

Clearinghouse Rule 22-079

ORDER of the DEPARTMENT OF ADMINISTRATION

The Wisconsin Department of Administration proposes an order to repeal Wis. Admin. Code §§ Adm 35.02 (6), 35.03 (1), (2) (intro.), and (2) (a) to (i), 35.04 (1), 35.05 (3), and 35.06 (3); to renumber and amend Adm 35.02 (1) and 35.06 (1); to amend Adm 35 (title), 35.01, 35.02 (4) and (5), 35.03 (title), 35.03 (3) (a) and (b), 35.03 (4) (a) and (b), 35.04 (3), 35.05 (title), 35.05 (1), Adm 35.06 (intro.), 35.07 (title), 35.07 (1) (intro.), 35.07 (1) (a) to (c), (2) and (3), and 35.09; to repeal and recreate Adm 35.02 (3) and (7), 35.04 (2), 35.05 (2), 35.06 (2), and 35.08; and to create Adm 35.02 (3m), 35.03 (3) (c), 35.03 (4) (b) 4., 35.06 (1) (a) to (e), and 35.06 (3) (intro) and (3) (a) and (b), relating to financial management of the Environmental Improvement Fund.

Rule Analysis prepared by the Department of Administration

1. Citations to statutes interpreted:
Sections 25.43, 281.58, 281.59, and 281.61, Stats.
2. Citations to statutory authority:
Sections 227.11 (2) (a), 281.59 (2) (a) and (b), 281.59 (14), and 281.61 (2), Stats.
3. Explanation of the agency's statutory authority to promulgate the rule under the statutes cited:
Section 281.59 (14), Stats. mandates that DOA promulgate rules necessary to execute its responsibilities under Sections 281.58, 281.59, and 281.61, Stats.

Wis. Stat. s. 227.11 (2) (a) permits DOA to “promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute. . . .” Adm 35 is necessary to carry out DOA's responsibilities under ss. 281.59 (2) (a) and (b) and 281.61 (2), Stats.

4. Related statutes or rules:
The Department of Natural Resources is currently amending chs. NR 162 and 166, Wis. Admin Code, relating to its administration of the Environmental Improvement Fund (EIF).
 - Existing policy: DOA's administration of the EIF is subject to:
 - The federal Clean Water Act and Safe Drinking Water Act. “Clean Water Act” is the common name of the Federal Water Pollution Control Act and its amendments. The Clean Water Act and Safe Drinking Water Act require EIF funds to remain in the EIF in perpetuity; specify how, to whom, and for what projects the EIF can provide financial assistance; and require financial assistance to include principal forgiveness, which does not need to be repaid.
 - Regulations of the U.S. Environmental Protection Agency (EPA). EPA regulations govern assistance recipient federal single audit requirements; the

documentation required to disburse assistance; and for what purposes the EIF expends money from different sources, e.g. the EIF cannot use loan principal repayments to fund debt service on the state match portion of EIF revenue bonds.

- Regulations of the U.S. Treasury (Treasury). Treasury regulations govern tax-exempt municipal debt, including both EIF financial assistance to projects and the EIF's issuance of revenue bonds. Treasury restricts who and for what purposes entities can issue tax-exempt debt.
- Wisconsin Administrative Code NR 162 and 166 – governing technical and application requirements of the Clean Water Fund Program (CWFP) and Safe Drinking Water Loan Program (SDWLP), respectively. NR 162 and 166 govern recipient and project eligibility, interest rates for various project activities, the assistance disbursement request form and process.
- The annual Intended Use Plans (IUP) prepared by DNR in consultation with DOA and submitted to EPA. There is one IUP for the CWFP and one for the SDWLP. The IUPs describe the policies, goals, and administration of the EIF. State fiscal year 2021 IUPs govern the maximum loan term, program timelines, and details for disbursing assistance.
- Resolutions enacted by the Wisconsin Building Commission regarding the EIF revenue bonds. Resolutions specify how money flows through EIF accounts; require bond counsel opinions for EIF loans; require the EIF to diligently enforce loan terms; and limit the EIF's ability to take certain actions, such as modifying the terms of outstanding loans.

5. Brief plain language summary of the proposed rule:

- Address loan forgiveness. Federal law changes since the last Adm 35 revision allow the Environmental Improvement Fund to forgive loan principal. Forgiven loan principal is effectively a grant.
- Include all the types of financial assistance permitted under federal law, such as loan guarantees.
- Include the SDWLP and reflect the CWFP's expansion into the Environmental Improvement Fund.
- Reflect Wisconsin's creation of the Environmental Improvement Fund revenue bond program to replace the Clean Water revenue bond program.
- Remove requirements meant to protect funding capacity and instead focus on streamlined administration. The Environmental Improvement Fund's increased funding capacity means that the program's short-term solvency is not in doubt.
- Incorporate federal Environmental Protection Agency policy changes, including the federal equivalency policy that alleviates regulatory burdens on recipients.
- Remove provisions that duplicate Wisconsin Statutes or are the responsibility of the Department of Natural Resources.

6. Summary of, and preliminary comparison with, any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule:

The EIF is governed by the federal Clean Water Act and Safe Drinking Water Act as well as EPA regulations. The EPA annually reviews Wisconsin's EIF and regularly determines that the EIF complies with federal law and regulations.

Because the EIF receives grants from the EPA, it is also subject to an annual grant agreement with the EPA.

Adm 35 complies with US Treasury and Internal Revenue Service regulations related to issuing tax-exempt municipal bonds.

7. Comparison with similar rules in Illinois, Iowa, Michigan, and Minnesota:

Illinois, Iowa, Michigan, and Minnesota, along with all other states and Puerto Rico, operate state revolving funds that are broadly similar to Wisconsin's Environmental Improvement Fund. Like Wisconsin, Illinois, Iowa, Michigan, and Minnesota issue revenue bonds to leverage federal grants and program funds. Illinois, Michigan, and Minnesota are in EPA region five with Wisconsin, facilitating interstate communication and information sharing among state revolving fund program staff.

8. Summary of the factual data and analytical methodologies that the agency used in support of the proposed rule and how any related findings support the regulatory approach chosen for the proposed rule:

The Department of Administration did not use any factual data or analytical methodologies in developing the proposed rule. Adm 35 does not implement any regulatory requirements.

9. Effect on small business

None. The Environmental Improvement Fund provides financial assistance only to municipalities as defined in Section 281.59 (1) (c), Wis Stats. The requirements of Adm 35 apply only to municipalities and only if they choose to use the program.

Municipalities who apply for Environmental Improvement Fund loans may employ professional services: engineers, accountants, financial advisors, and lawyers to help the municipalities comply with program requirements. Some of these professional services firms may be small businesses. Otherwise Adm 35 does not impact small businesses.

10. Any analysis and supporting documents used in support of the agency's determination of the rule's effect on small business or in preparation of economic impact report:

None.

11. Email address and telephone number of agency contact person:

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Katherine Miller, 608 266-2305, katherinec.miller@wisconsin.gov

Aaron Heintz, 608 267-1836, aaron.heintz@wisconsin.gov

12. Place where comments are to be submitted and deadline for submission:

doaeif@wisconsin.gov

Deadline: 5 pm central time on January 5, 2023

RULE TEXT

SECTION 1. Adm 35 (title) is amended to read:

Adm 35 (title) ~~CLEAN WATER~~ ENVIRONMENTAL IMPROVEMENT FUND

SECTION 2. Adm 35.01 is amended to read:

Adm 35.01 Purpose. The purpose of this chapter is to establish rules under ~~s. ss. 281.58, 281.59, and 281.61~~ Stats., for the administration of a program to provide financial assistance ~~to municipalities for certain costs incurred in abatement of~~ to abate pollution of the waters of the state ~~or to provide drinking water.~~

SECTION 3. Adm 35.02 (1) is renumbered 35.02 (2m) and amended to read:

Adm 35.02 (2m) “~~Clean water~~ Environmental improvement fund” means the fund established under s. 25.43, Stats., ~~for the purpose of providing financial assistance to municipalities for certain costs incurred in abatement of~~ pollution of waters of the state.

SECTION 4. Adm 35.02 (3) is repealed and recreated to read:

Adm 35.02 (3) “Financial assistance” includes assistance from the environmental improvement fund under ss. 281.58 (6) (b), 281.59 (12), or 281.61 (2r), including assistance that the department does not require the recipient to repay.

SECTION 5. Adm 35.02 (3m) is created to read:

Adm 35.02 (3m) “Financial assistance agreement” means an agreement entered into by the department pursuant to s. 281.59 (11) (a), Stats., including an amendment to a financial assistance agreement.

SECTION 6. Adm 35.02 (4) and (5) are amended to read:

Adm 35.02 (4) “Market interest rate” ~~means interest at the effective rate, as determined by the department, for revenue obligations issued by the state to fund a project loan or a portion of a project loan.~~ has the meaning given in s. 281.59 (1) (b), Stats.

Adm 35.02 (5) “Municipality” has the meaning ~~set forth~~ given in s. 281.59 (1) (c), Stats.

SECTION 7. Adm 35.02 (6) is repealed.

SECTION 8. Adm 35.02 (7) is repealed and recreated to read:

Adm 35.02 (7) “Obligation” means financial assistance that the recipient must repay. Obligations include a recipient’s debts guaranteed or insured by the environmental improvement fund that the recipient must repay to another lender.

SECTION 9. Adm 35.03 (title) is amended to read:

Adm 35.03 (title) ~~Certification.~~ Conditions of financial assistance.

SECTION 10. Adm 35.03 (1), (2) (intro.), and (2) (a) to (i) are repealed.

SECTION 11. Adm 35.03 (3) (a) and (b) are amended to read:

Adm 35.03 (3) (a) The department may not ~~issue a certification~~ enter into a financial assistance agreement unless the ~~municipality recipient~~ municipality recipient demonstrates to the satisfaction of the department that the ~~municipality recipient~~ municipality recipient has the financial capacity to assure sufficient dedicated sources of revenue to operate and maintain the ~~project system for its useful life as long as an obligation is outstanding for the project~~ project system and to pay the debt service, including funding and maintaining any debt service reserve, on its ~~project loan obligation.~~ project loan obligation. ~~The department may consider the effect of proposed financial hardship assistance or assistance provided by another entity in making a determination of financial capacity.~~

(b) The department ~~may~~ shall require an opinion of counsel or bond counsel, acceptable to the department, to the effect that the obligation of the ~~municipality recipient to repay the project loan~~ municipality recipient is valid and enforceable ~~and that interest on the project loan is excluded from gross income for federal income tax purposes.~~

SECTION 12. Adm 35.03 (3) (c) is created to read:

Adm 35.03 (3) (c) The department may require the opinion of counsel or bond counsel under par. (b) to include a statement that interest on the obligation is excluded from gross income for federal income tax purposes.

SECTION 13. Adm 35.03 (4) (a) and (b) are amended to read:

Adm 35.03 (4) (a) The department may not ~~issue a certification~~ enter into a financial assistance agreement unless the ~~municipality recipient~~ municipality recipient establishes one or more dedicated sources of revenue that the department deems sufficient for repayment of the ~~project loan~~ obligation.

(b) ~~In this subsection, "dedicated source of revenue" includes any~~ The dedicated source of revenue pledged to repayment of the obligation shall include one or more of the following:

SECTION 14. Adm 35.03 (4) (b) 4. is created to read:

Adm 35.03 (4) (b) 4. Any other dedicated source of revenue that the department deems satisfactory.

SECTION 15. Adm 35.04 (1) is repealed.

SECTION 16. Adm 35.04 (2) is repealed and recreated to read:

Adm 35.04 (2) A recipient may not pay the principal of an obligation prior to the payment schedule specified in the financial assistance agreement, except in accordance with the financial assistance agreement and the obligation.

SECTION 17. Adm 35.04 (3) is amended to read:

Adm 35.04 (3) In administration of its powers and duties under s. 281.59 (11) (b), Stats., the department shall deduct, as a first charge against state payments due the municipality, any amounts due to the ~~clean water~~ environmental improvement fund.

SECTION 18. Adm 35.05 (title) is amended to read:

Adm 35.05 (title) Disbursement of ~~project loan proceeds~~ financial assistance.

SECTION 19. Adm 35.05 (1) is amended to read:

Adm 35.05 (1) ~~Except as provided in this section, The department may disburse the proceeds of a project loan shall be distributed by the department~~ financial assistance to the municipality recipient upon presentation of a request for disbursement from the municipality and written certification receiving a determination from the department of natural resources that the municipality financial assistance requested by the recipient is in compliance with all applicable requirements of ch. NR 162 or 166 and the financial assistance agreement. The form and procedure of the request shall be specified in the financial assistance agreement.

SECTION 20. Adm 35.05 (2) is repealed and recreated to read:

Adm 35.05 (2) The department may only disburse financial assistance in accordance with a financial assistance agreement.

SECTION 21. Adm 35.05 (3) is repealed.

SECTION 22. Adm 35.06 (intro.) is amended to read:

Adm 35.06 (intro.) Interest rates. ~~The department shall establish the market rate used to calculate the applicable rate under s. NR 162.07 (4) for each project loan, taking into account the following factors:~~

SECTION 23. Adm 35.06 (1) is renumbered Adm 35.06 (1) (intro.) and amended to read:

Adm 35.06 (1) (intro.) The department shall ~~establish~~ periodically review, and may periodically change, the market interest rate used to calculate the applicable rate under s. NR 162.07 (4) for each project loan, taking into account the following factors: ~~(1) The market interest rate used to calculate the rate for a particular project loan or portion of a project loan shall be at the effective interest rate of the funds, as determined by the department, that are used to fund all or a portion of each project loan. When a current market rate cannot be determined from an actual bond sale, the department may estimate such market rate based on market comparables and market indices.~~ set by the department under this section shall be the market interest rate for the purpose of ss. 281.58(12) and 281.61(11), Stats. The department may consider any of the following factors when establishing or changing the market interest rate:

SECTION 24. Adm 35.06 (1) (a) to (e) are created to read:

- Adm 35.06 (1) (a) Municipal bond market indexes
- (b) Comparable bond market transactions.
- (c) Expectations for bond market changes to the next planned periodic market interest rate review.
- (d) Effective interest rates for environmental improvement fund revenue obligations issued under s. 281.59(4), Stats.
- (e) Efficient administration of the environmental improvement fund.

SECTION 25. Adm 35.06 (2) is repealed and recreated to read:

Adm 35.06 (2) The department may review and change the market interest rate at any time as necessary to aid the purposes of ss. 281.58, 281.59, and 281.61.

SECTION 26. Adm 35.06 (3) is repealed.

SECTION 27. Adm 35.06 (3) (intro.) and (3) (a) and (b) are created to read:

Adm 35.06(3) (intro.) The department may set multiple market interest rates applicable to different types of obligations, including the following:

- (3) (a) Obligations of different final or average maturity.
- (b) Taxable obligations as compared to tax-exempt obligations.

SECTION 28. Adm 35.07 (title) is amended to read:

Adm 35.07 (title) Accountability for ~~project loan~~ financial assistance.

SECTION 29. Adm 35.07 (1) (intro.), (1) (a) to (c), (2), and (3) are amended to read:

Adm 35.07 (1) (intro.) A financial assistance agreement shall require a municipality that receives recipient of a project loan shall financial assistance to do the following:

(1) (a) Maintain project accounts in accordance with the financial assistance agreement generally accepted government accounting principles, including accurate, complete and current records of project costs, sources and uses of project funds, documentation as to the eligibility of project costs, records of refunds, rebates and other credits relating to the project and all payments that constitute the dedicated source of revenue.

(b) Provide, if available, the most recent audited financial statements at the time of application upon request from the department and at least annually during the term of the financial assistance agreement while the recipient has an obligation outstanding.

(c) Take no action which would to reduce the amount available from adequacy of the dedicated source of revenue established for repayment of the project in accordance with ss. s: 281.58 (14) (b) 1. or 281.61 (8m) (a), Stats.

(2) The department may require or perform financial audits prior to, during or at the end of the term of the project loan obligation.

(3) A municipality recipient that receives financial assistance for a project designated as federal equivalency by the department of natural resources provided in whole or in part from the federal capitalization grant described in the Federal Water Quality Act of 1987, 33 USC 1381 to 1387, shall comply with the Federal federal Single Audit Act, 31 USC 7501 to 7507, and OMB Office of Management and Budget Uniform Guidance, circular A-128. A municipality that receives financial assistance from other sources may, at its option, commission a single audit in accordance with the Federal Single Audit Act, OMB circular A-128 and the state's single audit guidelines. All reasonable, allocable costs of single audits are eligible costs to the extent provided in s. NR-162.05.

SECTION 30. Adm 35.08 is repealed and recreated to read:

Adm 35.08 Financial assistance amendments. Neither the recipient nor the department may enter into an amendment to a financial assistance agreement, except in accordance with the terms of the financial assistance agreement. The recipient may not amend the obligation, except in accordance with the terms of the obligation.

SECTION 31. Adm 35.09 is amended to read:

Adm 35.09 Variances. The department may approve a variance from requirements of this chapter when the department determines that the variance is essential to provide financial assistance within the scope and intent of the program environmental improvement fund, or

that the variance is in the best interest of the state. In approving a variance, the department may take into account such factors as good cause, circumstances beyond the control of the recipient or the department and financial hardship. A request by a ~~municipality~~ recipient for a variance shall include a description of the nature of the variance and the circumstances leading to the request.

SECTION 32. EFFECTIVE DATE. This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22 (2) (intro.), Stats.

STATE OF WISCONSIN
DEPARTMENT OF ADMINISTRATION

Kathy Blumenfeld, Secretary-designee

Date