

February 15, 2023

Paul Hauch, P.E., Bureau Chief
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Municipal Finance and Construction Element
waterbankinfo@dep.nj.gov

Re: Comments on Proposed DWSRF and CWSRF Intended Use Plans

Dear Mr. Hauch,

On behalf of New Jersey Future and Natural Resources Defense Council, thank you for the opportunity to submit comments on the New Jersey Department of Environmental Protection's (NJDEP's) Proposed Drinking Water State Revolving Fund (DWSRF) and Clean Water State Revolving Fund (CWSRF) Intended Use Plans (IUPs) for Federal Fiscal Year 2023 and State Fiscal Year (SFY) 2024.

Please find below our questions, comments, and recommendations concerning the IUPs.

Thank you for your consideration. We would welcome the opportunity to discuss these issues further with you.

Sincerely,

Gary Brune
Senior Policy Analyst
New Jersey Future

Lawrence Levine
Director, Urban Water Infrastructure
Natural Resources Defense Council

Detailed Comments

- **Program Size (Sources and Uses Chart)**
 - Total Program Size

The following funding sources do not seem to be included in the IUP's "Sources and Uses" chart for the CWSRF or the DWSRF. Does each provide additional funding for projects in SFY24, and if so how would they be allocated by program?

 - \$500 million SWIFIA loan
 - Leveraged portion of \$60 million state appropriation (i.e., private bank financing). Explain the footnote on the Source and Uses chart re: "leveraging the \$25 million I-Bank share to generate \$110 million".
 - New Jersey Infrastructure Bank (NJIB or I-Bank) Share

- What determines the level of the I-Bank share and how much discretion exists in setting that amount? For example, the I-Bank share of the DWSRF program in SFY22 was 50% of the total (i.e., \$90 million of \$180 million total), while in SFY24, it represents only 23% of the total (i.e., \$125 million of \$537 million). The I-Bank share in the CWSRF seems to follow a different pattern (i.e. 23% of total sources in SFY23 (\$314 million of \$1,353 million) but 32% in SFY24 (\$287 million of \$909 million)).
 - Funds Unused in Prior Years
 - DWSRF: Why does this amount increase steadily from SFY22 (\$30 million) to SFY23 (\$188 million) to SFY24 (\$269 million)?
 - CWSRF: A bit more than half of the projected 33% drop (\$445 million) in the size of the CWSRF program from SFY23 (\$1,353 million) to SFY24 (\$908 million) is attributable to non-recurring federal ARP funds (\$248 million), but what explains the large decline (\$178 million) in “Funds Unused in Prior Years”?
 - Has NJDEP considered a more aggressive funding package for disadvantaged communities (DACs), such as planning and design grants, selective waiving of funding caps for high priority projects, and zero interest loans for the loan portion of any award to a DAC involving federal Infrastructure Investment and Jobs Act (IIJA) funds, in order to increase spending in the year that funds are originally provided?
- **American Rescue Plan (ARP)**

If it is not possible to obligate the federal American Rescue Plan (ARP) funds for combined sewer overflow projects by the December 2024 deadline established by the U.S. Department of Treasury and a reallocation is necessary, will those funds remain within the CWSRF program? We recommend that NJDEP consider the “highest and best use” of the funds across both drinking water and clean water projects requested by disadvantaged communities.
- **State Appropriation**

Please provide a complete reconciliation of the planned uses of the \$60 million state appropriation to the State Revolving Fund program, including all planned uses beyond the state matching fund requirements.
- **Lead Service Line Replacement (LSLR)—Prioritization**

For LSLR, where priority is given to water utilities that exceed the lead action level, will the amount and terms of assistance provided take into account each utility’s fiscal condition (i.e., relative to others)?
- **Principal Forgiveness (PF)**

For Emerging Contaminant (EC) projects in the DWSRF, 25% of PF will be awarded to DACs serving populations of 25,000 or less. Is that provision new, what is the intent, and is EC the only category that is so affected?

- **SRF Set Asides**

Has NJDEP considered maximizing the use of set asides permitted by the U.S. Environmental Protection Agency (EPA) to assist DACs, including funding for planning and design phases for projects with vital environmental benefits?

For example, federal law allows states to set aside up to 26% of their DWSRF capitalization grants (including “base” funds and IIJA funds) under the following categories:

- Administration and technical assistance (**4%** of federal grant)
- Small System (<10,000) Technical Assistance (**2%** of federal grant)
- State Program Management (**10%** of federal grant)
- Local capacity development (**10%** of federal grant).

With respect to IIJA LSLR funds, examples of eligible uses of set-asides are offered here: [State SRF Policies to help Communities Fully Take Up the new Federal Funding for Lead Service Line Replacement](#). Most or all of these uses would be valuable in supporting equitable implementation of New Jersey’s ten year LSLR mandate.

Please provide in the final IUPs a table that outlines the planned set asides for both the CWSRF and the DWSRF, showing both the SFY24 planned amount and the maximum amount permitted by the EPA. (The latter would amplify the table presently listed on page 25 of the DWSRF IUP).

- **Affordability Criteria**

The IUP’s existing Affordability Criteria relies almost exclusively on one indicator, median household income (MHI), and has been liberalized in recent years to include all localities below 80% of the statewide MHI. We recommend that NJDEP consider further adjustments to the affordability criteria, which may better prioritize communities with the greatest need.

- *Alternative Measures of Affordability*

MHI is not always the best measure of fiscal need of a community, particularly if it is the sole measure. For example, MHI captures only household income, not the local tax base attributable to commercial property. Further, MHI does not account for the actual cost of water service relative to residential customers’ ability to pay (particularly low-income customers). NJDEP should consider alternative metrics for its affordability criteria, including the following:

- *DCA’s Municipal Revitalization Index (MRI)*

This [index](#), published by the Department of Community Affairs, is a multi-dimensional tool that provides a more robust measure of local affordability, including a composite score for each locality.

- ***Water Affordability Index***

In August 2021, New Jersey Future released a report, [*A New Jersey Affordability Methodology and Assessment for Drinking Water and Sewer Utility Costs*](#), for Jersey Water Works with Dan Van Abs from Rutgers University. The report presents a detailed methodology for assessing the extent to which current drinking water and sewer utility costs pose a financial burden for low-income New Jersey households.

- ***Scaling Priority Points*** - To recognize the different levels of need that exist among localities that presently qualify as “disadvantaged communities”, NJDEP should consider distributing financial assistance (e.g., principal forgiveness or funding packages) by issuing priority points on a [*sliding scale*](#), as some other states (e.g., [*Wisconsin*](#)) have done. Ideally, this approach would include a broader set of indicators to properly account for the relative environmental challenges, fiscal distress, and the potential burden per taxpayer on the water rates in various communities. Most importantly, it would allow for financial assistance to be differentiated among DACs, providing more to the most needy and less to water utilities that barely qualify. At least six states have adopted some version of a sliding scale or tiering system and others are considering it. (See ASDWA’s recent report [*ASDWA - State DAC Definitions*](#).)

- ***Affordability Points for Project Priority List Ranking***

NJDEP continues to provide only 80 extra points to localities that satisfy the Environmental Justice Economic Overburdened Community Criteria. Given the sheer size of the points provided under other measures in the scoring system, has NJDEP considered providing a higher amount of points to help differentiate environmental justice communities?

- **Principal Forgiveness Caps**

Recognizing that the pool of principal forgiveness is understated and the need to spread it as effectively as possible, NJDEP should nonetheless consider waiving principal forgiveness caps for projects that would provide vital environmental benefits to DACs that require additional financial assistance to move forward (i.e., If such flexibility was exercised on at least a limited basis for DAC projects that NJDEP deems critical, wouldn’t that represent a better use of funds?).

- **DAC Funding Package—AAA Rate**

Since by their nature DACs have recognized affordability issues, why charge the AAA rate to them at all? (e.g., Why not 50% PF and 50% as a zero-interest loan?)

- **Customer Cost Share Policy**

The SFY24 IUP addresses the issue of water utilities charging a customer “cost share” to contribute toward the cost of replacing the privately-owned portion of a LSL as follows:

“Principal forgiveness shall be utilized to address the cost-share of the property owner as applicable.”

Please clarify what is meant by this statement, i.e., does it mean that, in any instance in which a SRF-funded LSLR project involves a customer-owned LSL that needs to be replaced to achieve a “full replacement” (i.e., to avoid a prohibited “partial replacement”), the water utility must apply any principal forgiveness portion of the SRF award to cover the customer-side costs, at least until the principal forgiveness is exhausted?

Given the major inefficiencies and environmental justice issues associated with charging a customer cost share for this work, NJDEP should stipulate that no customer cost share may be charged by any water utility that accepts financial assistance for any LSLR project that is funded with SRF funds. For SRF-funded projects, DEP should require the water system to pay to replace the portions of the lead service line that are owned by the water utility and the customer. Based on numerous examples across the country, the imposition of a cost share requirement will disproportionately exclude low-income households and people of color from participating in the LSLR program, and places New Jersey at risk of violating Title VI of the Civil Rights Act. (See links below regarding such a situation facing Providence, RI.)

Indeed, in August 2022, the State of New Jersey filed a brief in federal court challenging EPA’s Lead and Copper Rule under the Safe Drinking Water Act on the ground that, by failing to ensure that all water systems replace customer-side lines even when the customer cannot afford the expense, EPA’s approach imposes “disproportionate effects...on minority and low-income individuals who face greater lead exposure, but may not be able to afford replacement of a privately-owned lead service line, or live in rental housing where the landlord refuses to pay for such Replacement.” [Newburgh Clean Water Project v. USEPA](#) (D.C. Cir., No. 21-1019), Initial Opening Brief of State Petitioners, Aug. 8, 2022, pp. 38-39,.) (The Lead and Copper Rule applies to all water systems, independently of whether they receive SRF funds. Accordingly, the challenged EPA regulation does not define or limit NJDEP’s obligations regarding the use of SRF funds for LSLR.)

Further, we note that EPA emphasized in its March 2022 IJA guidance (e.g., on p. 25) that the agency will keep a close watch on Title VI compliance in the use of IJA water infrastructure funds, including a burden on states to demonstrate compliance in their IUPs.

References concerning Title VI complaint against Providence, RI:

Environmental Defense Fund: [“Update: EPA agrees to investigate civil rights allegations against Providence Water’s LSL replacement practices”](#) (March 2022)

- **Paradigm Shift**

NJDEP's Enhanced Technical Assistance program is an important step to help the SRF program shift from a historically "passive" approach, in which most applications are triggered by local initiative, to aggressively identify and develop projects that provide the greatest environmental benefit. However, sole reliance on that effort will not prove to be sufficient. That is, though "readiness to proceed" is a vital feature for project selection, a better balance needs to be struck. To ensure that projects that promise a significant "bang for the buck" in overburdened communities do not continue to languish, NJDEP should independently track such projects and use CWSRF and the DWSRF funds to advance them aggressively.

Beyond the Project Priority List, which reflects project requests submitted by potential borrowers, does DEP maintain a list of the most critical drinking water and clean water projects across the state (i.e., those with the highest environmental benefits)? If not, how does NJDEP judge the impact that the SRF program is having on environmental quality in New Jersey versus the impact that it otherwise could have?

- **Technical Assistance**

While the SFY24 IUPs references planned improvements in technical assistance services, they do not provide a detailed description. Given that TA programs are planned by the NJ Infrastructure Bank (Early Engineering and Engagement Assistance), NJDEP (Enhanced Technical Assistance), and EPA (Environmental Finance Centers), when will NJDEP release a full description of these services, including how they will be implemented to avoid duplication?

We also encourage DEP to consider using a portion of TA set-asides to help water and wastewater systems develop low-income affordability programs and equitable rate designs, which can enhance a community's "technical, managerial, and financial capability" to maintain adequate revenue for operation, maintenance, and improvement of the system. Affordability programs and rate structure reforms can enable systems to increase rates without burdening low-income customers. (As noted by the state's 2018 Joint Legislative Task Force on Drinking Water Infrastructure, [Final Report](#), "A major deterrent to proper investment in water infrastructure is affordability . . . Municipalities with a larger share of low-income residents find it difficult to raise rates to fund water infrastructure upgrades due to the detrimental effect higher rates will have on those residents. The result is underinvestment, which is a losing proposition . . . However, while increasing rates can adversely affect low-income households, as several witnesses noted, these effects are not inevitable and can be avoided . . .") For example, Michigan—although not with SRF funds—has offered affordability [planning grants](#) to water and wastewater systems that supported development of local affordability plans, with significant community engagement.

- **“Sponsors Under State Supervision”**

The Draft IUPs state that NJDEP may choose to provide a 100% loan to municipalities (or local authorities whose repayment is secured by participating towns) that do not satisfy the I-Bank’s credit policy but are subject to State financial supervision.

- To further enhance the credit of DACs, has the NJDEP considered expanded use of a State intercept of local aid through the Municipal Qualified Bond Act program or bond insurance to reduce “repayment risk”?

- **Lead Service Line Replacements — Public Health Protections**

The federal Lead and Copper Rule Revisions (LCRR) require notification to homeowners/tenants, certified filters, and water testing when LSLs are replaced or disturbed. EPA has delayed the LCRR compliance date to October 2024. However, especially with the infusion of IJJA LSLR funds, the DWSRF will be funding extensive LSLR activities before October 2024, as well as other activities (e.g., water main or meter replacement) that may result in unplanned disturbances of LSLs. Those activities present public health concerns if best practices are not followed to mitigate the risk of lead exposure. To protect public health, the IUP should require that all projects receiving DWSRF assistance must immediately implement the following LCRR provisions concerning notification, filters, and testing:

- 40 CFR 141.84(d) [here](#) — applies to partial LSL replacements (note that subpara. (1) is probably not applicable in NJ since the state generally bans partials, but (2) would be applicable in the event of emergency work that results in a partial replacement)
- 40 CFR 141.84(e) [here](#) — applies to full LSL replacements; and
- 40 CFR 141.85(f) [here](#) — applies to other activities that disturb a LSL.

- **Possible Errors — IUP Draft**

Highlighted below are several potential errors that NJDEP may wish to revisit prior to finalizing the SFY24 IUP for the DWSRF:

- DW BIL Supplemental - The text (page 7) references \$35.5 million for this source while the SFY24 Financing Program chart (page 12) references \$26 million. Is the chart incorrect, or should it be adjusted to reflect the planned shift of \$10 million of Supplemental PF to LSL replacement?
- Funding Packages (page 16, blue box insert) - IUP references that investor-owned utilities will receive a loan mix for the Base DWSRF program of 25% NJDEP @0% and 75% NJIB @0%. Should the latter read “75% NJIB @ AAA rate”?
- Service Line Inventory (page 18) - Since the enabling legislation for the LSLR program (P.L. 2021, c. 183) was effective on July 22, 2021, and since that legislation identified one and two year milestones for development of a service

line inventory, is it accurate to say that state law required utilities to post the latest version of their service line inventory online by January 2023?

As noted below, the section of the statute that requires publication of the inventory does not identify a specific date.

H. A public community water system shall provide its most recent service line inventory, upon request and at no cost, to appropriate State officials or to the local government officials of a municipality served by the public community water system. A public community water system shall make its most recent service line inventory available on its Internet website. For public community water systems serving fewer than 3,300 customers, whenever an Internet website is not available, the public community water system shall make its most recent service line inventory available in another publicly accessible location.