

NATURAL RESOURCES COMMISSION

TITLE 256, ADMINISTRATION OF THE RESOURCES DEVELOPMENT FUND

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TITLE 256 - REGULATIONS GOVERNING THE ADMINISTRATION OF THE RESOURCES DEVELOPMENT FUND

Chapter 1 - GENERAL PROVISIONS

001 Purpose and Effect of Rules. These rules and regulations are adopted for the purpose of carrying out the provisions of the Nebraska Resources Development Fund Act. Under no circumstances shall these rules and regulations be construed as a limitation or restriction upon the exercise of any proper discretion that is vested in either the Director or the Natural Resources Commission, nor shall they in any event be construed to deprive the Director or the Commission of any exercise of powers, duties and jurisdiction conferred by law, nor to limit or restrict the amount or character of data or information which may be required for the proper administration of the Act.

002 Definitions. As used in these rules and regulations, the terms listed below shall have the meanings noted:

002.01 Act. "Nebraska Resources Development Fund Act" or "Act" shall mean Sections 2-1586, R.R.S., 1997; 2-1587, 2-1589, 2-1590, 2-1592, 2-1593, and 2-1595, R.S. Supp., 2000; and 2-1588 and 2-1594, as amended by LB 129, 97th Nebraska Legislature, 1st Session (2001), and any and all amendments, additions, or deletions which may be made thereto;

002.02 Applicant. "Applicant" shall mean any state agency or political subdivision applying for financial assistance under the Act;

002.03 Commission. "Commission" shall mean the Nebraska Natural Resources Commission created pursuant to Section 2-1504, R.S. Supp., 2000;

002.04 Department. "Department" shall mean the Nebraska Department of Natural Resources created pursuant to Sections 61-205 and 81-101 R.S. Supp., 2000;

002.05 Director. "Director" shall mean the Director of the Department Natural Resources as provided in Section 81-102, R.S. Supp., 2000;

002.06 Fund. "Fund" shall mean the Nebraska Resources Development Fund created by Section 2-1587, R.S. Supp., 2000;

002.07 Governing Body. "Governing Body" shall mean the individual or group of individuals which are empowered by law to govern the business of an applicant;

002.08 Intangible Benefits. "Intangible Benefits" shall mean benefits, either primary or secondary, that cannot be expressed in monetary terms;

002.09 Political Subdivision. "Political Subdivision" shall mean any political subdivision of the State of Nebraska to which has been granted the authority to develop water and related land resources, including, but not limited to a natural resources district, irrigation district, public power and

irrigation district, reclamation district, county, and any municipal corporation, village, or city, whether operating under home rule charter or under the general laws of the State of Nebraska;

002.10 Primary Benefits. "Primary Benefits" shall mean net values attributable to a project of increases in products and services and of reductions in costs, damages, or losses of primary beneficiaries;

002.11 Program and/or Project. "Program and/or Project" shall mean any structural or non-structural undertaking for which assistance from the Fund is requested. Unless the context otherwise requires, no distinction is intended between such terms and they may be used interchangeably for purposes of administration of these rules and regulations;

002.12 Project Engineer or Project Director. "Project Engineer or Project Director" shall mean any engineer, engineering firm, or other person, persons or firm retained by the sponsor to provide professional engineering or other professional or technical services during the planning, design, and construction of the project;

002.13 Secondary Benefits. "Secondary Benefits" shall mean net values to persons other than primary beneficiaries as a result of economic activity induced by or stemming from a project;

002.14 Sponsor. "Sponsor" shall mean the state agency or political subdivision primarily responsible for the development, administration, operation and maintenance of a program or project for which assistance from the Fund is requested;

002.15 State Agency. "State Agency" shall mean any agency, board, commission or other office of state government to which has been granted the authority to develop the state's water and related land resources;

002.16 Tangible Benefits. "Tangible Benefits" shall mean benefits, either primary or secondary, that can be expressed in monetary terms.

003 Types of Assistance. Eligible applicants for financial assistance from the Fund may receive such assistance in the form of grants, loans, or through the direct acquisition by the state of interests in eligible programs and projects. The form of assistance which may be allocated to a program or project shall be determined utilizing the following criteria:

003.01 Grants. Allocations from the Fund may be made as grants to applicants when it is determined that such an allocation will not be reimbursed from revenue or receipts and when the program or project, or separable portion thereof, appears to be of general public benefit thereby making reimbursement of such money from local tax funds inappropriate or impossible, or when the funds are intended for a state or local contribution to a program or project requiring such contribution to meet the requirements for a matching federal grant. If only a portion of the project meets the above criteria, only that portion will be eligible for a grant. In determining the appropriateness of a grant the considerations of the

Director and the Commission shall include the extent of the area over which the anticipated benefits will accrue and whether equitable distribution of the costs of the program or project can be accomplished without a grant.

003.02 Loans. Allocations may be made from the Fund as loans to applicants for any program or project or any part thereof consistent with the purposes of the Act which will directly generate revenue or receipts or which can be anticipated to culminate in a program or project which will generate revenue or receipts, or which would not generate revenue or receipts but would be of general public benefit to the applicant making repayment from local tax funds appropriate.

003.03 Acquisition of State Interests. Interests in water and related land resources projects may be acquired by the Department, upon approval by the Commission, in the name of the state with moneys from the Fund when the public benefits obtained from the project or a part thereof are statewide in nature and when associated costs are determined to be more appropriately financed by other than a local organization. The Department, upon approval by the Commission, may also acquire interests in water resources projects in the name of the state to meet future demands for usable water.

003.04 Allocations to State Agencies. No grant or loan shall actually be made to state agencies for programs or projects determined to be eligible for funding unless:

003.04A The allocation is for the purpose of reserving land for a future resource development project, or;

003.04B The allocation has been approved by the Legislature by earmarking appropriations to the Fund for that purpose.

004 Eligible Projects. Moneys from the Fund may be used to (a) participate in locally sponsored projects; (b) participate in projects sponsored or financially assisted by the federal government; and (c) finance state-sponsored projects. The types of projects and programs eligible for funding and the respective forms of such funding are as follows:

004.01 Structural Measures. Structural measures which may be eligible for allocations from the Fund in the form of grants and/or loans include measures designed for flood control; pollution abatement; fish and wildlife enhancement and preservation; outdoor recreation, irrigation development; irrigation rehabilitation; groundwater recharge; water supply for any beneficial use including domestic, agricultural, and manufacturing uses; streamflow augmentation; stream bank stabilization; and erosion and sediment control.

004.02 Non-structural Measures. Non-structural measures which may be eligible for financial assistance from the Fund in the form of grants and/or loans include: Flood damage reduction; fish and wildlife enhancement and preservation; outdoor recreation; reservation of lands for future resources development projects; and other water and related land resources

programs. Projects whose primary purposes are research or data gathering shall not be eligible for assistance.

005 Interest Rate. The rate of interest payable on loans from the Fund shall be determined annually prior to October 1 of each fiscal year. Except as otherwise provided herein, such rate of interest shall be computed by averaging the yields, as determined by the "Moody's" rating and classification system, of AAA State-Local Bonds issued nationally for the three previous fiscal years and by rounding off such average to the nearest one-eighth percent. For loans for the rehabilitation or betterment of surface water irrigation projects, the Commission may reduce the rate of interest to not less than three percent if (1) the amount of the loan is \$500,000 or less; (2) the repayment period is ten years or less; (3) the project sponsor has not previously received a reduced interest loan from the Fund; and (4) the Director and the Commission determine that the proposed project will make water available for public use or will provide other public benefits. The rate of interest payable on a loan for a specific program or project shall be the rate in effect for the fiscal year in which the Director recommends approval of the program or project for a loan allocation. Such rate shall remain in effect throughout the repayment period determined to be appropriate for such program or project.

006 Deferred Interest. When, in the Commission's judgment, a construction or preconstruction period (not exceeding five years next following the initial allocation) is justified, no payment on the interest or principal on such loans is required during that period, but interest shall begin accruing on all loan allocations immediately with disbursement. Repayment shall commence no later than one full year following completion of project construction. Any deferred interest may be apportioned over the repayment period. The repayment period will not exceed the project life or fifty years, whichever is less.

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Chapter 2 - APPLICATION PROCEDURES AND REQUIREMENTS

001 Filing Fees. No filing fee is required to accompany any project proposal or any application for assistance under the Act.

002 Filing Location. All project proposals, applications or other documents or instruments supplied by an applicant in connection with a request for financial assistance from the Fund shall be filed with the Director.

003 Application Procedure. It is recommended that each formal application for financial assistance from the Fund be preceded by a Project Proposal. An applicant may include the cost to the applicant of the feasibility report, the contents of which are specified by section 2-012 as a portion of the project costs of any project for which funding in an amount of less than \$100,000 is requested. Such cost may also be included as a portion of the project costs of any project for which funding in excess of \$100,000 is requested if, and only if, a project proposal has been previously submitted.

004 Information Required in Project Proposal. If the applicant decides to submit a Project Proposal, twenty-five copies shall be filed unless otherwise directed by the Director. The Project Proposal shall include the following information:

004.01 Name and address of applicant;

004.02 Applicant's authorized representative and his name and address;

004.03 A description of the proposed project and the desired accomplishments;

004.04 The primary purpose of the proposed project;

004.05 Other purposes of the proposed project;

004.06 A statement of urgency and need for the proposed project;

004.07 The applicant's most recent financial statement or budget document;

004.08 The estimated costs of the project;

004.09 The expected benefits from the proposed project;

004.10 The anticipated funding or other assistance from other sources;

004.11 The type and approximate amount of state assistance to be requested;

004.12 A discussion of probable environmental effects which shall include the applicant's plans to determine the potential impact of the proposed

project on any threatened or endangered species or the critical habitat of any such species. Copies of any applicable correspondence with the Game and Parks Commission shall be included, if available.

004.13 The estimated schedule of construction of the project, and;

004.14 A discussion of alternatives for accomplishing the purpose of the project.

004.15 An indication whether liability insurance or contractor bonding will be required.

005 Details of Project Proposals. The information required in Project Proposals shall be in such detail as directed by the Commission and Director. Appropriate guidelines for assistance in Project and Program Proposal preparation shall be prepared and distributed to all state agencies or political subdivisions expressing a need for such assistance.

006 Omissions in Project Proposal. If the Commission or the Director desires additional information on a Project Proposal, it will so notify the applicant. If the Director determines that a Project Proposal is not complete, or if additional information is required, the Director will notify the applicant of such omissions. The applicant shall be expected to correct any such omission or provide any additional information requested within 60 days following notification.

007 Review by Commission and Director. Upon receipt of a properly completed Project Proposal, the Director shall review it forthwith, make a preliminary evaluation, and advise the Commission within 90 days: (1) that the Director recommends the Sponsor be authorized to proceed with preparation of a formal application and feasibility report; or (2) that, based upon the submitted proposal, the Director does not recommend the Sponsor prepare an application and feasibility report. The reasons for any negative recommendation shall be stated. If the Director recommends proceeding, he or she shall also indicate the type of funding for which the project may be eligible and a cost-share range within which a funding recommendation is probable if the project is later determined to be eligible for funding. The Director may make any additional recommendations regarding the contents of the formal application and feasibility report he or she deems appropriate. Any such recommendations shall be forwarded to the Sponsor by the Department along with a notice of when the Commission will next be considering Project Proposals that have been reviewed by the Director but have not yet been acted on by the Commission. The Sponsor will be invited to appear before the Commission and comment on the Director's recommendations at that time. Upon review and consideration of the Director's recommendations and the Sponsor's comments, if any, the Commission shall determine whether the Director is to advise the applicant: (1) that it is authorized to proceed with preparation of a formal application and feasibility report; or (2) that it is recommended that an application and feasibility report not be prepared; the reasons for a negative recommendation shall be stated. If the Commission has compared and ranked two or more projects for which project proposals were reviewed at the same time, the Sponsor shall also be informed as to the relative ranking of each such proposed project.

008 Public Hearing and Notification. Except for projects requesting less than \$100,000 from the Fund, the applicant shall conduct at least one public hearing on all aspects of the proposed project or program prior to submission of the formal application and feasibility report. Notice of the hearing shall be provided to the general public by the publication, at least ten days prior thereto, in a newspaper or newspapers of general circulation within the project or program area. A copy of such notice will be provided to the Director. Information gained from the hearing, including a summary of testimony presented, is to be forwarded with the application.

009 Time to Complete Formal Applications. Upon notice by the Director of the Commission's findings on the Project Proposal, the Applicant shall be given a period of one year to complete a formal application and feasibility report. If an application is not completed within one year, or within such additional time as the Commission may grant for good cause shown, the Commission may request the filing of a new Project Proposal.

010 Form of Formal Application and Feasibility Report. Applicants for financial assistance from the Fund shall file twenty-five copies of an application and feasibility report. Such application shall contain a specific request for each type of assistance applied for in a specified amount. The contents of such application and feasibility report shall include all items required by sections 2-011 to 2-018 unless otherwise authorized by the Director. Feasibility reports shall be prepared at the initial expense of the applicant and with the assistance of licensed engineers, financial consultants, economists, recreation planners, wildlife specialists, or other consultants if deemed necessary by the applicant or by the Director following his or her evaluation of the Project Proposal. Costs of preparation of the feasibility report incurred by the applicant may be included if consistent with section 2-003.

011 Contents of Formal Application. Except to the extent that such information has previously been indicated through submission of a Project Proposal, the formal application shall include the following information:

011.01 A cover letter from the applicant submitting the feasibility report, the contents of which are specified by section 2-012;

011.02 The name and address of the applicant's authorized representative;

011.03 An outline of the initial development and background of the project;

011.04 An explanation of the need and urgency of the project;

011.05 A description of project goals and purposes;

011.06 A general discussion of alternative plans considered including a comparison of the technical, economic, and environmental aspects of each alternative with the plan chosen; and

011.07 A statement whether money from other sources is available or has been sought.

012 Contents of Feasibility Report. Contents of the feasibility report are to be of sufficient detail to demonstrate the technical, economic and financial feasibility, as well as the legal soundness, of the proposed project. Additionally, the expected positive and adverse environmental and ecological consequences of the project shall be therein demonstrated. The extent of detail necessary in the feasibility report will depend upon the type, purpose, and complexity of the project. Upon completion of any project proposal review, the Director will, to the extent deemed necessary, advise the applicant as to:

012.01 The criteria utilized to evaluate the technical, economic, financial, legal, and environmental aspects of the project;

012.02 The informational detail to be contained in the feasibility report.

013 Technical Feasibility.

013.01 A structural project shall be considered technically feasible when it can and will be designed, constructed, and operated to accomplish the purpose(s) for which it was planned utilizing accepted engineering and other technical principles and concepts. Technical data and information to be provided in the feasibility report should include, but is not limited to, the following:

013.01A A detailed discussion of the plan of development selected for the project;

013.01B A description of all field investigations made to substantiate the feasibility report;

013.01C Maps, drawings, charts, tables, etc., used as a basis for the feasibility report;

013.01D A description of the water and land rights associated with the project and pertinent water supply and water quality information, if appropriate;

013.01E A detailed discussion of each component of the final plan preparation including, when applicable:

013.01E1 Required geologic investigation;

013.01E2 Required hydrologic data;

013.01E3 Design criteria for final design including, but not limited to, soil mechanics, hydraulic, hydrologic, structural, embankments and foundation criteria.

013.02 A non-structural project shall be considered to be technically feasible when it can and will be designed and carried out to accomplish the purpose(s) for which it was planned. Data necessary to establish the technical feasibility should include, but is not limited to the following:

013.02A A detailed discussion of the plan of development designed for the project, including techniques to be utilized in all aspects of the project;

013.02B A description of field or research investigations utilized to substantiate the project conception;

013.02C A description of the water and/or land rights necessary for project continuation, if applicable;

013.02D A discussion of the anticipated effects, if any, of the proposed project upon the development and/or operation of existing or envisioned structural measures including a brief description of any such measure.

014 Economic Feasibility. Except as otherwise specified by subsection 014.04 or subsection 014.05 of this section, a project is economically feasible if primary, tangible benefits exceed project costs. In addition, for projects for which \$100,000 or more is requested from the Fund, each project's purpose in a multi-purpose project must provide benefits equal to or greater than its separable or specific cost as specified by the Director and there must be no known means of accomplishing the same purpose or purposes more economically. The Director and the Commission may also require that separable project features or increments have benefits which equal or exceed their costs. All costs and benefit data reported by the applicant will be based upon current data and sources for all data must be documented. Certain commodity prices, recreation benefit prices, and wildlife prices will be prescribed by the Director. The Director may also prescribe other cost and benefit information necessary for completion of the feasibility report. The period of analysis for economic feasibility studies shall be fifty (50) years or the life of the project, whichever is less.

014.01 Cost Information. The report shall include all relevant cost information including, but not limited to, all actual or anticipated costs for the feasibility study, the engineering and inspection costs, capital construction costs, annual operation and maintenance costs, and annual replacement costs. Cost information shall also include the estimated construction period as well as the estimated project life.

014.02 Benefit Information. Only primary tangible benefits may be counted in providing the monetary benefit information. In a multi-purpose project, the benefits will be estimated for each purpose and displayed by year for the project life. Intangible and secondary benefits of the proposed project or program should be described for consideration and evaluation by the Director and the Commission. Benefit measurement techniques and criteria shall be provided to the applicant by the Director.

014.03 Cash Flow Stream. All benefit and cost data will also be presented in a table form to indicate the annual cash flow for the life of the project, not to exceed 50 years. A form for so indicating the annual cash flow shall be supplied by the Director.

014.04 Rate-of-Return on Investment. The cost and benefit data expressed in the cash flow stream will be utilized by the Director to calculate the rate-of-return on the investment. The rate-of-return on the investment is the discount rate applied to future benefits and costs at which costs and benefits become equal and the net present worth of the project cash flow is zero. The Commission may prescribe a minimum rate-of-return for a project to be considered economically feasible.

014.05 Other Methods. In the case of proposed programs or projects for which there is no generally accepted method for calculation of primary, tangible benefits, the economic feasibility of such program or project shall be demonstrated by such method as the Director and the Commission deem appropriate.

015 Financial Feasibility. A project is financially feasible if sufficient funds can be made available to complete the project, and if sufficient annual revenues can be obtained to repay the reimbursable costs and to operate, maintain, and replace the project. When a loan is involved, financial feasibility requires assurance that the projects can be adequately operated, maintained, and replaced and that the loan can be repaid during the repayment life of the project. Financial data supplied by the applicant shall include the applicant's most recent financial statement, budget document or other documentation necessary to illustrate the following:

015.01 The legal limit of the rate of taxation by the applicant and the rate currently being levied;

015.02 The limit of property that can be locally taxed by the applicant;

015.03 The level and trend of actual valuation;

015.04 The rate of local delinquency;

015.05 The legal limit of revenue and general obligation bond indebtedness;

015.06 Any debts, including bonded indebtedness and those resulting from contractual or other obligations.

If a loan is requested, applicant shall also supply a complete year-by-year repayment schedule in such detail as directed by the Director.

016 Environmental Acceptance. A project is considered to be environmentally acceptable when:

016.01 The Director has found that the project will not jeopardize the continued existence of any threatened or endangered species or result in the destruction or modification of the critical habitat of any such species; and

016.02 The plan of development minimizes, in a manner satisfactory to the Director, any adverse impacts on the natural environment and adequately addresses existing cultural resources.

In addition to any proposed mitigation measures, if applicable, all aspects of the proposed project which can be anticipated to result in environmental enhancement shall be considered in determining whether the plan of development does minimize adverse impacts. To assist the Director in determining environmental acceptance, the applicant will demonstrate the probable environmental and ecological consequences of the project by addressing all areas of study identified on the environmental acceptance form (NRC/NRDF Form 02Ev1).

017 Federally Assisted Projects. When assistance from the Fund is requested for participation in a project planned by an agency of the federal government, the federally prepared plan of work can be submitted by the applicant for the purpose of complying with Sections 2-013, 2-014, and 2-016 and shall be submitted at the request of the Director. The Director does, however, reserve the right to reject all or a portion of any such plan of work on the grounds that the information provided therein is insufficient or inadequate for full evaluation of the proposed project's eligibility for assistance from the Fund.

018 Required Legal Data. The applicant shall assure the Director and the Commission that all legal requirements have or can be met prior to the allocation of any funds for the proposed program or project. Legal data submitted by the applicant in the feasibility report shall include the following:

018.01 Citation(s) to the legal authorities relied upon by the applicant to undertake or participate in the proposed program or project.

018.02 An explanation, with appropriate documentation of legal authorities, of the applicant's intention to finance that part of the project or program for which assistance from the Fund is not requested.

018.03 A showing that the applicant has or can acquire all necessary land rights and water rights.

018.04 Copies of any available proposed or executed contracts for construction or consultant services necessary for construction of the proposed program or project and included as part of the total cost of the project.

018.05 A listing of any permits, licenses, or other approvals required for the proposed project, their current status, and estimated schedule for compliance.

018.06 An explanation of the sponsor's plan to require consultants, contractors, and sub-contractors to obtain liability insurance or bonding to ensure the proper design and construction of the project.

018.07 An analysis of the sponsor's potential liability for damages from the project, including dam failure, overflow, or seepage of water and an explanation of the sponsor's plan to protect itself from any such liability.

018.08 A certified copy of a resolution of the applicant requesting financial assistance from the Department and containing a finding that the applicant cannot finance the project from other available state or federal sources.

018.09 Such other information, plans, and specifications as are requested by the Director or the Commission and which are reasonably necessary for an adequate understanding of the project.

018.10 A notarized statement executed by the applicant's official representative that the facts contained in the application are true and correct to his or her best knowledge and belief.

019 Omissions in Application. If an application submitted to the Director is not complete or if additional information is required, the Director will so notify the applicant. If the application is not completed within 90 days after the notice, unless the Director extends this time for good cause shown, the Director will return the application to the applicant without making any findings on the application and without prejudice to the submission of a new application at any future time.

020 Use of Department Data. Any pertinent data of the Department made available to applicants for use in preparing applications and feasibility reports will be furnished at cost.

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Chapter 3 - ACTION BY THE DIRECTOR

001 Review and Report by the Director. On receipt of a completed application and feasibility report required by Chapter 2 of these rules and regulations, the Director shall review the application and feasibility report and shall, within six months of receipt, prepare a report containing his or her findings and recommendations with respect to the application and will file such report with the Commission. Copies of the Director's report will be furnished to the applicant. The Director's report shall include the following items:

001.01 A recommendation of approval or rejection of the program or project for funding eligibility.

001.02 If approval is recommended, a recommendation that the allocation be made in the form of a grant, loan, acquisition of state interest, or combination thereof.

001.03 If a program or project is recommended for loan assistance, a recommendation of the appropriate repayment period.

001.04 A recommended degree of assistance for each type of allocation recommended by the Director which shall be developed with assistance from a subcommittee of the Commission's Program Committee.

001.05 Any conditions which the Director recommends be placed on project design, construction, operation, or maintenance to ensure the consistency of the project with the Act and with other state policies, plans and programs.

002 Committee Findings and Public Hearings. To assist the Director in making his or her review and report, the Director may refer the application and feasibility report, or any parts thereof, to such review committees as he or she may establish. In addition, the Director may, at his or her discretion, conduct one or more public hearings at such location (s) as he or she shall choose for the purpose of receiving public testimony on all aspects of the proposed program or project. The record of any such public hearing shall constitute a part of the Director's report to the Commission.

003 Considerations in Passing on Applications. In passing on applications, the Director shall consider:

003.01 The needs of the area to be served by the program or project and the benefit to be received from the program or project by the area served.

003.02 The availability of revenue to the applicant from all sources.

003.03 Whether the program or project is of such general public benefit that state financial assistance is justified.

003.04 The relationship of the program or project to the overall statewide water and related land needs.

003.05 Other factors relating to the nature of the project and the appropriate level of financial assistance.

004 Required Findings of Fact. Prior to making any report to the Commission recommending approval of a program or project for funding eligibility, the Director shall make the following findings of fact:

004.01 The plan does not conflict with any existing Nebraska State land plan.

004.02 The proposed program or project is technically, economically, and financially feasible based upon standards contained within these rules and regulations or otherwise adopted and supplied to the applicant by the Commission or the Department.

004.03 The plan for development of the proposed program or project is satisfactory.

004.04 The plan of development minimizes any adverse impact on the natural environment.

004.05 The applicant is qualified, responsible, and legally capable of carrying out the program or project.

004.06 In the case of a loan, the borrower has demonstrated the ability to repay the loan, and there is assurance of adequate operation, maintenance, and replacement during the repayment life of the project.

004.07 The plan considers other plans and programs of the state in accordance with the provisions of Sections 84-135, Reissue Revised Statutes of Nebraska, 1994, and resources development plans of the political subdivisions of the state.

004.08 The project will not jeopardize the continued existence of any threatened or endangered species or result in the destruction or modification of the critical habitat of any such species.

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Chapter 4 - COMMISSION ACTION AND REQUIREMENTS

001 Action on the Report of the Director. Following receipt of a report prepared by the Director in accordance with section 3-001, the Commission may request additional information from the Applicant. At the first regular meeting following receipt of that report, the Commission will decide whether (1) to act at the next regular meeting to approve or reject the findings of fact made by the Director pursuant to section 3-004 and the recommendations of the Director made pursuant to section 3-001 or (2) to defer such action until a later date. If any such deferral is made, it shall be to a date no later than eighteen months following receipt of the Director's report and shall be for the purpose of allowing the Commission to rank all projects for which the Commission has not taken action on a report provided by the Director pursuant to section 3-001 and, if desired by a Sponsor thereof, any project for which action on a report provided by the Director was acted upon in the previous four years but for which no funds have yet been allocated. Prior to the initial Commission action on any project, a delegation composed of Commission members shall visit the project site and report the results of its tour to the Commission or the appropriate committee of the Commission. Action on recommendations made by the Director pursuant to subsections .01 and .02 of section 3-001 shall be in accordance with such recommendations unless action to the contrary is approved by each Commission member eligible to vote on the specific recommendation under consideration. Recommendations made by the Director pursuant to subsections .03, .04, and .05 of section 3-001 may be acted upon by the concurrence of a majority of the Commission. A Commission member shall be ineligible to participate in the action of the Commission concerning an application for a grant or a loan only if such member is a member of the governing body or otherwise represents the applicant for financial assistance. All Commission members shall be eligible to vote on programs and projects involving state acquisition of interests in projects pursuant to Section 2-1590, R.S.Supp, 2006 as amended. If the Commission determines, following review of the application, feasibility report, and the Director's report, that the proposed program or project is eligible for financial assistance from the Fund, the Commission shall determine a tentative dollar figure for such assistance. Tentative allocations shall also be established for each separable component of the project, as determined in accordance with section 4-007. In establishing its tentative allocations, which can be for zero dollars, the Commission may take into consideration the recommendations of the Director pursuant to subsection .04 of section 3-001, the nature of the project and the factors associated with it, the total amount of money available in the Fund, any fiscal limitations placed by the Legislature upon allocations from the Fund, and the number of and total tentative dollar allocations for other programs and projects previously determined eligible. No tentative grant allocation shall exceed an amount equal to seventy-five percent (75%) of the portion of the estimated project costs which the local sponsor would be required to provide if financial assistance from the Fund was not available. The Commission may vary the maximum allowable cost-share rate for different categories of projects. No tentative loan allocation or combination loan and grant allocations shall exceed an amount equal to ninety percent (90%) of such portion of the estimated

project costs.

002 Project Totals Exceeding Balance in Fund. Although the total of previously approved allocations exceeds the amount of funds then available in the Fund, the Commission may approve the eligibility of additional projects and establish tentative dollar allocations for such projects if such projects are otherwise eligible for financial assistance and if such approval and tentative allocations are otherwise consistent with state law. Notwithstanding any such approval, a sponsor shall not under any conditions be entitled to reimbursement for any project costs until funds have been apportioned and set aside in accordance with sections 4-008 or 4-009 for reimbursement of costs incurred by the sponsor on such project. Costs paid, accrued or authorized by a sponsor prior to funds being set aside for such projects and costs paid, accrued or authorized by a sponsor for portions of project development in excess of those portions for which funds have been set aside, including application and engineering costs, shall be incurred at the risk of the sponsor and such sponsor shall not be entitled to reimbursement of such costs at any time without specific Commission approval for such reimbursement. Such costs may, however, be used by the sponsor to satisfy in whole or in part the sponsor's share of the total costs of the project if funds for remaining project costs are later apportioned and set aside for such project in accordance with sections 4-008 or 4-009.

003 Annual Availability of Funds. Regardless of the status of the Fund at the time of Commission approval of the eligibility of a project, the extent, if any, to which financial assistance will be provided to such project in any one fiscal year shall be in accordance with and contingent upon the availability of funds and Commission action apportioning and setting aside funds for such project in such fiscal year in accordance with sections 4-008 or 4-009.

004 Continued Funding. In order to assure continued funding of projects with no separable components and of separable project components which are not further separable, the Commission, when it first apportioned and sets aside in accordance with sections 4-008 or 4-009 funds for such project or project component, shall set aside an amount equal to the appropriate percentage of the total cost of the project or the component even if it is not anticipated that all of such funds could be expended during the next ensuing fiscal year. Funds thus apportioned and set aside shall, as soon as costs have been incurred by the sponsor subsequent to such apportionment, remain set aside and be committed for such project or project component until the sponsor has received all reimbursement to which it is entitled unless:

004.01 The project is abandoned or significantly delayed;

004.02 The Commission has reasonable grounds for concern that the project or any portion of it may not be completed due to public opposition, litigation, or the loss of other state, local or federal funds needed to complete the project;

004.03 The Department fails to receive a reappropriation of unexpended funds;

004.04 The appropriation for the Resources Development Fund is reduced by subsequent legislative act; or

004.05 The Commission determines the project no longer meets the criteria for funding eligibility contained in the Resources Development Fund Act or the Commission's rules and regulations.

If the Commission determines at any time that any of these conditions have occurred, any funds apportioned and set aside for the project which have not been disbursed may be deemed by the Commission and the Department to be no longer apportioned and set aside.

005 Funding Preferences. In order that the maximum practicable assurance of continued funding may be provided to sponsors of uncompleted projects which have previously been apportioned funds for one or more separable components, preference shall be given such projects and project components whenever funds are apportioned and set aside in accordance with section 4-008 or section 4-009.

006 Determination of Fiscal Year Financial Needs.

006.01 No later than March 31 of each year each sponsor willing to utilize and capable of utilizing either an initial or an additional apportionment of funds for a project which has been determined eligible for funding shall submit a report to the Director indicating as follows:

006.01A If the project has no previously identified separable components and no request is made for identification of any such components, the report shall indicate the estimated time schedule for beginning and completing the project.

006.01B If the project has separable components, the report shall indicate the component or components for which the sponsor is requesting an apportionment and the estimated time schedule for commencing and completing such component or components.

006.01C If desired by the sponsor, the report may also include a request for the identification of separable components for a project with no previously identified separable components or for the separation of one or more previously identified separable components into additional separable components. Any such request shall be accompanied by an estimate of the costs for completing all separable components for which identification is requested. For those components for which apportionment of funds is desired, the information required by part B of this subsection shall also be provided.

006.01D The extent of any opposition to completion of the project, or any separable component, including whether any lawsuits to prevent its completion have been instituted or are anticipated, whether any problems are being experienced or are anticipated in obtaining sufficient funds to meet the sponsor's financial obligations for the project, and

whether any other factors exist which may affect the sponsor's ability to complete the project.

007 Separable Components. If a project plan provides that development of the project will take place on two or more land areas not contiguous to each other, the project portion planned for each such land area shall constitute a separable component of the project. Projects for which total project development will take place all on one contiguous land area and separable components of projects of the type described above may also have separable components. A project component shall be deemed to be any distinguishable phase of project development including such phases as land rights acquisition, project construction, and related facilities development. The extent to which such components constitute separable components for any project shall be determined by the Commission after consultation with the Director and the sponsor. In the event that any project is determined to have separable components, the Commission shall take action to identify such separable components and to determine the estimated costs of completing each such component.

008 Apportioning and Setting Aside Funds. Prior to July 1 of each year the Commission shall apportion and set aside available funds for projects and project components eligible for funding assistance. In making such apportionments, the Commission shall consider the following:

008.01 Whether it is reasonable to expect that each project or project component for which funding is requested is capable of being commenced within the next ensuing fiscal year;

008.02 Whether any of the projects or project components proposed for funding by the sponsors could, in the opinion of the Commission, be delayed without significant adverse effects on the total project;

008.03 Whether there are reasonable grounds for concern that the project, or portions of it, may not be completed. Reasonable grounds for concern shall include, but not be limited to, opposition to completion of the project including current or anticipated lawsuits or the unavailability or loss of local, federal, or other state funds needed to complete the project;

008.04 The funding preferences established in section 4-005;

008.05 Each project's rate-of-return on the investment;

008.06 The water and related resources needs addressed by each project;

008.07 The economic impact of each project on the local and/or regional economy;

008.08 The environmental impact of each project;

008.09 The support for or opposition to each project;

008.10 The urgency of need for each project;

008.11 The extent of benefit provided by each project; and

008.12 How to make the most efficient utilization of the available funds.

Prior to the Commission's action apportioning and setting aside funds for a given fiscal year, the Department shall invite the sponsors of all projects for which funding has been requested for that fiscal year to appear before the Commission to address the manner in which their projects relate to the factors to be considered by the Commission.

009 Adjustments in Apportionments. A sponsor may at any time during the fiscal year submit reports containing an update of the information contained in the report submitted in accordance with section 4-006. A sponsor of a project for which no report was submitted in accordance with section 4-006 may also at any time submit a report containing the information required by such section. At the first Commission meeting following August 1, November 1, and February 1 of each year, the Commission shall review all such reports, if any, which have been submitted since the last such review, and any other relevant information available to it and shall, if appropriate and consistent with the funding preference established in section 4-005, make adjustments in the amount apportioned and set aside for any project for that fiscal year. No amount previously apportioned and set aside in accordance with sections 4-008 shall be decreased unless:

009.01 The sponsor has indicated a decrease in needs;

009.02 The Commission, based on information contained in the sponsor's report submitted in accordance with section 4-006 or other information available to it, finds that there are reasonable grounds for concern that the project or any separable component may not be completed;

009.03 The project is abandoned or significantly delayed;

009.04 The Department fails to receive a reappropriation of unexpended funds;

009.05 The appropriation for the Resources Development Fund is reduced by subsequent legislative act, or;

009.06 The Commission determines the project no longer meets the criteria for funding eligibility contained in the Resources Development Fund Act or the Commission's rules and regulations.

In case of any such findings, the Commission may modify, suspend or revoke any previous action to apportion and set aside funds for the project or any separable component. Provided, however, any action to modify, suspend, or revoke any previous apportionment shall not affect the sponsor's right to reimbursement for costs which it has incurred or for which it has become legally obligated prior to such Commission action. In addition, such action shall not affect the sponsor's right to reimbursement for the cost of land or interests in land acquired through condemnation actions commenced prior to the

Commission action to modify, suspend, or revoke an apportionment.

010 Limitation on Reimbursements. A sponsor shall not be reimbursed during any fiscal year in any amount in excess of the amount apportioned and set aside for the sponsor's project in accordance with sections 4-008 and 4-009.

011 Review and Approval of Final Plans. Prior to the actual disbursement of any funds for construction for the project or for any portion thereof, the Director shall review the final plans for the proposed program or project or the portion for which funds are requested. If it appears during such review or during any prior or subsequent review or inspection of the project plans or construction, or during any review of project cost information that:

011.01 The plans and specifications for the project are not being followed;

011.02 The plan for development or any work performed on the project are not based on sound technical principles or practices;

011.03 The project or any portion thereof no longer meets the criteria for funding eligibility contained in the Resources Development Fund Act or the Commission's Rules and Regulations; or

011.04 There is or has been non-compliance with any of the terms of the contract between the Sponsor and the Department.

The Director shall immediately bring such variances to the Sponsor's attention and may refuse to disburse any funds for the project until such time as the variances are corrected and the project is brought into conformance with all appropriate standards.

012 Limitation on Allocation. The amount actually disbursed for a program or project, or a separable component of a project, shall not exceed the dollar amount of the tentative allocation for the program, project or separable component approved by the Commission pursuant to section 4-001 or a dollar amount equal to the same percentage of the actual project costs as the tentative allocation represented to the estimated project costs, whichever is less, without specific Commission approval; except that funds apportioned and set aside for one separable component but not disbursed may be used to reimburse the Sponsor for the costs of another separable component even though such reimbursement may exceed the amount apportioned and set aside for that component if necessary in accordance with section 4-002 to achieve or maintain the appropriate ratio between eligible project costs paid by the Sponsor and those paid by the Department.

013 Contractual Arrangements. State funds will not be advanced to any applicant pursuant to an approved loan or grant until a contract between the applicant and the Department setting forth terms and conditions of such loan or grant has been executed.

014 Disbursements. The Director shall disburse, no more often than once each month, such funds from those apportioned and set aside to a program or project as are necessary to reimburse, in the proper proportion, all eligible costs

incurred by the applicant in carrying out the program or project since the next preceding disbursement, if any. All such costs shall be documented by the applicant in such manner as is directed by the Director prior to the disbursement of any funds. In the event that a program or project has been approved for combination grant and loan allocations, each disbursement shall, unless otherwise specified by the Commission constitute a disbursement of loan and grant funds in the same proportion as the totals of the allocation approved.

015 Inspection During Construction. The Commission and Director shall have the privilege of inspecting the construction of any project at any time in order to ensure that plans and specifications are being followed, and that the works are being constructed in accordance with sound engineering and technical principles and practices, but such inspection shall never subject the State of Nebraska to any action for damages. The Director shall bring to the attention of the sponsor and the project engineer any variances from the approved plans and specifications. The Sponsor and the project engineer or project director shall initiate necessary corrective action.

016 Changes in Scope of Approved Projects. The Sponsor shall promptly report all increases in the cost of a project, or any separable component of the project, and any proposed additions, deletions, or modifications of any separable component, or any change in the purpose or purposes of the project by submitting to the Director an amendment to the formal application and feasibility report. Commission approval of any change in the scope, purpose, or plan for development of the project, and any increase in the tentative allocation for the project, or any separable component, shall be required. Any proposed change in the scope, purpose, or plan of development for the project, any request for an increase in the allocation for the project, or any cost increase, regardless of whether an increase in the tentative allocation for the project is requested, may at the discretion of the Commission, be referred to the Director for his or her review and recommendation regarding whether the project still meets the criteria for funding eligibility contained in the Act or the Commission's rules and regulations.

ANNOTATION

Title 256 NAC

Section 2-1586, R.R.S., 1997; 2-1587, 2-1589, 2-1590, 2-1592, 2-1593, and 2-1595, R.S. Supp., 2000; and 2-1588 and 2-1594, as amended by LB 129, 97th Nebraska Legislature, 1st Session (2001)

