding or diverting water. A dam includes all appurtenant works, such as a dike, canal or powerhouse.

SECTION 3. NR 335.03(5) and NR 335.03(6) are created to read:

NR 335.03(5) "Dam grant inventory" means the list of dams maintained by the department that require a dam safety project and for which a grant application has been filed under s. 31.385, Stat.

NR 335.03(6) "Dam safety project" means the maintenance, repair, modification, or abandonment and removal of a dam to increase the safety of the dam or any other activity that will increase the safety of the dam.

SECTION 4. NR 335.03(5) to (23) are renumbered to NR 335.03(7) to (25) and NR 335.03(14), NR 335.03(18) and NR 335.03(21) as renumbered, are amended to read:

NR 335.03(14) "Large dam" means a dam that has either a structural height of more than 6 feet and a maximum storage capacity of ~~more than~~ 50 acre-feet or more, or a structural height of 25 feet or more and a maximum storage capacity of more than 15 acre-feet.

NR 335.03(18) "Municipality" means any town, village, city, ~~or county,~~ or tribe in this state.

NR 335.03(21) "Owner" means any municipality or lake district which has title to a dam and fee title ownership or permanent legal access for the purposes of operation and maintenance to the specific piece of land on which a dam is physically located.

SECTION 5. NR 335.05 is amended to read:

NR 335.05 **State share.** ~~The state share may not exceed 50% of the total eligible project costs nor exceed \$200,000 for any one dam.~~

SECTION 6. NR 335.05(1), NR 335.05(2) and NR 335.05(3) are created to read:

NR 335.05(1) For dam repair, reconstruction or maintenance projects the state share may not exceed 50% of the first \$400,000 of eligible project costs nor more than 25% of the eligible project costs that exceed \$400,000.

(2) For dam removal projects the state share may not exceed 100% of the eligible project costs.

(3) The state share is limited to no more than \$400,000 for each dam safety project.

SECTION 7. NR 335.06(1) NR 335.06(2) NR 335.06(3), NR 335.06(4), NR 335.06(6) and NR 335.06(7) are amended to read:

NR 335.06(1) All applications for a grant under this chapter shall be received by the department no later than ~~April 1~~ October 15 of each year, unless otherwise noted on the application materials.

(2) The department shall establish a priority list ~~by June 1 of each year which~~ within 45 days of the application deadline, which ranks all complete applications received by the April 1 application deadline. Applicants shall be notified of their placement on the priority list and the probability of approval for funding. The ranking of applicants shall be made available upon written request.

(3) Applicants receiving a commitment for funding shall submit plans and specifications to the department, for approval, ~~prior to October 1 of the same year the application is made~~ within 6 months of the notification on placement on the priority ranking list, unless an extension is requested in writing and approved by the department.

(4) Applicants receiving a commitment for funding shall submit construction bids for the proposed work to the department within ~~60~~ 90 days of department approval of plans and specifications. Following submission to the department, the owner may rebid the project without losing eligibility if the original bid is deemed too high or inappropriate. The applicant shall rebid the project within 60 days of receipt of the original bid. The department shall direct the owner to rebid the project if it deems the bid inappropriate. The applicant shall rebid the project within 60 days of receiving notification from the department that the department deems the bid inappropriate.

(6) All complete applications received after ~~April 1~~ the application deadline shall be considered for funding during the next year in which money becomes available. To be considered, any amendment to a late application shall be received by the department no later than the next ~~April 1~~ application deadline.

(7) If there are insufficient funds to award aid to all eligible applicants on the priority list, the remaining projects shall be considered for funding during the next year in which money becomes available. To be considered, any amendments to unfunded applications shall be received by the department no later than the next ~~April 1~~ application deadline.

SECTION 8. NR 335.06(8) and NR 335.06(9) are created to read:

NR 335.06(8) A grant will not be awarded under this program until the owner of the dam provides adequate proof of ownership of the entire dam and a dam failure analysis approvable under the standards of NR 333.05(2), including maps suitable for the purpose of implementing land use controls below the dam.

(9) A grant will not be awarded under this program for a dam project that has already received a grant award though the Dam Removal Grant program administered under NR 336.

SECTION 9. NR 335.07(1)(a), NR 335.07(1)(b), NR 335.07(2)(a)3. and NR 335.07(2)(b)1. are amended to read:

NR 335.07(1)(a) A separate grant application shall be submitted to the department for each individual dam for which financial assistance is requested under this chapter. Only one application under this chapter can be received for a dam in any year.

(1)(b) The department shall review each application received for completeness and shall advise the applicant in writing of any deficiencies, omissions or errors in the application ~~in writing~~. Incomplete applications may not be considered if all information is not received by the department by ~~April 1~~ the application deadline for that year.

(2)(a)3. Proof of receipt of a letter sent by certified mail, from the dam owner to the municipality(s) responsible for the implementation of land use controls within the hydraulic shadow, informing the municipality(s) that a change in the land use controls may be necessary to secure the hazard rating for the dam.

(2)(b)1. A dam failure analysis ~~including maps suitable for the purpose of implementing land use controls below the dam sufficient to identify the appropriate hazard of the dam based on current development.~~

SECTION 10. NR 335.07 – ANNOT. is amended to read:

NR 335.07 - ANNOT. Note: Application forms ~~are available from the department by writing to the Wisconsin Department of Natural Resources, Bureau of Water Regulation and Zoning, P.O. Box 7921, Madison, WI 53707~~ may be obtained from the department's website, <http://dnr.wi.gov/org/caer/cfa/Grants/Dammaint.html>, or from the DNR Bureau of Community Financial Assistance, PO Box 7921, Madison, WI 53707.

SECTION 11. NR 335.08(1)(c), NR 335.08(1)(d) and NR 335.08(2)(e) are amended to read:

NR 335.08(1)(c) Actual and reasonable construction costs incurred in the repair, modification or abandonment of the dam,

including labor and materials;~~and~~

(1)(d) Actual and reasonable engineering costs involved in the on-site inspection of the repair, modification or abandonment of the dam. On-site inspection by an engineer registered in the state of Wisconsin is required during critical stages of construction; and

(2)(e) Costs of equipment necessary for routine maintenance of the dam;.

SECTION 12. NR 335.08(1)(e) is created to read:

NR 335.08(1)(e) Actual and reasonable costs for activities other than the maintenance, repair or modification of the dam (structural alternative) only if the cost of that activity will be less than the cost of the structural alternative.

SECTION 13. NR 335.08(2)(f) is repealed.

SECTION 14. NR 335.08(2)(g) is renumbered to NR 335.08(2)(f).

SECTION 15. NR 335.09 - ANNOT. is amended to read:

NR 335.09 - ANNOT. * Based on ~~the most recent department of revenue publication, Long Term Indebtedness of Wisconsin Political Subdivisions and Taxes, Aids and Shared Taxes and confirmation of its applicability by department investigation references provided in the application materials.~~

When determining financial need points for lake districts, the point totals are to equal the weighted average of the income and indebtedness figures for the individual municipalities making up the district, based on the percent of the district lying within each municipality.

SECTION 16. NR 335.14(1)(b)1. is amended to read:

NR 335.14(1)(b)1. Any consultant, construction or service contract ~~totaling~~totaling \$10,000.00 or more annually shall be covered by a formal contract or agreement specifying financial terms, contract duration, and services to be rendered.

SECTION 17. NR 335.15 is created to read:

NR 335.15 **Variances.** The department may approve variances from nonstatutory requirements of this chapter upon the request of a sponsor when the department determines that variances are essential to effect necessary grant actions or program objectives, and where special circumstances make such variances in the best interest of the program. Before granting a variance, the department shall take into account such factors as good cause and circumstances beyond the control of the sponsor.

SECTION 18. NR 335.16, NR 335.16 (1), NR 335.16 (2) and NR 335.16(3) are created to read:

NR 335.16 **Dam Grant Inventory.**

(1) Projects will be added to the dam grant inventory after receipt of an application. By signing the application, the applicant is acknowledging they are aware the dam will be placed on the dam grant inventory.

(2) As part of the application, the department shall provide notice to the dam owner stating that it will proceed on the funding request and addition to the dam grant inventory without a hearing unless a request for a hearing is filed with the department by the dam owner.

(3) If a hearing is requested pursuant to notice under this subsection, the department may schedule the matter for hearing using the procedures under s. 31.06 (2), Stats., or may notify the owner that the dam has been removed from the dam grant inventory.

SECTION 19. NR 336 Title is amended to read:

NR 336, ~~SMALL AND ABANDONED DAM REMOVAL GRANT PROGRAM~~

SECTION 20. NR 336.02(1) and NR 336.02(2) are amended to read:

NR 336.02(1) ~~In the case of small dam Counties, cities, townships, villages, public inland lake protection and rehabilitation districts, tribes or private dam owners for the removal of dams they own.~~

(2) ~~In the case of Any person, including a state agency, who has obtained legal access to property for the purpose of removing a dam declared abandoned dam removal under s. 31.187, Stats.~~

SECTION 21. NR 336.02(1)(a), NR 336.02(1)(b), NR 336.02(2)(a) and NR 336.02(2)(b) are repealed.

SECTION 22. NR 336.03(1) and 336.03(9) are amended to read:

NR 336.03(1) "Abandoned dam" means a dam declared abandoned using the process under s. ~~30.121 (4)~~31.187, Stats.

(9) "Project" means ~~an abandoned or small~~ dam removal project.

SECTION 23. NR 336.03(12) and NR 336.03(14) are repealed.

SECTION 24. NR 336.03(13) is renumbered NR 336.03(12) and amended to read:

NR 336.03(12) "~~Small dam~~Dam removal project" means the activities associated with removal of a ~~small-dam~~ and associated stream restoration.

SECTION 25. NR 336.05(11) is amended to read:

NR 336.05(11) Total grant assistance provided under this chapter shall be ~~limited to a maximum of 50~~100% of eligible project costs up to \$50,000 unless otherwise provided by law or the maximum award amount identified in the application materials.

SECTION 26. NR 336.06 – ANNOT. is amended to read:

NR 336.06 - ANNOT. **Note: Applications may be obtained by contacting the Department of Natural Resources, Dam Safety Program, WT/2, Bureau of Community Financial Assistance, ~~101 South Webster Street, Box 7921, Madison, WI 53707-7921, (608) 266-8030~~ or from the department's website, <http://dnr.wi.gov/org/caer/cfa/Grants/DamRemov.html>.**

SECTION 27. NR 336.08 is amended to read:

NR 336.08 **Project priority list.** The department shall maintain a list containing the order of projects eligible for funding. The order of funding is based on the ~~following 2 factors: date when the department receives the application.~~ Applications received on the same date will be randomly selected and ranked within that day.

SECTION 28. NR 336.08(1) and NR 336.08(2) are repealed.

SECTION 29. NR 336.10(1) is amended to read:

NR 336.10(1) The grant award for a ~~small-dam~~ removal project is ~~50~~100% of the eligible project cost not to exceed \$50,000 or the maximum award amount identified in the application materials and may be limited by availability of grant funding.

SECTION 30. NR 336.10(5) is created to read:

NR 336.10(5) A grant award will not be awarded under this program for a dam project that has already received a grant award through the Municipal Dam Grant program, administered under ch. NR 335, in the same year.

SECTION 31. STATEMENT OF EMERGENCY. The substantial increase in bonding for the dam grant programs is a strong message from the legislature that that concern for public welfare from unsafe dams is growing, as well as the desire to help dam owners, including the owners of the many dams damaged during the flooding in 2007 and 2008. In order to

protect the public and provide this financial assistance, these additional funds should be put to work as soon as possible. The timeline for permanent rule promulgation will impede the Department's ability to accept applications and commit funding to dam safety projects until at least June 2010, which would delay most projects until late 2010 or 2011. The emergency rules will allow immediate implementation of modifications that will allow a grant application cycle to be conducted yet this fall and allow most projects to be constructed during the 2010 construction season or before.