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Memo to: NJDEP WIIP Team
From: Andy Kricun, U.S. Water Alliance; Larry Levine, Natural Resources Defense Council; Chris Sturm, New Jersey Future
CC: Gary Brune, Diane Schrauth, New Jersey Future
Date: February 18, 2022
Subject: Recommendations for the New Jersey Department of Environmental Protection Water Infrastructure Investment Plan (WIIP)

Our recommendations fall into seven categories:

1. Shifting Beyond "First-Come, First-Serve"
2. Technical Assistance and Set Asides
3. Disadvantaged Community and Affordability Criteria
4. Allocation of Principal Forgiveness
5. New Performance-Oriented Eligibility Requirements
6. Communicating Funding Gaps and Solutions
7. Complementary Grant Programs

1. Shifting Beyond "First-Come, First-Serve"

The work of the NJ Department of Environmental Protection and NJ Infrastructure Bank to distribute funding for water infrastructure in NJ has been transformational in promoting safe drinking water and clean waterways in our state. And, with the new, additional, infrastructure funding now available from the Federal government, the DEP and I-Bank are working to make these funding programs even more attractive to prospective borrowers.

However, there is a group of communities that have not historically applied for I-Bank funding. This may be due to either lack of resources, lack of political will to address infrastructure problems now as opposed to leaving them for successors to address, or other reasons. Regardless, since our mission is to ensure clean waterways and safe drinking water for all residents of NJ, no matter where they live, a proactive approach is needed to identify communities with the most serious drinking water and clean water challenges and then to do our utmost to assist them.

Therefore, we recommend that, in addition to the current practice of reviewing all applications for funding that are received, a parallel effort be undertaken to

proactively identify key water-related projects in disadvantaged communities and to provide the assistance necessary to move them forward. The program would involve the NJDEP:

- identifying the most serious drinking water and quality issues in the state that have long remained unaddressed;
- working with those communities to identify corresponding solutions;
- providing assistance to those communities to help them through the planning, design, permitting and application processes needed before SRF construction funding can be awarded; and
- tracking progress to learn about any potential obstacles or issues on the part of applicants and/or the Water Bank program

The current passive approach will not address public health and water quality issues in all low income/EJ communities, as it is unlikely to provide the kind of assistance that is needed in low income and low resource communities. If the State is truly serious about the notion that a person's zip code should not determine whether or not they have safe drinking water or clean waterways, then it must take the aforementioned proactive approach.

Project readiness is also essential, however. Setting aside too much funding for low resource communities that are not ready to proceed would be inefficient. A balancing act is needed between these two competing considerations --- providing low income households with a fair chance at funding support while also ensuring that funds do not languish.

This paradigm shift to proactive identification, assistance, and funding of the most impactful projects would not only help to ensure that the additional funding will be used where it is needed most but would also have the ongoing benefit for the SRF program thereafter as well. A primary goal of the NJ WIIP should be to ensure reliable, affordable water, wastewater and stormwater services that support water quality and public health in every community.

The five-year duration of the additional injection of SRF funding allows for more time to identify "shovel worthy" projects in underserved communities, and take them through the planning, design, permitting and application process. We suggest that the first two years be devoted primarily to funding "shovel ready" projects while working in parallel in disadvantaged communities to get their set of "shovel worthy projects" through the application process so that they can join the roster of funded projects during the last three years.

The NJDEP could consider creating an advisory council of interested stakeholders, to assist with this work, particularly in the identification of high priority challenges and corresponding solutions. The stakeholders could include groups like the NJ Environmental Justice Advisory Council and others.

Specifically, we recommend:

1. The Water Bank should identify “at risk” “low-resource” systems that have some combination of the following.

    - Consent decrees, consent orders, or compliance schedules in permits
    - Historic pattern of violations
    - Compliance obligations (CSO, LSL, identified PFAs, etc.) that are significant relative to size of rate base and its capacity to absorb rate increases
    - Low-income rate base, perhaps defined by status as a disadvantaged community

2. Assuming that it takes 12-18 months to go through the planning, design, permitting and application processes, the NJ Water Bank should consider a two-pronged approach such that:

    - The first two years of the SRF cycle focus on projects that are far enough along in the project development pipeline – or can be accelerated through the pipeline – to meet the state’s deadlines for obligation and/or expenditure of the initial tranches of federal funds. We recommend grants to nonprofit organizations that work with environmental justice communities in New Jersey on water issues. Their efforts, like the Funding Navigator, and technical nonprofit partners like Moonshot Missions, can play a critical role in working with communities to identify important capital projects and help them submit a concept application to the Water Bank’s H20 Loans. At that point, Water Bank technical assistance on-call augmentation consultants and staff can take over.
    - The remaining three years of the SRF cycle focus on "shovel worthiness" with a goal of bringing the most important projects, from a public health, water quality and social justice perspective through the pre-construction phases of planning, design, permitting and application during the first two years in parallel with the implementation of the aforementioned shovel ready projects. We recommend that the Clean Water “Environmental Justice Affordability” and “General BIL Principal Forgiveness” allocations be available only to the high-risk/low-resource communities as defined above. DEP officials would meet with mayors and the public in high-risk/low-resource communities to explain the opportunity and deadlines for applications. They would prioritize these communities for Technical Assistance (see below). We also recommend that the

Water Bank publish annual progress of at-risk systems in obtaining financing.

In summary, the WIIP would provide environmental justice set-asides in the first two years, but only for those projects that are shovel-ready or could be soon. And, in the final three years, there would be a much higher percentage of financing going to environmental justice/low income communities under the assumption that they would get the help they need within the first two years of the five-year cycle to be ready by years 3-5. If a system can't meet deadlines, in spite of getting all of the help they need (i.e., not willing to proceed even with the necessary help and resources), then the set-asides could be re-evaluated and released on an annual basis.

2. Technical Assistance and Set Asides

We recommend creation by the Water Bank of a larger program that is designed to provide direct technical assistance (TA) to underserved communities in the form of individualized pre-development work with communities on preparing applications and managing awards. Technical assistance reduces the burden that communities must shoulder in the entire process, from envisioning a project to securing funding to managing the funds. Proactive TA can ensure that the IIJA infusion of funds into SRF programs is distributed equitably and delivers the highest quality projects–providing cost-efficient, sustainable solutions to pressing water infrastructure needs that would otherwise remain unaddressed. We recommend the NJ Water Bank's TA program follow the principles below[1]:

1. **Be proactive in identifying, recruiting, and providing technical assistance to disadvantaged communities to procure applications for shovel-worthy projects.** Given the technical expertise, time, and costs required to prepare applications, passive reliance on submissions of "shovel-ready" projects often yields a disproportionately wealthy applicant pool and hinders the equitable distribution of SRF awards. States' identification and recruitment of communities in need of technical assistance should aim to ensure better outcomes in terms of (1) more equitable distribution of SRF awards and (2) better projects. Without proactive efforts and targeted outreach, the neediest communities–with limited capacity to even bring their needs to the table–will be left out. Moreover, without proactive efforts, the scope, type, and sustainability of projects will be limited.

2. **Technical assistance should address every phase of the SRF process**. Utilities in underserved communities need help assessing problems, building internal capacity, gathering community input, planning and designing projects, and receiving and managing awards. The Water Bank should fund

[1] Drawn in part from a forthcoming sign-on letter to the EPA circulated by the NRDC.

TA efforts to assist disadvantaged and EJ communities in all stages of the process.

3. **Provide communities with access to consultants** with successful experience in navigating the Water Bank application process. Program "augmentation" has long been used by state transportation agencies who engage consultants to complete specific tasks. In this instance, we recommend that the DEP craft a scope of work for the consultants and then deploy the I-Bank's existing augmentation team of five qualified engineering firms. It's critical to note that municipalities that may be unwilling to work with consultants hired by a regulatory agency for fear of compliance issues coming up, would likely be comfortable with consultants hired by a financing agency.

4. **Include grants to disadvantaged and EJ communities for planning and design.** Planning grants can help communities assess which problems to tackle, develop projects, involve the community in the decision-making, complete paperwork, and submit applications. While these expenses can probably not be reimbursed from an SRF loan, they are critical for the equitable distribution of SRF funds. Utilities that do not have sufficient revenue to fund planning and designing work need grants to cover the costs. With sufficient funding, communities can plan projects that are climate-resilient and reflect the needs of the community.

5. **Support pre-development expenses through loans and third-party loan guarantees.** Securing an SRF loan requires several technical documents, such as a preliminary engineering report and environmental review, which can cost thousands of dollars to complete. If pre-development funds are not available, applicants must cover these costs up-front, since the Water Bank does not reimburse for planning and design expenses until the construction phase is awarded. This cash flow challenge impedes progress even in cases where the costs are forgiven or reimbursed after construction is initiated. Many consulting engineers delay billing for these pre-development expenses until the SRF award is issued, but this practice favors well-resourced communities who engender confidence that an ultimate SRF award will be obtained. Current pre-development loans to address these needs can be limited or hard to obtain. Third party intermediaries could reduce the inefficiencies of state-issued pre-development loans by privately providing small pre-development loans to disadvantaged and EJ communities, but only if SRF awards will reimburse the loan expenses.

6. **Support the development of natural or green infrastructure projects.** Many communities may not have the knowledge, resources or capacity to identify and apply for funds to support green infrastructure and climate resiliency projects. The Water Bank should provide technical assistance to communities to help identify applicable green projects and support

applications for funds, and to incentivize state programs to identify new priority projects and assist smaller and underserved entities in applying for SRF to finance natural or green infrastructure projects.

7. **Provide adequate funding for TA**. For both the Drinking Water SRF and Clean Water SRF, federal statutes allow states to use up to 4 percent of their annual capitalization grant for program administration and technical assistance. States may also use an additional 2 percent of their DWSRF capitalization grant for technical assistance to systems serving fewer than 10,000 people.[2] In addition, states can set aside up to 10 percent of their DWSRF capitalization grant for public water system supervision (PWSS) programs or to develop and implement a capacity development strategy. Through PWSS and capacity development, New Jersey can provide technical assistance to small and disadvantaged communities for engineering, needs assessments, and asset planning, among others.

   In addition, the state of New Jersey should use a portion of its American Rescue Plan (ARP) funds for this purpose. As one potential fund source, an appropriation of $5 million of ARP funds for Local Government Infrastructure Planning included in the FY2022 Appropriations Act could be used to support technical assistance on SRF projects. We recommend $5.5 million for assistance with the application process and $25 million for planning and design grants.

8. **Provide TA funding to nonprofit partners, such as the Funding Navigator, and peer-to-peer initiatives, who have relationships with local water systems, community leaders, and community organizations**. Nonprofits are developing programs to help utilities that serve underserved, disadvantaged, and environmental justice communities seek and secure SRFs and other funds. They can play a critical role in working with communities to identify important projects and help them submit a concept application to the Water Bank's H20 Loans. At that point, Water Bank on-call augmentation consultants can take over. One example is the Funding Navigator. The goal is to ensure more communities benefit from critical investments in safe and climate-resilient drinking water, wastewater treatment, and stormwater management.

3. Disadvantaged Community and Affordability Criteria

We support the DEP's idea of developing the same definition of disadvantaged community (i.e., affordability criteria) for CW and DW programs. We offer the following specific recommendations:

[2] 42 U.S.C. § 300j-12(g)(2)(C).

1. We support the use of median household income (MHI) <65% of state MHI rather than MHI of $90k or less (which is actually above the statewide MHI).

2. Among communities that meet the affordability criteria, include within the criteria gradations of financial need, rather than a single binary definition. In other words, consider offering relatively more grants or principal forgiveness (and more favorable loan terms, where a funding package must be a combination of grants/loans) to projects in relatively more financially distressed communities. There is a wide variation in fiscal conditions among the communities whose MHI is less than 65% of the state MHI. E.g., Camden's poverty rate of nearly 40% far exceeds Buena's of 10%, yet they both are below 65% of State MHI. (See attached chart with demographic data.)

3. NJ's environmental justice "overburdened community" economic criterion is worthy of further consideration, and is not mutually exclusive with also using MHI <65% as a factor.

4. We understand that the EPA authorizes the use of criteria related to UE (>5%) and population trends (<2%). Both seem like they could end up either being over-inclusive (e.g., the *statewide* unemployment rate is currently >6% but presumably will rebound) or under-inclusive (e.g., some disadvantaged urban communities have experienced population growth as development patterns change) of the universe of communities with greatest financial need. We cannot support keeping them without a better understanding of how they would be applied and what the likely results would be.

5. Consider including factors based on cost burdens specifically to low-income households within a community, accounting for rate increases that would be needed to cover debt service if a project were funded through loans.

6. Review the ranking criteria point system to determine whether adjustments should be made. Consider whether the affordability criteria should receive more points than 80 in order for the program to truly prioritize environmental justice criteria. Carefully consider a "circuit breaker" provision that would limit the total amount of PF that any single water system could obtain. (This might be needed if there is a water system that qualifies for principal forgiveness in many categories, such as because it has a consent decree, and would otherwise obtain an inordinate amount of limited PF.)

7. Finally, we expect that EPA will issue guidance emphasizing states' obligations to avoid
any adverse disparate impacts or otherwise violate the non-discrimination requirements of Title VI of the Civil Rights Act, or other applicable federal

law, with respect to the state's allocation of federal water infrastructure funds to communities within the state. DEP should ensure that its affordability criteria are designed such that, when applied in practice, they will satisfy this obligation.

4. Allocation of Grants and Principal Forgiveness

1. Capital projects should be eligible for grants or principal forgiveness under the WIIP only if they would be eligible under the "base" SRF program. (See explanation below.) This limitation should apply regardless of whether funds for a project are drawn from the base program or from IIJA money.

    a. For the DWSRF, this means that only communities meeting the "affordability criteria" should be eligible. Additionally, DEP should provide more points in the ranking system to projects in communities that meet the affordability criteria.
    b. For the CWSRF, communities meeting the affordability criteria would be eligible, although federal law also allows principal forgiveness for certain "green projects" in any community. However, DEP should provide more points in the ranking system to projects in communities that meet the affordability criteria.

2. Under the CWSRF, where a municipality does not meet the affordability criteria or otherwise qualify for grants or principal forgiveness for a capital project, DEP should pilot the approach of offering grants or principal forgiveness to be used for discounts to individual, low-income residential ratepayers. These funds would be used to offset the burden of rate increases that are necessary to pay back loans on an SRF-financed capital project. This is an allowable use of SRF funds under federal law, which can enable a community to receive an SRF loan without making bills unaffordable for low-income ratepayers. We recognize that this approach would be new to New Jersey; therefore, we recommend piloting it initially.

3. DEP should carefully consider the impact of per-project caps for grants or principal forgiveness. We recognize the tension between providing more per community vs. providing support to a larger number of communities. At the same time, strict caps may limit the ability of some disadvantaged communities to participate in the program, even if the balance of a project's costs are financed with low-interest loans. We encourage DEP to consider and compare the pros and cons of different levels for setting caps, using real-world scenarios of communities and projects that can be anticipated to satisfy the affordability criteria. As noted above, we recommend allowing higher caps in relation to the degree of fiscal distress in a given community. Additionally, for the CWSRF, based on what we currently know, we offer the following initial recommendations regarding caps:

a. For CSO projects, establish a range of per-project caps on grants or principal forgiveness, depending on the overall cost of the community's CSO LTCP. (A more expensive LTCP would allow for a higher per-project cap.)
b. For CSO projects, note that only seven municipalities qualify as disadvantaged communities using our recommended threshold of less than 65% of state MHI. If this is correct, then the caps for principal forgiveness would need to be increased in order to allow for full usage of the recommended $60m. (See attached spreadsheet.)
c. CSO applicants should construct green infrastructure early in the permit cycle. DEP should separate the CSO principal forgiveness program into "gray" and "green" projects, for the five-year duration of the WIIP. We recommend that 20% of total PF funding for CSOs be dedicated to green infrastructure. We also recommend additional points for green infrastructure CSO projects in the ranking system.
d. Establish a small grant/principal forgiveness program for communities that have a stormwater utility in place, such as a total of $2m at 50% principal forgiveness with a per community cap of $1m. This would incentivize creation of stormwater utilities, which in turn can generate additional local revenue for necessary stormwater infrastructure investments.

5. New Performance-Oriented Eligibility Requirements

We recommend modification to program eligibility requirements to advance public health, cost-efficiencies, environmental justice and climate resilience:

1. Communities receiving funds for LSL replacement should not be allowed to require a property-owner cost-share. As highlighted by a Title VI complaint filed with EPA, concerning a lead service line replacement program in Rhode Island, property-owner cost shares disproportionately exclude low-income households and people of color. (See http://blogs.edf.org/health/2022/01/07/civil-rights-complaint-draws-attention-to-the-discriminatory-impacts-of-common-lead-pipe-replacement-practice/)

2. The WIIP program should prioritize projects that reduce flood risk and increase climate resilience. For example, the program should address the fact that an inordinate number of stormwater and nonpoint source pollution projects languish at the bottom 25% of the priority list. We recommend that the DEP either create a project set aside for climate resilience, establish new design criteria, and/or revise its ranking system.

3. For CSO projects in a large/regional or otherwise economically diverse water/wastewater system, DEP should ensure that the applicant is prioritizing seeking funding for projects that meet the needs of disadvantaged/underserved communities within the system (i.e., funding should be equitable within communities, not only between communities)

6. Accurately Describe the Water Funding Gap and Provide Solutions

Accurate communications. DEP should continue to promote the WIIP, in order to ensure broad participation in the stakeholder process and to raise awareness of the new funding opportunities, especially for disadvantaged communities. However, DEP should revise its communications strategy, to also acknowledge the significant remaining funding gap, in order to avoid the new perception that there is adequate grant funding to address the many new water infrastructure mandates and challenges, such as replacing Lead Service Lines, meeting new standards for emerging contaminants, implementing CSO plans, and planning for climate resilience from storms like Hurricane Ida. The department's communications may set false expectations about the need for funding among local officials. It is also hindering our efforts as advocates to engage decision-makers in conversations about the use of American Rescue Plan funds for water infrastructure, since some of them (incorrectly) believe the WIIP will completely fill the funding gap.

Using NJDEP's numbers in the WIIP, we calculate **a five-year water financing gap of $10B**:

- Slide 13 shows an estimated 5-year funding demand of $14.7 billion.
- Slide 14 shows over $900m available for project funding each year over the next five years, which conservatively adds up to $4.5B.
- The difference is about $10B.

Providing solutions. NJ DEP's WIIP should both describe the amount of new funding and acknowledge the large funding gap that remains for water systems. The WIIP should urge communities to use their American Rescue Plan funds for water infrastructure projects. It should make a commitment on behalf of the Administration to work with the Legislature to allocate a portion of the state's American Rescue Plan funds to help close the funding gap. We also recommend the DEP expands its view past the DEP's SRF Program. This is necessary to fully meet the Commissioner's intention to develop a Water Infrastructure Investment Plan. DEP has the opportunity to set the stage for truly meeting the needs for water infrastructure moving forward by embracing the goals/outcomes of Senate Bill 1229 (Senator Greenstein). These actions will enable the department to get the attention and engagement of mayors.

7. Complementary Grant Programs

We recommend that the WIIP consider the need for two complementary grant programs, which may or may not be able to be included as part of the SRF programs themselves, but are critical for the WIIP to achieve its lo-g term goals:

1. Identify whether there are water systems that cannot access SRF funding, even where there is 50% PF funding, because they cannot afford to take on the loan portion. Identify a way to assist them with identifying and accessing complementary grant programs using other funding sources (including non-DEP/I-Bank state and federal programs).
2. Discuss the need for small grants for water system regionalization studies, including robust public engagement.