

DRINKING WATER SYSTEMS EMERGENCY

LOAN FUND

FINAL

PROGRAM REGULATIONS

ADOPTED BY THE BOARD

AUGUST 10, 2007



LOCAL GOVERNMENTS AND RURAL WATER SYSTEMS

IMPROVEMENTS BOARD

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Title 33: Rivers and Waters - Local Governments and Rural Water Systems Improvements Board

Part 1: Drinking Water Systems Emergency Loan Fund Program Regulations

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Title 33: Public Health - Local Governments and Rural Water Systems Improvements Board

Part 1: Drinking Water Systems Emergency Loan Fund Program Regulations

Part 1 Chapter 1: Introductory Provisions

Subchapter 1: Scope of Regulations.

Rule 1.1.1 These regulations, adopted pursuant to Section 41-3-16, Mississippi Code of 1972, as amended, will govern the Local Governments and Rural Drinking Water Systems Emergency Loan Fund (DWSELF) Program. These regulations may be superseded by the DWSELF loan agreement, when a variance or exception is made by the Board, and when not in conflict with any state or federal laws or executive orders.

Source: Miss. Code Ann. § 41-3-16(3)(b)

Subchapter 2: Effective Date of Regulations.

Rule 1.2.1 These amended regulations are effective October 12, 2000 May 11, 2007.

Source: Miss. Code Ann. § 41-3-16(3)(b)

Subchapter 3: Definitions.

Rule 1.3.1 The following words and terms, when used in this regulation, will have the following meanings, unless the context clearly indicates otherwise:

1. Act - The Local Governments And Rural Water Systems Improvements Revolving Loan Program Act, Section 41-3-16, Mississippi Code of 1972.
2. Administration Fee - Those fees charged the loan recipient to defray the reasonable costs of administering the emergency fund.
3. Allowable Costs - Those project costs that are eligible, reasonable, necessary, allocable to the project, within the established project scope budget, and budget period in conformance with the DWSELF Regulations and approved by the Department.
4. Authorized Representative - The signatory agent or office of the applicant, authorized and directed by the applicant's governing body to make application for assistance and to sign documents required to undertake and complete the project, on behalf of the applicant. The signatory agent or office must be a member of, or an employee of, the applicant's governing body and may not be under a separate contract with the applicant at any time during the execution of the project.
5. Board - Local Governments and Rural Water Systems Improvements Board.
6. Change Order - The documents executed by the loan recipient and the construction contractor, upon recommendation of the registered engineer if required by the contract documents, authorizing a change, alteration, or variance in the plans, specifications, and contract documents, including but not limited to, additions or deletions of work to be

- performed pursuant to the contract or a change in costs or time for work performed pursuant to the execution of the contract.
7. Construction - Any one or more of the following: repair, erection, building, acquisition, alteration, remodeling, improvement or extension of drinking water systems.
  8. Department - Mississippi State Department of Health and staff, and their designated representatives.
  9. DWSELF - Drinking Water Systems Emergency Loan Fund.
  10. DWSIRLF - Drinking Water Systems Improvements Revolving Loan Fund.
  11. Drinking Water System Viability Analysis - A managerial, operational, financial and technical analysis of a water system to determine whether the system has the capability to reliably meet performance requirements and financial obligations on a long term basis.
  12. Eligible Applicant - A county, incorporated municipality, district or other water organization that has been granted tax exempt status under either federal or state law which has authority to collect, treat, store and distribute piped water for human consumption, has the authority under State law to receive DWSELF loan assistance and has the ability to comply with this regulation and the requirements of the DWSELF loan agreement.
  13. Eligible Costs - Eligible costs are those costs in which DWSELF loan participation is authorized pursuant to applicable statute.
  14. Emergency - Any circumstance caused by fire, flood, explosion, storm, earthquake, epidemic, riot, insurrection or caused by any inherent defect due to defective construction, or when the immediate preservation of order or public health is necessary by reason of unforeseen event or condition, or when the immediate restoration of a condition of usefulness of any drinking water facilities appears advisable.
  15. Emergency Fund - The Local Governments and Rural Drinking Water Systems Emergency Loan Fund, created pursuant to Section 41-3-16(2)(b), Mississippi Code of 1972, as amended.
  16. Financial Assistance - Loans by the Board from the Local Governments and Rural Drinking Water Systems Emergency Loan Fund.
  17. Improvements - Will include making necessary repairs to existing drinking water systems to meet the emergency, and may, at the Board's discretion, include new construction needed to provide a permanent correction to the problems which caused the emergency.
  18. Loan Agreement - An agreement between the Board and the loan recipient through which the Board provides DWSELF funds for eligible assistance and the recipient promises to repay the principal sum and interest back to the DWSELF over a period not to exceed 5 years at an interest rate established by the Board.
  19. Loan Applicant - A county, incorporated municipality, district, or other water organization that makes application for assistance from the DWSELF program.
  20. Loan Recipient - A county, incorporated municipality, district, or other water organization that receives a loan from the DWSELF program.
  21. May - Whenever used in the context of an action to be taken by the loan recipient the word may will be interpreted as optional but is not mandatory.
  22. May not - Whenever used in the context of an action by the loan recipient such an action is prohibited by these regulations.
  23. Must - Whenever used in the context of an action to be taken by the loan recipient the

- word must will be interpreted as mandatory.
24. Plans, Specifications and Contract Documents - The engineering description of the project including engineering drawings, maps, technical specifications, design reports and construction contract documents in sufficient detail to allow contractors to adequately construct the work.
  25. Project - The scope of work for which assistance is awarded under the DWSELF.
  26. Project Completion - The date of the final construction observation, as performed by the Department, for the purpose of an allowability determination.
  27. Protest - A written complaint to the loan recipient concerning the loan recipient's solicitation or award of a contract. The protest must be filed with the loan recipient by a party with a direct financial interest adversely affected by a loan recipient's procurement action.
  28. Public Water System - A system for the provision to the public of piped water for human consumption if such system has at least fifteen (15) service connections or regularly serves at least twenty-five (25) individuals, including but not limited to any collection, treatment, storage and distribution facilities under control of the operator of such system and used primarily in connection with such system.
  29. Rate Structure - Will have the same meaning as User Charge System.
  30. Registered Engineer - The engineer, registered by the Mississippi State Board of Registration for Professional Engineers and Land Surveyors, retained or employed by the loan recipient to provide professional engineering services during the planning, design, and/or construction of the project.
  31. Repayment - Principal and interest payments on DWSELF loans which must be credited directly to the DWSELF.
  32. Surcharge - That charge added to each user's water bill each month to cover the cost of repaying the DWSELF loan.
  33. Unilateral Change Order - Change orders executed only by the loan recipient, and identified as such, in accordance with the contract documents.
  34. User Charge System - That system by which the loan recipient charges users of the system, water rates that produce adequate revenues required for operation, maintenance, replacement of major equipment, retirement of existing debt, and repayment of the DWSELF loan for the project.
  35. Water Use Ordinance/Corporate Resolution - An ordinance or corporate resolution enacted by the loan recipient which must require that new distribution lines, service lines, and connections are properly designed and constructed, and must establish any prohibitions or conservation measures for water usage, and must establish any other requirements for use of the system determined appropriate by the loan recipient.
  36. Will - Whenever used in the context of an action to be taken by the loan recipient the word will is to be interpreted as mandatory.

Source: Miss. Code Ann. § 41-3-16(3)(b)

Part 1 Chapter 2: Program Requirements

Subchapter 1: Eligible Applicant Determination.

Rule 2.1.1 To be eligible for financial assistance, an applicant must meet the definition of an eligible applicant as described in Section I.C.(12) of this regulation, as determined by the Department.

Source: Miss. Code Ann. § 41-3-16(3)(b)

Subchapter 2: DWSELF Uses.

Rule 2.2.1 The Emergency Loan Fund may be used for the following purposes, as determined by the Board:

1. To make emergency loans to eligible applicants in making necessary repairs to existing drinking water systems to meet the emergency;
2. To make emergency loans to eligible applicants in completing construction needed to provide a permanent correction to the problems which caused the emergency;
3. For the reasonable costs of administering the DWSELF program and/or the DWSIRLF program and conducting activities under the act; and
4. To earn interest on fund accounts.

Source: Miss. Code Ann. § 41-3-16(3)(b)

Subchapter 3: Project Priority.

Rule 2.3.1 These funds will be obligated on a first-come, first-served basis in order of those eligible applicants which complete all actions necessary to receive a loan award, for eligible projects meeting the definition of an emergency, as defined in these regulations.

Source: Miss. Code Ann. § 41-3-16(3)(b)

Rule 2.3.2 The Board will be the judge of whether a proposed project meets the definition of an emergency project and whether all actions necessary for loan award have been completed.

Source: Miss. Code Ann. § 41-3-16(3)(b)

Subchapter 4: DWSELF Financing.

Rule 2.4.1 The DWSELF has been established to provide loans to assist eligible applicants in making emergency repairs to existing drinking water systems and may, with Board approval, include new construction needed to provide a permanent correction to the problems which caused the emergency. Basic DWSELF financing requirements are as follows:

1. DWSELF loans may be limited at the discretion of the Board based on funds availability or as otherwise established by State law.
2. Loans will be made at the interest rate determined by the Board.

3. Monthly principal and interest repayments will commence as further described in Section III.F of this regulation, and all loans will be fully amortized not later than five (5) years after project completion.
4. Except for program administration expenses, funds will not be disbursed from the emergency loan fund without first entering into a legal and binding commitment with the Board.
5. The fund will be credited with all repayments of principal and interest on all loans.
6. The applicant must not be in violation of, or delinquent on, any provisions of a previously awarded DWSELF or DWSIRLF loan agreement

Source: Miss. Code Ann. § 41-3-16(3)(b)

#### Subchapter 5: Responsibility.

Rule 2.5.1 The applicant/loan recipient is responsible for the proper planning, design, construction, operation, maintenance, replacement, performance, and fiscal integrity of the project. The Department's approval of any document does not relieve the applicant/loan recipient or any others of any liabilities or responsibilities. Department approval of any document is for loan eligibility/allowability purposes only and does not establish or convey any such liability or responsibility.

Source: Miss. Code Ann. § 41-3-16(3)(b)

#### Subchapter 6: Other Approvals.

Rule 2.6.1 The applicant (or loan recipient) must obtain approval of all necessary documents from each state, local, and federal agency having jurisdiction over or funding in the project, if so required by that agency.

Source: Miss. Code Ann. § 41-3-16(3)(b)

### Part 1 Chapter 3: Project Requirements

#### Subchapter 1: Application for DWSELF Loan.

##### Rule 3.1.1 Project Budget Period.

1. Costs for the project must be incurred within the Project Budget Period established in the loan agreement. When justified and approved by the Board, the Project Budget Period may begin prior to loan award, but may not begin more than 30 days prior to receipt of the loan application by the Department. If project costs are incurred prior to loan offer, the prospective loan recipient agrees that he is proceeding at his own risk and relieves the Board, the Department, and the Department staff of all responsibility and liability should such costs later be determined unallowable for any reason, or should such funding not become available for any reason.

2. The end of the Project Budget Period will coincide with the 30 day deadline described in Section III.C.(9)(e) of this regulation.

Source: Miss. Code Ann. § 41-3-16(3)(b)

Rule 3.1.2 Obtaining a Loan Application.: Potential applicants may request a DWSELF loan application package by calling the Department staff. The Department staff will fax and/or mail the loan application package to the potential applicant.

Source: Miss. Code Ann. § 41-3-16(3)(b)

Rule 3.1.3 Contents of Application.

All documents listed below must be complete and approvable when submitted to the Department staff:

1. An original and one copy of the DWSELF loan application must be submitted to the Department staff. When forms are provided by the Department staff these forms must be used, and these forms may not be altered. The DWSELF loan application may request assistance only for costs that are allowable in accordance with Appendix A of this regulation, and may include a construction contingency, as determined by the Department staff, in the project budget. The application must include in the Project Cost Breakdown any administration fee charged to the loan recipient by the Department. A complete application must conform to this regulation, including all Appendices, and must include the following:
  - a. A complete DWSELF loan application form, which includes the amounts requested for construction/repairs, equipment, supplies, land/easements, testing contracts, contingency, contracts for planning, design, land acquisition, engineering services during construction/repairs and administration fees required by the Board.
  - b. A certified copy of a resolution by the loan applicant's governing body which:
    - i. declares an emergency, which meets the definition of an emergency as defined in Section I.C.(14) of this regulation, exists;
    - ii. agrees to implement, prior to final disbursement of DWSELF funds, a per connection surcharge, over and above all existing user charges, adequate to completely cover repayment of the DWSELF loan;
    - iii. commits the loan recipient's authorized representative to meet with the Department staff, prior to final disbursement of DWSELF funds, to discuss the results of the drinking water system viability/financial capability analysis to insure future operational/managerial capabilities and commits to implement the recommendations approved by the Department;
    - iv. authorizes the submission of the application; and
    - v. designates an individual or office to make application for assistance and to sign documents required to undertake and complete the project, on behalf of the applicant.

- c. A clear description from the certified operator or registered engineer or other qualified personnel (i.e. well contractor, equipment representative, electrician, etc.) explaining the circumstances leading up to this emergency.
  - d. A registered engineer's (City/County Engineer or consulting engineer) or other qualified personnel's recommended course of action and estimated costs to remedy the emergency. If such project must be designed by a registered engineer in accordance with State Law and the Rules and Regulations of the Mississippi State Board of Registration for Professional Engineers and Land Surveyors, the report must include the seal of the professional engineer who prepared the report.
  - e. Registered engineer's plans, specifications and contract documents, if applicable, and/or contracts for repairs/equipment/supplies needed to meet the emergency.
  - f. A copy of contracts for all eligible engineering, observation, architectural, administrative, and legal services included in the DWSELF loan application, if applicable. All procurement actions related to the DWSELF Loan project must comply with state law and Appendix B of this regulation.
  - g. A procurement certification from the Loan Applicant and the loan applicant's legal counsel, stating that all procurement actions related to the DWSELF loan project have been, and will be, in compliance with State law and Appendix B of this regulation.
  - h. A draft user charge system and ordinance/corporate resolution. The user charge system must establish a surcharge over and above any existing user charges to the system's customers in an amount necessary to meet the repayment schedule established in the DWSELF loan agreement. The ordinance/corporate resolution enacting this user charge system must be enacted prior to final disbursement of DWSELF loan funds and by the date established in the DWSELF loan agreement.
2. After loan award the loan recipient may request and receive Department approval to eliminate the surcharge if the loan recipient can demonstrate its user charge system is adequate to meet the repayment schedule established in the loan agreement.
  3. A draft water use ordinance/corporate resolution, if applicable - The water use ordinance or corporate resolution must require that new distribution lines, service lines, and connections are properly designed and constructed, must establish any prohibitions or conservation measures for water usage, and must establish any other requirements for use of the system determined appropriate by the loan recipient.
  4. A statement of the amount of all local funds necessary for the project and a Financial Certification Form from the Loan Applicant which states that all local funds necessary for the project have been secured, or will be secured within 30 days after loan offer, and a statement to this effect from the funding source(s). If all funds for the project are being requested from the DWSELF program, this certification need not be submitted.
  5. A completed water system financial capability summary.
  6. A Legal Certification Form from the Loan Applicant and the loan applicant's legal counsel, stating that (1) the loan applicant has authority under state laws and regulations to receive DWSELF loan assistance, to collect user charges through an approved user charge ordinance or corporate resolution, to enforce the user charge ordinance or corporate resolution and water use ordinance or corporate resolution, to repay the loan under the terms of the loan agreement, to comply with all other terms of the loan

agreement, to own, operate, maintain and replace the facilities to be constructed with DWSELF loan funds, and that (2) there are no restrictions under federal or state laws or regulations regarding indebtedness which may prevent the loan applicant from executing the DWSELF loan agreement and implementing the project.

7. A copy of the bid forms from the contract documents containing the registered engineer's cost estimates, if applicable. The costs shown on the application must match those on the bid forms.
8. If the Loan Applicant is a water organization other than a county, incorporated municipality, or district, documentation of its tax exempt status under either federal or state law.
9. Clear Site Certificates from the loan applicant and the title counsel indicating that the Loan Applicant has secured all real property and easements (including power and other utilities) necessary to build the project.
10. Completion of the intergovernmental review process as described in Appendix G of this regulation, and submittal of a completed Intergovernmental Review Certification, any intergovernmental review agency comments received, and the action required to address all comments prior to awarding contracts for construction.
11. Certification Regarding Debarment, Suspension and Violating Facilities.
12. All other forms, documents, and supporting information that may be required by the Department.

Source: Miss. Code Ann. § 41-3-16(3)(b)

Subchapter 2: Offer of DWSELF Loan.

### Rule 3.2.1

3.2.1.1 Upon determination by the Department staff that:

1. all applicable requirements of this regulation have been met,
  2. all applicable documents have been approved,
  3. all applicable permits have been issued or will be issued, and
  4. funds are available for the amount of the DWSELF loan application,
- the Department will seek approval of the DWSELF loan award from the Board.

3.2.1.2 If the Board approves the DWSELF loan application, the Board Chairman, or his designee, will execute and transmit a DWSELF loan offer (includes an offer letter, loan agreement and initial repayment agreement) to the loan recipient. In addition to the estimated allowable project costs as described in Appendix A of this regulation and any administration fee, the loan offer may include a construction contingency, as determined by the Department staff, in the project budget. If determined necessary by the Department staff, this contingency may be reduced after receipt of construction bids, as described in Section III.B.(6) below.

Source: Miss. Code Ann. § 41-3-16(3)(b)

Rule 3.2.2 Upon receipt of the DWSELF loan offer, the loan recipient must completely execute

and return it to the Department staff, along with a certified copy of a resolution by the loan recipient's governing body authorizing acceptance of the loan offer, within the time frame established in the DWSELF loan offer. The loan offer becomes void if not executed and returned within the time frame specified, unless extended by the Board Chairman or his designee.

Source: Miss. Code Ann. § 41-3-16(3)(b)

Rule 3.2.3 Upon return of the executed DWSELF loan offer to the Department staff, any administration fee established in the loan agreement will be processed accordingly and such fee will be paid to the appropriate Department administration fund.

Source: Miss. Code Ann. § 41-3-16(3)(b)

#### Rule 3.2.4

3.2.4.1 Upon return of the executed DWSELF loan offer to the Department staff, the loan recipient must then execute any remaining unexecuted approved contracts for construction/repairs/equipment/supplies and engineering planning/design and construction phase services, or if required by State law and Appendix B, must then advertise, receive bids, award, and execute any other contracts for construction/repairs/equipment included in the project, within the time frame established in the loan agreement. All procurement actions by the loan recipient (including water associations) must comply with state law and Appendix B of this regulation.

3.2.4.2 The loan recipient will be responsible for assuring that every appropriate procedure and incidental legal requirement is observed in awarding these contracts. The contracts must not vary from those approved by the Department staff.

Source: Miss. Code Ann. § 41-3-16(3)(b)

Rule 3.2.5 Upon execution of all contracts funded under the loan agreement, the loan recipient must then submit (a) all such executed contracts for emergency construction/repairs/equipment/supplies and engineering planning/design and construction phase services, (b) if any contracts must be bid, the completed contract award certification and a completed loan agreement amendment request (to reflect as-bid {if applicable} and other executed construction contract amounts, all other contract amounts, a construction contingency as determined by the Department staff, and the original administration fee) to the Department staff within the time-frame established in the loan agreement. Within the time frames established in the loan agreement, the loan recipient must then, at his discretion, issue any notices to proceed and submit a copy of such to the Department and begin any remaining construction/repair work or purchase any remaining equipment/supplies funded under the loan agreement.

Source: Miss. Code Ann. § 41-3-16(3)(b)

Rule 3.2.6 Upon receipt of the documents required under (5) above, the Department staff will review these documents, determine whether a request for an increased loan amount is justified

and eligible and that funds are available. The Department may, upon approval of the Board, if determined necessary and appropriate, transmit to the loan recipient an amended DWSELF loan offer, which includes in the project budget

1. as-bid (if applicable) and other executed construction contract amounts,
2. all other contract amounts,
3. a construction contingency as determined by the Department staff, and
4. the original administration fee.

Upon receipt of the amended DWSELF loan offer, if applicable, the loan recipient must completely execute and return it to the Department within the time-frame established in the DWSELF loan offer letter. [After execution of the amended DWSELF loan offer, the DWSELF loan amount will not be increased. Any increased project costs in excess of the amended DWSELF loan amount must be paid by the loan recipient from sources other than DWSELF funds.]

Source: Miss. Code Ann. § 41-3-16(3)(b)

Subchapter 3: Construction/Repair Phase.

Rule 3.3.1 Awarding Contracts for Emergency Construction/Repairs Equipment /Supplies, and Engineering Planning/Design and Construction Phase Services.

Upon executing and returning any amended loan agreement and initial repayment agreement to the Department staff, if applicable, or upon execution of all contracts funded under the loan agreement, and within the time frames established in the loan agreement, the loan recipient must issue any remaining notices to proceed and begin any remaining construction/repair work and purchase any remaining equipment/supplies funded under the loan agreement, and must transmit a copy of all notices to proceed to the Department staff within the time frame specified in the loan agreement.

Source: Miss. Code Ann. § 41-3-16(3)(b)

Rule 3.3.2 Preconstruction Conferences.

If determined necessary by the loan recipient, the loan recipient may arrange and hold a preconstruction conference and, if held, must notify and allow attendance and participation by the Department staff.

Source: Miss. Code Ann. § 41-3-16(3)(b)

Rule 3.3.3 Observation During Construction.

1. During all times that construction/repair work is being performed which requires the services of a registered engineer, the loan recipient must provide for full-time observation of the project by the registered engineer or his staff and must require the registered

engineer's assurance that the work is being performed in a satisfactory manner in accordance with the DWSELF loan agreement and the approved plans, specifications, and contract documents, approved change orders, and in accordance with sound engineering principles and building practices. Less than full-time observation may be allowed when properly justified and approved by the Department staff.

2. The Department staff is authorized to observe the building of any project at any time for compliance with the terms of the loan agreement and to determine if the loan recipient is assuring that plans, specifications and contract documents are being followed and is assuring that the project is being built in accordance with sound engineering principles and building practices. A representative may be stationed at the building site by the Department staff to observe the manner and progress of the building or to observe conditions relating to the equipment or materials furnished and the compliance by the contractor with approved plans, specifications, and contract documents for the project. Such observation will not subject the Department to any action for damages or other liability. Such observation will not release the contractor from any obligation to perform the work in accordance with the requirements of the contract documents, nor the registered engineer from determining compliance with the requirements of the contract documents, nor the loan recipient from insuring compliance with the terms of the loan agreement.
3. The contractor, registered engineer, and the loan recipient must furnish the Department staff with every reasonable opportunity and means for observing whether the work as performed appears to be in accordance with the requirements of the loan agreement. The Department staff is authorized to observe and require submission of daily logs, record drawings, file notes, and any other documents prepared by any party in relation to the DWSELF funded project.

Source: Miss. Code Ann. § 41-3-16(3)(b)

#### Rule 3.3.4 Observation of Materials and Equipment.

The Department staff is also authorized to observe all equipment and materials furnished, including observation of the preparation or manufacture of the equipment and materials to be used.

Source: Miss. Code Ann. § 41-3-16(3)(b)

#### Rule 3.3.5 Construction/Repair Deficiencies.

1. In the event construction/repair procedures, materials or equipment appear to the Department staff to be substandard, otherwise unsatisfactory, and/or not in conformity with approved plans and specifications, the Department staff may determine such work unallowable for DWSELF loan participation, unless the loan recipient takes such action, through the registered engineer if applicable, in the manner provided for in the construction/repair contract to correct any such deficiencies
2. The Department staff may immediately begin withholding DWSELF loan payments

should such substandard or unsatisfactory construction/repair work, materials, or equipment become apparent and may require the loan recipient to repay any previously paid amounts related to such work, within 30 days of such notification. Interest may be charged on such delinquent repayments after expiration of the 30-day period at the rate established in Section III.E.(6) of this regulation. Alternatively, the Department staff may withhold such amounts from subsequent payment requests.

3. In addition to normal testing procedures required of the loan recipient, should questions arise concerning the construction work, materials, or equipment, for DWSELF loan allowability purposes the Department staff may request the loan recipient to perform reasonable additional tests of construction materials, equipment, or processes which the Department staff determines to be necessary to answer such questions during or after the construction of the project. All tests, whether for the Department staff or the registered engineer, must conform to current American Water Works Association, American Association of State Highway and Transportation Officials, or American Society of Testing and Materials published procedures, or similar acceptable criteria. The Department staff will specify which tests are applicable, if not described in the approved plans, specifications, and contract documents, for DWSELF loan allowability purposes. Samples for testing must be furnished free of cost to the Department staff upon request at the construction site.

Source: Miss. Code Ann. § 41-3-16(3)(b)

### Rule 3.3.6

#### 3.3.6.1 General.

1. In the event a determination is made by a loan recipient after a construction contract is let that changes or modifications to the original contract are necessary or would better serve the purpose of the loan recipient, such loan recipient may, in its discretion, execute such change orders pertaining to the construction that are necessary under the circumstances, as provided in the contract documents and when in accordance with state purchasing law.
2. Change orders must not change, vary, or alter the basic purpose or effect of the project unless allowed by the Department. Change orders must be technically adequate, the costs and time extensions must be necessary and reasonable, and eligible/ineligible costs must be appropriately separated.

#### 3.3.6.2 Change Order Submittals.

1. After completion of the claims resolution and/or change order negotiation process between the Loan Recipient and the contracting party, a fully executed change order must be submitted to the Department staff for review and approval, in order to obtain a DWSELF loan eligibility/allowability determination.
2. If any change order is submitted to the Department that is not complete and fully executed by the Loan Recipient, the contracting party, and the registered engineer if appropriate, the Department may return such change order without review. However, unilateral

change orders executed by the Loan Recipient, and the registered engineer if appropriate, and identified as such, that are issued in accordance with the contract documents may be submitted to the Department for review and approval, in order to obtain a DWSELF loan eligibility/allowability determination.

3. The Loan Recipient may submit a complete and fully executed change order which has been executed conditional upon a DWSELF loan eligibility/allowability determination by the Department.
4. All change orders must be submitted to the Department for review and approval in a timely manner.
5. If possible, approval of a change order should be secured from the Department before the work is started, particularly for change orders requesting time extensions as per Section III.C.(6)(e) below. Approval may also be secured after the work is started; however, the loan recipient must bear the cost if the work is determined to be ineligible or unallowable. The Department may withhold payments to the loan recipient if change orders are not submitted in a timely manner.
6. When the eligible cost of a project will be significantly reduced by a change order or change orders, the Department may issue an amendment to the loan agreement decreasing the loan amount, and the loan recipient must execute such amendment within the time frame established by the Department.

#### 3.3.6.3 Technical Review.

In order to allow the Department to perform a technical review, requests for change order approvals must contain:

1. A completed change order form.
2. A clear and complete description of the change.
3. A justification of the need for the change.
4. Revised plans, specifications, and contract documents, as needed.
5. Engineering computations and sketches, as needed.
6. Clear site certificates for any new real property or easements that may be required.
7. Any other permits or approvals that may be required.

#### 3.3.6.4 Eligibility Review.

In order to allow the Department to perform an eligibility review, requests for change order approvals must contain:

1. a separation of all items into eligible and ineligible categories
2. for change orders which alter an existing unit price or which add new related items of work costing more than \$10,000, exclusive of freight and shipping charges, the contractor's cost and/or pricing data and the engineer's analysis of the contractor's data.
3. Change orders which increase or decrease the quantities of items in the contract with no change in the unit price or which add new related items of work costing \$10,000 or less, exclusive of freight and shipping charges, need not include the contractor's cost and/or

pricing data or the engineer's analysis of the contractor's data.

#### 3.3.6.5 Time Extensions.

1. Change orders which include time extensions must be submitted to the Department no later than ten (10) days after the current contract completion date, as specified in Section III.C.(9)(d) of this regulation. Justification for contract time extensions included in a change order must be prepared, but need not be submitted to the Department unless the total time extensions for the contract exceed 25% of the original contract time, in which case justification for all time extensions must be submitted to the Department for review and approval.
2. Construction and construction related work which occurs after the date representing a 25% time extension to the original contract time are allowable only to the extent approved by the Department pursuant to review of the justification for all time extension change orders. Construction and construction related work which occurs after the date representing a 25% time extension to the original contract time, and for which a time extension change order cannot be adequately justified by the loan recipient and approved by the Department, are not allowable unless the Department determines that the loan recipient is implementing all legal remedies provided in the contract documents for failure to complete construction when required.

Source: Miss. Code Ann. § 41-3-16(3)(b)

#### Rule 3.3.7 Contract Claims

3.3.7.1 The Department is not a party to any contract between the DWSELF Loan Recipient and the construction contractor(s), the registered engineer(s), The attorney(s), the equipment supplier(s), the subcontractor(s) or any other parties.

3.3.7.2 Upon execution of any contract between the Loan Recipient and any other party in regard to a DWSELF funded project, the Department does not assume any authorities, duties, responsibilities, or liabilities under such a contract.

3.3.7.3 The Department does not have any authority, duty, responsibility, or liability in contract claims identification, negotiation, resolution, or any other actions regarding contract claims under the contract(s) between the Loan Recipient and any other party.

3.3.7.4 No actions taken by the Department, either directly or indirectly, in regard to the DWSELF loan funded project constitute or establish any determinations, authority, duty, responsibility, or liability under the contract(s) between the Loan Recipient and any other party.

3.3.7.5 The Loan Recipient and the contracting party must resolve all claims and contract disputes by negotiation, arbitration, litigation, or other means as provided in the contract documents and State law, prior to submission of any change order to the Department staff for review and approval, in order to obtain a DWSELF loan eligibility/allowability determination.

Source: Miss. Code Ann. § 41-3-16(3)(b)

#### Rule 3.3.8 Contractor's Bankruptcy or Default.

In the event of a contractor's bankruptcy or default, any proposed agreements with the bonding company (other than the bonding company serving as general contractor or fully bonding another contractor acting as their agent) must be submitted for DWSELF loan allowability determination by the Department staff prior to execution. If the loan recipient determines that re-award of the construction/repair contract, or a portion thereof, is necessary due to contractor bankruptcy or default, such proposed re-award contracts must be submitted for DWSELF loan allowability determination by the Department staff prior to execution. The loan recipient will be responsible for assuring that every appropriate procedure and incidental legal requirement is observed in advertising for bids or otherwise re-awarding a construction contract, if this course of action is taken.

Source: Miss. Code Ann. § 41-3-16(3)(b)

#### Rule 3.3.9 Construction Phase Submittals, Approvals, and Actions.

The following submittals, approvals, and actions will be required during the construction phase of the project. The Department staff may establish other time frames within the loan agreement when properly justified.

3.3.9.1 Within 30 days after the original loan offer all local funds necessary for the project must be secured and proof of such must be submitted, to the Department.

3.3.9.2 Within 60 days after the original loan offer (1) the loan recipient must execute and submit to the Department a copy of any remaining unexecuted contracts for construction/repair/equipment/supplies and engineering planning/design and construction phase services, or (2) if required by State law, must advertise, receive bids, award, execute and submit any other contracts for construction/repairs/equipment included in the project, and must issue any remaining notices to proceed, begin remaining construction/repair work, purchase any remaining equipment/supplies funded under the loan agreement and transmit a copy of all notices to proceed to the Department staff, and (3) if any contracts must be bid, a completed loan agreement amendment request, as required by Section III.B.(5) of this regulation must be submitted.

3.3.9.3 By the date established in the loan agreement, the loan recipient must (1) meet with the Department to discuss the findings of the financial capability analysis and agree to a schedule for implementing the findings of this analysis and (2) enact the approved user charge ordinance or corporate resolution and submit proof of such enactment.

#### 3.3.9.4

1. Within 5 days after construction completion of each construction/repair contract, the loan recipient must submit a determination of construction/repair completion and must request

- a final construction observation by the Department staff.
2. Within 10 days after the current contract completion date, all change orders which include time extensions, and/or documentation showing the loan recipient is implementing all legal remedies provided in the contract documents for failure to complete construction when required, must be submitted to the Department for approval, otherwise construction and construction related work which occurs after the current contract completion date will be unallowable.
  3. The final construction/repair observation may be delayed by no more than 30 days after the current construction completion date, unless further delayed by the Department staff pursuant to review of the loan recipient's request and justification for such delay. Should the Department staff decide that the determination of construction/repair completion and request for final construction observation are being unreasonably delayed, a final construction observation may be immediately performed by the Department staff.

3.3.9.5 Within 30 days after the final construction observation performed by the Department staff, the loan recipient must submit: final payment requests; approvable summary change orders, if applicable, for all construction/repair contracts; a complete set of record drawings for any new construction work requiring design by a registered engineer and, if applicable, a certification from a registered engineer that the project has been constructed substantially in accordance with the approved plans, specifications, and contract documents; loan recipient's resolution of acceptance of each construction/repair contract; final construction phase services contract amendments, if any; and all other administrative forms and documents required by the loan agreement and the Department staff. Payment requests submitted after this date are not allowable, regardless of when the costs were incurred.

3.3.9.6 Any other submittals or actions required by the loan agreement must be performed when so required and are subject to review and approval by the Department staff.

Source: Miss. Code Ann. § 41-3-16(3)(b)

Rule 3.3.10 Retainage. The loan recipient must retain payments to any party under contract with the loan recipient, in accordance with state law, or if not specified by state law, in the amount of 10% until 50% completion and 5% until final payment. Any such retained amounts may not be requested by or paid to the loan recipient from DWSELF loan funds, until so described above.

Source: Miss. Code Ann. § 41-3-16(3)(b)

#### Subchapter 4: Post Construction Phase.

Rule 3.4.1 Following final payment of DWSELF loan funds to the loan recipient, or upon expiration of any deadlines established by the loan agreement or the Department staff, the Department staff or other designated parties may perform an audit of the DWSELF loan project for the purpose of determining compliance with the DWSELF loan agreement and to determine final allowable costs, payments made to date, and any additional payments due the loan recipient or repayment due the Department.

Source: Miss. Code Ann. § 41-3-16(3)(b)

Rule 3.4.2 Upon completion of the DWSELF audit, (or if an audit is not performed, following final payment of DWSELF loan funds to the loan recipient, or upon expiration of any deadlines established by the loan agreement or the Department staff) the Department staff will transmit to the loan recipient a copy of the audit, if performed, and a final determination of allowable costs and payments due the loan recipient or repayments due the State. The final determination will also establish a 30-day appeal deadline, as required by (3) below, and will require repayment of any overpayment with an interest penalty to begin accruing on the appeal deadline. The interest penalty will be as established in Section III.E.(6) of this regulation.

Source: Miss. Code Ann. § 41-3-16(3)(b)

Rule 3.4.3 Within 30 days after the date of the above final determination of allowable costs, the loan recipient may submit a written appeal of the final determination, including a written justification of the reason for the appeal, and supporting documentation for any disputed costs of the final determination; otherwise the final determination of allowable costs will become the final allowable costs for purposes of DWSELF loan payments and the DWSELF loan repayment agreement.

Source: Miss. Code Ann. § 41-3-16(3)(b)

Rule 3.4.4 Should an appeal be submitted in accordance with (3) above, the disputes procedures established in Appendix D of this regulation will be followed in order to resolve the dispute and establish the final allowable costs.

Source: Miss. Code Ann. § 41-3-16(3)(b)

Rule 3.4.5 Upon expiration of the final determination appeal period, or upon resolution of a dispute of the final determination, the Department staff will transmit to the loan recipient a final DWSELF loan repayment agreement between the loan recipient, the Department, and if applicable as established under State law, the State Tax Commission. The loan recipient must execute and submit to the Department the final loan agreement within the deadline established by the Department.

Source: Miss. Code Ann. § 41-3-16(3)(b)

Rule 3.4.6 Upon receipt of an executed final repayment agreement from the loan recipient, repayment of the DWSELF loan will commence, or if applicable as established under State law, the Department staff will transmit the repayment agreement to the State Tax Commission for execution and return to the Department staff.

Source: Miss. Code Ann. § 41-3-16(3)(b)

Rule 3.4.7 Upon receipt of the executed final repayment agreement from the State Tax Commission, if applicable as established under State law, the Department staff will transmit a copy to the loan recipient, and repayment of the DWSELF loan will commence under the terms of the repayment agreement.

Source: Miss. Code Ann. § 41-3-16(3)(b)

#### Subchapter 5: Payments to DWSELF Loan Recipients.

Rule 3.5.1 Payments from the DWSELF may be made to DWSELF loan recipients under the following conditions:

3.5.1.1 Payments may be requested by and may be made only to loan recipients, in accordance with the DWSELF loan agreement and the loan recipient's contracts for eligible and allowable services and construction/repair for work performed within the project scope and budget period.

3.5.1.2 Excluding the payment requests for the administration fee, payments may be requested no more often than on a monthly basis, except as required by state law. Payment requests can not include costs incurred during two different state fiscal years, therefore two payment requests may be submitted in July: one for costs incurred through June 30th and a second for costs incurred after June 30th.

3.5.1.3 The loan recipient must deduct from all DWSELF payment requests the amount of funds provided or to be provided from all other state and federal agency funding sources for allowable DWSELF project costs.

3.5.1.4 Payment requests must be submitted by the loan recipient to the Department staff and must include the following:

1. DWSELF payment request form;
2. Invoices for all allowable costs for which payment is requested, except that invoices need not be submitted for any administration fee included in the loan agreement; and
3. Any other documents required by the loan agreement;

3.5.1.5 The timing of DWSELF payments will be as follows, provided the loan recipient is in compliance with the requirements of this regulation and all provisions of the DWSELF loan agreement.

1. Payment for the administration fee must be the first payment request submitted and will be paid to the appropriate Department administration fund.
2. Payments for design and construction phase services may be requested and paid based upon incurred allowable costs. Such requested payment amounts are subject to verification by the Department staff. No more than 85% of the total planning/design and construction phase services contract amounts will be paid until submission of: the determination of construction completion by the loan recipient; performance of the final

construction observation by Department staff; submission of the final pay request; submission of approvable summary change orders on all construction contracts; submission of record drawings on all construction contracts, if applicable; submission of the certification from a registered engineer that the project has been constructed substantially in accordance with the approved plans, specifications, and contract documents; submission of loan recipient's resolution of acceptance of each construction/repair contract; submission final construction phase services contract amendments, if any; and compliance with all other applicable provisions of the DWSELF loan agreement. Upon completion of these actions, the remainder of the planning/design and construction phase services contract amounts may be requested and paid.

3. Payments for allowable construction/repair work may be requested and paid based upon in-place work or delivered materials and equipment as specified in the construction/repair contract, and as supported by invoices and verified as accurate by the registered engineer, if applicable, and the loan recipient, less any retainage. Such requested payment amounts are subject to verification by the Department staff.
4. Payments for eligible land may be requested and paid immediately after loan agreement execution, provided the Department has approved the purchase price prior to loan award and proof of the purchase price has been submitted with the payment request. Within 30 days after purchase of the loan eligible real property, clear title certification forms from both the loan recipient and the title counsel must be submitted to the Department.

3.5.1.6 Any payments made to the loan recipient which are at any time determined by Department staff to be for costs not in accordance with the DWSELF loan agreement, for ineligible or unallowable costs, or for costs related to waste, fraud, abuse or illegal acts under state or federal law, must be repaid to the DWSELF fund within 30 days of such notification by the Department staff. Interest may be charged on such delinquent repayments after expiration of the 30-day period at a rate of ten (10) percent per annum, compounded monthly. Alternatively, the Department staff may withhold such amounts from subsequent payment requests.

Source: Miss. Code Ann. § 41-3-16(3)(b)

Subchapter 6: DWSELF Loan Repayment Requirements.

Rule 3.6.1 All DWSELF loan repayments are subject to the following requirements:

3.6.1.1 Interest on amounts paid to the loan recipient will commence on the original construction contract completion date.

3.6.1.2 The amount of interest accrued between the original construction contract completion date and the initiation of the repayment process will be added to the final allowable project costs to determine the principal amount to be repaid by the loan recipient.

3.6.1.3 The repayment period will be from the time of transmittal of the final loan repayment agreement to the loan recipient to the date five (5) years after project completion, or sooner if so

requested by the loan recipient.

3.6.1.4 Repayments are to be made by counties on a semi-annual basis through homestead exemption annual tax loss reimbursement withholdings, by municipalities on a monthly basis through state sales tax withholdings if adequate to provide such repayments, and by all other loan recipients through submission of monthly payments in accordance with state law, and must commence no sooner than 90 days after and no later than one year after final construction observation by the Department staff.

3.6.1.5 The repayment interest rate and the frequency of interest compounding will be established in the DWSELF loan agreement and repayment agreement.

Source: Miss. Code Ann. § 41-3-16(3)(b)

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## IV. APPENDICES

### APPENDIX A

#### Determination of Eligible and Allowable Costs

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## A. General

The terms "eligible" and "allowable" are often used interchangeably. Although technically a difference exists between these terms as defined below, their synonymous use will not influence the outcome of a cost determination.

Eligible costs are those costs in which DWSELF loan participation is authorized pursuant to applicable statute. Allowable costs are those project costs that are eligible; are only for projects or portions thereof that meet the definition of an emergency as established in Section I.C.(14) of this regulation; are reasonable, necessary, allocable to the project, within the established project scope and budget, in conformance with this DWSELF regulation and are approved as allowable by the Department.

An example best illustrates the difference between the two terms. Emergency improvements to drinking water systems, including construction of new drinking water systems or repair of existing drinking water systems, are eligible. Building of roads, fire fighting vehicles, wastewater treatment projects, etc. are not eligible.

Within a generic eligible category of projects, costs may be allowable or unallowable for loan participation. For example, the cost of building a distribution line is eligible, but such costs incurred after the thirty-day deadline established in Section III.C.(9)(e) of this regulation are unallowable.

In addition to and/or the absence of a specific cost item described in the DWSELF regulations, to be allowable under the DWSELF loan program, costs must meet the following general criteria:

- (1) Be necessary and reasonable for the proper and efficient administration and construction of the project, be allocable to and within the defined scope of the project, and not be a general expense required to carry out the overall responsibilities of the loan recipient.
- (2) Be authorized or not prohibited under state or local laws or regulations.
- (3) Conform to any limitations or exclusions set forth in state laws or other governing limitations as to types or amounts of cost items.
- (4) Be consistent with policies, regulations, and procedures that apply uniformly to both state assisted and other activities of the loan recipient.
- (5) Be accorded consistent treatment through the application of generally accepted accounting principles appropriate to the circumstances.
- (6) Not be allocable to, or included as, a cost of any other Federally or State financed program in either the current, prior, or future period.

- (7) Be approved as allowable by the Department.
- (8) Be within the scope of the project and per the loan agreement.
- (9) Eligible costs will be determined without regard to any previous DWSELF or DWSIRLF loan funding provided for facilities to be replaced, upgraded, or rehabilitated, except as described in Section II.D.(6) of this regulation.
- (10) Are necessary for the immediate preservation of public health or the immediate restoration of a condition of usefulness of a public water system, or as otherwise allowed in Section II.B. of this regulation.

**B. Construction/Repairs**

- (1) Allowable costs include:
  - (a) The costs of subagreements for construction/repair work on drinking water systems improvements. These subagreements are the prime contracts (including any subcontracts) for such construction/repair work and any necessary contracts for purchase of equipment, materials and supplies by the loan recipient. Should any costs for such contracts be incurred prior to loan offer, said costs will be allowable provided that the loan recipient has requested and obtained Department approval of said costs, and the loan agreement budget period includes the time period these costs are incurred.
  - (b) Drinking water distribution lines on drinking water distribution projects which provide drinking water to previously unserved areas, service lines between the public water main and the water meter are also allowable.
  - (c) The costs of drinking water distribution system rehabilitation (including rehabilitation of eligible service lines) necessary to eliminate water loss or to preserve/restore the safety or integrity of the system, as determined in a facilities plan.
  - (d) The cost of water system capacity equal to all water distribution system leaks that will remain in the system, as determined in a facilities plan.
  - (e) Drinking water systems which serve industrial or commercial users when such works are owned by counties, incorporated municipalities, districts, or other water organizations that have been granted tax exempt status under either federal or state law.
  - (f) In the design, construction and renovation of drinking water systems, buildings that house or protect water production, treatment or distribution

facilities. Administration buildings are unallowable.

- (2) Unallowable costs include:
  - (a) Construction/repair and construction/repair related costs which are incurred after the Department approved eligible contract completion date (including approved time extension change orders), unless approved by the Department pursuant to Section III.C.(6)(e) of this regulation.
  - (b) Drinking water systems which serve federal users exclusively, or almost exclusively.
  - (c) The use of DWSELF funds to finance the expansion of any public water system in anticipation of future population growth.
  - (d) Bonus payments that are part of the construction contract for completion of building before a contractual completion date, unless required by state law.

C. Equipment, Materials and Supplies

- (1) Allowable costs include:
  - (a) The cost of a reasonable inventory of chemicals and supplies necessary to initiate plant operations and laboratory items necessary to conduct tests required for plant operation.
  - (b) The costs of necessary and reasonable safety equipment, provided the equipment meets applicable federal, state, local or industry safety requirements.
  - (c) Flow metering devices used for billing or treatment purposes. The costs of constructing or installing water flow metering devices used for monitoring and/or billing intermunicipal or other flows are eligible costs. Meters constructed or installed for the primary purpose of serving and billing individual residential, commercial or industrial users and back flow preventers are also eligible.
  - (d) Computers, display monitors, and computer software which are designed into the control system for the daily operation of the water system.

Computers are also allowable if they are to be used for the operational control and analysis of the water system.

The cost of computer software specifically designed for the operation and

maintenance (including the cost of developing unique operating programs for the specific loan funded project) of the treatment works is also allowable for loan participation.

- (e) The cost of specialized mobile equipment for the operation of the water system, or for the maintenance of equipment. These items include, but are not limited to:
  - (i) Portable stand-by generators.
  - (ii) Portable emergency pumps to provide "pump-around" capability in the event of pump station failure or pipeline breaks.

(2) Unallowable costs include:

- (a) The cost of vehicles for the transportation of the loan recipient's employees, including buses, trucks, cars, motorcycles, ATVs, golf carts, bicycles, etc.
- (b) Items of routine "programmed" maintenance such as filters, couplings, hoses, belts, etc.
- (c) Radios, televisions, VCRs, camcorders, and other items of a similar nature.
- (d) The cost of shop equipment.
- (e) The costs of distribution system maintenance equipment.
- (f) (Deleted, effective 10/12/2000)
- (g) Replacement parts.
- (h) The cost of furnishings, office equipment, and maintenance equipment, including chairs, desks, file cabinets, typewriters, coffee tables, telephones, office supplies, calculators, copiers, book cases, shelves and lamps, etc.
- (i) Ordinary site and building maintenance equipment such as lawn mowers, rakes, shovels, brooms, picks, hedge trimmers, and other such equipment.
- (j) Hand tools such as screwdrivers, pliers, socket wrenches, electric drills or saws, etc.
- (k) Computers for non-operational purposes, such as for the scheduling of

equipment maintenance and replacement and for accounting and billing services.

D. Change Orders

- (1) Change orders are allowable provided the costs are:
  - (a) Necessary and reasonable.
  - (b) Within the scope of the project.
  - (c) Not caused by the loan recipient's mismanagement.
  - (d) Not caused by the loan recipient's vicarious liability for the improper actions of others.
  - (e) In conformance with the DWSELF regulations.
- (2) Provided the above requirements are met, the following are examples of allowable change orders.
  - (a) Construction costs resulting from defects in the plans, design drawings and specifications, or other contract documents only to the extent that the costs would have been incurred if the contract documents on which the bids were based had been free of the defects, and excluding the costs of any rework, delay, acceleration or disruption caused by such defects.

Additional costs to correct defects (i.e., errors and omissions in the contract documents) and other costs caused by the impact of such defects on other portions of the project are not allowable. For example, if the construction drawings had omitted piping from a well to a water tank, and the engineer or contractor detected this before building was undertaken, the cost of a change order to include the piping would be an allowable cost, because:

- (i) the piping should have been included in the original bid,
- (ii) no additional construction or rework was required (beyond what would have been required if the work had originally been included), and
- (iii) there was no cost impact on other portions of the project (since construction work had not begun).

If this omission had been realized after substantial construction work had been completed, and therefore required rework, delay, or additional work

beyond that which would have been required by defect free drawings, the cost of the piping would still have been allowable, but the additional cost of rework or delay would have been unallowable.

The additional cost is measured as the difference between the cost which would have been included in the bid based on defect free drawings and the actual cost of the change order. For example, if a concrete tank had been constructed and was later found to be at an incorrect elevation due to an error in the design drawings and if it was necessary to demolish the tank and reconstruct it at the correct elevation, the entire change order would be unallowable, except for differences in excavation costs. If additional excavation was required to construct the tank at the correct elevation (i.e., the incorrect elevation was too high), the cost of the additional excavation would be allowable. However, if too much excavation had been undertaken, and fill was required to enable the tank to be constructed at the correct elevation (i.e., the incorrect elevation was too low), both the entire change order and the cost of the unnecessary excavation and additional fill would be unallowable. In these cases, the loan recipient must determine whether to seek remedial action or compensation from the responsible parties, however, such action or decision not to take such action will have no effect on loan allowability.

Regardless of the allowability of construction costs to correct errors and omissions, in no case are additional engineering, legal, observation, or other costs allowable, except for the cost of observing allowable construction work, to the extent that such observation costs would have been incurred to observe the same construction if such construction had originally been included in defect free drawings.

- (a) Equitable adjustments for differing site conditions.

#### E. Professional Services

The term professional services refers to engineering, legal, administrative, and similar services. Should any costs for professional services be incurred prior to loan offer, these costs will be allowable provided that the loan recipient has requested and obtained Department approval of such costs, and the loan agreement budget period includes the time period that these costs are incurred.

- (1) Allowable costs include:
  - (a) Pre-award costs. These costs include all engineering and other costs that are incurred in applying for the loan, including, but not necessarily limited to:

- (i) Preparing the facilities plan, if required by the Department.
  - (ii) Public notification and public hearings.
  - (iii) Preparing the plans, specifications, and contract documents.
  - (iv) Value engineering.
  - (v) Preparing the draft user charge ordinance/corporate resolution and draft user charge system.
  - (vi) Preparing interlocal agreements necessary for the project.
  - (vii) Surveys and all other work needed to obtain clearance or permits from all intergovernmental review agencies.
  - (viii) Preparing the loan application, preparing applications for permits required by federal, state or local regulations or procedures.
  - (ix) Compliance with the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act, if required.
- (b) The costs of services incurred during the advertisement, award and construction of a project to insure compliance with state purchasing laws and to insure that it is built in conformance with the design plans and specifications. These services are primarily engineering and construction management services provided during the advertisement, award and building of the project, including observation services, materials testing (e.g., concrete strength, soil compaction, etc.) required by the specifications, inspecting and expediting the delivery of equipment and material purchased directly by the loan recipient, reviewing shop drawings and record drawings, preparing change orders, payment processing, etc.
  - (c) The costs of legal, engineering, and other services incurred by the loan recipient in deciding procurement protests and defending their decisions in protest appeals under Appendix H are allowable regardless of the outcome of the protest, provided there was not an attempt by the loan recipient to violate or circumvent state purchase laws.
  - (d) The cost of development of an operation and maintenance manual.
  - (e) Start-up services for onsite training of operating personnel in operation and control of specific treatment processes, laboratory procedures, and maintenance and records management, provided these costs are incurred

prior to the end of the 30 day period established in Section III.C.(9)(e) of this regulation.

- (f) Professional liability insurance premiums for a provider of professional services only for insurance which the provider maintains in connection with the general conduct of its business. The types and extent of coverage must be in accordance with sound business practice, and the rates and premiums must be reasonable under the circumstances, but only as part of the contractor's indirect cost agreement.
  - (g) Administrative Services associated with the construction/repair project and administering the DWSELF loan.
  - (h) The cost of services, other than engineering services during construction/repairs, such as railway or highway flagmen or utility or highway inspectors, required during the building of the project, provided that:
    - (i) The agency responsible for the affected railway, highway, or utility requires such services for all parties conducting similar types of work, regardless of the source of construction funding for the project, or the services are required by law.
    - (ii) The project work requiring such services is allowable and is included in the scope of the approved project.
    - (iii) The cost of such services has not been included in the construction contractor's bid price.
    - (iv) The cost of such services is incurred directly by the loan recipient.
    - (v) The cost is reasonable.
- (2) Unallowable costs include:
- (a) The cost of ineligible real property.
  - (b) Engineering, observation, or other services necessary to correct defects in a facilities plan, design plans and specifications, or other contract documents, except as provided in Appendix A, Section D.(2)(a) above.
  - (c) Public liaison services.
  - (d) The cost of local travel (i.e., commuting expenses) between living quarters

and the construction site for persons working at the site.

- (e) The cost of insurance (e.g., for a specific project), beyond that normally carried by the contractor.

#### F. Claims

- (1) Allowable costs, provided the costs are properly documented, incurred and requested prior to the end of the 30 day period established by Section III.C.(9)(e) of this regulation, include:
  - (a) Change orders to the construction/repair contract as a result of settlements, arbitration awards, or court judgements, to the extent that they would have been allowable had there not been a claim.
  - (b) The costs of assessing the merits of, negotiating, or defending against a claim against the loan recipient are allowable, regardless of the outcome, provided that the matter under dispute is not the result of fraudulent or illegal actions or mismanagement on the part of the loan recipient.
  - (c) Alterations in engineering, legal, etc. contracts as a result of settlements, arbitration awards, or court judgements are allowable to the same extent that they would have been allowable had there not been a claim.
- (2) Unallowable costs include:
  - (a) Claims arising from work outside the scope of the loan.
  - (b) Claims resulting from fraudulent or illegal activities.
  - (c) Claims resulting from mismanagement by the loan recipient.
  - (d) Claims resulting from the loan recipient's vicarious liability for the improper action of others.
  - (e) The cost of settlements, arbitration awards or court judgements over the allowable costs as established in this regulation.

#### G. Mitigation

- (1) Allowable costs include:
  - (a) Costs necessary to mitigate only direct, adverse, physical impacts resulting from construction/repair of the water system.

- (b) The cost of reasonable site screening necessary to comply with facilities plans and necessary to screen adjacent properties.
  - (c) The cost of groundwater monitoring facilities necessary to determine the possibility of groundwater deterioration, depletion or modification resulting from construction/repair of the water system. The extent of the allowable costs for groundwater monitoring facilities is decided on a case-by-case basis and depends on the size and complexity of the project and the present and potential future use of the groundwater.
- (2) Unallowable costs include:
- (a) The costs of solutions to aesthetic problems, including design details which require expensive building techniques and architectural features and hardware, that are unreasonable or substantially higher in cost than approvable alternatives and that neither enhance the function or appearance of the treatment works nor reflect regional architectural tradition.
  - (b) The cost of land acquired for the mitigation of adverse environmental effects identified pursuant to an environmental review.

#### H. Real Property

- (1) Allowable costs include:
- (a) The cost of land acquired in fee simple title or by easement, at fair market value, which is integral to water system projects, for only:
    - (i) The cost of land acquired for the construction of a treatment facility;
    - (ii) The cost of land acquired for a consolidation project;
    - (iii) The cost of land acquired to protect the source water of the system from contamination; and
    - (iv) The cost of easements and/or rights-of-way for distribution lines.
  - (b) The cost associated with the preparation of the treatment works site before, during and, to the extent agreed on in the loan agreement, after building. These costs include:
    - (i) The cost of demolition of existing structures on the treatment works site (including rights-of-way) if building cannot be

undertaken without such demolition. Demolition of existing structures on the treatment works site (including rights-of-way), when not required for building the project, will be considered to be an allowable cost only if the existing structures constitute a real and present hazard to safety, public health, or water quality, and when the hazard can best be abated by the removal of the existing structures.

- (ii) The cost of removal, relocation or replacement of utilities, provided the loan recipient is legally obligated to pay for such as a result of the DWSELF project under state or local law.
- (iii) The cost of restoring streets and rights-of-way to their original condition. The need for such restoration must result directly from the construction/repair of the DWSELF project and is generally limited to repaving the width of trench.

- (c) The cost of complying with state law in the acquisition of eligible property.

(2) Unallowable costs include:

- (a) Any amount paid by the loan recipient for eligible land in excess of just compensation, based on the appraised value, the loan recipient's record of negotiation or any condemnation proceeding.

An amount higher than the determination of just compensation may be found allowable as a result of an administrative settlement if the loan recipient provides sufficient written documentation to the Department prior to the actual acquisition. Such an administrative settlement may be appropriate where negotiated purchase is unsuccessful and where a condemnation action may entail a long delay or excessive cost. Administrative settlements may be used when they are reasonable, prudent and in the public interest. Documentation may include evidence of purchase negotiations, real property sales data, estimated court settlement and legal costs based on previous condemnation proceedings.

- (b) Removal, relocation or replacement of utilities located on land by privilege, such as a franchise, unless the loan recipient is required to pay such costs under state or local law.
- (c) The cost of acquiring all or part of an existing publicly or privately owned drinking water treatment works.
- (d) The demolition of an existing structure for the convenience of the owner

as a means of increasing property value or property use is unallowable.

I. Miscellaneous Costs

(1) Allowable costs include:

- (a) The costs the loan recipient incurs for equipment rental and material cost necessary for the construction/repair project.
- (b) Unless otherwise specified in this regulation, the costs of meeting specific legal requirements directly applicable to the project.
- (c) Reasonable royalties associated with the procurement of the right to use, or the rights in, a patented product, apparatus, or process are allowable costs, provided that they are:
  - (i) necessary, and
  - (ii) based on a published fee schedule or on reasonable fees charged to other users under similar conditions.
- (d) Costs of loan recipient employees attending training workshops/seminars that are necessary to provide instruction in operational, administrative, fiscal or contracting procedures required to complete the construction of the water system. To be allowable, attendance at such training workshops or seminars may only occur after loan offer and before the end of the loan agreement budget period.
- (e) Any administration fee charged to the loan recipient by the Department, as established in the Intended Use Plan under which the project is funded.
- (f) Cost of a reasonable project sign.

(2) Unallowable costs include:

- (a) The salaries and benefits for the loan recipients employees.
- (b) Ordinary operating expenses of the loan recipient including salaries and expenses of elected and appointed officials and preparation of routine financial reports and studies.
- (c) Administrative, engineering and legal activities associated with the creation of special departments, agencies, commissions, regions, districts, associations, or other entities.

- (d) Approval, preparation, issuance and sale of bonds or other forms of indebtedness required to finance any portion of the project and the interest on them.
- (e) Personal injury compensation or damages arising out of the project.
- (f) Fines and penalties due to violations of or failure to comply with federal, state or local laws, regulations or procedures, and related legal expenses.
- (g) Costs outside the scope or budget period of the approved project.
- (h) Costs for which payment has been, or will be, received from another state or federal source.
- (i) Operation and maintenance costs of the water system, which includes but is not limited to labor, utilities, chemicals, materials and supplies, monitoring and testing, equipment replacement, etc.
- (j) Periodic payment of royalties for the right to operate under a patent are considered operating costs and are unallowable for loan participation.
- (k) Costs for travel, by the loan recipient, unless included under an indirect cost agreement, and except as allowed under I.(1)(d) above.
- (l) Administration Building.

J. Project Income From Bid Bond Forfeitures, Liquidated Damages, and Interest on Deposits of DWSELF Loan Payments:

(1) Bid bond forfeitures will have no effect on the determination of allowable and unallowable costs. The loan recipient must make the determination of whether or not a bid bond will be forfeited.

(2) The amount of liquidated damages collected will have no effect on the determination of allowable and unallowable costs, except as described by Section III.E.(5)(e) of this regulation..

(3) Interest income on DWSELF payments to loan recipients will have no effect on the determination of allowable and unallowable costs.

## APPENDIX B

### Procurement Requirements for DWSELF Loan Recipients

In the procurement of all repairs, construction, equipment, materials, supplies, professional services and non-professional services and all other costs related to the DWSELF project, all loan recipients (including water associations) must comply with State Purchasing Laws as they apply to local governments.

The procurement and conduct of all professional engineering and land surveying services must also be in accordance with the Code of Conduct and other guidance and interpretations established by the Mississippi State Board of Registration for Professional Engineers and Land Surveyors.

The procurement of all construction contracts must also be in accordance with the rules and regulations of the State Board of Contractors and other guidance and interpretations established by the Mississippi State Board of Contractors.

All loan recipients (including water associations) must submit a procurement certification, as required by the Department staff, indicating that all of the above referenced requirements have been met. Should it be determined that any of the above procurement requirements are violated, the Department may determine that the related costs are unallowable and may require repayment of all DWSELF Loan funds paid for such costs, in accordance with Section III.E.(6) of this regulation.

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## APPENDIX C

### Debarment, Suspension and Violating Facilities

#### A. Debarment and Suspension

Loan recipients are prohibited from entering into contractual agreements with individuals, businesses, organizations, or any other entities that have been debarred or suspended by the U. S. Environmental Protection Agency, any other federal agency, state agency or by the Department. Entities debarred or suspended by the federal agencies are identified in the General Services Administration (GSA) publication entitled "List of Parties Excluded from Federal Procurement or Nonprocurement Program."

Loan recipients are responsible for ensuring that prime contractors utilized on the project are not on the federal or state debarment lists. Likewise, prime contractors are responsible for ensuring that subcontractors utilized on the project are not on the federal or state debarment lists.

Anyone may contact the Board Chairman concerning the existence of a cause for debarment or suspension. The Board Chairman may refer the matter to the State Attorney General or other appropriate office for further investigation. If, after review or investigation, the Board Chairman reasonably believes that a cause for debarment exists, the Board Chairman may propose debarment or suspension and may initiate procedures similar to, but not necessarily identical to, federal regulation 40 CFR Part 32: Debarment and Suspension Under EPA Assistance Programs.

Such above described debarment or suspension actions will not affect existing executed contractual agreements, unless such agreements have been terminated or suspended under the terms of the agreement by the loan recipient.

#### B. Violating Facilities

No loan will be awarded to any loan applicant which owns or makes use of any facility that is on EPA's "List of Violating Facilities", or its successor, unless such loan will remedy the problem which resulted in the facility being placed on the list.

Loan Recipients are prohibited from entering into contractual agreements with individuals, businesses, organizations, or any other entities that are in violation of the Safe Drinking Water Act, unless the agreement will remedy the problem which caused the violation. Such entities are identified in the "List of Violating Facilities".

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## APPENDIX D

### DWSELF Disputes Procedures

Only DWSELF loan recipients may submit a notice of dispute (disagreement) with a decision made by the Department. The following procedures will be used to resolve disputes between the loan recipient and the Department.

- (1) The loan recipient must submit a written notice of dispute with a Department decision, including a summary of the dispute and reasons for why the loan recipient believes the Department decision should be reversed.
- (2) The Department staff will then render a written decision on the dispute and will include reasons for the decision.
- (3) Should the loan recipient desire to appeal the Department staff decision, a request for an informal hearing must be received by the Department within 30 days after the date of the Department staff decision. Upon receipt of such a request, an informal hearing will be held with staff members, as designated by the Board Chairman, and the affected parties. The Board Chairman, or his designee, will render a decision on the appeal as a result of the informal hearing.
- (4) Should the loan recipient desire to appeal the above informal hearing decision, a request for a formal hearing before the Local Governments and Rural Water Systems Improvements Board must be received by the Department within 30 days after the date of such decision. Upon receipt of such a request, the Board will hold a formal hearing to consider the matter and will render a decision.
- (5) Appeals of the above formal hearing decision may be made to the Chancery Court in accordance with state law.

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## APPENDIX E

### Waste, Fraud and Abuse

It is the loan recipient's responsibility for preventing, detecting, and prosecuting waste, fraud, abuse, and all other corrupt practices which occur in relation to the DWSELF loan project.

If the loan recipient becomes aware of allegations, evidence, or the appearance of corrupt practices, the loan recipient must:

- (1) Immediately inform the Department in writing.
- (2) Promptly pursue available state and local legal, administrative, and contractual remedies.

The Department may disallow costs under the DWSELF loan agreement where it is determined that such costs are related to waste, fraud, abuse, or other corrupt practices. The Department may also require repayment of DWSELF loan funds paid for such costs in accordance with Section III.E.(6) of this regulation.

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## APPENDIX F

### DWSELF Loan Recipient Accounting and Auditing Requirements

All DWSELF loan recipients must maintain project accounts in accordance with generally accepted government accounting standards, as defined by the Guidelines of the Municipal Accounting and Audit Manual, as prescribed by the State Auditor's Office. Charges to the project account must be properly supported, related to eligible construction/repair costs, and documented by appropriate records. These project accounts must be maintained as separate accounts.

All contracts for professional services, construction, equipment, and supplies must include an access to audit clause which gives the Department and its representatives access to and the right to audit, inspect, copy and examine books, financial records and other documents relating directly to the receipt and disbursement of DWSELF funds.

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## APPENDIX G

### Intergovernmental Review Process

The following outlines the Board's requirements for compliance with the Intergovernmental Review Process for Drinking Water Systems Emergency Loan Fund (DWSELF) projects in Mississippi. These actions must be taken and an Intergovernmental Review Certification (hereinafter Certification) submitted as part of the DWSELF loan application package. The Intergovernmental Review Agencies (IGR) are as follows:

- (1) Department of Archives and History (For Archaeological/Cultural Resources Review);
- (2) Natural Heritage Program (For Vegetative/Wildlife Survey);
- (3) Army Corps of Engineers, Regulatory Functions Branch (For Wetlands and Navigable Waterway Crossing Review);
- (4) U. S. Fish and Wildlife Services (Jackson, Harrison, and Hancock County Projects only, for Coastal Barriers Resources Act Review); and
- (5) U. S. Forest Service (For Wild and Scenic Rivers).

#### Loan Application

When completing the Certification form, the applicant/loan recipient should mark the first certification if the proposed project will consist of only construction/repair work on previously disturbed sites, easements, and rights-of-way. If this certification is marked accurately, then no further intergovernmental review is necessary.

If there are portions of the project that will affect previously undisturbed sites, easements, or rights-of-way, during preparation of the DWSELF loan application package the appropriate intergovernmental review agencies must be consulted, by telephone, or other communication, about the proposed project area concerning the existence of any known or possible archaeological/cultural resources sites, endangered vegetation/wildlife, wetlands, navigable waterway crossings, wild and scenic rivers impact or coastal barriers resources impact, and their concurrence or comments noted on the Certification.

If any of the intergovernmental review agencies have comments on the project, the applicant/loan recipient must attach a summary of those comments and the actions necessary to address those comments, including a schedule for completing the required actions, to the Certification, which must be included as part of the DWSELF loan application package. It will be the applicant/loan recipient's responsibility to take all actions necessary to satisfy the IGR comments and obtain concurrence in the project prior to awarding contracts for construction/repair for project portions under comment.

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## APPENDIX H

### DWSELF Procurement Protest Procedures

This Appendix sets forth the process for the resolution of procurement protests filed with the loan recipient by an adversely affected party. The Loan Recipient's protest procedures must include the requirements of this Appendix.

- (1) Prior to advertisement for bids or proposals, the loan recipient must establish its own procedures for prompt consideration of initial protests concerning solicitations or contract awards. A "protest" is a written complaint concerning the loan recipient's solicitation or award of a contract. The protest must be filed with the loan recipient by a party with a direct financial interest adversely affected by a loan recipient's procurement action, and must be filed in accordance with and within the time frame established by the loan recipient's protest procedures.
- (2) Any party which transmits any document concerning the protest during the course of a protest and protest resolution must simultaneously furnish all other affected parties and the Department with a copy of all documents in the transmittal.
- (3) Upon receipt of a protest, the loan recipient must make a determination on the protest in accordance with the loan recipient's protest procedures within thirty (30) calendar days after such protest, or sooner if so required by the loan recipient's procurement protest procedures.
- (4) The party with a direct financial interest adversely affected by a loan recipient's determination of the protest may appeal such a determination only through the appropriate court of competent jurisdiction, provided such appeal is initiated within seven (7) calendar days after receipt of the determination.
- (5) Any delay due to a protest or protest resolution will not relieve the loan recipient of the requirement to meet the project schedule established in the loan agreement, nor will such delays prevent the Department from pursuing the remedies for default established in the loan agreement.

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## APPENDIX I

### Related Laws and Regulations

The loan recipient must comply with all related laws and regulations during the planning, design, construction, and operation of the project, including the following. The listing below does not relieve the loan recipient from the responsibility of compliance with all related laws and regulations, whether listed below or not.

- Federal "Safe Drinking Water Act" (42 U.S.C. 300et. seq.). Public Law 93-523.
- "National Interim Primary Drinking Water Regulations", Environmental Protection Agency, Water Programs, Federal Register 40, No. 246, December 24, 1975, 59566 - 59574.
- "Secondary Maximum Contaminant Levels", Environmental Protection Agency, Water Programs, Federal Register 42, March 31, 1977, 17144 - 17146.
- "Mississippi Safe Drinking Water Law of 1976", Section 41-26-1 through 41-26-21, Mississippi Code of 1972, annotated.
- "Primary Drinking Water Regulations", Mississippi State Board of Health Environmental Regulations, Division 300 - Water Supply, Part 301, Public Water Systems.
- "Municipal and Domestic Water and Wastewater System Operator's Certification Act of 1986", Section 21-27-201 through 21-27-221, Mississippi Code of 1972, annotated.
- Regulations Governing the Certification of Municipal and Domestic Water System Operators", Mississippi State Board of Health Environmental Regulations, Division 300 - Water Supply, Part 302.